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Excelsior Iron Mining Company, a corporation, and Utah Construction Company, a corporation v. Clarence I. Justheim and Robert Gorlinski : Reply Brief

Utah Supreme Court

IN THE SUPREME COURT of the STATE OF UTAH

EXCELSIOR IRON MINING COMPANY, a corporation, and UTAH CONSTRUCTION COMPANY, a corporation,
Plaintiffs and Appellees,

vs.

CLARENCE I. JUSTHEIM and ROBERT GORLINSKI,
Defendants and Appellants,

CLARENCE I. JUSTHEIM,
Cross-Plaintiff and Appellant,

vs.

EXCELSIOR IRON MINING COMPANY, a corporation, and UTAH CONSTRUCTION COMPANY, a corporation,
Cross-Defendants and Appellees

Case No. 7825

REPLY BRIEF OF DEFENDANTS AND APPELLANTS

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I.

THE JONES PATENT DID NOT GRANT THE ENTIRE CORA No. 1 LODE BUT SPECIFICALLY EXCLUDED THE PART THEREOF CONTAINED WITHIN THE CONFLICT AREA.

It is manifest that the critical issue in this case involves the construction and interpretation of the Jones

Patent. Defendants and Appellants in their opening brief discussed this issue under Point III at pages 33, et seq. Plaintiffs and Appellees set forth their position in their brief under point A-7 at page 25, et seq. Counsel for Plaintiffs and Appellees *"skeletonize"* the pertinent language in the patent and seek to demonstrate that the concluding clause of the exception, viz:

> "and also that portion of said Cora No. 1 vein or lode, and of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground"

operates as a grant rather than as an exclusion. Oppositely, Defendants and Appellants assert that this clause when properly related to the other provisions of the patent operates as an exclusion from the grant of that portion of the Cora No. 1 vein or lode which is situate in the conflict area.

There is no apex of the Cora No. 1 vein or lode within the non-excluded ground of the description. The testimony of the engineers and geologists, Hanson and Christensen (who were plaintiff's experts), proves there is no apex of the vein within such ground. The testimony of Dr. Hanson on this point is set forth on pages 42 to 48 in Defendants' and Appellants' opening brief. Dr. Christensen, at pages 53, 54, 55 and 56 of Defendants' and Appellants' opening brief, clearly demonstrates that this mineral deposit possesses no apex. The grant to Jones therefore carried with it no extralateral rights. The authorities cited in the opening brief of Defendants and Appellants sustain the proposition that it is the

existence of an apex within a granted area that carries extralateral rights. If the apex of the vein is not within the granted area the patentee acquires no title to the deposit exterior to the side and end lines of the grant. Therefore, Defendants and Appellants cannot rely upon the doctrine of extralateral rights and it must be excluded from consideration.

In construing and interpreting the exceptions and exclusions in the Jones patent (the portion of the patent in controversy is set forth at page 4 of Defendants' and Appellants' opening brief and at pages 26 and 27 of the brief of Plaintiffs and Appellees), consideration must be given to several elements entering into the form of the exception and exclusion clause.

1. The element of punctuation is an important consideration.

The Cora No. 1 lode claim is specifically described by metes and bounds. The description has eight courses and eight corners. That portion of the Cora No. 1 embraced within Lot 48 or the Little Allie Claim and that portion situate in the Southwest Quarter of the Northwest Quarter of Section 32 (except Tract A, which is described by metes and bounds) are obviously excluded from the grant. Attention is invited to the placement of a semi-colon following the terminal words of the description of Tract A being the words "to the place of beginning." According to Funk and Wagnall's standard dictionary a semi-colon is "A mark of grammatical punctuation used in English to indicate a separation in the relations of the thought a degree greater than that

expressed by the comma." According to the same dictionary, a comma is "A rhetorical punctuation mark (,) indicating the slightest possible separation in ideas and construction." The draftsman excluded that part of Cora No. 1 situate in the Southwest Quarter of the Northwest Quarter of Section 32 and then from this exclusion excepted Tract A describing it by metes and bounds and then placed a semi-colon at the end of the description of Tract A. He placed a semi-colon in the position indicated because he had completed the description of the area which was excepted from the broad exclusion of the area within the Southwest Quarter of the Northwest Quarter of Section 32. By the placement of a semi-colon in this position he definitely indicated a separation of thought. He had concluded his idea concerning the land (which was Tract A) to be saved to the patentee from the general exclusion. He was then prepared to go forward with another thought. He then introduced an idea entirely alien to Tract A and there follows the clause "and also that portion of said Cora No. 1 vein or lode, and of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground." This thought certainly has no connection with the description of the land to be saved from the general exclusion (Tract A) and the use of the semi-colon was the proper method of indicating that the draftsman was introducing a new thought which relates back to the primary exclusion of the patent and refers to the general exception and exclusion pertaining to Lot 48 and the Southwest Quarter of the Northwest Quarter of Section 32. Read in this manner the patent excepts

and excludes from the grant all that portion of the ground of Cora No. 1 embraced in:

(a) Lot 48 or Little Allie Claim, and

(b) Southwest Quarter of the Northwest Quarter of Section 32 except Tract A, and

(c) All that portion of Cora No. 1 vein or lode and of all veins, lodes and ledges, the tops or apexes of which lie inside of such excluded ground.

2. The granting clause of the Jones patent confirms Defendants' and Appellants' construction.

The granting clause of the Jones patent reads as follows:

> "Now know ye, that there is therefore, pursuant to the laws aforesaid, hereby granted by the United States unto the said grantee and to the heirs or successors and assigns of said grantee, the said mining premises hereinbefore described and not expressly accepted (excepted) from these presents, and all that portion of the said vein, lode or ledge, and all other veins, lodes and ledges through their entire depth, the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said survey extending downward vertically, although such veins, lodes or ledges to (in) their downward course may so far depart from the perpendicular as to extend outside the vertical side lines of said premises * * *."

For convenience there is below shown in parallel columns the relevant parts of the definitive description of the patent and also of the granting clause thereof:

Definitive Description	Granting Clause of Jones Patent
"and also all that portion of said Cora No. 1 vein or lode, and of all veins, lodes and ledges, throughout their entire depth, *the tops or apexes of which lie inside of such excluded ground* * * *." (Emphasis supplied).	"the said mining premises hereinbefore described and not expressly accepted (excepted) from these presents, and all that portion of the said vein, lode or ledge and all other veins, lodes and ledges through their entire depth, the tops or apexes *of which lie inside of the surface boundary lines of said granted premises* in said survey, etc. * * *." (Emphasis supplied).

The provisions of the granting clause are consistent with the requirements of R.S. 2322 (U.S.C.A. Title 30, Section 26). There is a grant of extralateral rights based on the statutory mandate. If the non-excluded area of Cora No. 1 (delineated in blue on plat in opening brief of Defendants and Appellants) had contained the apex or top of the vein this grant would have carried with it all "veins, lodes and ledges throughout their entire depth * * * although such veins, lodes and ledges may so far depart from the perpendicular in their course downward as to extend outside the vertical sidelines of such surface locations." Stated otherwise, if said non-excluded area contained the apex of a vein the grantee would be entitled to follow the vein on its dip although it extended

outside the vertical sidelines of the survey location. (R.S. 2322 is set forth verbatim on pages 62 and 63 of opening brief of Defendants and Appellants).

When the granting clause is compared with the definitive description of the patent an anomalous situation is provoked if the interpretation and construction of the definitive description advocated by Plaintiffs and Appellees is adopted. As has been demonstrated the granting clause conveyed all that portion of the veins which may have their apexes within the non-excluded area and according to Plaintiffs and Appellees it also conveyed the portion of Cora No. 1 vein *and of all veins the tops or apexes of which lie inside of such excluded ground.* The result of this construction is that Jones was granted not only the portions of veins or lodes having their apexes in the non-excluded ground but also all veins which have their apexes within the area which was specifically excluded. It is submitted that no such conveyance was intended as such interpretation vested in the patentee greater rights than the statute permitted. Under the doctrine of *Montana Ore-Purchasing Co.* v. *Boston & M. Consol. Copper and Silver Min. Co.* (20 Mont. 336; 51 Pac. 159) and *State* v. *District Court* (25 Mont. 504, 572; 65 Pac. 1020) cited at pages 74-78 of the opening brief of Defendants and Appellants, the grant of all veins, lodes and ledges the tops or apexes of which lie inside of such excluded ground would be void.

The construction and interpretation of the definitive description asserted by Defendants and Appellants reconciles completely with the provisions of the granting

clause. In this light, the granting clause confirmed Jones' extralateral rights in and to all veins which had their tops or apexes within the non-excluded ground but in order to prevent any ambiguity arising as to the extent of the grant the draftsman took the precaution of excluding all that portion of Cora No. 1 vein or lode and of all veins, lodes and ledges the tops or apexes of which lie inside such *excluded* ground. The excluded ground was Lot 48 and the conflict area except Tract A.

It should be noted that the part of the definitive description above set forth in column parallel to the granting clause consists of two parts as follows: (a) the portion of Cora No. 1 vein or lode which lies inside of the excluded ground; and (b) all veins, lodes and ledges the tops or apexes of which lie inside of such excluded ground.

If the construction of the definitive description advocated by Plaintiffs and Appellees is adopted the results are also incongruous. By this interpretation the portion of the Cora No. 1 vein or lode which lies inside of the excluded ground and also all veins, lodes and ledges the tops or apexes of which lie inside of such excluded ground were patented to Jones. The two constituent elements of the grant are coupled together in the definitive description. As has been demonstrated above the conveyance of all veins, lodes and ledges the tops or apexes of which lie inside the excluded ground is in opposition to RS 2322 (U.S.C.A. Title 30, Sec. 26). According to Defendants' and Appellants' contention the same is void. In

interpreting the definitive description it is impossible to separate this void grant from the grant covering the portion of Cora No. 1 vein which lies inside of the excluded ground. (Cf. *Browne* vs. *Weare,* 348 Mo. 135, 152 S.W. (2d) 649, 136 A.L.R. 286, 295).

The construction supported by Plaintiffs and Appellees requires the void element to be ignored. It is submitted that such method of interpretation violates established rules of construction. It was certainly not the intention of the draftsman to convey veins, lodes and ledges the tops or apexes of which lie inside of the excluded ground when such grant would be in derogation of the statute and since the portion of the clause referring to Cora No. 1 vein or lode is coupled with reference to the veins, lodes or ledges the tops or apexes of which lie inside of the excluded ground it is impossible to believe that a *grant* was intended by the definitive description. Rather this situation points to the validity of the interpretation of Defendants and Appellants which is that the definitive description is an *exclusion* and not a *grant.*

3. The Area Computation of the Patent Must Be Considered.

Reference is made to the plat inserted in the opening brief of Defendants' and Appellants' wherein are shown the areas described in the Jones patent. For convenience there is here repeated the tabulation as to the acreage described in the patent:

Cora No. 1 Lode-Total Area as Located		16.157 acres
Less Conflict with Lot No. 48, Little Allie Lode	5.002 Acres	
Less Conflict with Armstrong Placer	1.571 Acres	
Total Conflict		6.573 Acres
Balance		9.584 Acres
Plus Area of Tract "A"		0.141 Acres
Total Area of Cora No. 1 Amended Lode Patent		9.725 Acres

This computation makes obvious that the conflict area (except Tract A) was excluded.

Defendants and Appellants take cognizance of the argument of Plaintiffs and Appellees to destroy the effect of this situation. In commenting on Point V of Defendants' and Appellants' opening brief counsel for Plaintiffs and Appellees declare:

> "In Point V appellants ignore the controlling fact that we are here concerned with a lode claim within a prior placer." (Page 39 Plaintiffs' and Appellees' brief.)

It is manifest that Plaintiffs and Appellees recognize that the Jones patent excluded the conflict area (except Tract A) but assert that the exclusion pertains to *surface* rights only and not to the portion of the Cora No. 1 lode within the conflict area (except Tract A). They assert that because of the operation of R.S. 2333 (U.S.C.A. Title

30 Sec. 37) Jones received title to the surface of Tract A (being a fifty foot strip) and all of the Cora No. 1 lode within the conflict area and that their position is supported by the decision in *Mt. Rosa Mining, Milling and Land Company v. Palmer,* 26 Colo. 56, 56 Pac. 176. It is declared in their brief that the Mt. Rosa case "continues to be the only decision by a court of last resort upon the precise point here involved, * * *"

There is a sharp distinction between the facts in the *Mt. Rosa* case and the case at bar. In the *Mt. Rosa* case Mt. Rosa Company owned a patented placer claim within which were known lodes at the time of application for patent for the placer. The application failed to mention these lodes or apply for patent to same. Under the statute the applicant in the *Mt. Rosa* case therefore declared that it had no right of possession to these known veins or lodes (R.S. 2333). In the instant case there was knowledge by the applicants for the Armstrong placer patent of the existence of the lode called the "Armstrong Iron Mine" but they failed to describe the part of the lode within the conflict area. They, therefore, also declared that they had no right of possession of that part of the lode within the conflict area. So far, the facts of the *Mt. Rosa* case and the instant case parallel.

In the *Mt. Rosa* case Palmer's grantors on March 18 and April 5, 1892 entered upon land included within the exterior boundaries of the Mt. Rosa placer and located the two lode claims therein. On November 7, 1892, the Mt. Rosa Company made application for the Mt.

Rosa placer claim, making no mention of the lode claims, and on April 24, 1893, the patent therefor issued. The ground described in said lode mining claims was excepted out of the land described in and conveyed by the placer patent. At the time of trial the lode claims had not been patented. In the instant case Walker and Blair received their patent to the Armstrong placer on December 16, 1879, which patent included the part of the Armstrong Iron Mine as therein specifically described, which description excluded the part thereof in the conflict area. On August 26, 1912, Jones became the owner of Cora No. 1 mining claim under patent of that date. In the instant case, therefore, the lode claimant had received a patent specifically describing his grant and it is this Jones patent which controls the present situation. In the *Mt. Rosa* case the lode claimant had received no patent and the case was, therefore, decided upon the basis of the Mt. Rosa placer patent (which specifically excluded the lode claims) and the grantee of the locators of the unpatented lode claims. There did not intervene in that case a patent to the lode claims which defined the rights of the lode claimants. In the instant case there is the Jones patent which definitely sets forth the extent of the grant to Jones. The terms of the Jones patent cuts across the factual field and distinguishes the instant case from the *Mt. Rosa* case, and makes the rule of that decision inapplicable to the instant case. The Land Department of the Federal Government by the issuance of the Jones patent conclusively and particularly defined the land and mineral rights conveyed. It possessed

full authority to specify in the patent the rights of Jones under the patent and this it did by process of grants and exclusions. It finally concluded by describing the area patented to Jones as 9.725 acres which corresponds with the Cora No. 1 amended application for patent after the excluded areas are subtracted. This fact bears heavily upon the construction and interpretation of the patent. It can be rightfully asked, why the patent declares the area conveyed to be 9.725 acres if the mineral deposit within the conflict area was included in the grant?

The definitive description contains the concluding phrase, "the premises hereby granted, containing 9.775 acres, more or less." The mineral deposit in the conflict area consisted of 1.430 acres after excluding the area of Tract A of 0.141 acres. As shown above, the figure of 9.775 acres does not include these 1.430 acres, although it does include the area of Tract A. There is also included in the total of 9.775 acres the acreage of Cora No. 1 claim situate in the Northwest quarter of the Southwest quarter of Section 32, which embraces both *surface and sub-surface rights.* It is the *"premises hereby granted"* which contains a total acreage of 9.775 acres; not the surface area only. According to the interpretation of Plaintiffs and Appellees, the part of the mineral deposit in the conflict area consisting of 1.430 acres was also part of the "premises hereby granted," but the computation of the acreage as recited in the patent does not include this area of 1.430 acres. These

facts show that the draftsman, in formulating the definitive description, had definitely in mind the idea that both the surface and sub-surface rights or ownership in the conflict area (except Tract A) were *excluded* and not *included* in the grant.

II.

THE DEFENDANT AND APPELLANT JUSTHEIM IS THE SOLE OWNER OF THE LUCKY CLAIMS. GORLINSKI HAS NO INTEREST THEREIN.

Justheim located the Lucky claims within the conflict area. The notices of location are in his name alone. (Defendants' Exhibits 6, 7 and 8, R. 225) Gorlinski was employed by Justheim as an engineer to make the locations. (R. 261) There is not a line of evidence in this case which controverts Gorlinski's testimony in this respect. As further proof of this fact, attention is invited to the cross-complaint of Justheim against the Plaintiffs and Appellees wherein he seeks to quiet title to the Lucky claims. In this cross-complaint he asserted sole ownership in and to the claims. If he had been successful in the lower court, the judgment would have resulted in quieting title in Justheim (not Justheim and Gorlinski) in and to the claims against the Plaintiffs and Appellees.

Plaintiffs and Appellees have devoted several pages of their brief to demonstrate that the location of the Lucky claims by Justheim is void under the theory that Gorlinski has an interest therein. The record proves that Justheim alone is the owner of the claims and that

Gorlinski was only an employee of Justheim. The status of the "conflict area" was not a secret held by Gorlinski alone which he revealed to Justheim, but is a situation clearly shown by the public land records. Anyone interested could have easily discovered the facts by an inspection of these records. Gorlinski revealed to Justheim no professional secrets nor violated any confidence by taking employment under Justheim. It requires much imagination to discover any confidential relationship between Gorlinski and the plaintiff, Excelsior Iron Mining Company. The employment of Gorlinski by the predecessor in title to said plaintiff had long ago ceased. The fact that he possessed the same information concerning the conflict area as revealed by the public records did not deny him the right to accept Justheim's employment. It is submitted that if the Lucky locations are otherwise valid, the fact that Gorlinski did the survey work in connection with the same does not invalidate them. Gorlinski did not create this condition, nor did any information he possessed invest him with an interest or ownership in the claims. Gorlinski's relationship with the location of the claim is an immaterial matter in this case.

III.

JUSTHEIM WAS AUTHORIZED BY LAW TO ENTER UPON THE CONFLICT AREA TO MAKE THE LUCKY LOCATIONS.

Reference is made to the discussion of the *Mt. Rosa* case, supra, by Defendants and Appellants in their opening brief (pages 103-113). It is unnecessary to repeat

what was there said. It should be carefully noted that the facts of the instant case bring it squarely within the doctrine of the *Mt. Rosa* case *with respect to the question as to whether Justheim had a right to enter upon the Armstrong Placer in order to make his locations.* If the Jones patent excluded the conflict area in so far as the mineral deposit is concerned, then that area was open public domain and under the doctrine in the *Mt. Rosa* case, Justheim was authorized to make his locations within the area of the Armstrong Placer.

Defendants and Appellants affirm the statement made at pages 110 and 111 of their opening brief:

> "The evidence is clear and undisputed that the existence of the Armstrong 'Iron Mine' was well known at the time application for patent to the Armstrong Placer was made; otherwise the application would not have included a description of *part* of the iron mine and the patent to Walker and Blair would have made no reference to it. The mineral deposit manifestly was a well-known, notorious geological fact prior to the application of the Armstrong placer patent and prior to the issuance of the patent. The patent itself proves that the deposit existed and knowledge of its existence must be imputed conclusively to the patentees. They elected to secure title to a part of this deposit but failed to secure title to that part of it within the 'conflict area.' Neither the patentees nor their successors in title are in a position to contend that that part of the mineral deposit within the 'conflict area' was unknown to the patentees."

It is manifest that the final determination of this case turns upon the construction and interpretation of the Jones patent. If the construction urged by Defendants and Appellants is correct, then that part of the mineral deposit within the conflict area was open public domain, subject to location, and under the rule laid down in the *Mt. Rosa* decision Justheim was not a trespasser in entering upon the Armstrong Placer to make his Lucky locations.

WHEREFORE, Defendants and Appellants reaffirm the prayers of their opening brief and Defendant and Appellant Justheim submits that the District Court should be directed to make, enter and file its judgment quieting title in and to the Lucky claims in him.

Respectfully submitted,

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