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George H. Stevens et al v. Ralph C. Memmott et al : Brief of Respondents

Utah Supreme Court

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Orville Isom; Attorney for Respondents;

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In The Supreme Court of the State of Utah

GEORGE H. STEVENS, et al,

Plaintiffs and Appellants

vs.

RALPH C. MEMMOTT, et al

Defendants and Respondents

1950
Civil Court, Utah
Civil No. 8700

RESPONDENTS' BRIEF

ORVILLE ISOM

Attorney for Respondents

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STATEMENT OF FACTS

The statement of facts set out in Appellants' brief does not clearly set forth the issues in this case but appears to add more confusion to a mining case which appeared at first to be rather involved and complicated but which actually has turned into a simple one. Admittedly the various pleadings, amended pleadings, conflicting proof of mining claims, a fairly large transcript of the testimony, all presented to a jury, when the case could have been tried much more expeditiously before the court without a jury, lend credence to the impression that this is a complicated case.

With the dismissal of the Respondents' Cross Appeal, we are actually concerned only with conflicts in three claims of the appellants with three claims of the respondents:

(1) The appellants' Red Robin "A" and respondents' Red Hill No. 1: Here the appellants' Red Robin "A" was the prior location and since the location is not attacked, our only concern is whether the appellants did the required annual labor for the year ending July 1 in which respondents subsequently located. The Jury has found that the appellants did not do this work.

(2) The appellants' Red Robin mining claim and respondents' Cinder Crater No. 13: The respondents' Cinder Crater No. 13 was located first and since the location is not assailed, we are only concerned with whether the respondents did the required annual labor for the year ending July 1 in which the appellants located. The Jury has found that the work was done.

(3) The appellants' Drake No. 1 and 8, which con-

flict with the respondents' Cinder Crater No. 14: The respondents' Cinder Crater No. 14 was located first and since the location is not attacked, except insofar as it is claimed the ground was not open for location at the time Cinder Crater No. 14 was located, we are only concerned with whether the respondents did the required annual labor for the year ending July 1 in which appellants subsequently located. The Jury has found that the work was done.

Therefore, in all three conflicts, the respondents prevailed in the court below.

The only other pertinent facts have to do with the conflict between appellants' Drake No. 1 and 8 with respondents' Cinder Crater No. 14 mentioned above, and since the respondents' Cinder Crater No. 14 was the prior location, the appellants attempted to show that at the time the respondents located this claim on July 28, 1947, there was at that time a valid, subsisting location on generally the same ground and, therefore, it was not open to respondents' location. The appellants' pleadings, the pre-trial order and the evidence show that other parties, not parties in this action, had approximately ten years previous to respondents' location on the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 23, Township 21 South, Range 6 West, S. L. B. & M. located Black Dragon No. 6. However, for the year ending July 1, 1947, the owners of the old prior claim, the Black Dragon No. 6, had not done annual labor or filed any Notice of Intent to Hold and had not done so for a number of years prior. Therefore, the Black Dragon No. 6 had forfeited and the ground was then open for respondents' Cinder Crater No. 14 location.

STATEMENT OF POINTS

The following points are relied upon by the respondents to meet the claims of the appellants:

1. THE JURY'S FINDINGS THAT RESPONDENTS HAD DONE THE REQUIRED ANNUAL LABOR ON CINDER CRATER NO. 13 AND 14 AND THAT THE APPELLANTS HAD NOT DONE THE REQUIRED AMOUNT OF ANNUAL LABOR FOR THEIR RED ROBIN "A" WAS AMPLY SUPPORTED BY THE EVIDENCE AND THE JURY'S FINDINGS WILL NOT BE DISTURBED.
2. IT WAS NOT ERROR FOR THE LOWER COURT TO REFUSE TO ACCEPT THE MAP OF APPELLANTS' WITNESS A. R. SHELTON AS IT WAS ONLY A PICTURE SUMMARY OF HIS TESTIMONY AND IT WOULD HAVE BEEN IMPROPER FOR THE JURY TO HAVE THIS MAP IN ADDITION TO THE TESTIMONY.
3. REFUSAL BY LOWER COURT OF APPELLANTS' MOTION TO ALLOW JURY TO VISIT PREMISES IS PURELY DISCRETIONARY AND IN THE ABSENCE OF ABUSE OF DISCRETION, WILL NOT BE DISTURBED.
4. REFUSAL BY THE LOWER COURT OF APPELLANTS' MOTION TO AMEND PLEADINGS AND THE PRE-TRIAL ORDER AFTER THE TRIAL HAD COMMENCED WAS DISCRETIONARY AND SHOULD NOT BE DISTURBED ON APPEAL.
5. FEDERAL STATUTES OR RESOLUTIONS DISPENSING WITH REQUIREMENT OF ANNUAL LABOR AND ALLOWING NOTICE OF INTENT TO HOLD

IN LIEU THEREOF REQUIRE THE ACTUAL FILING OF THE NOTICE OF INTENTION TO HOLD OR THE CLAIM WILL FORFEIT.

6. A RE-LOCATION OF A MINING CLAIM BY A PARTY AFTER SUIT HAS BEEN COMMENCED BUT BEFORE TRIAL, IS GOOD PROVIDING APPROPRIATE PLEADINGS ARE FILED.
7. APPELLANTS' CONTENTION THAT IT WAS ERROR FOR THE LOWER COURT TO INJECT INTO THE CONTROVERSY THE OWNERSHIP OF APPELLANTS' DRAKE NO 3 CLAIM IS WITHOUT MERIT AS THE LOWER COURT AWARDED THIS CLAIM TO THE APPELLANTS AND THIS MATTER IS NOT BEFORE THE COURT

ARGUMENT

Point 1

The Jury's findings that respondents had done the required annual labor on Cinder Crater No. 13 and 14 and that the appellants had not done the required amount of annual labor for their Red Robin "A" was amply supported by the evidents and will not be disturbed.

In this case the appellants were granted a jury trial over the objection of the respondents. The questions of fact were submitted to the jury by Special Interrogatories. The appellants presented evidence of annual labor performed on their Red Robin "A" claim and this evidence is found at pages 11, 214, 215, 218 and 349 of the Transcript. This was disputed by the respondent and Special Interrogatory No. 2 (Tr. 365) was submitted to the jury to find if the required annual labor was actual-

ly performed. The jury found unanimously that it had not been performed. The appellants' contention appears to be that the Court should have ruled as matter of law that the annual labor had been performed but it is submitted this is indeed a novel contention in view of the fact there was evidence submitted and it was a question of fact upon which the jury should find.

Although the findings of the jury would give to appellants most of their Red Robin Claim, actually the only conflict involving this claim was in a very small area in the northwest corner of respondents' Cinder Crater No. 13 claim. As the Cinder Crater No. 13 was located prior, the jury heard ample evidence as to the respondents' annual labor for this claim for the year ending July 1, 1949 consisting of removing of overburden and the construction of a road to the claim (Tr. 222-227). Special interrogatory No. 5 (Tr. 366) was submitted to the jury and it found that the respondents had performed the required annual labor. The testimony of the respondents was detailed and complete as to the dates, type of equipment used and the amount and value of the work and it is submitted that the findings of the jury should not be disturbed.

The remaining conflict was between the appellants' Drake No. 1 and 8 claims which covered generally the same ground as respondents' Cinder Crater No. 14. Here again (Tr. 229-237) the respondents supplied detailed evidence as to the work for the year in question, showing the amount and value of the work done in the removing of over-burden preparatory to mining and the building of roads. The appellants disputed this and submitted evidence and photographs trying to prove the respondents had not done the work. Again this very question was submitted to the jury by Special Interrogatory No. 6 (Tr. 366), and again the jury found that the work was done.

As to whether annual labor has been performed for any given year by a locator is always a question of fact. It is common knowledge that this testimony is almost always in conflict and after wild claims are made by the conflicting parties, a jury must weigh the testimony and arrive at some finding. It is on such factual questions as this that the wisdom of submitting the special issues by special interrogatories is clearly evident. The court, by clearing away the chaff, makes it possible for the jury to make a clear cut decision and one which should not be disturbed if there was evidence to support the finding as was the case here.

Point 2

It was not error for the lower court to refuse to accept the map of the appellants' witness, engineer A. R. Shelton, as it was only a summary of his testimony and it would have been improper for the jury to have had this map in addition to the testimony.

The appellants are raising strenuous objections to the lower court's refusal to accept a map prepared by appellants' witness, engineer A. R. Shelton. Engineer Shelton had surveyed all the claims in question preparatory to becoming a witness. He testified at great length (Tr. 22-66). He testified as to what he had done and seen on these conflicting claims. Most of the testimony was relevant and competent. At the conclusions of his testimony, appellant offered a map made by Mr. Shelton which map as stated in appellants' brief recited "upon which he drew the results of his work and examination of the claims at the time the survey was made and recorded the monuments observed in his thorough examination of plaintiffs' claims." The court refused to receive as evidence this map until a further study of the map by counsel could be made, with the court's suggestion (Tr. 33-34)

that counsel discuss the admissability of the map. The record is silent as to any further offer of the map, but even so, it would have been clearly incompetent as it was only a favorable resume or re-capitulation of Engineer Shelton's testimony and which, under our rules of procedure, the jury could have taken to the jury room and studied and used. But for a jury to hear the testimony and then be able to take with them a picture of the testimony so as to refresh their memories, would have been highly improper. Rule 47(m) of our Rules of Procedure states what can be taken to the jury room and expressly states that notes taken by a juror can be taken but "none taken by any other person." It is submitted, the map was only Shelton's notes. Furthermore, even assuming this type of evidence had not been incompetent, the appellants surely have no room to complain because the jury heard the testimony given by the witness, all of which was the same as that on the map and a refusal of the map as an exhibit would not have been prejudicial.

Point 3

Refusal by Lower Court of Appellants' motion to allow jury to visit premises is purely discretionary and in the absence of abuse of discretion, will not be disturbed.

The appellants requested that the jury be allowed to make an inspection of the claims in question. The request was denied on the ground that the evidence showed that there were many diggings and workings and roads throughout the entire area and the court was afraid the jury would be more confused than ever after the inspection.

A request for a jury inspection is always addressed to the sound discretion of the court and this rule is so elementary there need be no citations of authorities. But in any event, if this court desires to inquire into the question of whether there was an abuse of discretion, it only has to look at the testimony of one Culbert Robinson, witness for appellants, (Tr. 309-328). Robinson was taken to the premises during the course of the trial purely for the purpose of qualifying him as a witness. But his testimony was the most confusing of any testimony at the entire trial. There is no reason to believe that the jurors themselves would have been any less confused.

Point 4

Refusal of lower court of appellants' motion to amend pleadings and the pre-trial order after trial had commenced was discretionary and should not be disturbed on appeal.

Again we have a matter for the court's discretion. As shown in the statement of facts there is a conflict between appellants' Drake No. 1 and 8 and respondents' Cinder Crater No. 14. The respondents' location was on July 28, 1947, several years prior to the Drake locations. Therefore, the appellants, in order to defeat the respondents' location set up that an old claim, known as the Black Dragon No. 6, covered generally the same ground. This old claim had been located approximately ten years prior to respondents' Cinder Crater No. 14 and the claim is that this Black Dragon was a valid subsisting claim on July 28, 1947 so as to defeat the respondents' location of their Cinder Crater 14. It is admitted that the general rule of law is that if there is a valid, subsisting claim on mining ground when a subsequent locator attempts to locate, the subsequent locator gets nothing by his location. Several pre-trials were held in this case and also

a number of hearings on preliminary matters. The appellants' complaint was also amended so as to set up this old Black Dragon No. 6 claim. In all the hearings, the pre-trials and pleadings, the appellants were relying upon the old Black Dragon No. 6, located by people not concerned with this controversy, to defeat the respondents' Cinder Crater No. 14 location.

The evidence shows that when the locators of the Black Dragon No. 6 located this claim on October 28, 1937, they also located on the same day Black Dragon Nos. 1, 2, 3, 4 and 5. An amended location notice on the Black Dragon No. 6 was recorded June 28, 1939 which tied this claim to government survey corners and government subdivisions as the first location had not done. Thereafter, the locators did annual labor or filed Notices of Intent to hold all of the Black Dragon claims up to and including July 1, 1942. This is all shown in an abstract of title to the Black Dragon claims, Defendants' exhibit No. 58. This abstract shows that the locators of the Black Dragon claims sold Black Dragon Nos. 1, 2, 3, 4 and 5 to a purchaser in 1942. Thereafter Notices of Intent to hold were filed by the new owner for all the years thereafter including July 1, 1947, but only on the claims purchased, or Black Dragon Nos. 1, 2, 3, 4 and 5. But Black Dragon No. 6 was the claim in conflict with respondents' Cinder Crater No. 14 and yet since no annual labor was performed or Notice of Intent to Hold in lieu thereof was recorded, this claim forfeited.

Apparently the appellants did not know until shortly before trial that the Black Dragon No. 6 upon which they had relied in order to defeat respondents' Cinder Crater No. 14 had lapsed for failure to do annual labor or include it in the Notices of Intention to Hold. The record shows (Tr. 144) that one day before the trial commenced, that counsel for respondent was informed that the appel-

lants claimed that Black Dragon No. 5 and 6 were actually one and the same claims and claimed the same ground. But respondents had prepared their entire case for trial on the theory that Black Dragon No. 6 had lapsed and would be of no concern. A claim that Black Dragon No. 5 and 6 were one and the same claim completely changed the entire case because Black Dragon No. 5 was still good at the time respondents located their Cinder Crater No. 14. It would have been highly prejudicial to have to meet the validity of Black Dragon No. 5 after reliance on appellants' pleadings, the preliminary hearings and the pre-trial order, particularly in view of the fact that the appellants had had more than ample opportunity to amend so as to make Black Dragon No. 5 an issue. Objection was made to amending the complaint and the pre-trial order so as to bring Black Dragon No. 5 in issue, (Tr. 144). The jury was then excused and the court examined quite fully, the appellant relying upon the Black Dragon claims (Tr. 136-140). The court thereupon ruled that it would be inequitable and prejudicial for respondents to have to meet the validity of Black Dragon No. 5 and denied the motion to amend the complaint and pre-trial order.

It is the general rule of law followed by this court in many cases that such an amendment would be prejudicial to the adverse party and should not be allowed. See Utah cases, *Johnson vs. Continental Casualty Co.*, 300 P. 1032, *Johnson vs. Brinkerhoff*, 57 Pac. 2d 1132, *Benson vs. Oregon Short Line*, 99 Pac. 1072, *Newton vs. Tracy Loan & Trust Co.* 40 Pac. 2d 204. Also that since it is within the sound discretion of the court, it is not an abuse of discretion when refused at or just before the trial.

Point 5

Federal statutes or resolutions dispensing with re-

quirement of annual labor and allowing notice of intent to hold in lieu thereof require the actual filing of the notice of intention to hold or the claim will forfeit.

The appellants' contentions at Point VI of their brief that it is not necessary for an owner of a mining claim to actually comply with the law in order to hold the claim is entirely without merit. It is submitted that when the federal laws or resolutions of Congress provide in unambiguous terms what must be done, they mean exactly what they say.

The Federal government at numerous times has relieved a locator of a mining claim from doing annual labor. Congress did this back in the 1893 "Depression" and again in 1917 and 1918 during World War I. Also during the "Depression" of the nineteen thirties and again during World War II from 1943 to 1949. In each instance because of some national emergency, annual labor was dispensed with. But in each instance Congress has required that in lieu of annual labor, the locator **shall** file in the County where the claim is located, a Notice of Intention to Hold. The reason for this is obvious as the locator must show good faith in his intentions to hold and he must do something to give notice to the world that he has not abandoned his claim. The provision suspending annual labor which applies to this case was a resolution adopted by Congress May 3, 1943 and designated as H.R. 2370. It provided that the requirements of \$100.00 worth of labor per claim "is hereby suspended as to all mining claims in the United States, including the Territory of Alaska until the hour of 12 o'clock Meridian on the 1st day of July after the cessation of hostilities in the present war as determined by proclamation of the President or concurrent resolution of the Congress; **Provided, that every person claiming any such mining claim, in order to**

obtain the benefits of this act, shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian of July 1 for each year this act remains in effect, a notice of his desire to hold said mining claim under this act." This provision was in effect until 1949.

In all cases found by this writer, where this question has been ruled upon by the courts, it has been held, with one exception, that the recording of a Notice of Intent to Hold in lieu of annual labor is mandatory in order to hold the claim. Some of these cases are *Kramer vs. Gladding, McBean & Co.* 85 Pac. 2d 552 (Cal.), *Pine grove Nevada Gold Mining Co. vs. Freeman*, 171 Pac. 2d 366, (Nevada). There do not appear to be too many cases involving these suspension statutes or resolutions and it is submitted that the reason for this is because the requirements are so obvious that there has been no reason to appeal. It most certainly would be wrong for a mining claimant to hold a claim indefinitely, without doing any work or even complying with the suspension requirements. He could hold a claim by having a secret intention, not communicated to any one, to eventually go back and assert ownership of the claim.

The only case found by this writer and which is cited in appellants' brief which appears to hold the recording of a Notice of Intent to Hold is not necessary is the case of *Donoghue vs. Tonopah Oriental Mining Co.* 198 Pac. 553 (Nevada). This is a very interesting case but even a casual reading will clearly show it gives no help to the appellants. There the several owners of a group of claims, partly in Nye County and partly in Esmeralda County, Nevada attempted to file a Notice of Intent to Hold under the resolution of Congress for the year 1918 which for all practical purposes is the same as that adopted during World War II. But the owners of the

claim were in doubt as to whether their claim was in Nye County or Esmeralda County as the County line was still in some doubt although surveyed a few years previously. The owners tried in every way to comply with the law and tried to record their notice in Nye County, but the County Recorder, a person upon whom they relied, told them it should be recorded in Esmeralda County where it was eventually recorded. There was no question about their intent and good faith but they recorded the notice in the wrong county acting in good faith and in bona fide compliance with the law. The Nevada Supreme Court stated that it was not a question of **construction of the resolution as its meaning was clear** but that it should not be applied under the peculiar circumstances of the case. With the wisdom of this decision, the Respondents agree but it clearly is not controlling in this case. In this Nevada case the locators made an honest attempt to comply but in the case at bar, the owner did exactly nothing over a period of approximately five years. If the 1943 resolution of Congress has no application to the present case, then it has no application at all. Furthermore, the Nevada Supreme Court, in the Pine Grove Case, *supra*, very carefully explained and distinguished the old Donoghue case.

Point No. 6

A re-location of a mining claim by a party after suit has been commenced but before trial, is good providing appropriate pleadings are filed.

The appellants raise a hue and cry that the respondents located their Red Hill No. 1 claim in conflict with the prior location of appellants' Red Robin "A" claim. But here the record shows that the respondents had located years prior to either claim, their Cinder Crater No. 5 on the same ground. Before trial the respondents con-

cluded their Cinder Crater No. 5 was not good but they also concluded that appellants' Red Robin "A" was not good for the reason that the annual labor had not been performed. Consequently respondents re-located this claim on September 6, 1956 under the name of Red Hill No. 1. The jury found that the appellants had not performed their annual labor for the year ending July 1, 1956 and therefore, the respondents' subsequent location was good.

With all the claims of the parties involved in this case, to be tried before a jury, it would have been folly for the court or jury to have spent considerable time in hearing the evidence and then found that neither of the parties had a valid claim upon this ground. So long as the matter is being litigated, it was only just and sensible that the court and jury have proper claims before them to make a decision.

Furthermore, the respondents' pleadings were amended several months before the trial so as to put the validity of the last location of Red Hill No. 1 in issue and no objection to this amendment was made. The appellants were fully apprised of the claim. Our code contemplates the incorporating of facts happening after suit is commenced as issues in the case providing proper pleadings are filed to bring the matter before the Court. See rule 15(d) of our Rules of Civil Procedure.

Point No. 7

Appellants' contention that it was error for the court to inject into the controversy the ownership of appellants' Drake No. 3 claim is without merit as the lower court and jury awarded this claim to the appellants and this matter is not before the Court.

The appellants are attempting to raise as an issue the fact that the lower court allowed the conflict between appellants' Drake No. 3 and respondents' Black Lava No. 1 claim, which cover the same ground, to enter the case. But surely the appellants have no cause to complain as this conflict was resolved by the court and jury in favor of the appellants and with the dismissal of respondents' Cross Appeal, there is nothing before the Court as to this claim. It is a situation of the appellant complaining about a decision entirely in their favor and nothing more need be said.

CONCLUSION

To summarize the contentions of the respondents, they earnestly believe that the points raised by the appellants have been met and refuted in each instance. The jury's answering of the special interrogatories submitted to them was amply supported by the evidence although admittedly much of it was in conflict. These findings were not the result of a general verdict or decision of the jury but were express findings upon interrogatories propounded to the jury on the specific questions of fact and the court has accepted and adopted these findings. Since there was evidence to support them, all of the appellants' contentions pertaining to whether required annual labor on the claims was or was not performed by the parties has been resolved and should not be disturbed.

The contention of the appellant that the lower court committed an error in refusing to allow an amendment to the plaintiffs' complaint and the pre-trial order, after the trial had progressed several days is without merit. Such an amendment would have changed the whole complexion of the case and would have been highly inequitable and prejudicial to the respondents. Also this is a matter for the sound discretion of the court and surely there

was no abuse of discretion under the circumstances. Likewise the refusal of the court to permit a jury inspection of the claims was discretionary and will not be disturbed on appeal in the absence of abuse of discretion.

The appellants' contention that even though Federal Statutes or resolutions of Congress suspending the requirement of annual labor upon the filing of a Notice of Intention to Hold actually do not require this to be done flies directly in the face of the very Act of which appellants seek to take advantage. When the Federal Act relieved a locator of performing the annual labor by doing something as easy as merely filing a short notice, surely such a minimum requirement should be strictly complied with.

The appellants' other contentions that one of respondents' claims was located after the commencement of the action has no merit as appropriate pleadings were filed, making this an issue in the case. And finally, for the appellants to complain about a matter resolved entirely in their favor is indeed a novel idea.

Respectfully submitted,

ORVILLE ISOM

Attorney for Respondents