

1960

George O. Patterson and Edna Patterson v. Max Wilcox and Ben D. Browning : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Robert H. Ruggeri; Attorney for Respondents;

Recommended Citation

Brief of Respondent, *Patterson v. Wilcox*, No. 9278 (Utah Supreme Court, 1960).
https://digitalcommons.law.byu.edu/uofu_sc1/3706

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT

of the
STATE OF UTAH

FILED
SEP 1 - 1960

Case No. 9278

Clerk, Supreme Court, Utah

GEORGE O. PATTERSON and EDNA PATTERSON, hus-
band and wife,

Plaintiffs and Respondents,

- vs -

MAX C. WILCOX and BEN D. BROWNING, et al,
Defendants and Appellants.

BRIEF OF RESPONDENTS

APPEAL

FROM THE DISTRICT COURT OF THE SEVENTH
JUDICIAL DISTRICT IN AND FOR SAN JUAN COUNTY
UTAH

HONORABLE F. W. KELLER, JUDGE

ROBERT H. RUGGERI

Moab, Utah

Attorney for Respondents

TABLE OF CONTENTS

PREFATORY STATEMENT	1
STATEMENT OF FACTS	2
STATEMENT OF POINTS	11
ARGUMENT	11
I. The Findings of Fact made by the Trial Court are fully and amply supported by evidence properly introduced into the record and in a suit of this kind, the Supreme Court should not disturb the Trial Court's Findings of Fact, unless the Findings are clearly against the preponderance of the evidence	11
II. In construing the "Agreement" and "Quit Claim Deed" the interpretation of the Court must be on the entire instrument and not merely on disjointed or particular parts of it in light of all the circumstances surrounding the parties to the instruments at the time of its execution --	14
(a) In construing the "Agreement" and "Quit Claim Deed" the Court was obligated to construe the entire instrument	16
(b) The question whether the "Quit Claim Deed" conveyed the entire mineral estate is to be determined by ascertaining the intention of the parties at the time and under the circumstances existing when made and executed	21
(c) Where one of the parties to a contract, or one directly interested in the subject matter thereof has prepared it, using ambiguous or uncertain language, such language will be construed most strongly against the party using it, especially when interested party is a lawyer and prepares a contract for opposite parties who are laymen	24
(d) Where the parties to a contract involving uncertainty as to its meaning have given it the same practical construction, that construction will generally be adhered to by the Courts in giving effect to its provisions	28
(e) Judicial Notice is the cognizance of certain facts which judges and jurors may properly take and act on without proof and because they already know them	33
CONCLUSIONS	36

T A B L E O F C A S E S

Barnard v. Hardy, 77 Utah 218, 293 P. 12 -----	28
Coltharp v. Coltharp, 148 Utah 389, 160 P. 121 -----	16-21-23
Hawaiian Equipment Co. Limited v. Eimco Corporation, 15 Utah 590, 207 P 2d 794 -----	28
Haynes v. Hunt, 96 Utah 358, 85 P 2d 861 -----	18
Penn Star Mining Co. v. Lyman, 64 Utah 343, 231 P. 107	13-27
Read v. Forced Underfiring Corporation et al, 82 Utah, 529, 26 P 2d 325 -----	22
Rieske v. Hoover et al, 53 Utah 87, 177 P 288 -----	11
Stanley v. Stanley, 97 Utah 520, 94 P 2d 465 -----	13
Trucker Sales Corporation v. Potter et al, 104 Utah 1, 137 P 2d 370-----	31
Wasatch Livestock Loan Co. v. Lewis & Sharp et al, 84 Utah 347, 35 P 2d 835 -----	30
Western Development Company v. Nell, 4 Utah 2d 112, 288 P 2d 452 -----	19-21
Wood v. Ashby, 122 Utah 580, 253 P 2d 351 -----	16-18-21
Woodward v. Edmunds, 20 Utah 118, 57 P 848 -----	31

T E X T S

L. R. A. 1918A Annotation 491 -----	21
31 C. J. S. 509 and 519 -----	33

**IN THE SUPREME COURT
of the
STATE OF UTAH**

CASE NO. 9278

GEORGE O. PATTERSON and EDNA PATTERSON, his
wife,

Plaintiffs and Respondents,

- VS -

MAX WILCOX and ROBERTA WILCOX, husband and
wife and BEN D. BROWNING and MARJORIE
BROWNING, husband and wife,

Defendants and Appellants.

BRIEF OF THE PLAINTIFFS AND RESPONDENTS
G. O. PATTERSON AND EDNA PATTERSON

PREFATORY STATEMENT

After hearing the evidence presented, the Trial Court ruled that the three-year statute of limitations set forth in the Utah Code was a bar to Respondents' claim of fraud leaving the only remaining issue before the Court, as stated by the Trial Judge, as follows:- (Page 55 of Reporter's Transcript).

"THE COURT: I think, as you say, you have covered it. I can read these cases and they probably will settle it. There are some things I can decide easily. I can decide easily the question of the Statute of Limitations here as I have, and there is no doubt in my mind but what this is a grant of at least the uranium ores there because I can't understand the presence of this description in the Deed unless it did. I can see that the only thing in my mind now is whether it was intended to convey something more than the uranium, and I think counsel pretty well exhausted what their views are, and I think that I understand you perfectly on it. So I will give my decision from the bench here tomorrow morning, gentlemen. Court is in Recess."

STATEMENT OF FACTS

The "Agreement" and "Quit Claim Deed" which are the written documents in issue in this case were prepared the same night as a part of the same transaction by the Appellant Ben D. Browning and are set forth in words and figures, to wit:

AGREEMENT

This agreement made and entered into this 28th day of April, 1955, by and between George O. Patterson of Moab, Utah, and Max C. Wilcox, of Moab, Utah,

WITNESSETH:

For and in consideration of the sum of Ten Thousand and no/100 Dollars (\$10,000.00), I, George O. Patterson do hereby quit claim to Max C. Wilcox, all of my right, title and interest in and to the following described real property:

30 Mining claims, designated lower Valley, Nos. 1 through 30

all located in R 20 E. 31 S. Salt Lake Meridian, as further shown by the official records of the San Juan County Recorder. Reserving nevertheless, surface rights to the said Geo. O. Patterson. And, all mineral rights to the following named parcels of land, to wit:

"SE $\frac{1}{4}$ NE $\frac{1}{4}$; NE $\frac{1}{4}$ SE $\frac{1}{4}$; SE $\frac{1}{4}$ SE $\frac{1}{4}$; Section 8, and NW $\frac{1}{4}$; NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 9 Township 31 South, Range 26 East, Salt Lake Meridian" Commonly known as the W.H. Coefield property. And, "The East $\frac{1}{2}$ of the Northeast Quarter of Section Seventeen in Township 31 South, Range 26 East, Salt Lake Meridian." Containing 80 acres.

Together with an easement of way to the grantee or his assigns to the above described parcels of property for the purpose of mining said properties and conducting all operations incidental thereto including but not limited to exploration, development and surveying.

Grantors further reserve the right to impose and obligation upon these properties to the extent of ten per cent of all minerals reserved by this deed as determined by gross mill receipts less haulage allowance and penalties for high lime content; said ore payment to terminate when such payments shall be paid in the sum of \$5,000,000.00.

The said Max C. Wilcox, or his assigns, does hereby agree to perform the necessary assessment work on the above described real property, yearly, said assessment work to commence and be completed on or before the 1st day of July, 1955, and thereafter on or before the 1st day of June, each and every year thereafter. In the event the said assessment work is not performed at the times specified, said mining claims shall revert to said George O. Patterson.

The said \$10,000.00 is to be paid at the following rate and in the following manner: \$5,000.00 in cash, and \$5,000.00 in stock in a corporation be formed, said stock to be issued at par value. And in the event that said corporation is not formed with 90 days from the date hereof, then the said Max C. Wilcox agrees to pay the said \$5,000.00 to the said George O. Patterson in cash.

Witness the signature of the parties hereto the day and year first above written.

/s/ George O. Patterson

/s/ Max C. Wilcox

GEORGE O. PATTERSON and EDNA L. PATTERSON, his wife, grantors, of Moab, County of Grand, State of Utah, hereby QUITCLAIM to MAX C. WILCOX of Moab, Grand County, State of Utah, grantee, for the sum of Ten and no/100 _____ DOLLARS, the following described tract of land in San Juan County, State of Utah:

30 Mining claims, designated Lower Valley, Nos. 1 through 30 all located in R 26 E, 31 S, Salt Lake Meridian, as further shown by the official records of the San Juan County Recorder. Reserving, nevertheless, surface rights to the grantors, and all mineral rights to the following named parcels of land, to wit:

“SE $\frac{1}{4}$ NE $\frac{1}{4}$; NE $\frac{1}{4}$ SE $\frac{1}{4}$; SE $\frac{1}{4}$ SE $\frac{1}{4}$; Section 8, and NW $\frac{1}{4}$: NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 9 Township 31 South, Range 26 East, Salt Lake Base and Meridian” Commonly known as the W. H. Coefield property, And,

**"The East ½ of the Northeast Quarter of Section Seventeen
in Township 31 South, Range 26 East, Salt Lake Meridian."
Containing 80 acres.**

Together with an easement of way to the grantee or his assigns to the above described parcels of property for the purpose of mining said properties and conducting all operations incidental thereto including but not limited to exploration, development and surveying.

Grantors further reserve the right and impose an obligation upon these properties to the extent of ten per cent of all minerals reserved by this deed as determined by gross mill receipts less haulage allowance and penalties for high lime contents; said ore payment to terminate when such payments shall be paid in the sum of \$5,000,000.00.

Witness the hand of said grantor, this 28th day of April, A. D, one thousand nine hundred and fifty five.

Signed in the presence of { /s/ GEORGE O. PATTERSON
/s/ BEN D. BROWNING { /s/ EDNA L. PATTERSON

STATE OF UTAH)
) ss.

County of _____)
 On the _____ day of _____ A.D. one thousand nine
 hundred and _____ personally appeared before me
 the signer of the foregoing instrumnt, who duly acknowledge to me
 that he executed the same.

My commission expires _____ Address: _____ Notary Public.

The Appellants in the Statement of Facts in Paragraph 3, Page 2 of their brief, state that the Plaintiffs “directed their attack toward the circumstances surrounding the consideration for the Deed rather than the intention of the parties or the provisions of the Deed.”

The Respondents do not feel that this is an accurate statement of the facts and calls the Court’s attention to the fact that the Court admitted testimony of the Plaintiff and Respondent George O. Patterson and the Defendant and Appellant, Max Wilcox, concerning the negotiations leading up to the signing of the “Agreement” and the signing of the “Quit Claim Deed” both dated July 28, 1955, and hereinafter for convenience referred to as the “Agreement” and as the “Quit Claim Deed”. All of said testimony clearly shows the intention of the parties was to deal in uranium and vanadium. Respondents rely on the entire transcript and particularly the statements in said transcript describing the negotiations leading up to the signing of the “Agreement” and “Quit Claim Deed” and call the Court’s attention to the repeated reference and discussions concerning uranium and the conspicuous absence of any mention of any other mineral or minerals.

Reporter’s Transcript, page 13, lines 1 through 19

Reporter’s Transcript, page 14, lines 12 through 30

Reporter’s Transcript, page 15, lines 1 through 30

Reporter’s Transcript, page 16, lines 1 through 30

Reporter’s Transcript, page 17, lines 1 through 30

The Respondents feel that it is also significant and important to state the following:-

1. The Defendant Ben D. Browning claims to own an undivided fifty per cent interest in the fee simple mineral estate in the patented land referred to and described in the "Agreement" and "Quit Claim Deed" (Reporter's Transcript, page 8, lines 6 through 20).

2. The said Ben D. Browning dictated, in the middle of the night of April 28, 1955, the "Agreement" and "Quit Claim Deed" to Edward M. Garrett, Appellant's attorney in this lawsuit, who in turn reduced the same to writing in the form set forth above. (See Reporter's Transcript, page 40, lines 7 through 13, and page 16, lines 8 and 9, and page 17, lines 13 through 30.)

3. That at the time of the negotiations between the Appellants and Respondents and at the time the "Agreement" and "Quit Claim Deed" were dictated by Mr. Ben D. Browning to Mr. Edward M. Garrett as aforesaid, Mr. Browning was acting not only as attorney for the Appellant, Max Wilcox, but was also seeking to acquire property interest for himself. (See Reporter's Transcript, page 29, lines 20 through 22).

In addition to the facts above presented which Respondents feel were not fully set forth in the Appellants brief, the Respondents call the Court's attention to the following facts which appear in the record:-

1. That on October 1, 1958, three years and two months after the "Agreement" and "Quit Claim Deed" were prepared by Ben D. Browning, the Defendant, Max Wilcox, entered into a Grazing Lease, a copy of which was and is

attached to Plaintiffs' Complaint, marked "Exhibit A" and by reference made a part thereof, which Grazing Lease provided, in part, as follows: -

"4. It is further understood and agreed that this Lease **does not include any mineral rights whatsoever** and the Lessors specifically reserve the right to occupy so much of the surface of the demised premises as may be necessary or convenient for any mining operation conducted by Lessors or those acting by their authority and that no compensation will be paid to Lessee for such right."

"It is further agreed between the parties that the Lessee upon paying the rent and performing all of the covenants and agreements herein set forth to be performed by said Lessee, shall at the expiration of this Lease on September 30, 1968, have the right to purchase the **surface rights only** to the real property above described together with the Taylor Grazing Permits and State Leases herein referred to at a price to be determined between the parties."

Paragraph 9 of the Appellants' Amended Complaint reads as follows: -

"9. That on the first day of October, 1958, the Plaintiff's, G. O. Patterson and Edna L. Patterson, husband and wife, entered into a Grazing Lease with the Defendant, Max C. Wilcox, a copy of which said Lease is attached hereto marked "Exhibit A" and by reference

made a part hereof that said Lease is a valid and existing Lease and is recognized as such by the Plaintiffs.”

In Paragraph 7 of the Defendants’ Answer and Counterclaim to Plaintiffs’ Amended Complaint they answer as follows: -

“Defendants admit the allegations of Paragraph 9 of Plaintiffs’ Amended Complaint.”

On pages 5 and 6 Reporter’s Transcript, the following statement was made to the Court in an effort to define the matters that would require proof and to eliminate those that would not require proof, and Mr. Edward M. Garrett, Attorney for the Appellants, at that time again recognized the Grazing Lease including the references to minerals as a valid and subsisting lease: -

“MR. RUGGERI: Now in Paragraph 9 of the Complaint, the Defendants admit that G. O. Patterson and Edna Patterson entered into a grazing lease with Max Wilcox and a copy of the lease is attached to it as “Exhibit A” and by reference made a part thereof, and a valid and existing lease and is recognized as such by the Plaintiffs. There was an argument or discussion that came up, Your Honor, about this particular matter and Mr. Patterson entered into a grazing lease with the Defendant Max Wilcox and in so far as that affects the, his right in that property we recognize that as being a valid subsisting lease and appar-

ently they do too. That's right, isn't it?"

"MR. GARRETT: That's correct."

2. That Appellant Max Wilcox and Respondent George O. Patterson had a conversation about the properties after the signing of the "Agreement" and "Quit Claim Deed" and discussed uranium and vanadium only. (Reporter's Transcript, page 18, lines 16 through 23).

3. The Appellants abandoned the unpatented lode mining claims referred to in the "Agreement" and "Quit Claim Deed" after doing assessment work for the assessment year ending July 1, 1955 only. (Reporter's Transcript, page 37, lines 21 through 30, and page 38, line 1, and page 36, lines 26 through 29).

4. The Appellants never bothered to record the "Agreement" or "Quit Claim Deed". (See Exhibits in the file.)

5. The Appellants never bothered to place any documentary stamps on said Quit Claim Deed or to have said "Quit Claim Deed" acknowledged so that it could be recorded despite the passage of almost five years from the date of its execution to the date of the commencement of this action. (See Exhibits in the file.)

6. The Defendant, Max Wilcox, who is the sole and only Grantee named in the "Agreement" and "Quit Claim Deed" did not ever convey a fifty per cent interest or any interest at all in said property to Mr. Ben D. Browning until March 20, 1960, the day before the trial in this case.

(Reporter's Transcript, page 36, lines 6 through 19.)

The following matters are of common knowledge, general geographical knowledge and common historical knowledge of which Trial Court and Appellate Court may take judicial notice: -

1. That all of the lands involved herein are located in Lisbon Valley, San Juan County, State of Utah.

2. That on April 28, 1955, there was a uranium mining boom on in San Juan County, Utah, and that large deposits of uranium and fissionable source materials had been discovered in Lisbon Valley, San Juan County, Utah.

3. That many corporations were being formed by persons eager to make their uranium fortunes.

4. That no oil of commercial value nor any commercial gas source had been discovered in Lisbon Valley at that time.

5. It is equally well known and a matter of common knowledge in the area of the transactions under consideration that "haulage allowance and penalties for high-lime content" apply particularly to the practices and milling processes relative to the mining and refining of uranium and related ores and have no relation to the recovery of oil and gas.

All dark print herein is supplied for emphasis by the Respondents.

STATEMENT OF POINTS

POINT ONE

The findings of the Trial Court are fully and amply supported by evidence properly introduced into the record and in a suit of this kind, the Supreme Court should not disturb the Trial Court's Findings of Fact, unless the findings are clearly against the preponderance of the evidence.

POINT TWO

In construing the "Contract" and "Quit Claim Deed" the interpretation of the Court must be on the entire instrument and not merely on disjointed or particular parts of it in the light of circumstances surrounding the parties to the instrument at the time of execution.

ARGUMENT

POINT I

The Findings of Fact made by the Trial Court are fully and amply supported by evidence properly introduced into record and in a suit of this kind the Supreme Court should not disturb the Trial Court's Findings of Fact, unless the findings are clearly against the preponderance of evidence.

RIESKE v. HOOVER et al, 53 Utah 87, 177 P 228, the Supreme Court of Utah said in determining the title to certain land:

“(1, 2) Unless the findings of the court are against the clear preponderance of the evidence, we have no power to reverse the judgment. That is the rule, even if it be admitted that this is an equity case, which we do not deem it necessary to determine. If it is a case at law, as cases in ejectment usually are, unless an equitable defense is interposed, then the rule is less liberal. In such case, if there is any substantial evidence to support the findings, whether by a court or a jury, we are powerless to interfere. These rules are so well established in this jurisdiction as to become a matter of common knowledge among the members of the bar and courts of the state.

“(3) Under either rule above referred to we are of the opinion that neither of the exceptions relied on by appellants should prevail. Applying the rule most favorable to appellants we are not prepared to hold that the findings are against a clear preponderance of the evidence. This is manifest upon a mere casual reading of testimony, the substance and effect of which we have endeavored to correctly state. It is not necessary to comment on the evidence. It speaks for itself. It is to some extent conflicting upon the main issue. It therefore became the duty of the Trial Court to reconcile the conflict, if possible, and determine the facts. The findings of the Trial Court being unimpeachable under the errors assigned, the duty of this court is plain and unequivocal, unless the law is contrary to our conception.

STANLEY v. STANLEY, 97 Utah 520 94 2d 465:

“(1) The scope of the review on appeal in equity cases is clearly settled in this jurisdiction. “This court is authorized by the State Constitution to review the findings of the trial courts on conflicting evidence will not be set aside unless it manifestly appears that the court has misapplied proven facts or made findings clearly against the weight of the evidence.” Olivero v. Eleganti, 61 Utah 475, 214 P 313, 315.

“To the same effect are Klopenstine v. Hays, 20 Utah 45, 57 P 712; Singleton v. Kelly, 61 Utah 277, 212 P 63, 66; Holman v. Christensen, 73 Utah 389, 274 P 457; Zuniga v. Evans, 87 Utah 198, 48 P 2d 513, 101 A.L.R. 532; Wilcox v. Cloward, 88 Utah 503, 56 P 2d; Hoyt v. Upper Marion Ditch Co., 94 Utah 134, 76 P 2d 234.” PENN STAR MINING CO. v. LYMAN et all, 64 Utah 343, 231 P 107:

“(7, 8) Lest we be misunderstood, we desire to add in this connection that we are not passing upon nor indicating what effect, if any, the trial court should give to this evidence offered on behalf of Lyman. That is a question which primarily is within the exclusive province of the trial court, or, in case there is a dispute or conflict respecting the facts, for the jury to determine. But, even though the facts are in dispute and are submitted to the jury when they are found, the court must nevertheless determine the legal effect on the contract.”

POINT II

In construing the "Contract" and "Quit Claim Deed" the interpretation of the Court must be on the entire instrument and not merely on disjointed or particular parts of it, in the light of all the circumstances surrounding the parties to the instruments at the time of its execution.

The Appellants take the position that the Trial Court could only reach the conclusions it came to by considering two matters only. They state on Page 10 of their brief, as follows:-

"The record discloses only two possible sources for such a conclusion, one of them being the Grazing Lease entered into by the Respondents Patterson and Wilcox more than three years after the delivery of the Deed; the second being, the royalty reservation contained in the Deed."

The Respondents can sympathetically understand how the Appellants would like for their unsupported statement to hold, but Respondents submit as a matter of fact that the record literally abounds with compelling evidence showing the intention of the parties was to deal for uranium and related hardrock minerals only while it is conspicuously silent with respect to any other minerals; the record shows that the Appellants themselves wrote the ambiguous "Agreement" and "Quit Claim Deed" which under the circumstances must be construed most strongly against them especially where the author is an attorney. In addition to the foregoing, and again contrary to the desires of the Ap-

pellants, the Trial Court and the Supreme Court has the right to take judicial notice of all matters of common knowledge. With above matters in mind, the Respondents respectfully submit that the following fundamental matters were properly considered by the Court in arriving at its conclusions and that the Court was not limited in the manner stated by the Appellants.

- a. The interpretation of the "Agreement" and "Quit Claim Deed" read in its entirety including "the reservation of royalty" mentioned by Appellants.
- b. The circumstances existing at the time of the execution of the "Agreement" and "Quit Claim Deed" as shown by extrinsic evidence properly admitted into the record by the Trial Court.
- c. The construction to be placed on an ambiguous instrument when it was written by an attorney acting for himself as an attorney for the Appellant, Max Wilcox, in its preparation.
- d. The practical interpretation placed upon the instruments by the parties themselves prior to the trial and indeed as late as the morning of the trial. (Referred to by Appellants as "Grazing Lease").
- e. Matters of which the Court could take judicial notice.

The Respondents will now proceed to discuss the following fundamental rules to the subjects they submit were

properly considered by the Trial Court in its determination of the intent of the parties in the order set forth above.

(a) In construing the "Agreement" and "Quit Claim Deed" the court was obliged to construe the entire instrument.

The Appellants apparently subscribe to this proposition as they state on Page 16 of their brief as follows: -

"The rule followed in this State is that the whole Deed will be considered and effect given to all its terms. Coltharp v. Coltharp, 160 Pac 121. (Utah, Wood vs. Ashby, 253, Pac 2d 351 (Utah), Haynes v. Hunt, 85 Pac 2d 861 (Utah)".

Respondents also rely upon the three cases cited by Appellants and feel that it is appropriate at this time to quote portions of said cases in greater detail than the Appellants did in their brief.

COLTHARP v. COLTHARP 148 Utah 389, 160 P 121, quoting from page 123: -

"While it is quite true that every word, and of course, every phrase must be given its ordinary and usual meaning and effect, yet, where unnecessary words are used in a grant and it is clear that they were not intended by the Grantor as limitations upon the grant, but rather as conferring a power which existed by implication of law, courts may not cut down the grant

merely because useless words are incorporated in the instrument. Moreover, where words or phrases found in different parts of a writing which are repugnant the courts must if possible, construe the whole instrument so all of its parts may be given sure meaning and effect, whether primary or secondary.”

Applying the rule of law to the facts in this case it seems quite apparent that the Trial Court was doing no more than reconciling repugnant parts of the ambiguous “Contract” and ambiguous “Quit Claim Deed” which the Appellants themselves had prepared and for which ambiguity they must be held solely responsible. Indeed the Quit Claim Deed is susceptible of an interpretation that no mineral rights of any kind whatsoever were conveyed to the Grantee where the Deed reads, as follows: -

“Reserving nevertheless, surface rights to the Grantors. And all mineral rights to the following named parcels of land, to-wit:”

(Description of the land in which Appellants now contend they own all mineral rights)

It is submitted that if the Court were to place a literal interpretation on the wording of the Deed, as the Appellants would like to have it do when it works to their advantage, that the Court could only find no minerals of any kind whatsoever were conveyed by such a grant as that quoted above.

HAYNES v. HUNT et al, 96 Utah, 348 84 P, quoting from page 863:-

“A more modern rule and that now followed by the greater number of the courts is that the whole deed and every part thereof is to be taken into consideration in determining the intention of the Grantor, and clauses in the Deed subsequent to the granting clause are given effect so as to curtail, limit, or qualify the estate conveyed in the granting clause.”

It seems apparent that the Trial Court was only following the rule stated above when it considered that the references made by the Appellants in preparing the Deed to “gross mill receipts,” and “high-lime contents” and “haulage allowance” as curtailing, limiting and qualifying the general term found in the granting clause of the “Quit Claim Deed” in question.

In this connection the Court properly took judicial notice of the matter of common knowledge that “haulage allowance” and “penalty for high-lime” apply particularly to the practices and processes relative to the mining and refining of uranium ores and have no relation whatsoever to the recovery of oil and gas.

WOOD v. ASHBY, 122 Utah 580 253 P 2d 351, quoting from Page 353.

“It is also established in this State that a deed should be construed so as to effectuate the intentions and

desires of the parties, as manifested by the language made use of in the deed.”

The Appellants in their brief also apparently rely heavily upon the case “Western Development Company v. Nell, 4 Utah, 2d 112, 288 P 2d 452 upon which the Respondents also rely and in so doing quote from said case on Pages 453 and 454, as follows: -

(1, 2) Although no similar case has arisen in the State of Utah, the problem of the interpretation of a deed, usually an old one, where “minerals” or “mineral rights” have been reserved and oil and gas have subsequently been discovered on the land is one which has been frequently treated in other jurisdictions. Were the only question involved the construction of the first paragraphs of both the reservation and the grant in the instant case, we would have no hesitation in endorsing and applying the majority rule that a reservation of “minerals” retains the rights to gas and oil, unless a contrary intention is manifested, See 86 A.L.R. 986 and Nephi Plaster & Mfg. Co. v. Juab County 33 Utah 114, 83 P. 53 14 L.R.A., N.S., 1043 holding that the expression “minerals” is not confined in meaning to metals. However, as counsel for Appellants suggests in his excellent brief, cases construing minerals as including oil and gas are not necessarily opposed to those reaching an opposite result as regards the particular instrument under the construction, since the intention of the parties controls in the interpretation, 16 Am. Jr. 527, and where the intention of the

parties can be ascertained from the instrument, arbitrary rules of law as to construction will not be invoked, *Haynes, v. Hunt*, 96 Utah 348, 85 P. 2d 861.

“(3) One line of cases views descriptions of rights to be exercised in the removal of the sub-surface values as restricting the grant whereas the other line of cases interprets such rights as enlarging or adding to the grant. With such confusion in the authorities and because logic compels us to recognize as valid either interpretation, we hold that the deeds are ambiguous, thus allowing the consideration of extrinsic evidence as to the situation of the parties at the time of execution, the circumstances surrounding the transactions, and the intent of the parties. See *Hudson & Collins v. McGuire*, 188 Ky. 712 223 S.W. 1101, 17 A.L.R. 148.

“(4) The trial court admitted the extrinsic evidence offered by Appellants, but determined the issue of intent against them. The burden of persuasion remained with the parties who asserted that the grantor in both deeds here under consideration intended to convey less than the estate attributed by law to the word “minerals” and hence, we must examine that evidence to determine whether or not it is of such substance as to compel a finding that oil and gas rights were not intended to be included in the reservation and grant.”

The court in the *Western Development* case recognized that cases construing minerals as including oil and gas are not necessarily opposed to those reaching an opposite

result as regards the particular instrument under construction since the intent of the parties controls and it is to be noted that in the instant case the trial court like the trial court in the Western Development case admitted the extrinsic evidence offered by the Respondents but **unlike** the Western Development case determined the issue of intent against the Appellants and in favor of the Respondents and as stated under the authorities cited under Point No. One the finding should not be lightly overruled but should be sustained whenever possible.

A prima facie meaning of the words "all minerals" must also yield to the intention considering the facts and circumstances surrounding the parties at the time the instrument was made. *Coltharp v. Coltharp*, 48 Utah 389, 160 Pac. 121. *Wood v. Ashby*, 122 Utah 580 253 P 2d 351. *Western Development Corporation v. Nell*, 4 Utah 2d 112, 288 P 2d 452. See Annotation, L.R.A. 1918A 491, which states that cases construing "minerals" as including oil and gas are not necessarily opposed to those reaching an opposite result as regards the particular instrument under construction, and that the words "minerals, mines and mining rights" do not have an absolute definition when used in legal documents, it being necessary to ascertain the intention of the parties to the instrument in which the term is used. *Pridle v. Baker*, 116 W. Va. 48, 178 S.E. 513, 514, *Winsett v. Watson* (Tex.) 206 S.W. 2d 656; *Dierk Lumber and Coal Co. v. Myer*, 85 Myer, 85 Fed. Supp. 157.

(b) The question whether the "Quit Claim Deed" conveyed the entire mineral estate is to be determined by ascertaining the intention of the parties thereto at the time

and under the circumstances existing when made and executed.

The Respondents do not agree with Appellants' statement set forth on Page 10 of their brief that the Trial Court was limited to the "Grazing Lease" and the "reservation of royalty" provisions in the Quit Claim Deed to determine the intention of the parties.

This statement by the Appellants simply is not true under the laws as set forth in this jurisdiction for the Trial Court not only had the duty to read the entire "Agreement" and "Quit Claim Deed" but it had the additional duty to take notice of all the surroundings and attendant circumstances and to consider the language used in the light of such circumstances.

The Utah Court in *Read v. Forced Underfiring Corporation et al*, 82 Utah 529 26 P 2d 325, the Court laid down the following rule quoting from Page 327, as follows:-

"Where the language is mixed and susceptible of more than one construction, the Court should attempt to place itself as nearly as possible in the situation of the parties to the contract at the time this agreement was entered into, so that it may view the circumstances as viewed by the parties themselves to be enabled to understand the language used in the sense with which the parties used it. In order to accomplish this purpose it is generally proper for the Court to take notice of the surroundings and attendant circumstances

and consider the language used in the light of such circumstances.”

The Appellants state in Paragraph 4, Page 2 of the brief that “In the lower Court the Respondents directed their attack surrounding the considerations for the Deed rather than the intent of the parties or the provisions of the Deed.” The Respondents answer this statement categorically stating that the only extrinsic evidence and all the extrinsic evidence demonstrates beyond any question that the parties talked about and bargained for uranium and related minerals only, and in this connection the Court’s attention is particularly drawn to the following parts of the said Transcript, to wit:-

Reporter’s Transcript, page 13, lines 1 through 19
 Reporter’s Transcript, page 14, lines 12 through 30
 Reporter’s Transcript, page 15, lines 1 through 30
 Reporter’s Transcript, page 16, lines 1 through 30
 Reporter’s Transcript, page 17, lines 1 through 30

Again, the Respondents rely upon the case of Coltharp v. Coltharp 148 Utah 389, 160 P 121 cited by Appellants and quote from page 122 of said case:-

“The rule of construction applicable to instruments of writing, including deeds, in this jurisdiction is that the intention of the parties, as the same is made **apparent from the ordinary and generally accepted meaning of the language used by them when applied to the subject-matter of the writing in the light of**

surrounding circumstances of the parties at the time, controls rather than the mere technical words or phrases. *Coins v. Hogenbarth*, 37 Utah 69, 106 Pac 945; *Burt v. Stringfellow* 45 Utah, 207, 143 P 234; *Reese Howell Co. v. Brown*, 158 Pac 684.

It is submitted that if the facts of this case are applied to the rule of law set forth above, the Respondents must prevail.

In applying the generally accepted meaning of the language used rather than mere technical words or phrases in light of the circumstances at the time, it seems quite evident that the parties intended to deal for and convey uranium and related minerals only.

(c) Where one of the parties to a contract, or one directly interested in the subject matter thereof has prepared it, using ambiguous or uncertain language, such language will be construed most strongly against the party using it, especially when interested party is a lawyer and prepares a contract for opposite parties who are laymen.

In the instant case the testimony clearly shows that the negotiations took place in the middle of the night, about the 28th day of April, 1955, (during the uranium boom in San Juan County, Utah); that one of the Appellants, Ben D. Browning, who claims to have an undivided fifty per cent interest in the mineral estate in the lands in question dictated the "Agreement" and also dictated the "Quit Claim Deed" to Edward M. Garrett, Appellant's

attorney, who in turn reduced the same to writing and the Defendant, Ben D. Browning, in so dictating said documents was acting for himself and as the attorney for the Appellant, Max Wilcox.

Quoting from Reporter's Transcript, page 8, line 6 through 21:-

"MR. RUGGERI: I have alleged here some place in the Complaint that, Oh, in Paragraph 5 which has been denied, I allege that the Defendants Max Wilcox and Ben Browning are, or claim to be partners engaged in a mining partnership with respect to the transactions and occurrence referred to in this amended complaint concerning the property herein referred to and described in Exhibit C attached hereto and by reference made a part hereof. Do you deny that they are partners in this deal?

"MR. GARRETT: Yes, our claim is that they are merely co-tenants in this property.' "

"MR. RUGGERI: And it is your contention that Max owns fifty per cent, an undivided fifty per cent?

"MR. GARRETT: That is correct.

MR. RUGGERI: And that Ben owns an undivided per cent?

"MR. GARRETT: That is likewise correct.

(Quoting from Reporter's Transcript, page 17, lines 13

through 30. Mr. Ruggeri questioning and Mr. George O. Patterson answering.)

“A. Well I don’t know if it was anything that would amount to anything. Asked Mr. Garrett if he’d go get a typewriter and type it up.

“Q. Did Mr. Garrett go get his typewriter?

“A. Yes he brought his typewriter in and Mr. Browning dictated a contract to him.

“Q. And as Mr. Garrett wrote it down?”

“A. Yes.

“Q. What about the deed?

“A. Well the same with the deed.

“Q. And then did you, were you the, review the written agreement?

“A. Yes. He read it and I read it and I signed it and when they called Mr. Wilcox over and had him sign it.

“Q. Now when you say they called Mr. Wilcox over do you remember what was said there?

“A. I think Mr. Browning said come on, sign this agreement, Max.”

(Quoting from Reporter’s Transcript, page 29, lines 20 through 23. Mr. Ruggeri is cross-examining Max Wilcox.)

“Q. Well you’re the one that — Question: Well you’re

the one that knows. Answer: Well I tell you Ben done most of that kind of work. I mean he was my attorney and he was there.

“A. That’s right.

(Quoting from Reporter’s Transcript, page 40, lines 7 through 14. Mr. Ruggeri is cross-examining Max Wilcox.)

“Q. And subsequent to that time all of your dealings with Ben Browning excepting for the time that you with Ben Browning, excepting for the time that you delivered the stock on the 17th of July, isn’t that right?

“A. Yes.

“Q. He was actually physically present during all of those times?

“A. Yes. Yes”.

PENN STAR MINING CO. v. LYMAN et al. 64 Utah 307, 231 P. 107.

Quoting from page 110, the Utah Court said:-

“(4) There is still another element to which the courts, under certain circumstances have recourse, in case the language in a contract is ambiguous or uncertain, which is that, where one of the parties, or one who is directly interested in the subject matter of the contract, has prepared it and has used language which is ambigu-

ous or uncertain in its meaning, the language will be construed most strongly against the party who used the uncertain or ambiguous language. Although the rule is not one of controlling influence, yet, when the evidence is in this case, shows that a lawyer, who is an interested party, prepared the contract for the Defendants who are laymen, the rule has special application.

See also Hawaiian Equipment Co. Limited v. Eimco Corporation, 15 Utah 590 207 P 2d 794 and Barnard v. Hardy 77 Utah 218, 293 P. 12.

The Appellants rely and cite the rule of construction that a deed should be construed most strongly against the Grantor but they completely failed to point out that the Appellants are responsible for the ambiguities in the Deed they prepared or the attendant rule of construction that is applicable in such situations.

(d) Where the parties to a contract involving uncertainty as to its meaning have given it the same practical construction, that construction will generally be adhered to by the Courts in giving effect to its provisions.

The Appellants in Paragraph 3, page 19 of their brief make the following statement: "The findings and decree of the lower court holding the terms of a Grazing Lease and the terms of the royalty reservation show an interpretation and intent not to convey oil and gas are not founded on substantial evidence or any evidence whatsoever and must be reserved."

As stated in Respondents' Statements of Facts, the conclusion of Appellants is not correct for the reason that the finding of the Court is founded on substantial evidence as is apparent from reading the following facts and applying them to the law in this jurisdiction as hereinafter set forth. In Paragraph 9 of Respondents' Amended Complaint they pleaded as follows: -

"9. That on the first day of October, 1958, the Plaintiffs G. O. Patterson and Edna L. Patterson, husband and wife, entered into a Grazing Lease with the Defendant, Max C. Wilcox, a copy of which said Lease is attached hereto marked "Exhibit A" and by reference made a part hereof; that said Lease is a valid and existing lease and is recognized as such by the Plaintiffs."

Appellants answered the allegation as follows:-

"7. Defendants admit the allegations of Paragraph 9 of Plaintiffs' Amended Complaint."

At the opening of the trial Mr. Edward M. Garrett specifically stated that the Appellants recognized the Grazing Lease as a valid and subsisting lease when the following questions were asked and the following reply given: (Reporter's Transcript, page 5, lines 27 through 30 and page 6, lines 1 through 9.)

"MR. RUGGERI: Now in Paragraph 9 of the Complaint the Defendants admit that G. O. Patterson and Edna Patterson entered into a Grazing Lease with Max Wil-

cox and a copy of the lease is attached to it as "Exhibit A" and by reference made a part hereof, and is a valid and existing lease and is recognized as such by the Plaintiffs. There was an argument or discussion that came up, Your Honor, about this particular matter and Mr. Patterson entered into a Grazing Lease with the Defendant Max Wilcox and in so far as that affects the, his right in that property we recognize that as being a valid subsisting lease, and apparently they do too. That's right, isn't it?

MR. GARRETT: That's correct.

It is the position of the Respondents that the Appellants, by admitting that the Respondents and the Appellants recognize the Grazing Lease as a valid and subsisting lease the morning of the trial as stated above and by Appellants admitting in their pleadings that it is a valid and subsisting lease, cannot now for the first time on appeal conscientiously assert that the "Trial Court's findings with respect to the interpretation of the parties are not founded on substantial evidence or any evidence whatsoever and must be reversed." On the contrary, it is respectfully submitted by the Respondents that the Utah law on this issue has been clearly stated in the Utah case of *Wasatch Livestock Loan Co. v. Lewis & Sharp et al*, 84 Utah 347 35 P 2d 835. Quoting from page 84 of said case, the Supreme Court of Utah, said:

"(5) Further, the banks by their verified pleadings having admitted the existence of Exhibit C, that it was in full force and effect, and that title and owner-

ship of lambs to be purchased with moneys of the second parties to the agreement were to pass and vest in Lewis & Sharp, with full right and power to mortgage them, must be held bound by such pleadings. It is familiar doctrine that pleadings in a pending cause are more than admissions; that until changed they are conclusive on the parties pleading them and cannot be controverted by the pleader either in the Trial Court or on Appeal. 1 Bancroft, Code Pleading, 626; 49 C. J. 122; Sutton v. Otis Elevator Co., 68 Utah, 85, 249 P. 437; Heywood v. Ogden Motor Car Co., 71 Utah, 417, 266 P. 1040, 62 A.L.R. 1232."

The Supreme Court of Utah in the case of Woodward v. Edmunds, 20 Utah 118, 57 P. 848, the Court states on page 851: "Where there is any ambiguity in a contract, the practical construction which the parties to the instrument have given it before any controversy arose between them should be adopted by the Court. This Court so held in Peary v. Salt Lake City, Utah 331, 40 Pac 206."

In Trucker Sales Corporation v. Potter et al, 104 Utah 1, 137 P 2d 370, the Supreme Court of Utah on page 372 made the following statement:

"It is well settled in this State that where the parties to a contract, with full knowledge of the terms thereof, by their actions before any controversy has arisen, place upon it a construction which is not contrary to the usual meaning of the language used, the Courts will follow that construction. Fowler v. Lawson, 56

Utah 420, 191 P. 227; Roberts v. Tuttle, 36 Utah 614; 105 P. 916; Titton v. Sterling Coal & Coke Co., 28 Utah 173, 77 P. 758, 107 Am St. Rep. 689; Snyder v. Fidelity Savings Association 23 Utah 291, 64 P. 870; Woodward v. Edmunds 20 Utah 118 57 P. 848; Peary v. Salt Lake City 11, Utah 331, 40 P. 206.”

The Grazing Lease, which the Appellant Max Wilcox entered into on October 1, 1958, a time prior to the controversy and which all the Appellants admitted in their pleadings and at the beginning of the trial to be a valid and subsisting lease, contains language which the Respondents submits fully supports the lower Court’s finding that parties themselves have placed an interpretation of the contract and Quit Claim Deed. The pertinent part of said “valid and subsisting Grazing Lease” reads, as follows:-

“4. It is further understood and agreed that this Lease **does not include any mineral rights whatsoever** and the Lessors specifically reserve the right to occupy so much of the surface of the demised premises as may be necessary or convenient for any mining operations conducted by Lessors or those acting by their authority and that no compensation will be paid to Lessee for such right.”

“It is further agreed between the parties that the Lessee, upon paying the rent and performing all of the covenants and agreements herein set forth to be performed by said Lessee, shall at the expiration of this Lease on September 30, 1968, have the right to

purchase the surface rights only to the real property above described together with the Taylor Grazing Permits and State Leases herein referred to at a price to be determined between the parties.”

(e) Judicial Notice. 31 C.J.S. 509 defines Judicial Notice as follows:-

“Judicial Notice is the cognizance of certain facts which judges and jurors may properly take and act on without proof and because they already know them.

Were it not for the statement of the Appellants, found in Footnote 3, Page 16 of their brief, in which they imply that the Court must be asked to take judicial notice of any particular matter and if not asked should be limited to matters in the record exclusively, the Respondents would not have considered it necessary to mention the matter at all but since it has been raised, the Respondents feel the issue should be met.

31 C.J.S. 519. “Proof is not required of facts which the Court can take judicial notice. The doctrine of Judicial Notice is based on convenience and expediency and to say that a Court will take Judicial Notice of a fact is merely another way of saying that the usual forms of evidence will be dispensed with if knowledge of the fact can otherwise be acquired. Judicial knowledge is not reached by the use of evidence; it is a matter pertaining to the judicial function and its exercise, like that of an admission, stipulation, or rule

of presumption dispenses with evidence as to the point . . . Facts of such common knowledge as to become the subject of Judicial Notice without proof are an exception to the general rule requiring findings of fact to be based on the evidence.”

It is submitted without further argument that in this case the following matters are the proper subject of Judicial Notice which formed a part of the circumstances existing at the time the “Quit Claim Deed” in question was whitten by the Appellants and executed by the Respondents.

1. That all of the lands involved herein are located in Lisbon Valley, San Juan County, State of Utah.
2. That on April 28, 1955, there was a uranium mining boom on in San Juan County, Utah and that large deposits of uranium and fissionable source materials had been discovered in Lisbon Valley, San Juan County, Utah.
3. That many corporations were being formed by persons eager to make their uranium fortunes.
4. That no oil of commercial value nor any commercial gas source had been discovered in Lisbon Valley at that time.
5. It is equally well known and the Court found in its memorandum decision that as a matter of common knowledge in the area of the transactions under consideration that “haulage allowance and penalties for

high-lime content" apply particularly to the practices and milling processes relative to the mining and refining of uranium and related ores and have no relation to the recovery of oil and gas.

CONCLUSIONS

The question here to be resolved is not whether oil and gas have often been held to be included within the general term "minerals" but whether the parties conveyed and intended to convey mineral rights other than uranium and related minerals. The Supreme Court is not called upon to determine a general definition; what is being determined is whether the particular parties intended by particular instruments and language and in view of particular conditions, times and circumstances to include only uranium and associated minerals within a particular grant.

The Trial Court had under consideration before it an "Agreement" and "Quit Claim Deed" which was on its face susceptible of more than one construction but when interpreted under the applicable rules of construction, taking into consideration all of the circumstances existing at the time of its execution and the practical interpretation placed on the documents by the parties themselves, both before and after the commencement of the trial, and having seen and observed the witnesses before it and being fully advised in the premises and having made its Findings of Facts, all of which are fully supported by the evidence and having properly determined the legal effect of the conveyance in question and having entered its Decree accordingly should now be sustained by the Appellate Court.

Respectfully submitted,

ROBERT H. RUGGERI

Moab, Utah

Attorney for Respondents