

1966

Lawrence Migliaccio, Et Al v. Union Carbide Corporation, et al. : Appellant's Brief

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

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. Dwight L. King and David B. Dee and Jack Darragh; Attorney for Appellants

Recommended Citation

Brief of Appellant, *Migliaccio v. Union Carbide*, No. 10458 (1966).
https://digitalcommons.law.byu.edu/uofu_sc2/3714

This Brief of Appellant 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 (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**

UNIVERSITY OF UTAH

FEB 28 1966

LAWRENCE MIGLIACCIO, et al,
Plaintiffs-Appellants,

vs.

UNION CARBIDE CORPORATION,
et al,
Defendants-Respondents.

LAW LIBRARY

Case No.
10458

APPELLANT'S BRIEF

**APPEAL FROM THE JUDGMENT OF THE
JUDICIAL DISTRICT FOR GRAND COUNTY**

HONORABLE F. W. KELLER, JUDGE

DWIGHT L. KING and DAVID R. KING
2121 South State Street
Salt Lake City, Utah

Attorneys for the Plaintiffs-Appellants

JACK DARRAGH

Boston Building

Salt Lake City, Utah

Attorney for Defendants-Respondents

Appellant

MOVES, DUFFORD, NELSON

800 First National Bank Building

P.O. Box 1508

Grand Junction, Colorado

WALK V. BUNDERSON

Castle Dale, Utah

BLANK B. HANSEN

Price, Utah

A. HAMMOND

Bedford Apartments

21 South State Street

Salt Lake City, Utah

EDGEMAN and KELLER

Price, Utah

WALD N. JENSON

Price, Utah

Attorneys for Defendants-Respondents

FILED

JAN 9

Clk. S. S. S.

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
STATEMENT OF POINTS	9
ARGUMENT	10
POINT 1. THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFFS TWO UNPATENTED MINING CLAIMS OF THE DIMENSION 600 X 1500 FEET	10
POINT 2. THE COURT ACCEPTED AS BEING THE STAKES THAT WERE ORIGINALLY PLACED BY BRANDON, STAKES WHICH WERE NOT IDENTIFIED BY ANY COM- PETENT OR SUBSTANTIAL EVIDENCE	17
CONCLUSION	17

AUTHORITIES CITED

Blank v. Ambs, et al, 260 Mich 589, 245 N.W. 525	13
Bemis v. Bradley, 126 Me. 462, 139 A. 593, 69 A.L.R. 1399 (annotated P. 1485)	13
Board of Education v. Board of Education, 88 Utah 276, 39 P. 2d 340	14
Cronin v. Gore, 38 Mich. 381	13
Hartung v. Witte, 59 Wis. 285, 18 N.W. 175	13
Huddert, et al v. McGuirk, et al, 186 Cal. 386, 199 P. 494	13
Jones v. Scott, 314 Ill. 118, 145 N.E. 378	13
Klaar v. Lemperus, Mo., 303 S.W. 2d 55	13
Pickett v. Nelson, 79 Wis. 9, 47 N.W. 936	13
Randleman v. Taylor, 94 Ark. 511, 127 S.W. 723	13
Rast, et al v. Fischer, 107 C.A. 2d 126, 236 P. 2d 393	13
Sanford, et al v. McDonald, et al, 6 N.Y. S 613, 25 N.Y. St. 721	13
Skinner v. Francisco, 404 Ill. 356, 88 N.E. 2d 867	13
Tidwell v. Waldrup, 347 Mo. 1028, 151 S.W. 2d 1092	13

	Page
Tripp v. Bagley, 74 Utah 57, 276, Pac 912, 69 A.L.R. 1417	13
Vitterauer v. Pulley, 401 Ill. 494, 82 N.E. 2d 643	13
Wood, et al v. Rapp, et al, 41 S.D. 198, 169 N.W. 518	13

TEXTS

11 C.J.S., P. 637	14
Clark, Surveying and Boundaries, P. 518, Sec. 564	12
6 Thompson on Real Property, P. 537, Sec. 3036	12

IN THE SUPREME COURT
of the
STATE OF UTAH

LAWRENCE MIGLIACCIO, et al,
Plaintiffs-Appellants,

vs.

UNION CARBIDE CORPORATION,
et al,
Defendants-Respondents.

} Case No.
10458

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

Plaintiffs brought this action to establish the agreed boundary line of mining claims located in Grand County and for an accounting of ores removed from an area north of the line claimed by plaintiffs to be the agreed line. The case was tried in two separate divisions, the first division being the action to establish the agreed claim line, and the second division which has not yet been tried to establish the amount of ore removed from the area north of the agreed line.

DISPOSITION IN LOWER COURT

Honorable F. W. Keller, Judge, found that the line on the claims was approximately where defendants claimed it should be and from this determination plaintiff's appeal claiming that the line should be located in accordance with the meets and bounds description rather than where certain markers were found on the ground.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek to have this Court determine as a matter of law that under the circumstances shown by the evidence and the record the agreed line for the mining claims of plaintiffs is the meets and bounds description which would be in a different location than some of the stakes on the ground.

STATEMENT OF FACTS

Plaintiffs and Defendants intervenor Glenny-Cutler and Defendant Petron Corporation, formerly Uranium Industries, Inc., are the owners and lessees, of Vanadium King No. 1 and Vanadium King No. 3 unpatented lode mining claims situated in the Temple Mountain Mining District in Emery County, Utah, during the crucial period involved.

The agreed location of the lines on these claims is the matter in dispute in this lawsuit.

Plaintiffs obtained the mining claims as a result of a settlement of a prior lawsuit entitled *Loren Hunt, et al vs. Jesse Bitterbaum, et al*, Case No. 1713 in the District Court of Emery County. The judgment in that case filed on February 9, 1954 was based on a stipulation between the parties. The judgment incorporated a description of the two Vanadium King mining claims as follows:

“Commencing at a steel pipe set by Robert Brandon of Metropolitan Engineers, Inc. of Salt Lake City, Utah, at a point which is located South $40^{\circ} 12'$ East, 1160.2 feet from U.S. Mineral Monument No. 246 located in unsurveyed Township 24 South, Range 11 East of the Salt Lake Base and Meridian, in Emery County, Utah, and running thence South 85° East 3000 feet; thence South 15° East 638.7 feet; thence North 85° West 3000 feet; thence North 15° West 638.7 feet to place of beginning.”

For a long time after 1954 plaintiffs and their lessees believed that the description as contained in the Decree of Court in Case No. 1713 actually described the place where the monuments were located on the mining claims. In November of 1956, Union Carbide Corporation became interested in the mining property south of the claims which were still owned by parties to Case No. 1713 and purchased from Consolidated Uranium, Inc., an interest in a lease of said mining claims. At the time of their purchase they were advised that the Vanadium King No. 1 and No. 3 claims were full sized claims, that is having a

width of 600 feet and a length of 1,500 feet each and were also shown stakes which were said to be the stakes of the Vanadium King No. 1 and No. 3 claims. (R. 239-40) The northwest corner of Vanadium King No. 3 was in place and was shown to Defendant, Union Carbide Corporation. Prior to the time that Defendant Union Carbide started to mine, none of the parties to the settlement of the case of Hunt vs. Bitterbaum had any notice that the boundary line was other than as described in the Brandon survey which was incorporated in the judgment in that Case No. 1713.

In the year 1958 the parties began to mine in the area along the south line of Vanadium King No. 1, and each claimed that the other had mined across the proper line. Correspondence was exchanged and it was agreed to have an independent surveyor survey the proper line of the Vanadium King No. 1 and No. 3 claims. As a result of the survey, the parties discovered that Brandon had made a mistake in the staking of the claims and that his location of monuments was seriously in error. This was spelled out in a letter dated the 17th day of February, 1959 from supervisor Van Fleet of Union Carbide Corporation to Tom Cuthbert, one of the owners of Vanadium King No. 1 and No. 3. Exhibit 8.

Parties immediately commenced to try to find out how the Brandon mistake had been made and what its effect was and attempted to settle their problems amicably, but could not do so.

Plaintiffs filed their complaint on October 10, 1960 and the present litigation was started. The complaint was amended in January, 1961, again in August, 1961 and November, 1961, and finally present counsel for plaintiffs were employed and a fourth amended complaint was filed on December 23, 1963. This complaint was on the theory of a mutual mistake of fact as to whether Brandon's meets and bounds description actually described the monuments which he had placed on the ground.

It was discovered that the first call of the Brandon survey, namely "a point which is located South $40^{\circ} 12$ minutes East, 1160.2 feet from U.S. Mineral Monument No. 246" was erroneous and that at the point so described which is the northwest corner of Vanadium King No. 3 claim, a steel pipe stake painted white was located and such stake was actually "South $41^{\circ} 8$ minutes East, 1259.2 feet from U. S. Mineral Monument No. 246."

At the trial and prior thereto after the discovery of the mistake, parties agreed that the steel pipe marking the northwest corner of Vanadium King No. 3 claim was located where Brandon located it and was actually located at a point where the parties intended the claims to commence. This in effect gave all of the parties a starting point which is agreed. The north line of Vanadium King No. 3 and No. 1 was described in the Brandon survey as running from the steel pipe South 85° East 3,000 feet and there were markers placed on said line and are not

seriously controverted, however, the Court in determining the north line described it as running South $85^{\circ} 40$ minutes East, 1465.81 feet to a car axle painted white, thence South $85^{\circ} 23$ minutes East, 1441.7 feet or a total distance along the north line of Vanadium King No. 1 and No. 3 of 2906.88 feet reducing in effect, the dimensions of the Plaintiffs' claim by 93.22 feet.

Defendants make no claim to any property adjacent to the north line of the property of Plaintiffs and do not claim anything along the East side of Plaintiffs' claim and the Court's refusal to adopt the Brandon description and order that its location be surveyed on the ground gratuitously took from Plaintiffs the 93.22 feet of their claim and did not award said property to anyone.

The Court in his description of Plaintiffs' claims after refusing to adopt the Brandon description of the north line, then changed the description of the East end line of Plaintiffs' claim. Under the Brandon description the East end line of Plaintiffs' claim were described as follows: "South 15° East 638.7 feet". The trial court described this line as South $19^{\circ} 8$ minutes East 625.72 feet and this narrowed the claims of Plaintiffs' by 12.98 feet on the call along the East end. This description of the distance from the north line to the south line becomes a crucial item of dispute between the parties since defendants own the property to the south of the property of the Plaintiffs.

The Brandon description went "thence North 85°

West 3,000 feet," the Court substituted for this call "thence North $84^{\circ} 37$ minutes West 1480.74" moving the strike of the line 53 minutes and shortening the distance 19.26 feet. The Court broke the call on the two claims into two separate descriptions, the Vanadium King No. 3 claim he described as "thence North $85^{\circ} 53$ minutes West 1468.17 feet to a pipe painted red or orange" and in these descriptions, shortened the south line of Plaintiffs' claims by 51.09 feet.

The final call on the Brandon description of the Vanadium King Nos. 1 and 3 read as follows: "Thence North 15° West 638.7 feet to place of beginning." The Court in order to connect up the west line of the Plaintiffs' claims ordered a description as follows: "Thence North $16^{\circ} 3$ minutes West 595.5 feet to the place of beginning" and shortened the west line of the Vanadium King No. 1 and No. 3 by 43.2 feet.

The Brandon description as contained in the decree in case number 1713 was of two full sized unpatented mining claims. This description was of record and a plat with such full sized mining claims on it, was exhibited to Union Carbide Corporation at the time they were negotiating the purchase of the interest in the property south of the Vanadium King No. 1 and No. 3. (R. 239-40)

There is no dispute by the parties that they agreed on the Brandon description of Vanadium King No. 1 and No. 3. The dispute arises only when it is discovered that

Brandon in locating the northwest corner of Vanadium King No. 3 had made a mistake in the distance and direction of said corner from Mineral Monument No. 246.

The testimony as to the location of the northwest corner of Vanadium No. 3 seemed to be clear and without serious dispute. Attorneys Tom Cuthbert and John Lowe testified to accompanying Brandon to the location of the claims along with attorney Elggren representing the owners of the ground to the south of Vanadium King No. 1 and No. 3 and agreeing as to the location of the northwest corner which is the point to which all of the descriptions are tied.

The country in which the survey by Brandon was accomplished is rough and precipitous and the various calls could not be made without resort to the use of reference points. Some of these stakes were located behind large rocks and in areas in which Brandon could not see his point of reference.

Lowe and Cuthbert did not go with Brandon to make his survey. But relied upon him as a licensed engineer to locate the stakes in accordance with the calls as contained in the stipulation which was finally embodied in the judgment in Case No. 1713.

There was no testimony as to the location by Brandon of the various stakes which the Court now decides mark the true south line of the Vanadium King Nos. 1

and 3. The only evidence that these stakes are located in a point which was agreed to by the parties came from the lawyer Elggren. All of the witnesses, including Elggren, testified that he did not remain at the location of Vanadium King No. 1 and No. 3 while the stakes were being placed by Brandon, but left earlier than the other parties who were there to supervise and agree upon the location of Vanadium King No. 1 and No. 3. The other witnesses testified that they did not remain at the scene of the survey by Brandon while he completed his survey. He placed the stakes along the south line and did the staking with the aid of Davis, one of plaintiffs. Davis is unable to identify the stakes along the south line as being in the same position as they were when Brandon located them. All of the parties assumed that the staking was in accordance with the description contained in the stipulation which is the basis of the judgment of the Court in Case No. 1713.

The Court's Findings of Fact and Conclusions of Law and Decree in the present case reduces the size of Plaintiffs' claim substantially. It is agreed by all parties to Case No. 1713 that Plaintiffs own two full sized unpatented mining claims of 600 x 1500 feet.

STATEMENT OF POINTS

POINT 1

THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFFS TWO UNPATENTED MINING CLAIMS OF THE DIMENSION 600 X 1500 FEET.

POINT 2

THE COURT ACCEPTED AS BEING THE STAKES THAT WERE ORIGINALLY PLACED BY BRANDON, STAKES WHICH WERE NOT IDENTIFIED BY ANY COMPETANT OR SUBSTANTIAL EVIDENCE.

ARGUMENT

POINT 1

THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFFS TWO UNPATENTED MINING CLAIMS OF THE DIMENSION 600 X 1500 FEET.

The evidence presented from all parties was that in the Bitterbaum case, Plaintiffs Migliaccio and Davis received two full mining claims with dimensions of 600 by 1500 feet. This description was incorporated in the judgment. The variation in the angle of the lines made it necessary that the end lines be longer than 600 feet.

All parties believed Brandon had made an accurate survey of the description contained in the stipulation. The fact is that Brandon had made a mistake in his surveying of the two claims. His stakes do not fit the description that he furnished the parties.

The first mistake was in the distance that the northwest corner was from Mineral Monument No. 246. The actual point at which the northwest corner was placed, parties now agree is acceptable. The remaining problem

to follow the Brandon description and locate by accurate survey the area, and the other corners of Vanadium King No. 1 and No. 3.

Along the north line of the claims, the monuments seemed to be fairly well in place and the description can be verified by location of some markers. This is true for the common corner between Vanadium King No. 1 and Vanadium King No. 3, but is not true as to the northeast corner of Vanadium King No. 1. At this corner there are two separate markers and there has been no reliable information as to which of the two markers at the northwest corner of Vanadium King No. 1 is the one set by Brandon.

The southeast corner of Vanadium King No. 1 is even more difficult to locate. In the letter dated February 17, 1959 written by Mr. Van Fleet, a responsible official of Union Carbide, to Mr. Tom Cuthbert (Exhibit No. 8), Van Fleet states that Union Carbide had not been able to locate the southeast corner of Vanadium King No. 1 when his company first came on the area and were negotiating the purchase of an interest in the lease of the claims to the south of Vanadium King No. 1 and No. 3.

At the time of trial there was testimony concerning several monuments located in the area where the description of the southeast corner of Vanadium King No. 1 might be located. None of the testimony is from Brandon. He was not available and none of the other parties

could definitely testify from their own knowledge as to which of the several monuments was the one placed by Brandon. None of the monuments were where the Brandon description placed them. The same general statement can be made of the common corner between Vanadium King No. 1 and No. 3 along the south line. In the area there were several monuments, none of an immovable kind, all of which were generally marked in the way that Brandon marked his.

The area had been surveyed by several surveyors, some for each party. None of the monuments were exactly where the description of the claims would have placed them. The southwest corner of Vanadium King No. 3 is located in the area where the northwest corner cannot be seen. It is in a hole and behind a big rock. There are a number of markings that would indicate that this corner was actually surveyed in by Brandon. It is located inaccurately as far as the reference to Mineral Monument No. 246 is concerned. Apparently Brandon here made the same mistake that he had made in trying to describe the location of the northwest corner. It appears that the 100 foot error to the Mineral Monument No. 246 was repeated.

The law is clear that when parties agree on a line between their properties and a mistake is made in the marking of the line, no one will be bound by the erroneous line. 6 *Thompson on Real Property*, P. 537, Sec. 3036; *Clark, Surveying and Boundaries*, P. 518, Sec. 564.

See, *Cronin v. Gore*, 38 Mich. 381; *Sanford, et al v. H. Donald, et al*, 6 N.Y. S 613, 25 N.Y. St. 721 (adjoining owners, survey erroneous, both parties express satisfaction with survey, acquiescence for 5 years in line before error is discovered, held no one bound by erroneous line); *Hartung v. Witte*, 59 Wis. 285, 18 N.W. 175; *Randelman v. Taylor*, 94 Ark. 511, 127 S. W. 723; *Pickett v. Nelson*, 79 Wis. 9, 47 N.W. 936 (surveyor hired to run line made mistake held not binding even though acquiesced in by parties); *Vitterauer v. Pulley*, 401 Ill. 494 82 N.E. 2d 643; *Rast, et al v. Fischer*, 107 C.A. 2d 126, 236 P.2d 393; *Wood, et al v. Rapp, et al*, 41 S.D. 198, 169 N.W. 518 (parties employ surveyor to locate true line, made mistake, held, mutual mistake not binding on either party); *Blank v. Ambs, et al*, 260 Mich. 589, 245 N.W. 525; *Bemis v. Bradley*, 126 Mo. 462, 139 A. 593, 69 A.L.R. 1399 (annotated P. 1485); *Jones v. Scott*, 314 Ill. 118, 145 N.E. 378; *Huddert, et al v. McGuirk, et al*, 186 Cal. 386, 199 P. 494 (mistake surveyed line, held not binding parties granted property according to deed descriptions); *Tidwell v. Waldrup*, 347 Mo. 1028, 151 S.W. 2d 1092; *Klaar v. Lemperus*, Mo., 303 S.W. 2d 55; *Skinner v. Francisco*, 404 Ill. 356, 88 N.E. 2d 867 (intentions of parties govern, true line will be found and govern over erroneous line parties mutually mistaken about).

The land mark case in Utah is *Tripp v. Bagley*, 74 Utah 57, 276, Pac. 912, 69 A.L.R. 1417. It does not pass directly on point in this case but does set down rules for

establishment of line by oral agreement acquiesced in for statutory period. 11 C.J.S., P. 637 sets rule as follows:

“When the line is capable of ascertainment by measurement and survey and the parties agree on a line so measured or surveyed, not as a compromise as to an uncertain boundary but to reproduce the true line and then proceed under a mutual mistake that it is the true line, the line established is not binding.”

This Court clearly recognized the mutual mistake principal in *Board of Education v. Board of Education*, 88 Utah 276, 39 P. 2d 340. Here the two boards had mistakenly believed that there was some uncertainty as to which district Koosharem was located in. The location was definite and certain. The agreement to share cost of operation on Koosharem schools was set aside. No one being bound by an obligation resting on a mutual mistake of fact.

Plaintiffs respectfully submit that they should not be required to accept an erroneous survey of their mining property. Union Carbide Corporation began to mine near the south line with full knowledge of the uncertainty as to the true line. No good purpose can be served by permitting an erroneous survey to become the survey governing the parties rights.

POINT 2

THE COURT ACCEPTED AS BEING THE STAKES THAT WERE ORIGINALLY PLACED BY BRANDON, STAKES WHICH WERE NOT IDENTIFIED BY ANY COMPETANT OR SUBSTANTIAL EVIDENCE.

The surveyor Brandon was out of the state at the time of the trial and no deposition was taken of his testimony.

Attorney Elggren is the only one of the parties on the ground on October 14, 1953 who has any memory of walking the area where the south line of the Vanadium King claims was to be located. His testimony is not that Brandon surveyed the line and had established it while he was present but only that he walked over the land with him. All of the other parties including two reliable and honorable attorneys testify that the corner to govern the description and to which all of the descriptions are tied, that is, the northwest corner was first located by Brandon and agreed upon by the parties. They further testify that after this point had been established, they then left Brandon to do his work and to follow out the stipulated description of the claims and mark them on the land and none of the parties remained with him during all of this marking process or during the time that he actually made the survey.

All of the evidence concerning Brandon's actual locations is hearsay. Witnesses found monuments but they

were not in the position where the Brandon survey would have placed them had it been accurately made. The Court's labored and changed calls and courses demonstrate how tortuous the route must be to pick up the monuments that are now located in the general area where Brandon laid out the claims.

A great deal of mining activity had been going on in the area. All of the parties recognized that the south line was through an area where substantial value in ores appeared to be located. No permanent monuments were set on the south line. Whether the monuments were moved through inadvertence or intentional cannot be proven. They were not where Brandon's description would place them. The alternate explanation would be that Brandon could not survey a single distance or course accurately. It is respectfully submitted that this is the least likely explanation since he was a licensed surveyor familiar with the general area and his competence would be presumed. Even though competent, it is certainly demonstrated that he miscalculated the distance from the northwest corner to Mineral Monument No. 246.

The letter of February 17, 1959 by Van Fleet (Exhibit No. 8) indicates that Union Carbide could not locate the stakes by following Brandon's survey. No one has relied on Brandon's survey to his damage.

It is respectfully submitted that there is no reliable evidence on which judgment of the Court could have been

ced. The present monuments which the Court has now returned the description to describe are not identified as those placed by Brandon. It is obvious they are not the ones which mark the line in accordance with the meets and bounds description contained in the stipulation of the parties as embodied in the judgment in Case No. 1713.

The decision of the trial Court defeats the intentions of all the parties. Plaintiffs do not get the claims of 600 by 1500 feet described and some of defendants do not have the line separating the claims marked by a clear meets and bounds description. The trial Court has made a new agreement no one ever contemplated. His judgment is clearly erroneous.

CONCLUSION

It is respectfully submitted that the evidence in this case demonstrates a mutual mistake of fact as to the accuracy of the Brandon survey. The Court should award the parties the area that they agreed each should have. The starting point for the description contained in the meets and bounds description is now agreed upon and a simple solution doing justice to all parties can be effected by the Court ordering that the meets and bounds description be surveyed on the ground starting with the northwest corner of Vanadium King No. 3 and following out

the calls that are contained in the Brandon description as set forth in the stipulation and the judgment in Case No. 1713.

RESPECTFULLY SUBMITTED this day
of, 1965.

DWIGHT L. KING and DAVID B. DEE
2121 South State Street
Salt Lake City, Utah
Attorneys for the Plaintiffs-Appellants

JACK DARRAGH
Boston Building
Salt Lake City, Utah
*Attorney for Defendant-Intervenor
Appellant*