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Grazing Permit Holder Liable for Trespass of Animals on Un-Patented Mining Claim

Robert Corontzos

ment, or the injury, corroboration of the claimant's testimony may not be possible. Thus, the insurer's financial burden of paying dishonest claims is countered by the natural sympathy for the employee whose honest claim goes uncompensated.[14] Three reasons can be advanced for preferring the first position over the third position. First, the burden of obtaining evidence to discredit or to corroborate the claimant's testimony, if such evidence can be obtained, may be considerable (crucial medical witnesses are often quite expensive) and the insurers are better prepared to meet this burden than are the claimants. Second, most states provide that workmen's compensation laws must be liberally construed in favor of the claimant.[15] Third, as a policy matter, it is better for the law to assume the claimants are truthful than to assume they are deceitful.

The second position, permitting the trier of fact to give to the testimony whatever weight it sees fit, provides a good compromise. The board, commission, jury or judge can look at all the circumstances and all the testimony of the claimant, including his appearance, demeanor, and manner of testifying, in deciding whether to believe the claimant. Such a position is more likely to achieve justice and to avoid hardship on either the insurer or the claimant.

The National Association of Claimant's Compensation Attorneys takes the interesting position that there must be affirmative evidence to deny compensation just as there must be affirmative evidence to grant it.[16] The board or commission, they claim, should not have the power to deny an award even when the credibility of the claimant's testimony is attacked; there must be affirmative evidence contradicting or impeaching his testimony to justify a denial. Although this view places a greater burden on the insurer who can better afford it financially, it ignores the fundamental rules regarding the burden of proof and has not found support in any of the cases.

The instant case indicates that Montana has adopted the third position. Although the statement on the problem of uncontradicted, credible testimony of the claimant is dictum it is a clear statement of position and appears to be the only statement to date of the Montana court on the problem. It will undoubtedly cause difficulty in the future as pressure increases for greater and more complete claimant benefits.

THOMAS E. TOWE

GRAZING PERMIT HOLDER LIABLE FOR TRESPASS OF ANIMALS ON UNPATENTED MINING CLAIM—Plaintiffs were holders of unpatented mining claims located on national forest land. Defendant had been granted a fed-

[14]This conflict of policy perhaps explains the confusion in the cases on the question. The courts tend to look at the facts of the particular case to obtain greater justice for that case and thereby increase their own control over the board or commission. Also, political philosophies and interests frequently enter into the case at this point.
[15]Generally there is a statute on this point. In Montana the statute is REVISED CODES OF MONTANA, 1947, § 92-838.
[16]NACCA L.J. 82, 146-149 (1949); 6 NACCA L.J. 87, 88 (1950).

eral sheep grazing permit for an area which included plaintiffs' claims. Defendant's sheep left natural droppings on the plaintiffs' claims which rendered the cabins unfit for use as living quarters and which polluted a spring used for drinking water. In an action for trespass, the jury awarded $700 damages. On appeal to the Montana Supreme Court, *held,* affirmed. The owner of sheep grazing under a federal permit is liable in trespass for injury to the mining operation on unpatented mining claims. *Ward v. Chevallier Ranch Co.,* 354 P.2d 1031 (Mont. 1960) (Justice Adair dissenting).

The decision is of special note, since it is apparently one of first impression not only in Montana, but in the nation. Because the instant case involves the competing interests of persons having overlapping rights in federal land, a brief consideration of the government's policy toward public lands is necessary to place the problem in proper perspective.

The whole statutory system of administering public lands of the United States shows a liberality in regard to their use. Persons may settle on and cultivate ordinary unoccupied public lands and eventually acquire title by such homesteading. Similarly the United States has suffered its public domain to be thrown open for the pasturing of livestock, so long as it has not expressly limited that use.[1]

The creation of a national forest, however, severs the land from the public domain and appropriates it to a special public use, so that it is no longer subject to the implied license to pasture on public lands.[2] Unless otherwise authorized by the Chief of the Forest Service, every person must submit an application and obtain a permit before his livestock can be allowed to graze on national forest land.[3] This the defendant in the instant case had done.

The public domain offers, however, not only grazing for livestock, but also valuable mineral deposits. The discovery of gold in California in 1848 led to a vast influx of prospectors upon the public lands and in the ensuing years great mineral wealth was taken from the public lands without any control by the federal government.[4] In the absence of statutory controls, a set of rules governing the rights and duties of such prospectors toward each other grew up through custom and usage.[5] These rules were so practical and successful that when Congress finally acted in 1866, it gave them the sanction of law in so far as they did not conflict with the federal statutes.[6] Subsequent legislation specified with greater particularity the modes of location and appropriation and extent of each mining claim, recognizing, however, the essential features of the rules framed by miners.[7] It is the policy of government to encourage the development of mines and every facility is afforded for that purpose, but the government exacts a faithful compliance with the conditions required.[8]

[1]See Buford v. Houtz, 133 U.S. 320 (1890).
[2]See Shannon v. United States, 160 Fed. 870 (9th Cir. 1908).
[3]36 C.F.R. § 231.3.
[4]Chambers v. Harrington, 111 U.S. 350, 352 (1884).
[5]See Glacier Mountain Silver Mining Co. v. Willis, 127 U.S. 471 (1888).
[6]14 Stat. 262 § 1 (1866).
[7]Jackson v. Roby, 109 U.S. 440, 441 (1883).
[8]United States v. Iron Silver Mining Co., 128 U.S. 673, 675 (1888).

National forest lands embraced in a mining claim continue to be part of the forest reserve and within the jurisdiction of the forest service until a patent is obtained, but subject to all the legal rights of the locator.[9] Prior to the granting of a patent for a mining claim, the locator may use the claim for mining and processing operations and other uses reasonably incident thereto; but his unpatented claim is subject to the right of the United States to manage and dispose of the vegetative resources of the surface and the locator may not sever or remove any vegetative or other surface resources except to the extent required for prospecting, mining or processing operations.[10]

In the instant case, then, the problem posed is how rights should be adjusted between a grazing permittee and the owners of unpatented mining claims where free grazing threatens to interfere with the mining operation. Federal law gives to the miner with unpatented claims a right to be free of interference in his mining operation, and to the stockman a right freely to graze in the national forest even upon the mining claim, so long as he does not interfere with the operation thereon.[11] The miner wrongfully interfered with must look to state law, however, for vindication of his right.

A Montana statute[12] regulates actions for trespass by stock to patented mining claims, but, as the court here held, that statute is inapplicable to this case. Plaintiffs here had to proceed at common law. The court held that they had a remedy in trespass.

The decision presents several difficulties. First, the continued reference to trespass implies that defendant's sheep had entered premises where they were forbidden to go, but this is not true. The sheep were entitled freely to move through the mining claims so long as they did not interfere with the operation. In this case it was not their entry that caused interference, but rather it was their remaining too long in one place. The action at common law would not be trespass but an action on the case.[13] That the sheep did not trespass convinces the dissenting justice, Adair, to conclude that no action will lie, yet the action is not for entry but for consequential interference with mining use. That the injury came about by way of the "natural functions" of the sheep seems irrelevant if there was substantial resultant harm, particularly when that harm was foreseeable. Justice Adair asserts that defendant committed no unlawful act, but the proof showed an intentional bedding down of the sheep near the cabins and bedding them there more than one night, both contrary to the instructions of the district ranger.

Second, the court refers repeatedly to the fact that the boundaries and corners of the claim were marked and even states as one of the two questions at issue:[14]

[9]United States v. Rizzinelli, 182 Fed. 675, 684 (N.D. Idaho 1910).
[10]69 Stat. 368 (1955), 30 U.S.C. § 612 (1958).
[11]*Ibid.*
[12]REVISED CODES OF MONTANA, 1947, § 46-1413.
[13]52 AM. JUR., *Trespass on the Case* § 5 (1944).
[14]Text by Scholarworks at University of Montana, 1960

> Were the boundaries and corners of the land involved herein marked and designated in such manner as to notify the public as to the location of plaintiffs' claims?

It is difficult to see how the question of marked boundaries is even relevant to the case, much less how it can be one of the two issues in the case. Marking of boundaries would have been relevant if the Montana statute on trespass to patented claims were involved, since liability thereunder is limited to trespasses where the claim is marked out or the defendant has actual knowledge of its boundaries, but the court held without hesitation that the statute is inapplicable to unpatented claims. One herding sheep is, under common law principles, liable for trepass to the lands of another even though he is unaware of the boundaries.[15] The discussion of marking boundaries and corners is thus only confusing.

The third difficulty is that under the decision the holder of a patented claim has less protection than the holder of an unpatented claim. By statute the owner of a patented claim can have an action against the owner of sheep for more than nominal damages only if (1) the boundaries of the claim are marked or the latter has actual knowledge of them and (2) a demand for payment of damages is made within six months.[16] The holder of an unpatented claim can have an action for more than nominal damages even without demand within six months though he must presumably show either an intentional or negligent interference with his activities.

The dissent in the principal case directs attention to the effect which the majority holding has upon the stock industry of this state. Justice Adair concludes that the majority opinion places every Montana stockman who has a permit to use national forest lands in the position of exercising his permit at the risk of being held liable in trespass for interference with the operation of any mineral claim. The proposition as stated, however, represents no change in the "risk" from what has been required under prior law. Federal law since 1955 has provided that the United States, its permittees, or licensees, must, under the law, not endanger or materially interfere with prospecting, mining, or processing operations or uses reasonably incident thereto.[17] Since sheep, under Montana law, must be tended by a sheepherder,[18] it is not unreasonable to require such sheepherder to avoid any unlawful interference by his sheep with the mining operation. A similar duty upon cattlemen, however, is more onerous since cattle are not included in herd laws, but are usually permitted to run at large in appropriate grazing areas.

The only effective means of preventing unlawful interference with mining operations by livestock that are not being herded is the use of partition fences. The problem of fencing requires a consideration of the relative burdens which would be placed on mining claim holders or livestock grazing permittees by requiring them to erect such fences. As a rule, one grazing permittee does not have an exclusive right to a national forest area. The

[15]Herrin v. Sieben, 46 Mont. 226, 127 Pac. 323 (1912).
[16]*Supra* note 12.
[17]69 Stat. 368 (1955), 30 U.S.C. § 612(b) (1958).
[18]REVISED CODES OF MONTANA, 1947, § 46-1704.

constant change in the number and identity of the grazing permittees would make apportionment of fence and maintenance costs between them very difficult. In order for stockmen to be sure that their cattle would not interfere with mining operations, it would be necessary for them to fence all doubtful areas on the claims and might also result in the otherwise unnecessary closing off of land suitable for grazing purposes. The stockman would be forced to keep all known and potential mining sites in the grazing area under constant surveillance in order that he might know when existing miners have changed their requirements and when new claimants have commenced operations. This could well be a very great burden considering the notorious unpredictability of the small mine industry.

On the other hand, if the burden of fencing is placed on the mining claim holder, he could fence off only those critical areas in which entering livestock would interfere with his mining operations. Unnecessary fencing of grazing areas would thus be avoided.

Montana statutes generally require an owner of property to "fence out" possible trespassing animals in order to protect himself.[19] In *Shannon v. United States*,[20] an action to enjoin trespass of stock upon a federal forest reserve, the court held Montana "fence out" statutes inapplicable to federal lands, stating:[21]

> [T]he state of Montana had no dominion over the public lands lying within its borders, and no power to enact legislation directly or indirectly affecting the same. . . . Its own laws in regard to fencing and pasturing cattle at large must be held to apply only to land subject to its own dominion. . . . The rights given by state statutes to the subjects of the state extend only to the lands of the state. They end at the borders of government lands. . . .

The Montana legislature, therefore, is powerless to require fencing of federal lands. The federal regulations concerning the administration of national forest lands are silent on the question of fencing requirements.

Under the principles discussed, a reasonable solution to the problem presented would be the promulgation by the federal government and its agencies of regulations requiring unpatented mining claim holders to fence out livestock before being entitled to any more than nominal damages for trespass.

ROBERT CORONTZOS

[19] REVISED CODES OF MONTANA, 1947, §§ 46-1409, -1410.

[20] 160 Fed. 870 (9th Cir. 1908). This rule is not without exception, however. Where a stockman turns his stock loose on his own property known to be insufficient to support them and such stock thereafter enter upon the unfenced land of another, the courts have often held the stockman liable for damages notwithstanding the fence out rule. See, *e.g.*, Hill v. Chappel Bros., 93 Mont. 92, 18 P.2d 1106 (1932); Dorman v. Erie, 63 Mont. 579, 208 Pac. 908 (1922).

[21] *Id.* at 875.