LACEY V. WOODWARD, 1891-NMSC-010, 5 N.M. 583, 25 P. 785 (S. Ct. 1891)

JOHN F. LACEY, Appellee,
vs.
JAMES C. WOODWARD et al., Appellants

No. 430

SUPREME COURT OF NEW MEXICO

1891-NMSC-010, 5 N.M. 583, 25 P. 785

January 1891, Term

Appeal, from a Judgment in favor of Plaintiff, from the Third Judicial District Court, Sierra County.

The facts are stated in the opinion of the court.

COUNSEL

Elliott & Pickett for appellants.

This case should be reversed, because the verdict is against the evidence, and the preponderance of the evidence is in favor of the defendants on every issue. 1 Graham & Waterman on New Trials, p. 367, sec. 2190, Comp. Laws, N. M.; Hopkins v. Orr, 124 U.S. 510.

If the original locator fails to do the annual assessment work on a claim, but resumes work upon the claim before anyone attempts to relocate the same, he must continue his resumption of work until he performs the full annual assessment, or the claim is open to relocation. Du Prat v. James et al., 65 Cal. 555.

Bell & Wright and Bail & Aucheta for appellee.

It was perfectly competent for plaintiff to show the value of his ores, that he was prevented by defendants from prosecuting his claim on the mine and shipping its product, and those acts had occasioned "loss of time which had value to him." Wade v. Leroy et al., 20 How. (U.S.) 34.

In an action for damages evidence showing the business in which the plaintiff was engaged, its extent, and consequent loss arising to him from his inability to prosecute it, is relevant and pertinent as enabling the jury to fix with some certainty, the direct and necessary damage resulting. Nebraska City v. Campbell, 2 Blackf. (U.S.) 590; Comp. Laws, N. M., secs. 2258, 2268.

As to the measure and rule of damages, see 2 Sedg. Meas. Dam. [7 Ed.], 499, et seq.; 2 Greenl. Ev., sec. 253.

The measure of damages is the value of the ore taken from the mine. Meay v. Yapper et al., 23 Cal. 306.

Damages are recoverable up to the rendition of the verdict. Comp. Laws, sec. 2265.

It is not true that the assessment work was not done in 1887 or 1888. But if it were not done by plaintiff, if he resumed work upon his claim in 1888, and before any adverse claim was made by defendants, under the law, he could hold the property. Belk v. Meagher, 104 U.S. 282; Pharis v. Muldoon, 75 Cal. 284; Belcher v. Deferrari et al., 62 Id. 160; 1 Fed. Rep. 522; Rev. Stat. U. S., sec. 2324.

JUDGES

Lee, J. O'Brien, C. J., and McFie, Seeds, and Freeman, JJ., concur.

AUTHOR: LEE

OPINION

*{*585}* **{1}** This is an action of ejectment, brought originally by plaintiff against the defendants in the district court of Grant county, to recover the possession of the "Star of the West" mine, and damages for the unlawful detention of the same. The venue was afterward changed to the district court of Sierra county, where, at the November term, 1889, a jury trial was had, which resulted in a verdict of guilty against defendants, and plaintiff's damages were assessed at $ 500. A motion for a new trial, made by the defendants, was overruled by the court, and judgment entered in accordance with the verdict, from which judgment the defendants took an appeal to this court.

{2} The first error assigned, and perhaps the principal one in the case, arises upon the following question, asked plaintiff by his counsel, he having been introduced as a witness in his own behalf: "State, Mr. Lacey, to the jury, what you *{*586}* regard as the damages you have suffered in consequence of these defendants taking from you the possession of that mine on the fifth day of November, 1888." The question was objected to for the reason that it called for the opinion of the witness as to the damages he might have sustained. The question was clearly open to the objection made, as well as to others that might be suggested. But whether the ruling of the court in admitting it constitutes error in the case must be taken into consideration with other rulings of the court upon the same question. In answering it the witness said: "Five thousand dollars. I base it on the fact of having a contract of at least two car loads per day, with the understanding that it could be increased right along to three or four car loads. In a short time after, I commenced shipping iron, and putting it down to the lowest figure, at fifty cents a ton, for the royalty, you, gentlemen, can figure the thing for yourselves for eleven months, even at two car loads per day." The counsel for the defendants asked

that this testimony be stricken out, as being entirely too remote. The court ruled upon this motion as follows: "I will have to instruct this jury upon the measure of damages. I will not pass finally upon this question now. I will reserve my opinion until a future stage of the case." This witness was recalled later in the case, and was asked practically the same question, as follows: "Mr. Lacey, state to the jury whether or not you have sustained any damages in consequence of the defendants taking possession of this mining property, and, if so, state the nature of the damages, in what manner you were damaged or injured, and the extent of the injury, commencing from the time of the commencement of this suit, up to the present month." This question was objected to for the reason that the rule, as fixed by statute, reads, "rents and profits of such premises," etc. At this time the court ruled as follows: "I think *{*587}* our statute controls on the subject, and it seems to direct what can be recovered. The question of what is embraced in the name of 'rents and profits' is a matter upon which you may give testimony, but I think we have to be governed by the statute in regard to assessing damages." The question was finally asked by the counsel for plaintiff in the following form: "Mr. Lacey, state to the jury what would be the reasonable value of the rents and profits, if any, of the 'Star of the West' mine now in controversy, from the time you commenced this action to the present time." To this question there was no objection, and, the ruling having finally been in favor of the appellants, and correct in point of law, it leaves the defendant nothing to complain of in this assignment of error.

{3} The fourth error assigned is as follows: "John F. Lacey, the plaintiff, called in rebuttal after the defendants had introduced all their testimony, and closed their case in chief, was asked: 'Mr. Lacey, are you a citizen of the United States, and, if so, how long have you been a citizen?'" -- to the admission of which defendants excepted. The record shows that the plaintiff, on motion and by leave of the court, asked the question as a question that had been overlooked on direct examination. The permission was a matter resting in the sound discretion of the court, and, as such can not be assigned as error. The rule is thus laid down by the supreme court of the United States in the Philadelphia & Trenton Railroad Co. v. James Stimpson, 39 U.S. 448, 14 Peters 448, 10 L. Ed. 535: "The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are matters properly belonging to the practice of circuit courts, with which the supreme court ought not to interfere." The district courts possess this discretion as fully as other judicial tribunals.

*{*588}* **{4}** Exception was taken to the ruling of the court in refusing an instruction asked by the defendants on the trial, which was as follows: "If you find from the evidence that the plaintiff did not perform one hundred dollars' worth of work on the 'Star of the West' mining claim, located by him in the year 1883, in the year 1887, and that, if he resumed work on the said claim in 1888, and did not perform work thereon to the value of one hundred dollars before the defendants made their location in November of that year, you will find for the defendants, and return your verdict accordingly." If the law was correctly presented to the jury by the court in an instruction which was given on his motion, and which was also excepted to by the defendants, then the above instruction was erroneous and properly refused. The instruction given was as follows: "If you believe from the evidence that the plaintiff made a valid location of the 'Star of the West'

mining claim on the first day of January, 1883, and that he had performed the necessary labor upon said claim, or that if the assessment work was not done for one year, but work upon said claim was resumed in good faith by the plaintiff prior to the making of a valid location of part or all of said claim by the defendants or other parties up to and including the fifth day of November, 1888; and if you further believe that the defendants, or some of them, unlawfully took possession of said mining claim, or a part thereof, and unlawfully withheld from the plaintiff all or a part of said mining claim, -- you should find for the plaintiff." We think the law correctly stated in this instruction. It is fully sustained by the supreme court of the United States. In Belk v. Meagher, 104 U.S. 279, 26 L. Ed. 735, in an opinion rendered by Chief Justice Waite, that court says: "For all purposes of this case the law stands as it would have stood had the original act of 1872 provided that the first annual expenditure *{*589}* on claims then in existence might be made at any time before January 1, 1875, and annually thereafter until patent issued. If it was not made by that time, the claim would be open for relocation, provided work was not resumed upon it by the original locator, or those claiming under him, before a new location was made. Such being the law, it seems to us clear that, if work is resumed upon a claim after it has once been open to relocation, but before a relocation has been made, the rights of the original owners stand as they would if there had been no failure to comply with the conditions of the act. The argument on the part of the plaintiff in error is that if no work is done before January 1, 1875, all rights under the original claim are gone but that is not, in our opinion, the fair meaning of the language that congress has employed to express its will, as we think the exclusive possessory rights of the original locator and his assigns were continued without any work at all until January 1, 1875, and afterward, if before another entered on his possession and relocated the claim, he resumed work to the extent required by law. His rights after resumption were precisely what they would have been if no default had occurred." In this case the evidence tends to show that the plaintiff located this mine January 1, 1883. He performed his annual labor for the years 1884 and 1885. In 1886 he did not perform the labor required. In 1887 he resumed work on the mine, and did the assessment work for that year, continuing in possession, and working from November, 1887, to and through February, 1888, performing his annual work for that year. He was ousted by the defendants in the fall of that year. This statement of the facts clearly brings the plaintiff within the provision as laid down by the supreme court of the United States, which is in full accord with the instruction given by the court.

*{*590}* **{5}** It is argued by the appellants that this court ought to review the evidence, and find that a preponderance was other than as found by the jury. This would be contrary to the whole policy of our government. The law-making power regards juries as better able to determine questions of fact correctly than judges, or it would do away with the system altogether, and submit all questions of fact, as well as of law, to the courts. Under the law as it exists this court has decided time and again that where there is a substantial conflict in evidence the verdict of a jury will not be disturbed, unless errors of law occurred upon the trial. Corkins v. Prichard, 3 N.M. 278, 3 P. 746.

{6} The judgment of the lower court will be affirmed, and it is so ordered.