

another state, he was not presumed to know the law of the state giving the authority to issue the bonds; and no one ever dreamed that the county officers, if they acted *ultra vires*, bound themselves personally. Why, then, was not the plaintiff in the present case bound to take notice of the law of Iowa conferring power upon the board of supervisors to offer the reward? The plaintiff saw, by the very terms of the offer, that the board intended to bind the county and not to make themselves personally liable. Why was he not bound to take notice of the law of Iowa, and see whether or not it gave the board power to make the contract upon which he sues?

If the defendants in this case can be made responsible for fraud, upon the theory that they knew the law while the plaintiff was ignorant of it, I can see no reason why the county officers who may issue bonds in perfect good faith under a mistake of the law may not be made personally responsible upon them by any non-resident purchaser for value.

The plaintiff made a contract with the county of Marion, not with the defendants as individuals. He did service to the county, not to the defendants individually. And now, finding he cannot recover from the county, seeks to change the whole nature of the transaction. He seeks to make parties liable with whom he had no contract, and for whom he performed no service.

Upon a careful reconsideration of the whole case by both judges we are prepared to reaffirm what was said in the original opinion, and to hold that there is nothing in the amended petition upon which to base a claim for damages in favor of the plaintiff and against the defendants.

The demurrer to the amended petition is therefore sustained, both judges concurring.

LITTLE PITTSBURGH CONSOLIDATED MINING CO. v. AMIE MINING CO.

(Circuit Court, D. Colorado. July 2, 1883.)

1. MINING CLAIM—LOCATOR DISPOSING OF PART.

After a mining claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way that seems proper to him, and the mere fact that a part of it is transferred to another will not defeat the right of the locator to other portions which were not so sold, disposed of, or surrendered.

2. SAME—PREVIOUS LOCATION.

A location of a mining claim cannot be made by a discovery shaft upon another claim which has been previously located, and which is a valid location.

At Law.

Rockwell & Bissell, for plaintiffs.

Markham, Patterson & Thomas, for defendants.

HALLETT, J., (*orally*.) The Little Pittsburgh Consolidated Mining Company brought an action of ejectment against the Amie Mining Company to recover the Winnemucca mining lode. The defendant answered, among other things, that the plaintiff at one time, without stating what time, set up a claim to the Winnemucca lode, and also to the Little Pittsburgh lode. At that time the Winnemucca lode was owned by other parties, claiming adversely to the plaintiff, and the Little Pittsburgh lode embraced or covered all of the Winnemucca claim except the ground in controversy in this suit, which is a small strip upon one side or the other—I don't remember the exact location. The ground then claimed by the plaintiff as a part of the Little Pittsburgh claim included the discovery shaft of the Winnemucca claim. The owners of the Little Pittsburgh claim applied for a patent to that claim, and were met by an adverse proceeding on the part of the owners of the Winnemucca claim, which was settled in some way, by which the claimants of the Little Pittsburgh property became entitled to their entire claim, including the discovery shaft of the Winnemucca claim. The adverse claim was withdrawn from the land-office, and the Little Pittsburgh people were allowed to make the entry of their lode. There is some confusion in the statements of the answer as to who were the parties owning these claims, respectively, at that time. In some parts of the answer it appears that the present corporation, the Little Pittsburgh Consolidated Company, then claimed and owned the Little Pittsburgh claim, and conducted the proceedings for patent; and from other parts of the answer it would seem that it was not this company, but some one from whom it has derived title. But the substance of the answer is that by the withdrawal of the adverse claim to the application of the Little Pittsburgh claim for a patent the Winnemucca parties abandoned their claim entirely, and no right or title can be now set up under that location. This position appears to be to the effect that one who owns a mining claim must at all events hold on to his discovery shaft until he has obtained a patent for his claim. If he yields it to another in any way, by conveyance or otherwise, he thereby abandons the rest of his claim.

I do not see upon what principle such a conclusion can rest. After a claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way that seems proper to him. What was done in this instance by the Winnemucca parties and the Little Pittsburgh parties is not stated. Whether the Winnemucca parties yielded voluntarily to the Little Pittsburgh people, or made sale to them, or in what way they disposed of their interest, if they had any, in this claim, is not stated. But I do not think that can be material. Any concession that they may have made to the Little Pittsburgh people is to them only, and is not available to any other person.

It has been decided, it is true, in the supreme court of this state,

and in this court also, that a location may not be made by a discovery shaft upon another claim which has been previously located, and which is a valid location, but that doctrine has nothing to do with the point in controversy here. For all that appears, the Winnemucca may have been the better location, and it may have been sold by the Little Pittsburgh parties, or disposed of in some way. The mere fact that a part of it was transferred to the Little Pittsburgh parties is not enough to defeat the right of the locators to other portions which were not sold, disposed of, or surrendered.

The demurrer to the answer will be sustained.

TILTON v. BARRELL and another.

(Circuit Court, D. Oregon. June 26, 1883.)

1. RES JUDICATA.

The decree of a competent court in a suit to enforce the right of the grantee against the grantors in an instrument admitted by both the plaintiff and defendants to have been intended to operate as a mortgage, determines the rights of the parties thereto and thereunder, so that either they or their privies, as against each other, are estopped to say or allege aught to the contrary.

2. FINAL DECREE—MODIFICATION OF.

During the term the court may modify, supplement, or supersede a final decree in any case; and while it is more orderly and convenient to state in the second decree how far or in what respect it is intended to affect the first one, still this is not actually necessary; and it will be presumed that in giving the second decree the court intended to modify the first one, in so far as they differ, unless the circumstances plainly indicate the contrary.

3. DECREE AND EXECUTION THEREON.

An execution directing the sale of mortgaged premises to satisfy the debt of the mortgagee must be based upon a decree which is sufficiently indicated therein; but, although there is a variance between the latter and the former as to the date of the decree, the execution and sale thereon is valid, in favor of any person claiming thereunder, if it plainly appears to the court, upon a view of all the facts, that the execution was in fact issued upon the decree in question, and for its enforcement.

4. TWO SIMILAR DECREES IN A CASE.

Two decrees, purporting to be final, were given in *L. v. B.*, within three days of each other, directing the sale of mortgaged premises, and differing only in the mode of describing the same,—the first one describing them by parcels, and the second one by the same parcels, and as a whole. *Held*, that said decrees were, in legal effect and operation, identical, and an execution might properly issue upon either of them.

Action to Recover Possession of Real Property. Motion for a new trial.

M. W. Feckheimer, for plaintiff.

W. W. Chapman, for defendants.

Before FIELD and DEADY, JJ.

DEADY, J. On November 29, 1882, Charles E. Tilton, a citizen of New York, brought this action against Colburn Barrell and his wife,