

COOKE and others v. NAVARRO and others.

(Circuit Court, S. D. New York. December 23, 1886.)

NEW TRIAL—VERDICT—EVIDENCE EQUALLY BALANCED.

Where the testimony of plaintiff contradicts that of defendant, and each is corroborated by other evidence, the court will not disturb the verdict.

The plaintiffs sue to recover for goods sold and delivered. The defense is that the goods were sold to one Pedro Garay, and not to the defendants. The cause was tried at the December circuit, and the plaintiffs had a verdict. The defendants now move for a new trial.

Preston Stevenson, for plaintiffs.

Emmet R. Olcott and *William Q. Judge*, for defendants.

COXE, J. The conclusion is reached, after a full examination of the papers submitted on this motion, that the court will not be justified in disturbing the verdict of the jury. The question now is, not what opinion the court entertains upon the facts, but was there sufficient evidence of a sale to the defendants to require a submission of the cause to the jury? The plaintiff Cooke testified positively to an agreement by the defendant Munoz, representing the firm, to pay for the goods. This was an original promise. The plaintiffs' version of the transaction is corroborated by the fact that the bills were uniformly made out to the defendants, and accepted by them without objection. The defendants flatly contradicted the plaintiffs' testimony as to what took place when the bargain was consummated, and their theory that the sale was made to Garay is sustained by several collateral facts and circumstances. There was, then, a positive assertion by the plaintiffs, and an equally positive denial by the defendants, each being corroborated, to some extent, by presumptions drawn from the undisputed testimony. In such circumstances the jury, and not the court, must determine the controversy. The verdict is not so clearly against the weight of evidence as to warrant the court in setting it aside, and the motion at the close of the testimony to direct a verdict for the defendants was, of course, properly denied. No exception was taken to the charge, and no exception to the admission or rejection of evidence is argued on the briefs.

The motion is denied.

HYMAN v. WHEELER and others.

*(Circuit Court, D. Colorado. December 23, 1886.)***1. MINES AND MINING—LODE—WHAT IS.**

An impregnation, to the extent to which it may be traced as a body of ore, is a vein, lode, or ledge, under section 2322, Rev. St. U. S., giving to the owner of a mineral claim, containing the top or apex of a vein, lode, or ledge, the right to follow the same beyond the vertical side lines, but between the vertical end lines, whether the ore is separated from the country rock by planes or strata of that rock visible to the eye, or is determinable in other ways, as by assay and analysis.

2. SAME—LODE—BODY OF ORE.

A body of mineral, or mineral bearing rock, in the general mass of country rock, so far as it may continue unbroken, and without interruption, is a lode, whatever the boundaries may be.

3. SAME—LODE—BOUNDARIES.

With well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode.

4. SAME—LODE—CASUAL CONCENTRATION.

If the entire mass of limestone in which a body of ore lies has been mineralized in the same way as the body of ore, and to some extent, and the body of ore is a casual concentration of unusual richness, the body of ore is not a lode.

5. SAME—LODE—MINERALIZED STRATA ALONG A PLANE OF CONTACT.

Strata lying along the plane of contact between blue and brown limestone, if mineralized to the extent of showing valuable minerals, and distinguishable from other parts of the country rock by carrying ore, and by association with the plane of contact, constitute a lode, as far as the strata lying on or near the contact may show ore in appreciable quantities.

6. SAME—IDENTITY OF LODES—PERSISTENCE OF ORE.

In determining whether a lode extends from defendants' claim to plaintiff's location, and has its apex therein, the persistence of the ore through these and the intervening claims is of little weight, unless there is evidence in plaintiff's claim tending to show a crevice or continuous ore or mineralized rock; with such evidence it is of considerable weight.

7. SAME—APEX—EXTENT.

Plaintiff's location and defendants' location are some distance apart, and they overlap so that the north end of plaintiff's location is nearly parallel to defendants' location for about the distance of 750 feet. In asserting a right to follow a vein or lode on its dip without his own location and into defendants' location, plaintiff must show the outcrop or apex of such vein or lode to be in his own location throughout the ground in controversy, being the extent of the locations parallel to each other.

8. EVIDENCE—ADMISSIONS—RECORD OF ANOTHER ACTION ADMISSIBLE AS AGAINST A PARTY.

Where one of the defendants in action has been a plaintiff in another action in which his claim was opposed to his claim in the case at bar, the complaint, order of court, and affidavits offered on behalf of plaintiff, are admissible as admissions of said defendant, as against him, but against none of his co-defendants.

9. WITNESS—CREDIBILITY—INSTRUCTION OF COURT.

In regard to a certain witness, the court instructed the jury as follows: "I can scarcely believe that any jury would be willing to accept the testimony of a witness who would declare, upon the stand, that he had made statements in a general way, and for business purposes, outside of the court-room, and with a view to defraud people with whom he was carrying on negotiations, in opposition to his testimony on the stand."

This was an action of ejectment, brought by David M. Hyman, of Cincinnati, Ohio, as the owner of the Durant mining claim, situate on