

Statement of the Case.

of the whole case, and therefore is not one which this court is called upon to answer. *Cross v. Evans*, 167 U. S. 60; *Warner v. New Orleans*, 167 U. S. 467.

It will, therefore, be certified to the Court of Appeals that the first question is answered in the affirmative, the third in the negative, the fourth in the affirmative. The second and fifth are not answered.

 CLARK *v.* FITZGERALD.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 145. Argued December 7, 8, 1897. — Decided May 23, 1898.

The answer given to the fourth question in *Del Monte Mining and Milling Co. v. Last Chance Mining and Milling Co. ante*, 55, compels an affirmation of the judgment below in this case.

THE case was thus stated by the plaintiff in error in his brief.

The plaintiff in error is the owner and in possession of the Black Rock lode mining claim situated in the Summit Valley mining district in Silver Bow County, Montana.

The defendants in error own two thirds interest, and the plaintiff in error one third interest in the Niagara lode mining claim situated in the same district and county. The Niagara lode lies along side of the Black Rock lode so that the south side line of the Niagara forms or is a part of the north side line of the Black Rock lode.

The Black Rock lode is the older of the two locations. As appears from the pleadings in the cause the vein or lode crosses the east end line and south side line of the Niagara lode 513 feet west of the northeast corner of the Black Rock lode and dips to the south and under the surface of the Black Rock lode claim.

The plaintiff in error entered upon that part of the vein, east of the point where it crosses the division side line between the Black Rock and Niagara lode claims and extracted ore

Syllabus.

from the said vein on its dip under the Black Rock lode at the point above described, and which is designated on the diagram as "ore bodies."

Thereupon the defendants in error, who as stated *supra*, own two thirds interest in the Niagara lode claim brought an action asking for an accounting and judgment for two thirds the value of the ore extracted by the plaintiff in error. Judgment was rendered against the plaintiff in error for the sum of \$27,242.54, being two thirds the value of the ore extracted and for the cost of the suit.

An appeal was taken to the Supreme Court of the State and the judgment of the lower court was affirmed.

Mr. Robert B. Smith for plaintiff in error. *Mr. Robert L. Wood* was on his brief.

Mr. James W. Forbis for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court.

The case is before us on error to the Supreme Court of Montana. It is unnecessary to state its facts in detail, and it is sufficient to say that the answer given to the fourth question in the opinion just filed in *Del Monte Mining Co. v. Last Chance Mining Co.*, *ante*, 55, compels an affirmance of the judgment.

Affirmed.

JOHNSON v. DREW.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 239. Submitted April 23, 1898. — Decided May 31, 1898.

The substantial rights of the defendant were not prejudiced by the ruling of the trial court sustaining the demurrer to the first equitable plea and refusing leave to file the second, and such ruling involved merely a question of state practice.

The evidence in the case shows that the particular lots of land described in the declaration were not embraced in the Fort Brooke reservation when the patent was issued.

A party cannot defend against a patent duly issued for land which is at the time a part of the public domain, subject to administration by the