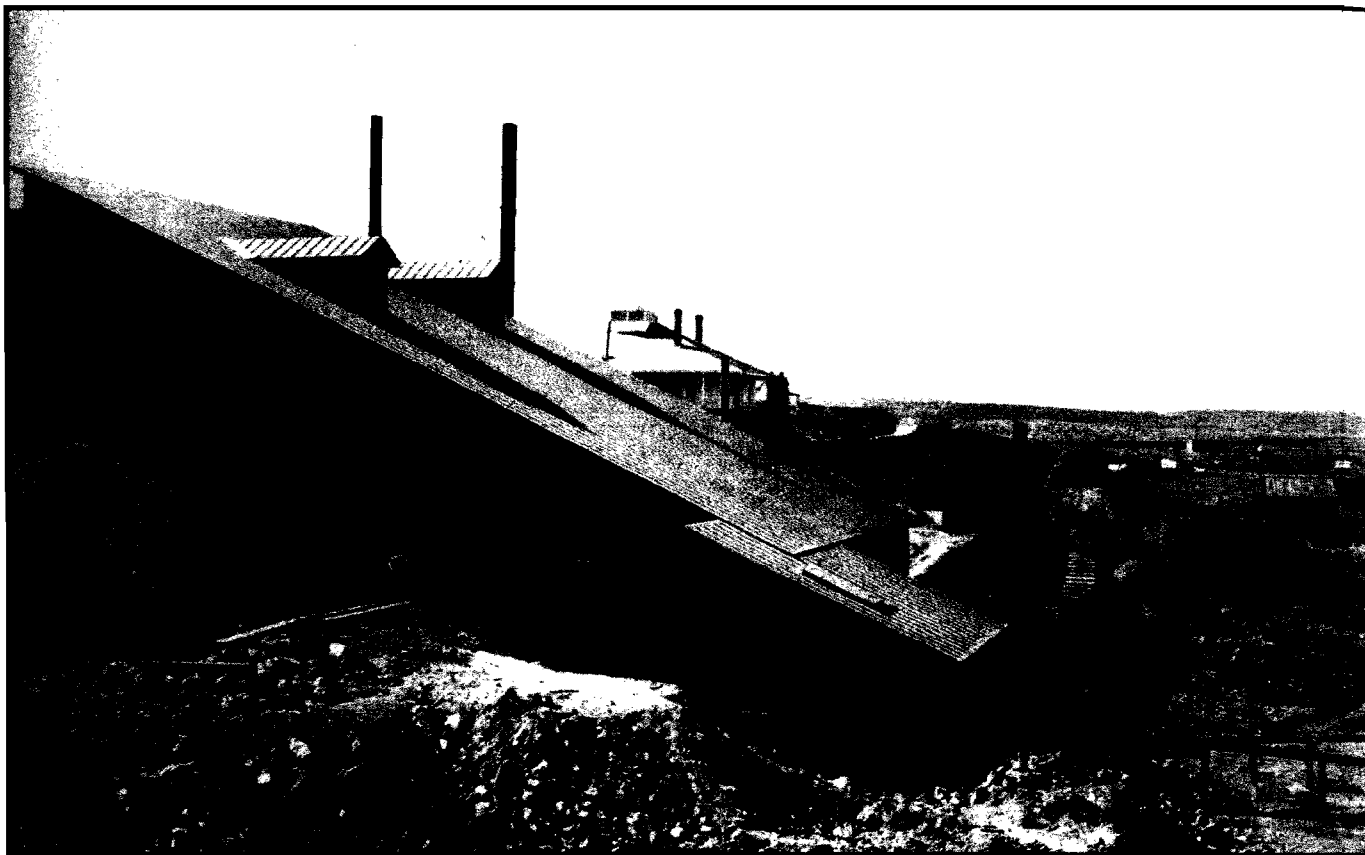


## Chapter Eleven

### *Tombstone Mill & Mining Company v Way Up*

During his time on the bench, and later as a private attorney, Judge Stilwell became a recognized expert on mining law. Especially important to the Tombstone community was Stilwell's May 1882 decision in the non-jury case of the Tombstone Mill and Mining Company, plaintiffs, versus the Way Up Mining Company and James S. Clark, defendants.

Early Tombstone investor Michael Gray purchased the Way Up from its original locator, James P. Wheeler in November, 1879 and in 1880 sold part interest to James Clark. The Way Up was adjacent to Ed Schieffelin's and Richard Gird's Good Enough mine which capitalized under the banner of the Tombstone Mill and Mining Company. In March, 1881, Gird launched a complaint in the TM&M's annual report that the owners of the Way Up were illegally extracting ore from the Good Enough's vein that ran below the ground of the Way Up. The right to follow a vein of ore was cherished by mine owners and had heretofore been protected by the courts.



**The Tombstone Mill and Mining Company**

The TM&M filed suit in Judge Stilwell's District Court in October of 1881, to which the Way Up Mining Company immediately filed a countersuit. Judge Stilwell put the suits on the docket to begin December 9, 1881. Though the case lasted several months and produced some 800 pages of testimony, the Tombstone newspapers paid little attention, listing only each day's witnesses. Expert witnesses for the litigants had statements of their positions published in various mining publications, particularly *The Engineering and Mining Journal*. It seems that the court sessions drew an interested crowd of spectators, including George Whitwell Parsons who stated in his diary that he found the testimony "interesting."<sup>1</sup> Arguments closed on December 21<sup>st</sup>.

It was almost five months later, in May, 1882, that Judge Stilwell reached his decision in favor of the Way Up. The decision, published in *The Engineering and Mining Journal*, May 27, 1882, is as follows:

**In District Court of the First Judicial District of the Territory of  
Arizona, in and for Cochise County.**

**The Tombstone Mill and Mining Company, plaintiff, vs. the Way Up Mining Company  
and J. S. Clark, defendants.**

**FINDINGS OF FACT.**

1st. I find that the plaintiff is in possession of the Good Enough mining claim described in its complaint, which is substantially a parallelogram, extending in a northeasterly and southwesterly direction.

2d. That the defendant, the Way Up Mining Company, is a corporation duly organized under the laws of the State of New York, existing and authorized to hold property and to be sued and sue in this territory, and is the owner of the Way Up mining claim, is located substantially at right angles with the claim of the plaintiff, the southerly end-line of the Way Up claim being the northerly side-line of the Good Enough claim.

3d. That there is no vein, ledge, or lode, so far as shown by the evidence, running through the said Good Enough claim parallel with its side-lines ; but the only vein, lode, or ledge shown by the evidence runs across the said Good Enough claim and crosses the side-lines thereof and enters the Way Up claim on its strike, and the ore mined and taken out by the Way Up Mining Company, defendant, and claimed by the plaintiff herein, was from the said vein, lode, or ledge, extending on its strike or course as aforesaid, across plaintiff's said Good Enough claim in a northeasterly direction, beyond its side-line and into defendant's Way Up claim.

4th. I find that the plaintiff has not, within the boundaries of its said claim and the extended side-lines of defendant's claim, any mineralized ledge, lode, or vein, belt, or zone of rock dipping beyond its side-lines into the Way Up claim, as alleged and described in the complaint; but that all ore shown by the evidence to have been found within the said Good Enough claim and the extended side-lines from the Way Up claim came from and was connected with and a part of the said vein, lode, or ledge, which upon its strike, in a northeasterly direction, enters the Way Up claim.

5th. I further find that there is no vein, ledge, or lode, or mineralized deposit having its apex within the exterior boundaries of plaintiff's claim, except that which crosses the side-lines thereof and enters the Way Up claim.

6th. I find that there is no vein, lode, ledge, or mineralized deposit having its apex within the exterior boundaries of plaintiff's said claim dipping beyond the side-line of plaintiff's said claim into the Way Up claim.

**CONCLUSIONS OF LAW.**

1st. And, as conclusion of law, I find that the defendant, the Way Up Mining Company, is the owner, and entitled to the possession of the Way Up mining claim described in the pleadings, together with all mineralized; veins, lodes, ledges, and mineral deposits within its exterior boundaries, and is entitled to receive the same and to work the same to any depth between vertical planes extended down through its lines, and to follow the same on the dip beyond its side-lines to any depth.

2d. I find that the plaintiff is entitled to take nothing by this action, and the injunction and the restraining order heretofore granted in this suit should be dissolved.

I also find that the defendants are entitled to receive their costs herein incurred.

W. H. STILLWELL, District Judge.

While the Tombstone locals were greatly pleased with the decision – the *Epitaph* stating, "...the

result of the decision will be a benefit to the town, as it will place two companies in operation instead of one..."<sup>2</sup> - The editors of *The Engineering and Mining Journal* were livid at what they called the "surprising course" of Judge Stilwell. They published the following scathing response:

### **The Tombstone Decision.**

We have received a copy of the Tombstone *Nugget* of May 5th, containing the decision of Judge STILLWELL, of the District Court of the First Judicial District of Arizona, in the case of the Tombstone Mill and Mining Company *against* the Way Up Mining Company. This case, as we understand it, is practically one of ejectment. That is, the plaintiff claims the ownership, under the mining law, of the ground in question; and the defendant is not bound to show title as against any body else except the plaintiff. If A, for instance, brings such a suit against B, and the ground in question is also claimed by C, it is quite sufficient for B to show A's title to be bad, in order to win the case ; the issue between B and any other party not being before the court.

The plaintiff in this case claiming that the defendant is working upon the downward continuation of a vein belonging to the former, there is no other vein in issue, and there need be no other vein proved to exist, having its apex within the plaintiff's claim, than the one upon which the suit is based.

Bearing these points in mind, we are impressed with several peculiarities of the decision. In the first place, the judge gives no reasons whatever for his conclusions. The voluminous evidence for the plaintiff is ignored; and the decision is drawn precisely as though the defendant's evidence alone had been presented. That the judge in the exercise of his discretion might prefer to accept the facts and theories stated by one side rather than the other, no one can deny. But to set aside sincere and competent evidence, such as was given by the experts of the Tombstone Company, without any comment whatever, or the slightest hint of the mental process by which this conclusion was reached, is a surprising course, particularly on the part of a judge who has spent several months in the preparation of his decision.

But a more surprising peculiarity is the actual determination of several points which do not seem to have been in issue. The first conclusion of law does not merely deny the claim of the plaintiff, but actually declares the rights of the Way Up Company against all other plaintiffs or defendants. These rights are described, moreover, in language which is inconsistent with the statute. The court declares the Way Up Company to be entitled to its mining claim, together with all "lodes, mineralized veins, ledges, and mineral deposits within its exterior boundaries," and "entitled to receive the same (whatever that may mean) and to work the same to any depth between vertical planes extended down through its lines, and to follow the same on the dip beyond its side-lines to any depth." It will be observed that the undoubted rights of neighboring owners to veins within the exterior boundaries of the Way Up claim having their apexes on other claims are entirely forgotten. This is probably an oversight.

But the fifth "finding of fact" is still more remarkable. The court finds that "there is no vein, ledge, or lode or mineral deposit having its apex within the exterior boundaries of plaintiffs claim, except that which crosses the side-line thereof and enters the Way Up claim." The Tombstone Company not only has an ore-body six hundred feet long, whether it be a separate ledge or not, lying nearly at right angles to the alleged Way Up vein, and held, we presume (though the court vouchsafes no information on this point), to be a local enlargement of the said vein; but it has also at the western end of the Good Enough claim another ore-body, hundreds of feet away from this disputed ground, which certainly is a " vein, ledge, or lode or mineralized deposit." This the judge appears to decide out of existence.

It is, therefore, doubly unfortunate that no explanation accompanies the decision. Not only has the judge given no reasons, but the language of the decision is such that nobody else can find any. This very obvious comment is based upon the presumption that the newspaper version (which we republish elsewhere) [see above] is correct and complete.

### William H. Stilwell – Bench and Bar in Arizona Territory

The TM&M appealed Stilwell's decision to the Territorial Supreme Court. Pending the appeal, much mining in the district came to a halt. The owners of the Head Centre mine joined the TM&M in the appeal putting up \$50,000 with local security. Finally, after some nine months of waiting, and eight months after Judge Stilwell left the bench in Tombstone, his ruling was affirmed in February, 1883.<sup>3</sup>

Later, some of Judge Stilwell's mining related decisions were argued before the Supreme Court of the United States where each time he was victorious.<sup>4</sup>

#### Endnotes:

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<sup>1</sup> Parson's diary, loc.cit., December 19, 1881.

<sup>2</sup> Tombstone *Epitaph*, May 5, 1882.

<sup>3</sup> The author is indebted to Robert F. Palmquist for sharing his monograph, "A "Great Mining Suit'... Is A Game Of Chance": The Case of Tombstone Mill & Mining Company v Way Up Mining Company, 1881-1883" from which numerous facts and statements have been summarized.

<sup>4</sup> Stilwell was admitted to practice before the United States Supreme Court in December 1901. See: *Prescott Evening Courier*, December 12, 1901.