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Vera S. King v. F. F. Hintze : Brief of Appellant

Utah Supreme Court

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CKET NO. 8071A

IN THE SUPREME COURT
of the
STATE OF UTAH

VERA S. KING,

Plaintiff and Appellee,

— vs. —

F. F. HINTZE,

Defendant and Appellant.

Case No.
8071

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

STATEMENT OF POINTS:

I. THE ALLEGED KIDDER-KING UNPATENTED MINING CLAIMS WERE MERE FICTIONS ON JUNE 24, 1950. THEY HAD NO LEGAL EXISTENCE AND AS A CONSEQUENCE THE PLAINTIFF HAD NO RIGHT, TITLE, CLAIM OR INTEREST IN AND TO THE SAME.....	11
1. The location of the Kidder-King claims was not distinctly marked on the ground so that their boundaries could be readily traced, as required by 30 U.S.C.A., 28, (R.S. 2324).	11-12
2. The locators of the Kidder-King claims failed to perform the location work within ninety days of the date of posting the location notice, as required by Section 4121, Volume 2, Nevada Compiled Laws, 1929.	19
II. THE CONTRACT DATED JUNE 24, 1950 BETWEEN KIDDER AND THE PLAINTIFF AND APPELLEE, KING, ON THE ONE PART AND THE DEFENDANT, HINTZE, ON THE OTHER PART, DEFINITELY IMPLIES THAT KIDDER AND KING HAD SOME RIGHT, TITLE, CLAIM AND INTEREST IN AND TO THE KIDDER-KING CLAIMS WHICH THEY WOULD CONVEY AND WHICH WOULD PASS TO AND BECOME ASSETS OF THE CORPORATION TO BE FORMED BY DEFENDANT.	27-28
1. A contract should receive a reasonable interpretation consistent with the purpose of the contract and intentions of the parties as expressed by the language of the contract and as shown by the surrounding facts and circumstances existing at the time the contract was executed.	28
2. A provision in a corporate promotion agreement that a party will convey his right, title, claim and interest in and to land or other property by quit claim deed unto the corporation to be organized under the agreement does not absolve him from all liability or responsibility except the execution and delivery of such quit claim deed and operate as a reservation of immunity on his part, while the contract remains executory, from all liability for his want of title to the land or other property, where the contract itself and surrounding facts and circumstances show that the parties intended the contract to be based on the premise that the party did in fact own a substantial title, right or interest in and to the property to be conveyed to the proposed corporation.	33

TABLE OF CONTENTS—(Continued)

	Page
III. THE INABILITY OF KIDDER AND THE PLAINTIFF AND APPELLEE KING TO CONVEY TO THE DEFENDANT, OR TO THE CORPORATION TO BE ORGANIZED BY HIM, SOME SUBSTANTIAL RIGHT OR INTEREST IN THE KIDDER-KING CLAIMS CONSTITUTED A BREACH OF THE PROMOTION CONTRACT OF SUCH NATURE AS TO DEFEAT ITS PURPOSE AND RELIEVE AND DISCHARGE THE DEFENDANT AND APPELLANT HINTZE FROM THE DUTY OF ORGANIZING THE CORPORATION CONTEMPLATED BY THE PROMOTION AGREEMENT.	38-39
1. A breach by one party that goes to the essence or root of the contract justifies a refusal of the other party to perform his promise and discharges his obligation to perform, even though there has been a partial performance on the part of the first party.....	39
2. A plaintiff must allege and move performance of the contractual obligations assumed by him in order to maintain an action against the defendant for a breach of the contract.....	42
INDEX OF CASES CITED	
Balance v. Van Uxem, 191 Ill. 319, 61 N.E. 85.....	40
Bergquist v. West Virginia-Wyoming Copper Co., 18 Wyo. 234, 106 P. 673	15-16
Bliss v. California Co-op Producers, 30 Cal. 2d (Adv. 237) 181 P. 2d 369, 170 A.L.R. 1009-16	41-42
Boley v. Butterfield, 57 Utah 262, 194 P. 128, 131	29
Braseth v. State Bank of Edinburg, N. D., 98 N.W. 79.....	41
Brockbank v. Albion Min. Co., 29 Utah 367, 81 P. 863.....	15
Davis v. Lee, 52 Wash. 330, 100 P. 753.....	35-36
DeWitt v. Sides, 81 Cal. App. 643, 254 P. 668	16-17
Eaton v. Norris, 131 Cal. 561, 63 P. 856.....	17
Egelund v. Fayter, 51 Utah 582, 172 P. 313-14	29
Fossume v. Requa, 218 N. Y. 339, 113 N. E. 330-332	40-41
Funk v. Sterrett, 20 Pac. St. Rep. (Cal.) at 614	17
Gelcich v. Moriarty, 53 Cal. 217, 18 Pac. St. Rep. 217	17
Gibbons et al v. Frazier et al., 68 Utah 178, 249 P. 472	16
Gleeson v. Martin White Mining Company, 13 Nev. 442, 35 Pac. St. R., 442, at 456	14
Johnson v. Tool, 1 Dana (Ky.) 479, 25 Am. D. 162	37
Larson v. Thomas,S.D....., 215 N.W. 927, 57 A.L.R. 1246-1250....	40
McCleary et al. v. Broaddus et al., 14 Cal. App. 60, 111 P. 125.....	16
Mebius & Drescher Co. v. Mills, 150 Cal. 229, 88 P. 917	30
Moiser et al. v. Parry, 60 Ohio St. 388, 54 N.E. 364, L.R.A. 1918E, 834	28-29
Nash v. McNamara, 30 Nev. 114, 93 P. 405, 16 L.R.A. (N.S.) 168..15, 24	
Niederhauser v. Jackson Dairy Co., (Iowa) 237 N.W. 222-224.....	42-43
Palmer v. Fox, 274 Mich. 252, 264 N.W. 361, 104 A.L.R. 1057-1061....	41
Read v. Forced Underfiring Corporation, 82 Utah 529, 26 P. 2d, 325-27	29-30

TABLE OF CONTENTS—(Continued)

	Page
Schofield v. Z. C. M. I., 85 Utah 281, 39 P. 2d 342, 96 A.L.R. 1089	30
Sissons v. Sommers, 24 Nev. 379, 55 P. 829	22-23
Slaughter v. Barnett, 114 Fla. 352, 154 So. 134, 102 A.L.R. 1073-1079	42
Southern Colonization Co. v. Derfler, Fla., 75 So. 790, L.R.A. 1917F, 744	41
Stern v. McKee, 70 App. Div. 142 (N.Y.), 75 N.Y.S. 157	43
Thomas v. Matthews, Ohio St., 113 N.E. 669, L.R.A. 1917A, 1068-1074	43
United States v. Sherman, 288 Fed. 497	17
Walsh v. Henry, 38 Colo. 393, 88 P. 449	23-24
Warnock v. DeWitt, 11 Utah 324, 40 P. 205	14-15
Weathered v. Weathered, 115 Kan. 744, 224 P. 901	41

INDEX OF TEXTS CITED

57 A. L. R., 1280-1281	34
12 Am. Jur., Contracts, Sec. 247, p. 784	28
12 Am. Jur., Contracts, Sec. 343, p. 901	39-40
12 Am. Jur., Contracts, Sec. 359, p. 926	42
13 Am. Jur., Corporations, Sec. 127, p. 266	28
36 Am. Jur., Mines and Minerals, Sec. 88, p. 340	24
36 Am. Jur., Mines and Minerals, Sec. 89, p. 341	13-14
55 Am. Jur., Vendor and Purchaser, Sec. 160, p. 630	33-34
Black's Law Dictionary, 3rd Edition, p. 1343	17
13 C. J., Contracts, Sec. 694, p. 627-9	39
13 C. J. Contracts, Sec. 848, p. 725	43
48 C. J., p. 779	17-18
66 C. J., Vendor and Purchaser, Sec. 522, p. 851	34-35
Hillyers Comp. Laws of Nevada, 1929, Sec. 1563	6-7
Hillyers Comp. Laws of Nevada, 1929, Sec. 4120	7
Hillyers Comp. Laws of Nevada, 1929, Sec. 4121	7-8
Hillyers Comp. Laws of Nevada, 1929, Sec. 4122	9-10
2 Lindley on Mines, Sec. 339, p. 794	19
2 Lindley on Mines, Sec. 343, p. 795-6	19-20
2 Lindley on Mines, Sec. 343, p. 799	20
2 Lindley on Mines, Sec. 344, p. 805	20-21
2 Lindley on Mines, Sec. 345, p. 807-8	21
2 Lindley on Mines, Sec. 346, p. 809-10	21
2 Lindley on Mines, Sec. 371, p. 871	13
7 L. R. A. (N.S.), 839	25
Morrison's Mining Rights, 16th Edition, p. 29	21-22
Morrison's Mining Rights, 16th Edition, p. 33	22
Morrison's Mining Rights, 16th Edition, p. 48	14
7 U. C. A. 1953, Sec. 6-1-1 - 6-1-41	38
U. S. R. S. 2324 (30 U.S.C.A. 28)	12

IN THE SUPREME COURT
of the
STATE OF UTAH

VERA S. KING,

Plaintiff and Appellee,

— vs. —

F. F. HINTZE,

Defendant and Appellant.

Case No.
8071

BRIEF OF APPELLANT

STATEMENT OF FACTS

On June 24, 1950 the plaintiff and appellee, Vera S. King, and one Edwin G. Kidder (herein designated Assignors) and the defendant and appellant, F. F. Hintze, (herein designated Assignee) entered into a written contract which is the basis of this action. The said contract is plaintiff's Exhibit 2 and was formally admitted in evidence (R. 2, 296). By this contract the Assignee agreed:

1. To organize a corporation under the laws of the State of Nevada to be capitalized for \$500,000.00 divided into 5,000,000 shares of the par value of ten cents each,

of which amount 2,490,000 shares were to remain in the company treasury to be sold, exchanged or otherwise disposed of at such times and for such purposes as the Board of Directors shall determine. All shares were to be fully paid and non-assessable.

2. To execute and deliver to the corporation to be organized by Assignee a quit claim deed conveying all of Assignee's right, title, claim and interest in and to 13 certain unpatented lode mining claims situated in White Pine County, Nevada, designated as Dolomite Nos. 1 to 12, inclusive, and Gap lode mining claim.

3. To transfer and deliver to the Assignors 1,250,000 shares of the capital stock of said mining corporation to be organized by the Assignee in payment of a certain lease and option and certain unpatented lode mining claims hereinafter described.

4. To take possession of the mining claims described in the agreement and all appurtenances thereto and within thirty days commence actual mining operations and perform the work requirements of the lease and option hereinafter described necessary to perpetuate same and maintain same in good standing.

By this contract the Assignors:

1. Agreed to assign to the Assignee (and by said agreement the Assignors did assign to the Assignee) all of the right, title and interest of the Assignors in and to a certain mining lease and option dated November 1, 1948, wherein William Isaacs and Otto Isaacs did lease and let unto Edwin G. Kidder (one of the Assignors),

certain lode mining claims situate in White Pine Mining District, White Pine County, Nevada.

2. Agreed to execute and deliver to the Assignee or to the company to be organized by him a quit claim deed conveying all of the right, title, claim and interest of the Assignors in and to certain lode mining claims situate in White Pine County, Nevada, and described as follows:

King Nos. 1 to 7, inclusive, unpatented lode mining claims

Kidder-King Nos. 1 to 8, inclusive, unpatented lode mining claims

Helena lode unpatented mining claim

Mid-Dolomite Nos. 7 and 8 unpatented lode mining claims

Charter Oak patented lode mining claim, survey No. 52-86, Patent No. 23319

An undivided $\frac{1}{3}$ interest in the Monitor Reindeer patented lode mining claim, Survey No. 127, Patent No. 23319.

3. Granted to the Assignee the exclusive right and option for a period of sixty days to purchase from Assignors 250,000 shares of the capital stock of the corporation, which Assignors were to receive for a total purchase price of \$20,000.00.

4. Warranted that there were no outstanding debts or liens against the property to be conveyed by the Assignors and the said mining lease and option, and that the same are free and clear of debts and claims of any kind, and should any claims arise out of operation of

claims in the past the Assignors will hold the Assignee harmless of all liabilities and expense of litigation which may arise out of same.

5. Gave immediate possession of said mining claims to Assignee.

6. Allowed Assignee, as consideration for his covenants in the agreement and for the assignment of mining claims claimed to be owned by Assignors, to issue to himself 2,510,000 shares (including the 1,250,000 shares to be transferred to Assignors) of the capital stock of the corporation to be organized by him.

The Assignee did not organize the corporation contemplated by the aforesaid agreement (R. 257).

The Assignor King (plaintiff and appellee) instituted and prosecuted this action against the Assignee Hintze (defendant and appellant) to secure judgment awarding said Assignor, King, damages for Assignee's breach of contract arising out of his failure to organize the corporation contemplated by the agreement. Although Edwin G. Kidder was named a party defendant, he was never served with process of court (R. 56). Kidder died December 20, 1952 (R. 22). The motion of the Assignee (defendant and appellant) to make Kidder's personal representative a party to the action (R. 21-24) was denied by the trial court (R. 25, 26). The trial was held on May 18, 19, 20, 1953, before a jury, which returned a verdict in favor of Assignor King (plaintiff and appellee) for nominal damages in the sum of six cents, and general damages in the sum of \$4500.00 (R. 284). The motion of the Assignee Hintze (defendant and appellant) for judg-

ment notwithstanding verdict (R. 286, 287) was denied (R. 288). Thereupon said defendant and appellant perfected his appeal to the Supreme Court from said judgment (R. 289-295, 297).

The trial court instructed the jury that as a matter of law the defendant and appellant Hintze had breached the contract above described and had offered no evidence constituting a defense and that plaintiff and appellee was entitled as a matter of law to nominal damages. (Instruction No. 1; R. 270, 271). There was then submitted to the jury under four separate instructions the question as to whether or not plaintiff and appellee was entitled to general damages, and if so, the amount of same (Instructions 2, 3, 4, 5; R. 272-274).

As a defense to the cause of action asserted against him by plaintiff and appellee King, the defendant and appellant, Hintze, specifically set forth in his amended answer (R. 28-33) his contention that the unpatented lode mining claims, King Nos. 1 to 7, Kidder-King Nos. 1 to 8, Helena and Mid-Dolomite claims Nos. 7 and 8, never had a legal existence at any time, and particularly did not exist on June 24, 1950, the date upon which Exhibit 2 was executed. Hintze further alleged in his amended answer that neither the aforesaid Kidder nor the plaintiff and appellee King had any right, title, claim or interest in and to said unpatented lode mining claims at the time of execution of the contract above described on June 24, 1950, and that at no time either before or after June 24, 1950 did said Kidder and King hold any right, title, claim or interest in and to said unpatented

lode mining claims (R. 30). Said Hintze further alleged that the non-existence of said claims and their fictitious nature became known to him long after June 24, 1950 and only when he attempted to organize a corporation which was to own and operate said claims (R. 30, 31). On this premise, Hintze asserted that it was impossible for Kidder and King to convey to him or to the company which he undertook to form the said unpatented lode mining claims and that such failure and inability of Kidder and King constituted a major and material breach of the contract dated June 24, 1950 by plaintiff and appellee King, and absolved and discharged him from the duty of organizing the corporation contemplated by said contract (R. 31). The trial court by its Instruction No. 1 (R. 270, 271), directed the jury that the defendant and appellant Hintze had failed to establish his defense. The fundamental question on this appeal is whether or not the trial court committed error on this issue.

The defendant and appellant Hintze introduced evidence as to the requirements of the laws of the State of Nevada with respect to the location of lode mining claims in that state. The following statutory provisions were operative at the time the locations of the King Nos. 1 to 7, Kidder-King Nos. 1 to 8, Helena, Mid-Dolomite Nos. 7 and 8, were made. The quotations are from Hillyers Comp. Laws of Nevada, 1929:

Sec. 1563:

“The location and transfers of mining claims heretofore made shall be established and proved in contestation before courts, by the local rules, regulations, or customs of the miners in the sev-

eral mining districts of the territory in which such location and transfers were made." (R. 159)

Sec. 4120:

"Any person who is a citizen of the United States, or who has declared his intention to become such, who discovers a vein or lode, may locate lode mining claim thereon by defining the boundaries of the claim in the manner and within the time hereinafter prescribed, and by erecting or constructing at the point of such discovery a monument of the size and character of any of the several monuments prescribed in section 2 of this act and by posting in or upon such discovery monument a notice of such location, which must contain: First — The name of the claim; Second — The name of the locator or locators; Third — the date of the location; Fourth — The number of linear feet claimed in the length along the course of the vein, each way from the point of discovery, with the width claimed on each side of the center of the vein and the general course of the lode or vein, as near as may be." (R. 160-161)

Sec. 4121:

"The locator of the lode mining claim must sink a discovery shaft upon the claim located four feet by six feet to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show by such work a lode deposit of mineral in place; a cut or crosscut or tunnel which cuts a lode at a depth of ten feet or an open cut along the said ledge or lode, equivalent in size to a shaft four feet by six feet by ten feet deep, is equivalent to a discovery shaft. The locator must define the boundaries of his claim by removing the top of a tree (having a diameter of not less than four

inches) not less than three feet above the ground, and blazing and marking the same, or by a rock in place, capping such rock with smaller stones, such rock and stones to have a height of not less than three feet, or by setting a post or stone one at each corner and one at the center of each side line. When a post is used, it must be at least four inches in diameter by four and one-half feet in length set one foot in the ground. When it is practically impossible, on account of bedrock or precipitous ground, to sink such posts, they may be placed in a mound of earth or stones, or where the proper placing of such posts or other monuments is impracticable or dangerous to life or limb, it shall be lawful to place such posts or monuments at the nearest point properly marked to designate its right place. When a stone is used (not a rock in place) it must be not less than six inches in diameter and eighteen inches in length set two-thirds of its length in the top of a mound of earth or stone, four feet in diameter and two and one-half feet in height. All trees, posts or rocks used as monuments, when not four feet in diameter at the base, shall be surrounded by a mound of earth or stone four feet in diameter by two feet in height, which trees, posts, stones or rock monuments must be so marked as to designate the corners of the claim located; provided, however, that the locator of a mining claim shall within twenty days from the date of posting the notice of location define the boundaries of said claim by placing at each corner and at the center of each side line one of the hereinbefore described monuments, and shall within ninety days of the date of posting said location notice perform the location work hereinbefore prescribed." (R. 161, 162)

Sec. 4122:

“Any locator or locators of a mining claim, after having established the boundaries of said claims, and after having complied with the provisions of this act with reference to the establishment of such boundaries, may file with the district mining recorder a notice of location, setting forth the name given to the lode or vein, the number of linear feet claimed in length along the course of the vein, the date of location, the date on which the boundaries of the “claim were completed, and the name of the locator or locators. Should any claim be located in any section or territory where no district has been as yet formed, or where there is no district recorder, the locator or locators of such claims may file with the county recorder, notice of location as set forth above, and said notice of location will be prima facie evidence in all courts of justice of the first location of said lode or vein. Within ninety days of the date of posting the location notice upon the claim the locator shall record his claim with the mining district recorder and the county recorder of the mining district or county in which such claim is situated by location certificate which must contain: First — The name of the lode or vein; Second — The name of the locator or locators; Third — The date of the location and such description of the location of said claim, with reference to some natural object or permanent monument, as will identify the claim; Fourth — The number of linear feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the lode or vein as near as may be; Fifth — The dimensions and locations of the discovery shaft or its equivalent, sunk upon the claim; Sixth — The location and

description of each corner, with the markings thereon. Any record of the location of a lode mining claim which shall not contain all the requirements named in this section shall be void. All records of lode or placer mining claims, millsites or tunnel rights heretofore made by any recorder of any mining district or any county recorder are hereby declared to be valid and to have the same force and effect as records made in pursuance of the provisions of this act. And any such record, or a copy thereof duly verified by a mining recorder or duly certified by a county recorder shall be prima facie evidence of the facts therein stated." (R. 163, 164)

The mining claims were located for Kidder and King in the autumn of 1949 (R. 51, 124) by an engineer named Casselli who lived in Ely, Nevada (R. 52). Kidder had been employed by Reynolds (who was obviously a promoter) to do this work. The location work consisted of driving location posts measuring 4 x 4 inches or 4 x 6 inches, into the ground or supporting them with a pile of stone where the earth was too firm and could not be penetrated. On these location posts were nailed cans in which were placed the location notices (R. 54, 124, 126). A witness for Mrs. King (Reynolds) asserted that the claims were "interlaced with ore showings." (R. 125). There was no location work done on the claims — "no shaft sunk, no digging." (R. 125, 126, 128). Nothing was done except placing the location stakes or monuments (R. 126). No notice of location was ever recorded either in the office of the Recorder of the White Pine Mining District or White Pine County, Nevada (R. 126). Casselli was employed by Reynolds on behalf of Kidder and King

only to erect the discovery stakes or posts and to place the notices in the cans which were affixed to the stakes (R. 127).

The unpatented lode mining claims were never conveyed by Kidder and the plaintiff and appellee, King, to Hintze, the defendant and appellant, or to any company organized by Hintze (R. 250) although shortly before Kidder's death he delivered to Hintze a file containing correspondence in regard to the transaction involved in this action (R. 253). Among the papers was a deed (Ex. 8, R. 258) which had been signed by Kidder, (R. 251) but not by King, wherein Hamilton Silver Mines, Inc. was grantee. This instrument described Mid-Dolomite Nos. 7 and 8, Helena, Charter Oak and Monitor Reindeer, but did not describe the Kidder-King and King claims (R. 254).

(Special Note: The alleged unpatented mining claims known and designated as King Nos. 1 to 7, Kidder-King Nos. 1 to 8, Helena and Mid-Dolomite Nos. 7 and 8, will be for convenience hereinafter be designated as the Kidder-King claims.)

ARGUMENT

I.

THE ALLEGED KIDDER-KING UNPATENTED MINING CLAIMS WERE MERE FICTIONS ON JUNE 24, 1950. THEY HAD NO LEGAL EXISTENCE AND AS A CONSEQUENCE THE PLAINTIFF HAD NO RIGHT, TITLE, CLAIM OR INTEREST IN AND TO THE SAME.

1. The location of the Kidder-King claims was not distinctly marked on the ground so that their boundaries could be readily traced, as required by 30

U.S.C.A., 28, (R.S. 2324).

The evidence clearly establishes the fact that the Kidder-King claims were located in the autumn of 1949 by an engineer named Casselli, who was employed by Reynolds to do this work. At this time Casselli simply erected location posts and nailed cans thereto in which were placed the location notices. Reynolds in his testimony makes it clear that nothing was done except placing these location stakes or monuments. There was no effort made to place markers in the ground so that the boundaries of each claim could be readily traced. This was manifestly the status of these so-called claims on June 24, 1950, the date on which the parties executed the contract which is the subject of this action. Over six months had elapsed between the date of posting the notices of location and the execution of the contract, as Reynolds repeatedly stated in his testimony that these locations were made in the autumn of 1949. The status of the law with respect to this situation is clear.

Congress had definitely provided the method by which lode mining claims should be located. *R.S. 2324 (30 U.S.C.A. 28)* provides in pertinent part as follows:

“The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: *The location must be distinctly marked on the ground so that its boundaries can be readily traced.* * * *” (Emphasis supplied)

Lindley discusses this statute as follows:

“The Revised Statutes of the United States contain the mandatory provision, that the ‘location must be distinctly marked on the ground so that its boundaries can be readily traced.’ There is no escape from this requirement. While it is possible that state statutes or local district regulations may particularize as to the character of the marking, they cannot dispense with the necessity for compliance with the law of congress. While, as we shall hereafter point out, time is allowed within which to establish the boundaries, until this is done the location is not complete. The requirement is an imperative and indispensable condition precedent to a valid location, and is not to be ‘frittered away by construction.’ After the discovery, it is the main act of original location. This was the rule under the Spanish and Mexican law. The object of the law in requiring the location to be marked on the ground is to fix the claim, to prevent floating or swinging, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue. It also operates to determine the right of the claimant as between himself and the general government.” (2 *Lindley on Mines* (3rd Ed.), Sec. 371)

“In order to prevent the swinging or floating of claims and to apprise other explorers of the amount of unappropriated ground still available, the Federal statutes declare that ‘the location must be distinctly marked on the ground so that its boundaries can be readily traced;’ and in many mining areas this somewhat cryptic enactment has been supplemented by miners’ rules or state

legislation, prescribing the methods to be followed and fixing a time for compliance. In other words, it is just as essential that the boundaries of a claim be duly marked as it is that a notice be posted, and it appears to be definitely settled that a failure to comply with this requirement nullifies the location and makes it inoperative to segregate the land included therein from the public domain — at least during the continuance of the default.” (36 *Am. Jur. Mines and Minerals*, Sec. 89, page 341)

“One of the imperative requirements of the statute, an indispensable condition precedent of a valid location, is that it shall be ‘distinctly marked on the ground so that its boundaries can be readily traced’ (R. S. 2324).” (*Gleeson v. Martin White Mining Company*, 13 Nev. 442, 35 Pac. St. R., 442 at 456.)

“That the staking of the surface boundaries of the claim has been required upon all surface locations made since May 10, 1872, has been repeatedly decided. * * These decisions are not made upon local statutes, but as the construction of 30 U.S.C.A., Sec. 28 (R.S. Sec. 2324); nor can we see how any other construction can be contended for. It follows, therefore, that since May 10, 1872, surface staking along the bounds of the claim has been required in all cases, without regard to State, Territorial or District legislation requiring such staking. Such legislation, when it existed, has been to direct the details of the taking, but a sufficient staking has been required under the Act of Congress whether the local rule has been silent or outspoken on this point. * *” (*Morrison’s Mining Rights*, 16th Ed., page 48)

“It will be observed that the statute nowhere

requires that the boundaries be marked. The requirement is that the location be marked so the boundaries can be traced. We think that where the notice of location gives the length and breadth of the claim from the discovery monument, and three corners are properly marked, and the centers of both end lines are also properly marked, there ought to be no difficulty in tracing the entire boundary, under ordinary circumstances." (*Warnock v. DeWitt*, 11 Utah 324, 40 P. 205.)

"And where a discovery of mineral has been made, and a proper location notice filed, then, if the boundaries are marked on the ground, before intervening rights have accrued, the claim will be valid. *The locator, however, delays at his peril, since thereby he assumes the risk of intervening rights of third parties.*" (Emphasis supplied) (*Brockbank v. Albion Min. Co.*, 29 Utah 367, 81 P. 863)

"But if the Portland notices were so posted, and the claims were not staked or monumented within 90 days thereafter, then we think the locations were not completed under the act of Congress and the state statute, and, the land not having been marked within that period, so that its boundaries could be traced, it was not segregated from the public domain, although such posting carried the right to define the boundaries within 90 days. The period for this purpose has since been shortened by an act of the legislature to 20 days. St. 1907, p. 419, c. 194." (*Nash v. McNamara*, 30 Nev. 114, 93 P. 405, 16 L.R.A. (N.S.) 168)

"The rule adopted in Nevada is that where the prior locator posts the requisite notice, and properly marks the boundaries of the claim within

the statutory period, the ground becomes segregated from the public domain from the date of posting the notice, so that during the statutory period for perfecting the location the area embraced in the claim will not be open to location by others, or until after a failure to do the other work required to be done within such period." (*Bergquist v. West Virginia-Wyoming Copper Co.*, 18 Wyo. 234, 106 P. 673)

"The discovery is manifestly the source of the title, and vests the discoverer with the prior right to complete his location. He could only lose this prior right to perfect his claim by a failure within a reasonable time to mark his location so that the boundaries could be traced upon the ground." (*McCleary, et al. v. Broaddus, et al.*, 14 Cal. App. 60, 111 P. 125.)

"As applied to the location in question, there were at least two essential facts required by Rev. St. U. S. Sec. 2320, 2324 (U. S. Comp. St. Sec. 4615, 4620,) viz: (1) The discovery of mineral within the claim; and (2) the marking of the location on the ground so that its boundaries may be readily traced. Lindley on Mines, Sec. 328. Until the requirements of law are complied with, a location is not perfected. The decisive question in this case is whether the record establishes the fact of a valid location of the plaintiffs' mining claim, and, if so, as of what time." (*Gibbons et al v. Frazier et al.*, 68 Utah 178, 249 P. 472.)

"The authorities further hold, however, as plaintiff concedes, that where notice is properly posted, but the locator does not remain in possession of said claim or distinctly mark the same on the ground so that its boundaries can be readily traced, the location is invalid as against a subse-

quent locator who complies with the requirements of the statute. * * In other words, * * a party can show a right to the possession of a mining claim (when no patent has issued) only by showing an actual pedis possessio as against a mere wrongdoer, or by showing a compliance with the requirements of law." (*De Witt v. Sides*, 81 Cal. App. 643, 254 P. 668.)

"We see nothing in the case to justify a verdict, or decision, upon such general grounds as were stated by the Court. The Act of Congress in question provides (Sec. 2324, R. S.), that 'the location must be distinctly marked on the ground, so that its boundaries can be readily traced.' Since the passage of that Act, a party can show a right to the possession of a mining claim (when no patent has been issued) only by showing an actual pedis possessio, as against a mere wrongdoer, or by showing a compliance with the requisites of the Act of Congress. There is no pretense of any actual possession of the whole claim other than by compliance with the Act. The true questions for decision, therefore, were: Which party had complied with the requirements of the law, and was prior in time; not which, 'on the whole, had the better right.'" (*Funk v. Sterrett*, 20 Pac. St. Rep., (Cal.) at 614.)

See also *United States v. Sherman*, 288 Fed. 497; *Gelcich v. Moriarty*; 53 Cal. 217, 18 Pac. St. Rep. 217; *Eaton v. Norris*, 131 Cal. 561, 63 P. 856.

"Pedis Possessio. Lat. A foothold; an actual possession. To constitute adverse possession there must be pedis possessio, or a substantial inclosure." (*Black's Law Dictionary*, Third Edition, page 1343.)

"Pedis Possessio or Possession Pedis. Actual

bona fide occupation; actual occupancy; actual possession; a foothold upon land accompanied with the real and effectual enjoyment of the estate, with the reception of its fruits, its rents, issues, and profits; occupancy in fact of the whole that is in possession; subjection to the will and control; substantial possession. *Pedis possessio* is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use according the particular locality and quality of the property." (48 *C. J.*, page 779)

It is manifest that the locators of the Kidder-King claims made no attempt whatsoever to comply with the requirements of the federal statute concerning the marking of the claims on the ground so that the boundaries could be readily traced. Neither did these locators comply or even attempt to comply with Sec. 4121, Comp. Laws of Nevada, 1929, which definitely charges the locator of a mining claim, within 20 days from the date of posting the notice of location, with the duty of defining the boundaries of said claim by placing at each corner and at the center of each side line a monument of the nature specifically defined by the statute. It follows that the plaintiff agreed to convey her right, title and interest in claims which had no existence. It is no defense to this assertion to reply that Kidder and King could assert a possessory right against a third party trespasser for the reason that neither of them had an actual bona fide occupation of the claims within the meaning of the rule of law that gives a person in possession of a mining claim superior rights against a trespasser. All that Reynolds caused Casselli to do, according to

Reynolds' statement, was to drive stakes in the ground and post notices of location thereon. Neither under the federal statute nor the law of Nevada did this constitute the location of a mining claim. Kidder and King had absolutely no shadow of title to the Kidder-King claims. They were non-existent; they were mere imaginings in the mind of Reynolds.

Professor Lindley summarizes the situation presented in this case with respect to a locator who fails to comply with the statutory mandate requiring the marking of claims on the ground:

"If he fails to comply with the law within the statutory period, his rights would thereafter be no greater than the rights of one in possession without discovery. He might protect his *pedis possessio* against forcible intrusion and hold it against one having no higher right; but he would be a mere occupant without color of title, and his possession must yield to anyone possessing the necessary qualifications, who enters peaceably and in good faith for the purpose of perfecting a valid location." (2 *Lindley on Mines*, (3rd Ed.), page 794, Sec. 339)

2. **The locators of the Kidder-King claims failed to perform the location work within ninety days of the date of posting the location notice, as required by Section 4121, Volume 2, Nevada Compiled Laws, 1929.**

Lindley writes thus of the provisions of the statute requiring a discovery shaft:

"Of the precious metal-bearing states, California and Utah have thus far enacted no laws requiring work of any character to be thus far enacted no laws requiring work of any character

to be performed as a prerequisite to the completion of a location; therefore, as to these states this article is inapplicable.

"The states and territories hereinafter enumerated, however, have supplemented federal legislation by requiring that certain preliminary development work in the nature of a discovery shaft, or its equivalent, shall be performed within a specified time as a condition precedent to the completion of a lode location. This legislation has been held to be valid.

"As these state statutes are frequently important factors necessary to be considered in construing and applying decisions of the state courts, we will present an outline of the provisions found in the several states and territories upon this subject, taking the state of Colorado as a basis of comparison." (2 *Lindley on Mines*, (3rd Ed.), page 795-6, Sec. 343)

* * *

"Nevada: The posting of a notice is required, and before the expiration of ninety days thereafter the locator must sink a discovery shaft to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show by such work a lode deposit of mineral in place. A cut, crosscut, or tunnel which cuts the lode at a depth of ten feet, or an open cut along the ledge or lode equivalent in size to a shaft four feet by six feet by ten feet deep is equivalent to a discovery shaft." (The ninety day provision has been changed to twenty days.) (2 *Lindley on Mines*, (3rd Ed.), Sec. 343, page 779)

"The time limit fixed in these statutes would seem to be mandatory. A discoverer could not extend it by simply renewing notices or changing

dates on the old notices, as against one making a location after the statutory period following the original discovery and notice had expired." (2 *Lindley on Mines*, (3rd Ed.), Sec. 344, page 805)

"His original discovery will protect him in his possession during the statutory period, but if he permits that period to elapse, and fails to perform his development work and accomplish the results contemplated by law, his possession must yield to the next comer who succeeds by peaceable methods in initiating a right. As is said by Mr. Morrison, the neglect of the locator to comply with this requirement is equivalent to an abandonment of the inchoate right given by discovery. The discovery has performed its office. The perfected location rests ultimately on the completed development work. This we understand to be the rule announced by Judge Hallett in the Adelaide-Camp Bird case, and we are not aware of any adjudicated case to the contrary." (2 *Lindley on Mines*, (3rd Ed.), Sec. 345, p. 807-8)

"The requirement as to disclosing the vein, crevice, or deposit in place, which terms are legal equivalents, is unquestionably mandatory. What constitutes such a vein is to be determined by the rules announced by the courts in the adjudicated cases, which have been fully presented in preceding articles, and need not here be repeated." (2 *Lindley on Mines*, (3rd Ed.), Sec. 346, p. 809-10)

"Discovery and Discovery Shaft Distinguished. The fact of discovery is a fact of itself, to be totally disconnected from the idea of discovery shaft. The discovery shaft is a part of the process of location, subsequent to discovery. If a lode, for instance, be discovered in a cross-cut run to operate some other known vein, or if a

prospect hole be dug on the outcrop of a lode, and no steps are taken to stake and record such hole, it becomes no more the property of the owner of the cross-cut, or of the party who dug the hole, than if he had never happened to strike it. Although he could have followed up the discovery by perfecting title, his neglect so to do is equivalent to abandonment of the inchoate right given by discovery." (*Morrison's Mining Rights*, 16th Edition, p. 29)

"Discovery Hold How Long? A discovery in Colorado, Wyoming, North and South Dakota, Montana and Oregon holds the claim for sixty days allotted to sink the discovery shaft. * * Alaska, Arizona, New Mexico and Washington allow ninety days. Idaho allows sixty days, but claim must be staked within ten days after discovery. Nevada allows ninety days from date of posting location notice, but requires the monuments to be placed within twenty days from date of posting." (*Morrison's Mining Rights*, 16th Edition, p. 33)

"The validity of the provisions of said statute with reference to discovery work is directly involved in this case, and presented for determination on this appeal. The determination of this question will dispose of the case, and we do not deem it material to consider or pass upon the many other questions discussed by counsel. In Colorado and several other states the work as specified in the Nevada statute is required to be performed as a prerequisite to the completion of a location. The same character of work is required in other states, but it is not made, in terms at least, necessary to complete a location, but rather, as we think, a condition to the continuance of the right acquired by location. We regard it

as entirely immaterial whether, under state legislation in reference to discovery work, the performance thereof be regarded as a necessary act of location, or as a condition to the continuance of the right after location. If such legislation is valid in the one case, it is in the other. * * * To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply, not only with the laws of Congress, but with the valid laws of the state and valid rules established by the miners, in force in the district where the claim is situated upon which such right depends. Failure to comply with such laws and rules works a forfeiture, whether the laws and rules provide for forfeiture for noncompliance or not, and the mining claim becomes subject to location by any qualified locator." (*Sissons v. Sommers*, 24 Nev. 379, 55 P. 829)

"If defendant's location was invalid because of the absence of a discovery cut, at the time plaintiff made peaceable entry, then the territory within the boundaries of defendant's claim was at the time open to location under the mining laws, and plaintiff could lawfully initiate his location within the boundaries of the Iva C. claim, irrespective of what his belief was as to territory being unoccupied and unappropriated (Lindley on Mines, vol. 1, Sec. 219); and, if the Iva C. location was invalid for such reason, it was immaterial to the validity of plaintiff's location that plaintiff knew that the claim of defendant had been surveyed for patent, and the boundaries had been marked on the ground, and that the situs of the claim was known to him, and that the defendant had posted his patent plats and notices. If the location of defendant was invalid for the reasons

assigned, plaintiff was not a trespasser when he attempted to initiate his location therein. The jury ought to have been plainly told that, if defendant's claim was invalid for the reason assigned, the plaintiff could initiate his location within the boundaries of such claim." (*Walsh v. Henry*, 38 Colo. 393, 88 P. 449)

"Taking advantage of the discretion accorded by the Federal statute, a number of states have supplemented the locational requisites hereinbefore noticed by requiring the performance of a specified amount of development work within a prescribed period after the making of a discovery, such as the sinking of a shaft in such manner as to disclose the vein or crevice that carries the mineral.

"It is clear, of course, that the position of the discovery shaft is of no importance in jurisdictions wherein the sinking of such a shaft is not demanded. And even where such a requirement is made a locational requisite, it seems that a shaft is not rendered ineffective by the circumstance that it extends a few inches over the boundary of an adjoining claim." (36 *Am. Jur., Mines and Minerals*, Sec. 88, p. 340)

"There is no doubt that, if the locator discovered a vein and filed proper notices on the Portlands on the unappropriated public domain, he was entitled to go on the ground and mark the boundaries, and in doing so float the locations and do the required work; but, if he never did anything but post the notices, it would seem that no piece of ground was ever defined for segregation from the public domain, so as to notify or warn off others, or prevent the initiation of locations which would be good against a later one." (*Nash v. McNamara*, *supra*, at page 412)

In 7 *L.R.A. (N. S.)*, at page 839, may be found an annotation which makes the following statement:

“Under the Federal mining laws, in the absence of state or local regulation, a location of a mining claim is complete upon proper discovery and marking the claim upon the ground. Nothing in the way of discovery or development work is required to complete it; and this applies to the existing conditions in California and Utah in which no such regulations have been adopted. In most of the other mining states and territories, however, Federal legislation on this subject has been supplemented by requirements for the performance of certain work in the way of development after discovery, which is a condition precedent to the completion of the location.

“These requirements have usually taken the shape of a provision for the sinking of a discovery shaft upon the lode or vein discovered, or for an equivalent thereto.”

There is also contained in this annotation a reference to the decisions which hold that work in the way of sinking a discovery shaft or the equivalent is required to be performed as a prerequisite to the completion of location and that a locator thus failing to comply with the statute cannot hold the claims as against a junior locator, and this is true whether the laws and rules provide for a forfeiture for non-compliance or not.

Section 4121, Compiled Laws of Nevada, 1929, specifically quoted above, requires the sinking of a discovery shaft measuring 4 feet by 6 feet to a depth of at least 10 feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show by such

work a lode deposit of mineral in place. A cut or cross-cut or a tunnel which cuts a lode at a depth of 10 feet or an open cut along the said ledge or lode equivalent in size to a shaft 4 feet by 6 feet by 10 feet deep is equivalent to a discovery shaft. This location work must be performed within ninety days from the date of posting the location notice.

The evidence in this case without contradiction shows that no discovery shaft was sunk on the Kidder-King claims, nor was any crosscut or tunnel excavated. Therefore, for this additional reason, on June 24, 1950, there had been no location of the Kidder-King claims, and as before stated, they were mere imaginings in the head of the promotor, Reynolds.

The information as to the purported location of the Kidder-King claims came entirely from the mouth of Reynolds, and by his testimony he proved that the Kidder-King claims had no existence and were mere creations of his imagination. All that had been done was to post notices of location. Neither had the boundaries been marked so that they could be readily traceable on the ground, nor had the discovery work been done. The area covered by these purported claims was on June 24, 1950, part of the public domain. The locators of these imaginary claims had no more interest in them than some stranger. They had no actual possession of the ground, and even as against a stranger they had no rights. Plaintiff's own proof, beyond a shadow of a doubt, showed that neither Kidder nor the plaintiff King had any title or ownership or any kind of interest in these supposed

and fictitious mining claims on the date they entered into the contract with the defendant, Hintze, and they were charged with knowledge of such fact. When they covenanted and agreed to quit claim their right, title and interest in these claims, they were entering into an agreement concerning non-existent property.

Plaintiff and appellee attempted to explain the absence of the location work required by Sec. 4121, Compiled Laws of Nevada, 1929, by introducing evidence of alleged custom of the miners in the White Pine Mining District with respect to the doing of this work (R. 54, 55, 56). The witness Reynolds was asked whether he knew of the custom of the area with regard to the extension of time due to weather conditions within which to do the location work (R. 56). Sec. 4121 specifically requires that this work be done within ninety days of the date of posting the location notices, and the authorities above cited indicate that such requirement is mandatory. The objection of defendant to this type of testimony (R. 56) should have been sustained. If any custom existed, it could not excuse the non-execution of the location work in the face of the statutory requirement.

II.

THE CONTRACT DATED JUNE 24, 1950 BETWEEN KIDDER AND THE PLAINTIFF AND APPELLEE, KING, ON THE ONE PART AND THE DEFENDANT, HINTZE, ON THE OTHER PART, DEFINITELY IMPLIES THAT KIDDER AND KING HAD SOME RIGHT, TITLE, CLAIM AND INTEREST IN AND TO THE KIDDER-KING CLAIMS WHICH THEY WOULD CONVEY AND WHICH

WOULD PASS TO AND BECOME ASSETS OF THE CORPORATION TO BE FORMED BY DEFENDANT.

1. A contract should receive a reasonable interpretation consistent with the purpose of the contract and intentions of the parties as expressed by the language of the contract and as shown by the surrounding facts and circumstances existing at the time the contract was executed.

"The rules for construing agreements of promoters do not differ from those that apply to other contracts. If such a contract is phrased in language of dubious meaning, it must be construed and interpreted, like other contracts, in the light of the circumstances surrounding the promoters, the objects they aimed to attain, and the results they contemplated." (*13 Am. Jur., Corporation, Sec. 127, p. 266*)

"In the interpretation of an agreement, the surrounding circumstances at the time it was made should be considered for the purpose of ascertaining its meaning, but not for the purpose of adding a new and distinct undertaking. In interpreting an agreement, a court should, to the best of its ability, place itself in the situation occupied by the parties when the agreement was made and avail itself of the same light which the parties possessed when the agreement was made so as to judge of the meaning of the words and of the correct application of the language to the things described. * * *" (*12 Am. Jur., Contracts, Sec. 247, p. 784*)

"If it were a contract between Parry and a corporation, anticipated, but not yet in existence, there could be no recovery. If, on the other hand, it were a contract between individuals, there might be, if the testimony warranted it; and that

is the principal question argued here. It seems to be conceded — at least it is to us apparent — that the contract is confusing, and that, unless light may be thrown upon its meaning by surrounding circumstances, the intention of the parties in several important respects will remain in doubt. But, reading the instrument in the light of the situation of the parties at the time and of the object to be accomplished, we may be aided in reaching a satisfactory construction. How, then, were the parties situated, and what did they undertake to do?" (*Mosier et al v. Parry*, 60 Ohio St. 388, 54 N.E. 364, L.R.A. 1918E, 834)

"One of the contentions is that parol evidence is inadmissible to vary the terms of a written instrument. It is assumed by defendant that the instrument in question is unambiguous and self-explanatory. If that were true, defendant's contention would be indisputable, but we have already determined that there is a latent ambiguity in the instrument as to whether or not it conveyed an exclusive permit to defendant or a right in common with other parties. This ambiguity opened the door for the admission of evidence as to the understanding of the parties at the time the instrument was executed." (*Boley v. Butterfield*, 57 Utah 262, 194 P. 128, 131)

"Where the parol evidence offered does not tend to vary or contradict the terms of the writing, but merely to explain a latent ambiguity, we know of no respectable authority that holds it to be inadmissible." (*Egelund v. Fayter*, 51 Utah 582, 172 P. 313-14)

"Where the language is mixed and susceptible of more than one construction, the court should attempt to place itself as nearly as possible in the

situation of the parties to the contract at the time the agreement was entered into, so that it may view the circumstances as viewed by the parties themselves to be enabled to understand the language used in the sense with which the parties used it. In order to accomplish this purpose it is generally proper for the court to take notice of the surroundings and attendant circumstances and consider the language used in the light of such circumstances." (*Read v. Forced Underfiring Corporation*, 82 Utah 529, 26 P. (2d) 325-27)

"While it is true that parol evidence may not be permitted to vary the terms of a written contract, it is equally true that in construing a contract all parts of it are to be considered, and the circumstances surrounding its making to be regarded, with a view of arriving at the true intent of the parties." (*Mebius & Drescher Co. v. Mills*, 150 Cal. 229, 88 P. 917.)

"It is elemental, in construing a contract, that its purpose, its nature, and subject matter should be considered. A construction giving an instrument a legal effect to accomplish its purpose will be adopted when it can reasonably be done, and between two possible constructions that will be adopted which establishes a valid contract." (*Schofield v. Z.C.M.I.*, 85 Utah 281, 39 P. (2d) 342, 96 A. L. R. 1089.)

The foregoing authorities teach that in determining the intentions of the parties to a written contract, the court is first charged with the duty of examining the language actually used in the contract, and if there exists an ambiguity therein, it may resort to the surrounding facts and circumstances as an aid to its interpretation

of the agreement. These rules of interpretation are of peculiar application to the contract involved in this action, inasmuch as it reveals upon its face a definite ambiguity which, in order to clarify it, requires the assistance of parol evidence.

The contract is a typical promotion contract between parties who mutually agree to furnish properties for the organization of a mining corporation. Upon the security of these properties, shares of stock were to be issued. Kidder and King were to receive a specified number of shares of stock for the assignment of the Isaacs lease and option and the conveyance to Hintze, or the company to be organized by him, of the Kidder-King claims. Hintze, on the other hand, was to receive a specified number of shares of stock of the new corporation for his services in organizing the new company, and also in consideration of the quit claiming by him to the company of "all his right, title and interest in and to" 12 certain unpatented lode mining claims. This contract certainly contemplated that assets and properties would be conveyed to the new corporation which had actual existence, both factually and legally.

One of the pertinent covenants made by Kidder and King reads as follows:

"The said Edwin G. Kidder and Vera S. King hereby agree to execute and deliver to F. F. Hintze or to the company to be organized by him a quit claim deed or deeds conveying all of their right, title and interest in and to the following named unpatented lode mining claims situated in Sections 24, 25, 30, 31 and 36, Township 16 North,

Ranges 57 and 58 East, in White Pine County, State of Nevada, to-wit;" (Here follows a specific description of the claims.)

By a further provision of the contract Kidder and King warranted that there were no outstanding debts or liens against "the said property" and their mining lease and option (meaning the Isaacs lease and option) and that the same were free and clear of debts and claims of any and all kinds, and should any claims arise out of their operations of said claims in the past, they agreed to hold said assignee free and harmless from all liabilities and expenses of any litigation that might arise out of any such debts and/or claims.

The agreement on its face clearly designates it as a promotion agreement, having for its ultimate purpose the organization of a mining corporation to take, hold and operate the Isaacs lease and option and also the unpatented lode mining claims which the respective parties agreed to quit claim to the new corporation. The question arises as to whether or not the requirements of this contract would be satisfied merely by the parties executing quit claim deeds to the corporation whereby the right, title and interest of the grantors, whatever they may be, were conveyed, or whether by the contract the parties intended that Kidder and King on the one hand, and Hintze on the other, should convey to the corporation unpatented mining claims *which had actual legal existence*. The uncertainty of the contract in this regard opens the door for the consideration of all evidence and circumstances surrounding this transaction.

2. A provision in a corporate promotion agreement that a party will convey his right, title, claim and interest in and to land or other property by quit claim deed unto the corporation to be organized under the agreement does not absolve him from all liability or responsibility except the execution and delivery of such quit claim deed and does not operate as a reservation of immunity on his part, while the contract remains executory, from all liability for his reservation of immunity on his part, while the contract remains executory, from all liability for his want of title to the land or other property, where the contract itself and surrounding facts and circumstances show that the parties intended the contract to be based on the premise that the party did in fact own a substantial title, right or interest in and to the property to be conveyed to the proposed corporation.

“A provision in a contract for the sale of land that the vendor shall give a quitclaim deed or other conveyance of less worth than a general warranty deed does not necessarily absolve him from any obligation other than the execution of such a deed, and operate as a reservation or immunity on his part, while the contract remains executory, from all liability for his want of title. That the purchaser has agreed to take a deed without warranty is not necessarily a waiver of the right to demand a clear title; on the contrary, the fact that a warranty in the conveyance is waived has been said to be all the stronger reason why he should insist on the cancelation of all liens and encumbrances, since he will have no warranty to fall back on if the title should prove to be defective. Even though the contract merely calls for a conveyance of the vendor's right, title and interest in the land, other provisions may so

indicate the character of title called for as to require the character of title so indicated. In a case in which the court stated that a grantee in a quitclaim deed has the same rights as a grantee in a deed of general warranty where the deed purports on its face to convey the land, a contract was held to show an intent to sell a good title and to require such a title where the first part of the contract was in the ordinary form of a contract for the sale and conveyance of the land although the contract subsequently provided for the giving of a quitclaim deed upon the full payment of the purchase price and 'upon surrender' of the contract. It has also been held that where the agreement is for a deed without warranty of all the vendor's 'right, title and interest' in certain land, the vendor is bound to show that he has some right, title or interest which he can convey. Such an agreement implies that the vendor has some right, title or interest which will pass by a conveyance, and if he has none the stipulation on his part is a nullity and the contract will be rescinded at the instance of the purchaser." (55 *Am. Jur.*, *Vendor and Purchaser*, Sec. 160, p. 630)

"But it seems that, even though the contract merely calls for a conveyance of the vendor's right, title and interest in the land, other provisions may so indicate the character of the title the vendor is to convey as to control. * * * But it seems that, regardless of protective provisions inserted in behalf of the vendor, he cannot successfully invoke the aid of equity to require the vendee to accept a conveyance of land, where he has no title whatever thereto." (57 *A. L. R.*, 1280-81)

"An agreement to convey by quitclaim deed does not require the vendor to convey a good

title, unless the contract shows that the parties intended to contract for the land and not merely for the vendor's interest, whatever it might be. But a contract to deliver a good and sufficient deed is breached where the vendor without title tenders a quitclaim deed sufficient in form; although under a contract for a good title, a quitclaim deed is sufficient, if the grantor has the title.' (66 C. J., *Vendor and Purchaser*, Sec. 522, p. 851)

"Respondent undertook to buy something more than a chance title. This the contract shows. To segregate the words 'a quitclaim deed to said premises,' and hold her to the legal import of those words, without reference to their relation to other words and covenants in the contract, would be an injustice to the buyer and do violence to accepted rules of construction. If a party agrees to sell land, it is in legal effect an agreement to sell a title to the land. In the absence of a stipulation to the contrary, the law implies an undertaking on the part of the vendor to make a good title. 29 Am. & Eng. Enc. Law, 606; *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583; 2 *Warvelle on Vendors* (2d ed.) 836. The form of conveyance is a secondary consideration. There may be reasons for giving or receiving a quitclaim deed. These will not be inquired into so long as that form of deed will convey the title agreed to be conveyed, in the contract itself.

"* * *The impression prevails to some extent that an agreement to sell lands by quitclaim deed or other conveyance of less worth than a warranty deed absolves the vendor from any obligation other than the execution and delivery of his deed; that it is a reservation of immunity on his part from all liability in damages for a breach of his

contract or failure of title. This is erroneous. The effect of a quitclaim deed was considered in the case of *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583, where, after some discussion, the court said: “* * * Under the statutes of our territory, a quitclaim deed is just as effectual to convey the title to real estate as any other form of deed, and a grantee in a quitclaim deed is entitled to the same presumptions as to bona fides, and has the same rights, as a grantee in a deed of general warranty. This is undoubtedly true of a quitclaim deed which purports on its fact to convey, not merely an interest, but the real estate itself.” (*Davis v. Lee*, 52 Wash. 330, 100 P. 753)

When the court places itself in the position of the parties to the contract, it will quickly sense the fact that they were clearly acting on the premise that Kidder and King *actually held legal ownership* of the Kidder-King unpatented mining claims and that the status of the title of those claims was such that Kidder and King and the corporation could assert it successfully against the whole world. There is not a suggestion on the face of the contract nor in the testimony at the trial that the parties contemplated any other ownership by Kidder and King than an absolute one which would stand inviolate against the intrusion on the properties by others. The fact that these claims were to form part of the underlying assets of the corporation to be formed by the defendant is certainly indicative that the parties themselves intended that that corporation would have an ownership in the claims which it could assert against trespassers or claim jumpers. The above cited authorities show that the covenant upon the part of Kidder and

King to execute and deliver a quit claim deed conveying their right, title and interest in the Kidder-King claims was not performed by a simple execution of the deed. Their undertaking carried the definite and explicit implication that Kidder and King had some kind of substantial ownership in the claims. The following quotation from *Johnson v. Tool*, 1 Dana (Ky.) 479, 25 Am. D. 162, is much in point:

“An undertaking to convey all the vendor’s ‘right, title and interest,’ but without general warranty, implies that he has some right, title and interest which can constitute the subject of a contract, and which can pass by the conveyance to the vendee. If the vendor has no ‘right, title or interest,’ the stipulation on his part amounts to a nullity. It cannot be presumed, that a vendee would ever engage to pay money for nothing. We are, therefore, of opinion, that it was incumbent on the vendor to exhibit a title, and shew himself able to make it to the vendee. We do not mean that the vendor was bound to shew the best title, nor even a title regularly derived from the commonwealth. But we think he was bound to present such a state of case as would show that he at least had some right. A naked possession might be such a right as would, if transferred and conveyed, satisfy the covenant on his part. But the vendor has not shewn that much.”

Paraphrasing this excerpt, it cannot be supposed that Hintze would have undertaken the obligation to organize a corporation and to convey his unpatented claims to it on the mere promise of Kidder and King to convey whatever interest they might have in and to the Kidder-King claims. Rather, the conclusion is that the

covenants of Kidder and King required them to convey to Hintze or to the corporation a substantial title or interest in and to the Kidder-King claims.

Any other interpretation of the contract than that above urged immediately suggests inimical complications to the existence and well-being of the corporation. The evidence in the case clearly shows that Kidder and King and their representative Reynolds contemplated that shares of stock of this corporation would be sold to the public. This would, of course, require a qualification under the "Blue Sky Law" (7 U. C. A. 1953, Sec. 6-1-1 to 6-1-41). It is difficult to imagine that the Securities Commission would grant a license to sell shares of the stock of this corporation upon showing of the status of the title to the Kidder-King claims. As hereinbefore demonstrated, these claims did not exist, and neither Kidder nor King had any 'right, title or interest' in and to any such claims as described. They could not own any interest or title in something that did not exist. Hence, their covenant to convey to the corporation or to Hintze their right, title and interest, was breached.

III.

THE INABILITY OF KIDDER AND THE PLAINTIFF AND APPELLEE KING TO CONVEY TO THE DEFENDANT, OR TO THE CORPORATION TO BE ORGANIZED BY HIM, SOME SUBSTANTIAL RIGHT OR INTEREST IN THE KIDDER- KING CLAIMS CONSTITUED A BREACH OF THE PROMOTION CONTRACT OF SUCH NATURE AS TO DEFEAT ITS PURPOSE AND RELIEVE AND DISCHARGE THE DEFENDANT AND APPELLANT HINTZE FROM THE DUTY OF ORGANIZING THE

CORPORATION CONTEMPLATED BY THE PROMOTION AGREEMENT.

1. A breach by one party that goes to the essence or root of the contract justifies a refusal of the other party to perform his promise and discharges his obligation to perform, even though there has been a partial performance on the part of the first party.

“Where promises which form the consideration for each other are concurrent or dependent, the failure of one party to perform will discharge the other, and one cannot maintain an action against the other without showing performance, or a tender of performance, on his part, unless such performance has been excused, the general rule being that a person who has himself broken a contract cannot recover on it. Where acts are to be performed by each party at the same time, neither party can maintain an action against the other without performance, or tender of performance, on his part. So where a party sues on a special contract to recover compensation due on its performance, he must show performance on his part or a legal excuse.” (*13 Corpus Juris, Contracts, Sec. 694, p. 627-9*)

“* * * Where there has been part performance [of a contract] and there is a breach of a promise which goes to only a part of the consideration and the breach may be compensated for in damages, the breach does not relieve the other party from his obligation to perform his promise. In order to operate as a discharge, the partial failure to perform must go to the very root of the contract. But a breach that goes to the essence of the contract justifies a refusal of the other party to perform his promise or discharges his obligation to perform, even though there has been part per-

formance. In other words, a breach of a promise which goes to the whole consideration gives to the injured party the right to treat the entire contract as broken. Where the failure to perform part of a contract is in regard to matters which would render the performance of the rest a thing different in substance from what was contracted for, the party not in default may abandon the contract. A plaintiff who has committed a substantial breach cannot recover where the promises are dependent. It may be observed that where there is such a material breach, the plaintiff has not substantially performed." (12 *Am. Jur., Contracts*, Sec. 343, p. 901)

"When the failure to perform the contract is in respect to matters which would render the performance of the rest a thing different in substance from what was contracted for, so far as we are advised the authorities all agree that the party not in default may abandon the contract." (*Balance v. Van Uxem*, 191 Ill. 319, 61 N.E. 85)

"A substantial failure of consideration is a ground for rescission." (*Larson v. Thomas*, S. D., 215 N.W. 927, 57 A.L.R. 1246-1250)

"The maxim, 'De minimis non curat lex,' does not apply in such a case. That maxim can only apply to imperfections in title so slight that the court can say of them the parties to the action did not have such defects in contemplation, and, if they had, they would have disregarded them. It may be that the plaintiffs intended to lay out the farm in a high-class residence district. In fact, something of the kind may be inferred from the evidence. The title search brought to the plaintiffs' knowledge the recorded grant made by Requa of a perpetual easement to construct and maintain over the farm a line of telegraph and

telephone poles and wires. That may have been a very objectionable incumbrance in the eyes of the plaintiffs, and I think it would be a very startling proposition for the court to say that it was a defect in title which may be disregarded in this action at law." (*Fossum v. Requa*, 218 N. Y. 339, 113 N. E. 330-332)

"The necessity of surfacing the streets in the subdivision, in order to improve the premises, is apparent, and in so far as defendant's rights are concerned, the surfacing of the entire street upon which his lot abutted was of paramount importance to him. The putting in of watermains, sidewalks, and sewers was of little avail, if the street remained unsurfaced so that he and others might not have a convenient way to and from his property. Merely to have surfaced the street in front of the one lot would be absurd. We think that the noncompliance by plaintiff in this respect amounts to a substantial and material breach of the covenant to improve.

"The plaintiff and his assignors, therefore, being guilty of a substantial breach of a dependent covenant, cannot maintain this action." (*Palmer v. Fox*, 274 Mich. 252, 264 N. W. 361, 104 A. L. R. 1057-1061)

See also *Braseth v. State Bank of Edinburg*, N.D., 98 N.W. 79; *Southern Colonization Co. v. Derfler*, Fla., 75 So. 790, L. R. A. 1917F, 744; *Weathered v. Weathered*, 115 Kan. 744, 224 P. 901.

"Failure of consideration is the failure to execute a promise, the performance of which has been exchanged for performance by the other party. Among other situations, the failure may arise from the wilful breach of the promise. And

in a bilateral contract, such failure of consideration is a defense to an action for a breach of the contract inasmuch as it is contemplated that the performance of the unilateral promises shall be in exchange for each other, the performance being considered as equivalent in value." (*Bliss v. California Co-op Producers*, 30 Cal. 2d (Adv. 237) 181 P. 2d 369, 170 A.L.R. 1009-16)

"It does not follow that because a technical rescission has not been made, and cannot be made, that a defendant cannot avail himself of the defense of failure or want of consideration. For practical purposes, there is no difference in the effect upon the agreement between the successful defense of want or total failure of consideration and the successful termination of an action to rescind it. In either case, the agreement is rendered incapable of enforcement, the judgment being a bar to any future action, so far at least as parties to the action, or those concluded by it, are concerned." (12 *Am. Jur., Contracts*, Sec. 359, p. 926)

"In other words, the stipulations were dependent, in which case the failure of one party to perform will discharge the other, and one cannot maintain an action against the other without showing performance or a tender of performance on his part unless such performance has been excused." (*Slaughter v. Barnett*, 114 Fla. 352, 154 So. 134, 102 A. L. R. 1073-1079)

2. **A plaintiff must allege and prove performance of the contractual obligations assumed by him in order to maintain an action against the defendant for a breach of the contract.**

"Having pleaded a fulfillment of all of the terms and conditions imposed upon him by the

contract, plaintiff failed in the proof. * * * The plaintiff having failed to prove his performance of the contract, he cannot recover damages from the defendant." (*Niederhauser v. Jackson Dairy Co.*, (Iowa) 237 N. W. 222-224)

"Plaintiff, having pleaded full performance of the contract, could not recover without establishing that fact. * * * The plaintiff, therefore, having alleged performance, was bound to establish that fact, and failing to do so, no recovery could be had." (*Stern v. McKee*, 70 App. Div. 142 (N. Y.), 75 N. Y. S. 157)

"It is the settled law of this state before recovery can be had upon a contract, that plaintiff must show either that he substantially performed or tendered performance of the conditions on his part to be performed." (*Thomas v. Matthews*, Ohio St., 113 N. E. 699, L. R. A. 1917A, 1068-1074)

"Where the promises or covenants in an agreement are mutual and dependent or concurrent, plaintiff must aver performance, or at least an offer to perform on his part, or a legal excuse for non-performance." (*13 Corpus Juris, Contracts*, Sec. 848, p. 725)

It has been demonstrated that Kidder and King, on June 24, 1950, had no title to the Kidder-King claims, *nor any other right or interest in these alleged claims*. Although approximately nine months prior to that date they had caused to be erected location notices on a certain part of the public domain, they had utterly failed to comply with the requirements of both the Federal and Nevada statutes to perfect the title to these claims. Their failure to mark the claims on the grounds so that their

boundaries could be readily traced, and their failure to excavate the location shaft totally destroyed the inchoate rights created by the posting of the location notices. Over six months had elapsed since the location notices were posted, and inasmuch as the marking of the boundaries and the digging of the discovery shaft were mandatory requirements of law, the failure to comply with such mandates within the time specified in the statutes terminated all right, title and interest of Kidder and King in and to these putative claims long prior to June 24, 1950. The evidence shows beyond contradiction that on June 24, 1950 neither Kidder nor King nor any of their agents or representatives held actual possession or occupancy of the ground upon which an attempt had been made to locate these claims. Hence, Kidder and King did not hold the color of even a possessory right in the putative claims.

Kidder and King breached the covenant of their contract whereby they agreed to convey to the defendant, or to the corporation to be organized by him, their right, title, claim and interest in and to these putative claims, because they held no right, title, interest, claim or possession in and to said putative claims. Such breach went to the heart of the contract. It is true that Kidder and King assigned to the defendant and appellant the Isaacs lease and option covering other properties, but the properties contained within the lease and option were only a part of the assets which were to be owned and held by the intended corporation.

Reynolds' testimony demonstrates that the Kidder-

King claims surrounded the properties described in the Isaacs lease, and according to his testimony they afforded substantial protection to the Isaacs properties and at the same time possessed intrinsic value. The parties to the agreement did not intend that the Isaacs lease and option should be the only asset of the corporation. They intended that the assets of the corporation should consist of the Isaacs lease and option, the Kidder-King claims, and the Hintze claims. A corporation whose assets do not include the Kidder-King claims would not be the same corporation as that contemplated by the parties to the agreement. Such a corporation would be an entirely different entity from one that owned and possessed the Isaacs lease and option, the Kidder-King claims and the Hintze claims — all of which would have formed an operating unit. The assertion that Kidder and King substantially performed their agreement by assigning the Isaacs lease and option does violence to the contract and imposes on the defendant the acceptance of a corporation entirely different from that contemplated by the parties.

The plaintiff alleged in her complaint that she and Kidder had fully performed all of the obligations imposed upon them by the contract (R. 1). This allegation recognizes the rule of law above stated that a plaintiff must allege the performance of the contractual obligations assumed by him in order to maintain an action against a defendant for breach of the contract. He must do something more than this: He must prove such allegation. In this case the plaintiff utterly failed to prove that Kidder and King had performed their part of the

contract. Rather, plaintiff's own proof showed that she and Kidder had breached the contract in a material, substantial manner and that such breach was in the form of a failure of consideration, which went to the root of the agreement. Under such circumstances the trial court committed highly prejudicial error in instructing the jury that the defendant had failed to present a defense to plaintiff's cause of action. It was a grievous error which permeated the jury's verdict. It is submitted that the defendant's and appellant's motion for dismissal and non-suit (R. 248) and his motion for judgment notwithstanding verdict (R. 286) should have been granted, and that the trial court committed reversible error in its Instruction No. 1, wherein it was declared that the defendant had presented no evidence which would amount to a defense of plaintiff's cause of action and instructing the jury as a matter of law that the defendant had breached the contract as claimed by the plaintiff, and that plaintiff was entitled, therefore, to nominal damages (R. 270-271).

WHEREFORE, defendant and appellant prays that the Supreme Court will set aside the judgment against him in favor of plaintiff, and that it order and direct the trial court to dismiss this action against defendant with prejudice.

Respectfully submitted,

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Received two copies of the foregoing Brief of Appellant this day of December, 1953.

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