

1949

Lawrence Migliaccio v. Frank Davis, Sally Davis and John B. Davis : Brief of Appellant

Utah Supreme Court

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In the
Supreme Court of the State of Utah

CLERK, SUPREME COURT, UTAH

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LAWRENCE MIGLIACCIO,

Plaintiff and Appellant,

vs.

FRANK DAVIS, SALLY DAVIS, his

wife, and JOHN B. DAVIS,

Defendants and Respondents.

Luke G. Paffas, 1110 Myrman-Hughes - Salt Lake City, Utah
attorneys

Case No.
 7412

BRIEF OF APPELLANT

AN APPEAL

FROM THE SEVENTH JUDICIAL DISTRICT
 COURT OF EMERY COUNTY, STATE OF UTAH

Fred W. Keller, Judge

GENERAL INDEX

BRIEF

	Page
Statement of Facts.....	1- 5
Assignments of Error	5- 6
Argument I	7-10
a. Statement	9-10
b. Testimony	10-26
THE COURT ERRED IN THE FOLLOWING HOLDINGS:	
1. IN HOLDING THAT QUIT-CLAIM DEED OF JOHN B. DAVIS TO HIS BROTHER FRANK M. DAVIS CONVEYED A 37½% OF THE SEVEN MINING CLAIMS, AND THAT THE APPELLANT ESTOPPED HIMSELF BY REMAINING SILENT WHEN HE SHOULD HAVE SPOKEN.	
2. IN HOLDING THAT THE APPELLANT AND RESPONDENTS, FRANK M. AND SALLY DAVIS WERE TENANTS IN COMMON.	
3. IN DISSOLVING THE INJUNCTION AND DELIVERING APPELLANTS BOND TO THE RESPONDENTS, FRANK M. AND SALLY DAVIS.	
4. IN HOLDING THAT THE APPELLANT COULD NOT SET-OFF AGAINST APPELLANT'S ORE SALES ALL ORE SALES MADE BY THE RESPONDENTS.	
5. IN OVER-RULING APPELLANT'S MOTION FOR A NEW TRIAL.	
6. IN NOT ORDERING RESPONDENT, FRANK M. DAVIS, TO ACCOUNT FOR HIS ORE SALES MADE PRIOR TO THE RESTRAINING ORDER.	
7. IN FAILING TO DETERMINE THE RESPECTIVE INTERESTS OF THE PARTIES TO THE ACTION IN THE MINING EQUIPMENT PURCHASED WITH ORE SALES MONEY AND EMPLOYED IN THE OPERATIONS OF THE MINING CLAIMS.	
(a) Testimony from Injunction Proceeding.....	10-12
(b) Testimony from Transcript.....	13-26
Argument and Law	27-36
I. Actual Notice	27-31
(a) Actual Notice—A Means of Notice	31-32
(b) Possession Constiutes Actual Notice	31-35
(c) Some Title Must be in Grantor	35-36

INDEX—Continued

	Page
II. Estoppel	36
(a) Testimony	37-48
(b) Law	48
(1) No Estoppel by Silence, Unless There is a Duty to Speak.....	52-57
(2) There is No Estoppel When Parties are Negligent	57-59
(3) The Law—Generally	59-63
Assignment of Error No. 6	63-66
Assignment of Error No. 7	66-68
Index to Exhibits	iii
Index to Cases	iv-v
Index to Judgment Roll	iv

INDEX

LIST OF PLAINTIFF'S & DEFENDANTS'

EXHIBITS

Re: Migliaccia vs. Davis and Wife.

The following is a list of the Exhibits offered by the Plaintiff in the aforementioned case:

Plaintiff's Exhibit 1	Quit-Claim Deed, John B. Davis & Dortha Davis—Admitted.
Plaintiff's Exhibit 2	Quit-Claim Deed, Thomas Migliaccio & Rose Migliaccio—Admitted.
Plaintiff's Exhibit 3	Quit-Claim Deed, J. W. Jensen & Nola Jensen—Admitted.
Plaintiff's Exhibit 4	Letter—Admitted.
Plaintiff's Exhibit 5	Quit-Claim Deed, J. B. Davis, Mrs. J. B. Davis—Admitted.

The following is a list of the Exhibits offered by the Defendants in the aforementioned case:

Defendants' Exhibit "A"	Quit-Claim Deed, A. E. Guymon, Perdita B. Guymon—Admitted.
Defendants' Exhibit "B"	Quit-Claim Deed, J. L. Safley, Maud Safley—Admitted.
Defendants' Exhibit "C"	Quit-Claim Deed, J. B. Davis—Admitted.

Defendants Exhibit "D"	Quit-Claim Deed, John B. Davis—Offered.
Defendants' Exhibit "E"	Quit-Claim Deed, Lawrence Migliaccio & Marie Migliaccio—Admitted.
Defendants' Exhibit "F"	Ore Reports and Bank Statements — Admitted.
Defendants' Exhibit "G"	Cancelled Checks for June, July, August, September, October, November, and December, 1948—Not Admitted.
Defendants' Exhibit "H"	Checks & Bills, January, 1949 and February, 1949—Not Admitted.
Defendants' Exhibit "I"	Checks & Bills, March and April, 1949—Not Admitted.
Defendants' Exhibit "K"	Letter—Offered.
Defendants' Exhibit "L"	Affidavit—Admitted.
Defendants' Exhibit "M"	Notice of desire to Hold—Offered.
Defendants' Exhibit "N"	Receipts, Telegram—Denied
Defendants' Exhibit "O"	Mining Lease—Admitted.
Defendants' Exhibit "P"	Stipulation—Admitted.

INDEX OF CASES

Table of Cases

Name	Page
Bank of America Nat. Trust & Savings Assn. v. National Finding Corp. 114 P2 49	52
Brigham Young Trust Co. v. Wagner, 12 Utah 1, 40 P 746	51
California Canning Peach Growers Assn. v. Williams, 69 P 2 893..	51
Centennial Eureka Min. Co. v. Juab County, 22 Utah 395,62 P 1024	51
Clarkson v. Van Antwerp, 200 P 2d 442	52
Cook v. Cook, 174 P2 434 (Utah)	50
Cope v. Davison, 30 Cal. 2d 193, 200, 180 P. 2d 873, 171 A.L.R. 667	34
Davis Estate, 101 P2 761	52
Essex Nat. Bank v. Hurley, 66 Fed. 2d, 552	29
Evans, 130 Pac 217 42 Utah 282 Pac p. 225.....	49
Eyers Woolen Co. v. Gibsum, 84 N.H. 1, 146 A. 511, 64 A.L.R. 1116	31
Farmers Reservoir & Irrigation Co. v. Fulton Irrigation Ditch Co., 120 P 2 196	52
Fite v. Van Antwerp, 200 P2 439	53
Fitzwater v. Norcross, et al, 37 P2 522	53

INDEX—Continued

Name	Page
Gappmayer v. Wilkenson, 53 U. 236 177 P 763.....	27-34
Garrett v. Cook, 200 P2 21	63
Gibson v. Jensen, 48 U. 244, 158 Pac 426	33
Gordon v. Pettingill, et al, 96 P2 416	57
Hawke v. California Realty, Etc. Co. 28 Cal. App, 377, 382, 152 P. 959	34
Hilton v. Sloan, et al, 108 Pac. 689 p. 699	48
Hirning v. Federal Reserve Bank, 52 F 2d, 382	31
Jordan v. Utah R. Co., 47 Utah 519 156 Pac. 939	19-34
Jordan v. Utah R. Co., 47 Utah 519 522 156 P 939 applying Comp. Laws 1907 S. 975 — 78-3-2, P. 507 (notes).....	19-32
Kelly v. Richards, et al, 83 P2 731	59
Killian v. Couselko Supreme Co. Unias Portugees Do Estado d. Calif.	51
Kloppenbrug v. Mayse, 88 P2 416	57
Laske v. Lampasoria, 200 P2 826	63
LeVine v. Whitehouse, 37 Utah 260, 109 Pac. 2.....	30
Lillywhite, et al v. Coleman, et al., 52 P2 1157	63
Little v. Bergdahl Oil Co., 95 P2 433 p. 838	50
McQuadly v. Waren 20 Wall, 14, 22 L. ed. 311	21
Maggini v. West Coast Life Ins. Co. 29 P2 263	51
Mercer Casualty Co. v. Lewis, 108 Pac. 65	52
Moss v. Underwriters Report, Inc. 83 P2, 503 at p. 507.....	61
Neponset Land & Livestock Co., v. Dixon, 10 U 334, 37 P. 573, applying 2 Comp. Laws, 1888, S2611	28
Parker v. Masters, 85 Kan. 130, 116 Pac. 227	28
Patters v. Santa Fe Nat. Life Ins. Co., 138 P2 1019, 47 N.M. 202	50
People v. Juehling, 10 Cal. App. 2d 527, 531, 52 P. 2d 520.....	33
Poynter v. Chipman, 8 Utah 442, 32 P 690	51
Rhodes v. Outcalk, 48 Mo. 367	28
Rosser v. Texas Oil Co. 48 P2 327, 173 Okl. 309	52
S & E Motor Corp. v. New York Indemnity Co., 255, N.Y. 69, 174 N.E. 65	18
San Petro, etc., Co. v. U. S., 146 U.S. 120 35 L. ed. 912.....	28

Schleif v. Gragsby, 88 Cal. App. 174, 180, 181, 263 P. 255.....	33
Sec. Tracy Loan & Trust Co. v. Openshaw Investment Co., et al., 132 P. 388, 102 Ut. 509, Cook	29
Sherlock v. Greaves, 76 P2 87 at 91	53
Simmons Creek Coal Co. v. Doran, 142 U.S. 417, 38 L. ed. 1063....	29
Susman v. Exchange Nat. Bank of Colorado Springs, 183 P 2d 57	51
Tarpey v. Deseret Salt Co., 5 Ut. 205, 210, 14 p. 338.....	33
Toland v. Corey, 6 U. 392, 24 P. 190, Aff'd 154 U.S. 499, 38 L. ed. 1062, 14 S. Ct. 1144	28
Tomas v. Hellman, 1 P2 31	51
Triff v. Bagley, 74 Utah 57, 276 Pac. 912.....	52, 61
Tracy Loan & Trust Co. v. Openshaw, 102 Ut. 509, 132 P Ind 388	50
Tuff v. Baglen, et al, 276 Pac. 912	36
Utah State Bldg. & Loan Assn. v. Perkins, et al, 173 Pac. 950....	49
Utah State Bldg & Loan Assn. v. Perkins, et al, 173 Pac. 950 53 Utah 474	62
Utah State Building Commission for the Use and Benefit of Mountain States Supply Co. v. Great American Indemnity Co., et al 140 P2 763, at p. 772	54
Wellsville East Field Irr. Co., et al. v. Lindsay Land & Livestock Co., et al, 137 P2 p. 634 Sylibus	49
Wood v. Carpenter, 101 U.S. 135, 25 O. Ed. 807	29

INDEX

Judgment Roll

Order Extending time to Serve Bill of Exceptions	1
Order Extending time to Serve Bill of Exceptions	2
Application for Extension of Time to Serve Bill of Exceptions....	3
Notice of Withdrawal of Counsel	4- 7
Affidavit of Mailing	8
Undertaking an Appeal	9-10
Affidavit of Mailing	11
Notice of Overruling Motion for New Trial	12
Notice of Appeal	13
Motion for New Trial	14
Motion to Move for a New Trial	15-16
Undertaking for Temporary Restraining Order	17-18

Judgment and Decree	19-22
Findings of Fact and Conclusions of Law	23-28
Order Dissolving Temporary Restraining Injunction and Direc- ting Clerk to Deliver Undertakings to Defendants	29-30
Demand for Surrender of Bond	31
Reply	32-35
Motion to Strike	36-37
Affidavit of Mailing	38
A Direction for Examination of Exhibits	39
Answer and Counter Claim	40-46
Order Granting Preliminary Injunction	47-48
Summons	49
Complaint	50-55

In the
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LAWRENCE MIGLIACCIO,

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Defendants and Respondents.

Case No.

7412

BRIEF OF APPELLANT

AN APPEAL

FROM THE SEVENTH JUDICIAL DISTRICT
COURT OF EMERY COUNTY, STATE OF UTAH

Fred W. Keller, Judge

STATEMENT OF FACTS

This is an Appeal by the plaintiff, the appellant, from the judgment of the Seventh Judicial District Court, setting in Emery County, Utah. The mining claims involved have lengthy descriptions so we refer this Court to the Answer of Respondents, (Judgment Roll pages 40-46) for their detailed description. The descriptions are of little significance from the view point of this Appeal.

While the appellant brought this suit primarily to quiet title to seven (7) mining claims, the Complaint

contains three separate causes of action. One: To quiet title; Two: Ownership; obtained by adverse possession for over seven (7) years; and Three: An accounting for damages for the commission of waste under our statute. (Complaint—Judgment Roll pages 50-55). The action was commenced on the 11th day of April, 1949, in Emery County, by filing of the Complaint. (Judgment Roll page 50). A restraining order was issued and served upon all of the defendants. (Judgment Roll pages 47-48). The case was tried without a jury. The defendant, John B. Davis, defaulted.

In January, 1941, John B. Davis, J. L. Safley, A. C. Guymon (Trans. 59) and J. W. Jensen located seven (7) mining claims on the unsurveyed public domain in Emery County, State of Utah. Safley and Guymon, at different dates in 1941, quit-claimed their interests to John B. Davis; J. W. Jensen quit-claimed his interest to appellant in June, 1948. On the 27th of May, 1942, (Trans. 41, 60, 61, 63, 64, 133) John B. Davis and wife quit-claimed all their interests in and to the seven (7) mining claims involved in this action to appellant for \$1,000.00, which quit-claim deed was forceably withheld from appellant by J. B. Hammond (Trans. 44, 82) until January 19, 1949, when it was recorded in Emery County. (Plaintiff's Ex. 1). Appellant tried to obtain this deed and finally did so on the date as aforesaid. Appellant did not owe F. B. Hammond anything and there was no reason for withholding it from appellant, and when appellant and John B. Davis called for it, Hammond

refused to surrender, claiming that he had some sort of deal, to which deal appellant was not a party, although Hammond tried to make appellant a party. Delivery had been made to appellant on or about the 27th of May, 1942, but he left his said deed with Hammond. The appellant took possession of the mining claims in 1942 and from then until the present time, has had continuous and actual possession of all of these claims. (Trans. 134 to 136).

For over six years after 1942, there was very little mining done on these claims, except exploration work by appellant which was sufficient to hold possession. (Trans. 134). In 1946, appellant learned that the Federal Government was seeking Uranium bearing ores, and he became active and by May of 1948, was prepared to mine ores from these claims. (Trans. 136). In the latter part of May, 1948, Frank M. Davis came to the home of appellant, primarily to find out if appellant still owned these claims. He was told by the appellant that he, Lawrence Migliaccio, owned all the claims, as it was at about this time that appellant secured the remaining, outstanding interest from J. W. Jensen and wife. (Trans. 136-138).

The appellant and Frank Davis, before the end of June, 1948, had entered into an oral agreement, called a "working agreement." (Trans. 136-138). By June 28th, the claims had been restaked and in early July, appellant and Frank Davis were working the claims and selling the ores in Monticello, Utah. Appellant did the hauling and Frank did the mining on the basis of a 50-50

sharing of the profits from the sale of ores. (Trans. 138). Mining under this agreement continued for a few months, until October 1948.

Trouble developed between appellant and Frank Davis and another oral agreement was entered into in October, 1948 whereby appellant agreed to haul ore from the "old dump" that had been there since appellant stopped active mining in the latter part of July, 1942, and to allow Frank and some employees to mine and haul the new mined ore, but they were still to share profits, share and share alike. (Trans. 141). This continued until the 11th of January, 1949, when a serious quarrel took place which resulted in this law suit. (Trans. 141 to 146).

Meanwhile, in October, 1948, John B. Davis had appeared at his brother, Frank's, solicitation, and began working on the claims with Frank, splitting Frank's profits 50-50. (Trans. 72-73). Before John B. Davis started to work with his brother, Frank, he came to Price in August from his home in Hood River, Oregon. On the 9th of August, 1948, appellant, John B. Davis, and Frank Davis drove to Castle Dale for the purpose of searching the records of the County Recorder's office for information for Attorney Raymond Senior about what is known as the "Gibbon Case." John B. Davis was a defendant in this case. At this time, John B. Davis executed a quit-claim deed (Exhibit "C") of a ONE-HALF UN-DIVIDED INTEREST in the claims which the Recorder's Records then (August 9, 1948) showed he owned

of record a THREE-QUARTERS INTEREST. John B. Davis had deeded to appellant all his interest in 1942, (Exhibit I) but this deed had not then been placed of record. This deed of August 9, 1948 was recorded on the same day. (Trans. 77).

Mining was carried on under the first and second oral agreements from July, 1948, up to and including April 13, 1949, at which time, Frank M. Davis was restrained from working on the claims. Frank M. Davis operated these claims (alone with his employees) and sold ore therefrom from January 11, 1949 up to and including April 13, 1949.

The appellant relies upon the following errors committed by the Court for reversal of the Judgment and such other ruling as to the Court seems equitable.

ASSIGNMENTS OF ERROR

1. THE COURT ERRED IN HOLDING THAT THE APPELLANT WAS ESTOPPED BY HIS SILENCE AND THAT THE QUIT-CLAIM DEED OF JOHN B. DAVIS TO THE RESPONDENT, FRANK DAVIS, DATED AUGUST 9, 1948, WAS VALID. (RESPONDENTS' EXHIBIT "C").
2. THE COURT ERRED IN FINDING THAT THE APPELLANT AND RESPONDENTS, FRANK M. DAVIS AND SALLY DAVIS, WERE AND ARE TENANTS IN COMMON, APPELLANT OWNING A $\frac{5}{8}$ UNDIVIDED INTEREST AND RESPON-

DENTS OWNING A $\frac{3}{8}$ UNDIVIDED INTEREST IN THESE MINING CLAIMS. (JUDGMENT PAGES 3 AND 4; JUDGMENT ROLL PAGES 19 AND 22).

3. THE COURT ERRED IN DISSOLVING THE INJUNCTION AND ORDERING THE CLERK TO DELIVER APPELLANT'S BOND TO THE RESPONDENTS, FRANK M. DAVIS AND SALLY DAVIS. (JUDGMENT PAGE 4; JUDGMENT ROLL, PAGES 19 AND 22).
4. THE COURT ERRED IN FINDING THAT THE APPELLANT COULD NOT SET-OFF ALL THE ORE SALES OF THE RESPONDENT, FRANK M. DAVIS, BEYOND THE APPELLANT'S ORE SALES IF A SUIT ON THE UNDERTAKING FOR AN INJUNCTION, OR RESTRAINING ORDER, WAS BROUGHT BY THE RESPONDENTS, FRANK AND SALLY DAVIS, AGAINST APPELLANT. (FINDINGS OF FACT PAGE 5; JUDGMENT ROLL PAGE 27).
5. THE COURT ERRED IN OVER-RULING THE APPELLANT'S MOTION FOR A NEW TRIAL. (JUDGMENT ROLL PAGE 12).
6. THE COURT ERRED IN NOT ORDERING THE RESPONDENT, FRANK M. DAVIS TO ACCOUNT FOR HIS ORE SALES DURING THE OCCUPATION OF THE PROPERTY BEFORE

THE RESTRAINING ORDER WAS ISSUED AND SERVED UNDER THE LOWER COURT'S DECREE THAT THE PARTIES WERE TENANTS IN COMMON. (JUDGMENT ROLL PAGE 19-22).

7. THAT THE COURT ERRED IN FAILING TO DETERMINE THE RESPECTIVE INTERESTS OF APPELLANT AND RESPONDENTS IN THE MINING EQUIPMENT PURCHASED BY APPELLANT AND RESPONDENTS AND EMPLOYED IN THEIR MINING OPERATIONS OF THESE CLAIMS.

ARGUMENT I.

The Argument upon which the division of the brief is based deals with the Assignments of Error Numbers 1 to 5 inclusive.

1. THE COURT ERRED IN HOLDING THAT THE APPELLANT WAS ESTOPPED BY HIS SILENCE AND THAT THE QUIT-CLAIM DEED OF JOHN B. DAVIS TO THE RESPONDENT, FRANK DAVIS, DATED AUGUST 9, 1948, WAS VALID. (RESPONDENTS' EXHIBIT "C.').
2. THE COURT ERRED IN FINDING THAT THE APPELLANT AND RESPONDENTS, FRANK DAVIS AND SALLY DAVIS, WERE AND ARE TENANTS IN COMMON, APPELLANT OWNING

A FIVE-EIGHTHS UNDIVIDED INTEREST AND RESPONDENTS OWNING A THREE-EIGHTHS UNDIVIDED INTEREST IN THESE MINING CLAIMS.

3. THE COURT ERRED IN DISSOLVING THE INJUNCTION AND ORDERING THE CLERK TO DELIVER APPELLANT'S BOND TO THE RESPONDENTS, FRANK DAVIS AND SALLY DAVIS.
4. THE COURT ERRED IN FINDING THAT THE APPELLANT COULD NOT SET-OFF ALL THE ORE SALES OF THE RESPONDENT, FRANK DAVIS, BEYOND THE APPELLANT'S ORE SALES IF A SUIT ON THE UNDERTAKING FOR AN INJUNCTION, OR RESTRAINING ORDER, WAS BROUGHT BY THE RESPONDENTS, FRANK AND SALLY DAVIS, AGAINST APPELLANT.
5. THE COURT ERRED IN OVER-RULING THE APPELLANT'S MOTION FOR A NEW TRIAL.

Unfortunately, the Findings of Fact do not have their paragraphs numbered. We, therefore, quote the Finding important to our argument at this point, from page 4 of the Finding of Fact. It reads:

“That defendant, Frank Davis, had heard of the existence of a deed from J. B. Davis to plaintiff, but on the other hand, the plaintiff know-

ingly permitted the said Frank Davis to believe that he was acquiring one-half of the three-fourths interest of the said J. B. Davis, and participated in the transaction which resulted in the execution and delivery of the said deed of August 9th, 1948, and knowingly permitted said Frank Davis to perform labor and expend money relying thereon." (Finding of Fact and Conclusions of Law. Judgment Roll P. 23-28).

From this finding, the Judgment and Decree decided that the appellant was estopped by his silence and the quit-claim deed from John B. Davis to Frank M. Davis was valid. (Judgment and Decree page 4, Judgment roll, page 22).

STATEMENT

As the plaintiff, the appellant, understands this case, the matter that governs most of the errors assigned, hinges on whether the record establishes an estoppel against the appellant. The Assignments of Error, 2 to 5, will be determined as error or not error, depending upon what the court holds in respect to the Assignment of Error No. 1, so Assignments of Error 2 to 5 will be included in the Argument of Error No. 1. That this Court may have the evidence conveniently before it, such portion of the transcript as appellant thinks controls the question of Estoppel and the facts upon which this Findings and Judgment are grounded is presented substantially below:

In the testimony that follows, Appellant has attempted to cover the evidence that definitely relates to

the title "Actual Notice." The respondents received a quit-claim deed from John B. Davis and wife several years before the quit-claim deed of John B. Davis to Frank M. Davis, dated August 9, 1948. This evidence is so closely tied into the evidence relating to Estoppel that to state all of it separately under each heading would so lengthen this Brief that it may be objectionable to the Court. All the testimony quoted herein applies to the Arguments presented under the separate headings.

(a) TESTIMONY FROM THE INJUNCTION PROCEEDINGS.

Taken on May 16, 1949.

DIRECT EXAMINATION OF DOROTHY HEINER
BY MR. RUGGERI:

Q. Now, I will ask you whether or not you ever had a conversation with Frank M. Davis relative to the deed that you and John B. Davis signed over to Lawrence Migliaccio?

A. Yes, sir.

Q. When did you have the first conversation, the first of such conversation or conversations?

A. Well, it was just before they went to work out to the mountain, wherever that was.
(Inj. Proc. 16)

Q. It was before they went to work on the mountain?

A. Yes, sir. . . .

Q. Now will you relate what was said at this time relative to the deed?

- A. Mr. Davis just told me that Mr. Migliaccio had the deed to the mines and he asked me if I had signed them and I told him at the time I didn't remember signing them and he said that Mr. Migliaccio had my signature on them, so after I seen my signature, I recognized it.

(Inj. Proc. 17)

(Plaintiff puts in Plaintiff's Exhibit 1 without objection (Transcript page 22-23) for which plaintiff paid John B. Davis \$1,000)

DIRECT EXAMINATION OF LAWRENCE MIGLIACCIO BY MR. RUGGERI:

- Q. All right, Mr. Migliaccio, I will ask you whether or not you ever had a conversation with, or conversations with Frank Davis relative to your deed from John B. Davis?
- A. Yes, sir.
- Q. Now when did you have the first of such conversations?
- A. At my home.
- Q. And when was it?
- A. Around the latter part of May or first of June, somewhere in there.
- Q. What year?
- A. 1948.
- Q. And who was present at this conversation?
- A. My wife.
- Q. Who else? List all the parties that were there, if anyone else.

- A. I think Mrs. Sally Davis was there too.
- Q. And Frank M. Davis and yourself, is that right?
- A. Yes, sir.
- Q. Now what was said at this time relative to your deed from John B. Davis to the vanadium claims 1 to 7 inclusive?
- A. He said, "Let's get- -"
- Q. Who do you mean by "he"? Let's use names.
- A. Frank Davis said to me, he said, "Let's get John down here," and I said, "What for." He said, "I want to get my share of that property." And I said, "I have got the deed for the property, we don't need him in any way. If I want to give anything, that is up to me."
- Q. And what did Frank Davis say, if anything?
- A. He said, "Oh, it's a forgery."
(Inj. Proc. 34 and 35)
- Q. Now, do you remember anything else being said at that time, during this particular conversation?
- A. Well, he said, "Can I come down and work in down there?"
- Q. And what did you say to him? Give us the conversation.
- A. I said, "Yes, you can come down and work on a working agreement of half the money." And he said, "If I can get in down there, I would spend some money and there is plenty of ore down there, we can make a lot of

money.”

(Inj. Proc. 35)

(b) EVIDENCE FROM THE TRIAL TRANSCRIPT.

DIRECT EXAM. LAWRENCE MIGLIACCIO BY MR.
STEFFENSEN:

Q. Well, repeat it as near as you can.

A. Well, he came down to my house and he said, “Lawrence, do you still own, or does my brother own Temple Mountain?” He said, “It is getting hot,” he said, “this uranium deal,” and I said, “I know it,” and he said something about, he said does my brother Jim own a part of that mountain and those claims,” and I said, “No. I own it and I have a quit-claim deed on it.”

Q. Now when you speak of Jim, who is that?

A. Well, Frank called John, Jim. He meant John Davis.

Q. He referred to John B. Davis?

A. Yes, that’s right.

Q. And at that time he asked you the question, did he?

A. Yes, sir.

Q. What else did he say?

A. Well, he said, “What about me getting in down there, putting some machinery in that mine down there and getting things into operation.” He said, “You know,” he said, “there is enough ore down there for you and I and many more.” “Yes, I think so,” I

said, "What about getting in with you."
"Well," I said, "I haven't got much money
right now to start mining operations."

Q. Did you enter into an oral or other agreement?

A. Just an oral agreement.

Q. And what was the basis of the agreement?

A. Well, we figured, oh, he was to spend the money until we got it going good and we'd split fifty-fifty. Pay the expenses out after the ore had been dug.

Q. What were you to furnish other than the property?

A. I wasn't supposed to furnish anything, but I did.

Q. What did you furnish?

A. I furnished two old trucks.

Q. Did you haul ore with them?

A. Yes, sir.

(Trans. 136-138)

CROSS EXAM. OF MIGLIACCIO BY MR. MOYNIHAN:

Q. Well you say that you told Frank in the Spring of 1948, you didn't have to, that you didn't have to deal with John because you already had title to the property?

A. Yes.

Q. And you claim that the title ever since May of 1942?

A. Yes, sir.

(Trans. 155)

DIRECT EXAM. OF MARIE O'NEIL MIGLIACCIO
BY MR. STEFFENSEN:

Q. Q. Are you acquainted with Frank Davis?

A. Yes, sir.

Q. When did you first meet him in relation to anything happening about these claims?

A. I would say it was around the middle of June he came to my home and had a discussion with Lawrence on the front porch. I was standing at the door because I was wondering who he was and I listened to it and he said to me, or said to Lawrence, "What about the Temple Mountain property?" and he said, "Are you still interested in it?" And Lawrence said, "Yes." And he said, "Well that uranium deal is getting plenty hot, I would like to have a chance to go down there." And he says, "What about my brother, John, does he still have an interest?" And Lawrence said, "No, he gave me his interest in 1942."

(Trans. 169-170)

A. Yes. One night when they both came together, why she said to me, "Frank tells me that Lawrence told him that John had deeded him all the property in 1942." So she said, "I think that is the stupidest thing I ever heard of, we know that John wouldn't give the property to Mr. Migliaccio."

THE COURT: Just a minute, was Mr. Davis there?

A. Yes.

THE COURT: When she said that?

- A. Yes, she also stated, "We are going to get that deed and send it to Washington, D.C., because we know that the signatures on it are forged."

(Trans. 171-172)

DIRECT EXAM. OF G. A. COOPER BY MR. RUGGERI:

- Q. Now, Mr. Cooper, I will ask you whether or not you are acquainted with Frank M. Davis?
- A. Yes, I am.
- Q. How long have you known Mr. Davis?
- A. Off hand, I'd say about 5 or 6 years.
- Q. Now calling your attention to the month of June, 1948, I will ask you whether or not you had occasion to talk with Mr. Frank M. Davis concerning the Vanadium King claims?
- A. Yes.
- Q. Where did this conversation transpire?
- A. At the Walnut Bar in Price.
- Q. Do you recall what day in June of 1948 that was?
- A. No, I couldn't tell you but it was the early part of June.
- Q. Now who was present besides you and Mr. Davis, if anyone?
- A. Well, all the ones I can think of now is Jim Hartzell.
- Q. Now will you relate the conversation that you

and Mr. Davis had relative to the Vanadium King claims?

- A. Well, he mentioned to me that he was going to send for his brother John. I told him no need to send for John because John had no claim there at all. And he said, "Why?" I said, "Why Lawrence Migliaccio got a quit-claim deed to that." And he said, "If he has got a quit-claim deed to it, it has been forged, the name has been forged." And I said, "I don't know anything about the names being forged." But I said, "I seen the deed."

(Trans. 174-175)

REBUTTAL EXAM. OF COOPER BY STEFFENSEN:

- Q. This morning, Attorney Hammond, F. B., I believe it is, testified that you were in his office but you never saw a deed. Do you now say that you saw a deed?

- A. I did.

(Trans. 315)

- Q. I show you the two exhibits and you pick out the one that you saw.

- A. This one.

- Q. That is the one you saw?

- A. Yes.

- Q. Have you ever seen that before?

MR. STEFFENSEN: The record will show that is Plaintiff's Exhibit 1.

(Trans. 316)

CROSS EXAM. OF COOPER BY MOYNIHAN:

Q. How did you happen to see that deed?

A. I was up there with Mr. Migliaccio in Hammond's offices.

Q. At what time?

A. Oh, sometime previous to that, I wouldn't set no date, but it was before that time.

Q. You never saw the deed in Migliaccio's possession?

A. Only there in the office.

Q. It was in Mr. Hammond's office?

A. That's right.

Q. You didn't see Migliaccio take it away with him?

A. No.

(Trans. 176)

DIRECT EXAM. OF LESTER TOMLINSON BY MR. STEFFENSEN:

Q. Are you acquainted with Frank Davis?

A. Yes, sir.

Q. How long have you known him?

A. Well I have known him since 1924.

Q. Do you recall any time in the spring of 1948 driving, of having a conversation pertaining to these Vanadium King Mining claims with Frank Davis?

A. Well, yes. We talked about these claims quite a number of times.

- Q. Well what was stated the first time?
- A. Well they was going down there and work those claims at Temple Mountain.
- Q. Well tell, go ahead. Was anything said about who owned them?
- A. Well, I knew the thing from the beginning. I thought John Davis owned them when I first heard about it and then the next thing I knew about it, why Miglaccio gotten into it somewhere, I don't know what the deal was or anything. Only that Migliaccio had a quit-claim deed from John.
- Q. Had you ever seen it?
- A. I saw it one time, maybe a couple of times.
- Q. Where?
- A. In Hammond's office.
- Q. Now did you ever talk to Frank about that deed?
- A. Well, I probably did. I told him that I thought Migliaccio had a quit-claim deed to the property.
- Q. Said you thought?
- A. Well, I told him I seen it.
- Q. That was in June, 1948?
- A. Well, it was either the later part of June or sometime in July but it was more than likely in July. I am quite sure that it was probably after middle of July, 1948.
- Q. And did you talk to him any other time about the deed?

A. Well, just off and on as I seen him.

Q. Before that?

A. I am not sure, I was sure that I had seen that deed in Hammond's office.

THE COURT: You mean you told Mr. Davis, Frank Davis that?

A. Yes, during our talks, we had been down to Temple Mountain, I was kind of interested down there myself and I was wondering how, what kind of claim, whether he bought in down there or how he owned an interest down there and that is how it come up I told him that I had seen this deed in Hammond's office, made out to Migliaccio,

THE COURT: From John B. Davis?

A. Yes.

(Trans. 182-183-184)

DIRECT EXAM. FRANK DAVIS BY MR. MOYNIHAN:

Q. Now, Mr. Davis, tell us about this deed from John Davis to Lawrence Milgliaccio dated sometime in May, 1940. What conversation did you have with Migliaccio about that deed?

THE COURT: May, 1942?

MR. MOYNIHAN: Yes, 1942, that is right, Your Honor.

A. I heard rumors of deeds but I never could chase down any definite deed but after we had the trouble—

Q. Well, now while you are talking about rumors, did you hear the former wife of John Davis

testify in this Court that you told her in September or October that Migliaccio had a deed to this property? Did you hear her testimony on that?

A. I heard her testify, yes.

Q. Well, now what is the fact, what conversation did you have with her and where was it and what did she say?

A. I met her in the Skaggs store.

Q. At what place?

A. Or Safeway Store in price and I asked her, I said, "Dorothy, did you sign a quit-claim deed that I heard that Migliaccio is supposed to have?" and she told me she didn't sign anything in Hammond's office but a divorce paper.

(Trans. 257-258)

CROSS EXAM. OF FRANK DAVIS BY RUGGERI:

Q. Now, Mr. Davis, you say that all you have heard is rumor that Lawrence had a deed, is that right?

A. That's all I ever heard. I never seen it.

Q. What do you mean by rumors?

A. People talking about it, Lawrence mostly.

Q. What did Lawrence tell you about it?

A. Well, he told me many a time that, that he was supposed to have one.

Q. Supposed to have one what?

A. Quit-claim deed from John Davis.

(Trans. 270)

Appellant refers this Court to Plaintiff's Exhibit
"4."

Q. Did you tell her (Mrs. F. Davis) that on June 8, then to tell your brother John, that Migliaccio told you that he had turned all his share over to him?

A. That was Migliaccio I understand told me. Yes, he told me that he heard that.

Q. So that in fact then, it wasn't December of 1948 that Migliaccio first told you he had a deed, it was sometime prior to June 8, 1948 that he told you about the deed?

A. I mean a deed that he could swear by.

Q. He talked with you about the deed before June 8 didn't he?

A. He couldn't record it, he had no deed.

Q. Well that is what you state here that he told you?

(Trans. 272)

Q. And isn't it a fact that Mr. Migliaccio told you that he had all the interest in this property prior to June 8, 1948?

A. No, sir.

Q. Then how did you know, or rather why did you state that he told you that in his letter to John?

A. State that again.

Q. Why did you tell John in this letter that he had told you that?

A. Well, he claimed he had it. I heard he had it, that's all.

(Trans. 273)

REDIRECT EXAM.— FRANK DAVIS BY MOYNIHAN:

Q. In connection with conversation with Migliaccio about John B. Davis's deed, what, if anything, did he ever say to you about his ability to produce or whether he had recorded it?

A. He couldn't produce it or record it.

(Trans. 293)

CROSS EXAM. OF SALLY DAVIS BY RUGGERI:

Q. Now when is the first time that you say according to your knowledge Frank had any information that Lawrence had the deed to the mining property?

A. It was a rumor came in, I don't recall when it was. It was after Frank talked to John in Oregon and it was in June and we were, he had been to Lawrence's and John over the telephone, Frank asked him if he still owned his interest in Temple Mountain and he said "absolutely."

Q. When did he ask him that?

A. Well, I don't recall the date. He wouldn't admit that but it was—

Q. Did you ever go with your husband, Frank up to Attorney Hammond's office to find out for yourself whether or not there was a deed there?

A. No. It wasn't recorded. Frank came to the courthouse, he said it should be on record. He searched the books in the Rerocder's office, he couldn't find it. He asked Lawrence about

it, Lawrence said he knew about a deed.

Q. That's right.

A. That's all, he said he heard about it. But he said he had never seen it.

Q. Didn't he also say if he had the money he would go get it?

A. Yes.

Q. Didn't he tell you that was in Mr. Hammond's office?

A. No, sir, he didn't. He said, that's all that was said.

Q. Didn't he say that the reason he couldn't get it was because Mr. Hammond wouldn't surrender it to him because he owed him some money?

A. No, sir. Why he couldn't get that record, he said he knew about a deed, he had heard about it, but he had never seen the deed and that's all he knew about it.

Q. When did he tell you that?

A. He kept on telling that up until August.

Q. When did he tell you the first time?

A. The first time was when we went in the house one time and asked him about it.

Q. What day was that?

A. I couldn't tell the day, but it was sometime in June, I do remember.

Q. So that you first had information that he claimed to own these claims, in June didn't you?

A. He claimed, yes, but he never produced it.
(Trans. 309-10-11)

Q. Well he told you he knew about the deed and had the deed didn't he?

A. He said one time that he had heard about the deed himself.

Q. And when was that?

A. But that he didn't own the deed and that he didn't have that deed.

Q. When was the one time?

A. That was sometime in June.

Q. That was before you wrote this letter?

A. Yes, certainly.

Q. I hand you what has been marked Plaintiff's Exhibit 4 and ask you to examine that. I will ask you whether or not you have seen this before?

A. Yes, sir.

Q. When did you first see it?

A. I wrote it.

Q. Where did you write it? When?

A. I imagine on June 18, 1948. (See Ex. 4)

Q. Whose name did you sign to it?

A. Frank's

Q. Well, was Frank there when you wrote this letter?

A. I believe Frank was.

Q. Did he tell you what to put in it?

A. Oh, he told me, but I put it in my own style.

Q. Did you write paragraph 3 in your own style?

A. Yes.

(Trans 311-312)

Q. He said he could, he new where to get it (deed) didn't he?

A. Yes, but he never offered to get it.

Q. Did you ask him to get it for you?

A. No, sir.

Q. Why didn't you ask him?

A. Because it wasn't my business.

Q. You weren't interested in that property?

A. Yes, I was interested in that property but he didn't have it recorded in the proper place to find it.

(Trans. 313)

Q. Isn't it a fact that both you and Mr. Davis knew that there was an existing deed?

A. We heard rumors that there was an existing deed.

Q. What did you do to run those rumors down?

A. We asked John. We asked Mr. and Mrs. Migliaccio and we went to the courthouse and it wasn't recorded. What more do you want?

Q. Did you go and see Mr. Hammond to see whether or not he had the deed?

A. Well, I thought if Mr. Migliaccio had such a thing, he'd certainly go and get it and have it recorded.

(Trans. 313-314)

ARGUMENT AND LAW

THE RESPONDENTS RECEIVED NOTHING BY THE QUIT-CLAIM DEED FROM JOHN B. DAVIS DATED AUGUST 7, 1948 FOR THE RESPONDENTS HAD ACTUAL NOTICE OF THE EXISTENCE OF THE QUIT-CLAIM DEED OF JOHN B. DAVIS OF MAY 27, 1942, TO APPELLANT BEFORE AUGUST 9th 1949.

I. ACTUAL NOTICE — The Law.

Our Utah Code, Ann. Vol. 4, Title 78-1-6, reads:

“Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected to operate as notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, *but shall be valid and binding between the parties thereto without such proof, acknowledgment, certification or record, and as to all other persons who have had actual notice.*”

“Where purchasers of real estate had such notice of adverse claims of plaintiffs as would put reasonable person upon inquiry to ascertain what interest was, they took subject to any equities or interest that plaintiffs had in premises, though such interest was not recorded as required by this section.”

Gappmayer v. Wilkenson, 53 U. 236, 177 P. 763.

“The demands of this section are answered if a party dealing with the land has information

of a fact or facts that would put a prudent man upon inquiry, and which would, if pursued, lead to actual knowledge of the state of the title; and this is actual notice.”

Toland v. Corey, 6 U. 392, 24 P. 190, Aff'd 154 U.S. 499, 38 L. Ed. 1062, 14 S. Ct. 1144.

“*Under this section actual possession and occupancy amounts to “actual notice” to all the world of grantee’s rights, though his deed is not recorded.*”

Neponset Land & Live Stock Co., v. Dixon, 10 U. 334, 37 P. 573, applying 2 Comp. Laws 1888, S 2611, which is substantially similar to present action.

“*Actual occupancy is enough to put parties dealing with the premises upon inquiry.*”

Toland v. Corey, 6 U. 392, 24 P. 190, Aff’s 154 U.S. 499, 38 L. Ed. 1062, 14 S. Ct. 1144.

“To entitle one to protection as a bona fide purchaser as against an unrecorded deed, his purchase must have been made without notice, actual or constructive of the unrecorded deed.”

San Petro, etc. Co. v. U. S. 146 U.S. 120, 35 L. Ed. 912.

46 C. J. 539, “A notice is regarded in law as actual, when the party sought to be affected by it knows of the existence of a particular fact in question, or is conscious of having the means of knowing it.”

Parker v. Masters, 85 Kan. 130, 116 Pac. 227.

Rhodes v. Outcalk 48 Mo. 367.

“Notice is actual when it is directly and per-

sonally given to the party to be notified.”

46 C. J. 433. “It is the general rule that whatever puts a party on inquiry amounts in judgment of the law to notice, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding.”

Wood v. Carpenter 101 U.S. 135, 25 L. Ed. 807.

Essex Nat. Bank v. Hurley 66 Fed. 2d. 552.

46 C. J. at pg. 544, “Wherever facts put a party on inquiry, notice will be imputed to him, if he resignedly abstains from making inquiry for the purpose of avoiding notice.” (and cases there cited.)

20 R. C. L. pages 346-47, “Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire; he is then chargeable with all facts which, by proper inquiry, he might have ascertained. . . Notice of facts which would lead an ordinary prudent man to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such facts.” (and cases cited in note 11).

“A person has no right to shut his eyes and/or his ears to avoid information, and then say that he had no notice.”

Simmons Creek Coal Co. v. Doran, 142 U.S. 417, 38 L. Ed. 1063.

“It will not do to remain wilfully ignorant of the thing really ascertainable.”

McQuadly v. Warren 20 Wall, 14, 22 L. Ed. 311.

LeVine v. Whitehouse 37 Utah 260, 109 Pac. 2.

The facts that are involved by the foregoing law consist of (a) respondents coming to appellant's home, making inquiry as to who owned the mining claims. Respondents were definitely informed that appellant owned all of them. Transcript quotes are given in the evidence above and in Exhibit 4. (b) Respondent, Frank Davis, entered into an oral agreement, whereby he was to furnish machinery and other mining equipment, and share the profits, share and share alike. (Transcript pages 128, 138, 276, 277, 165.) (c) Appellant furnished the trucks and hauled the ore to Monticello where it was sold. (Transcript pages 136-139.) (d) The latter modifications of the first oral agreement are stated in the Transcript pages, 103, 128, 242, 244. (e) The actual sharing of the profits, after the deed of August 9, 1948, is revealed by the Transcript pages 243-44, 274, 276-277. All operations on these claims was done under the agreements between appellant and Frank M. Davis and the agreement between the two Davis brothers, from October 30 to the time when Frank M. Davis left the property on April 13, 1949. (Transcript page 146.) Frank Davis continued to operate under the second oral agreement until the filing of the suit, and had never indicated to appellant that he claimed any title to the claims until his Answer was filed in the lower court.

From the evidence presented, it is clear that the respondents had the actual notice which our statute requires. There existed such a relation, by telephone, by

correspondence and by conversation, between the brothers, John B. and Frank M. Davis, that it seems impossible to believe anything but that John B. Davis had informed his brother, Frank, that he had quit-claimed all of his interest in the involved mining claims to appellant. In Exhibit 4, the respondents state that they had been informed by appellant of the existence of Exhibit 1. This, in itself, is sufficient actual notice to fulfill the requirements of the statute as is revealed in the cases above presented and those following.

(a) ACTUAL NOTICE OR MEANS OF NOTICE

“There is no estoppel when the other party had notice of the facts; to have the benefit of an estoppel, a person must show good faith and diligence to learn the truth.”

Hirning v. Federal Reserve Bank, 52 F. 2d, 383.

Eyers Woolen Co. v. Gisum, 84 N. H. 1, 146 A. 511, 64 A. L. R. 1116.

S & E Motor Corp. v. New York Indemnity Co., 255 N. Y. 69, 174 N. E. 65.

When the facts are weighed, they clearly reveal by the letter, Exhibit “4”, a request by Frank M. Davis for information from John B. Davis, about where the title to these claims stood. In this Exhibit, respondent states that they have been informed of such a deed as Exhibit 1. Then on the several occasions when John B. Davis was with his brother, Frank, after this letter was written, it is quite unreasonable to believe that if

John B. Davis didn't write to Frank and thereby inform him, he most certainly did tell Frank in one or more of John's visits to Price, before August 9, 1948, as well as on that date, of his deed to appellant. It would be extremely unnatural for respondents to write to John B. Davis and ask about a deed and then not find out about it definitely when he, John B. Davis, came to see them and work with them.

Should it be found that John didn't inform Frank of John's quit-claim deed to appellant, then certainly, it was the duty of Frank from the "rumors" he heard of such a deed, to have ascertained what the true fact was. Frank Davis spent a large part of his time in Price where F. B. Hammond's office is located. It would have taken but a few minutes for Frank to have learned the truth about the deed he had been told so many times about by four of the witnesses quoted above. It would appear, that he was extremely negligent for not having done so. For this negligence, this court must hold that the appellant is not estopped and that appellant really owns all the claims subject to the ownership of the United States of the fee.

(b) POSSESSION CONSTITUTES ACTUAL NOTICE

"Under this section a deed as between the parties and those having notice thereof is good without any acknowledgement. *And actual possession constitutes notice.*"

Jordan v. Utah R. Co., 47 U. 519, 522, 156 P. 939, applying Comp. Laws 1907, S. 975, which is identical

with present section 78-3-2, P. 507. (Notes)

“Ordinarily a conveyance of land is valid between the parties, and as to *all parties having actual notice thereof, without being recorded.*”

Tarpey v. Deseret Salt Co., 5 Ut. 205, 210, 14 P. 338.

“It is a general rule that whatever puts a party on inquiry amounts in judgment of law to be notice, provided the inquiry becomes a duty, and would lead to knowledge of the facts by the exercise of ordinary intelligence and understanding.”

Gibson v. Jensen, 48 Utah 244, 158 Pac. 426.

In 46 C. J. pg. 534 S. 2, it states:

“A notice is regarded in law or action when the party sought to be affected by its knows of the existence of the particular fact in question, or is conscious of having the means of knowing it. . . . Notice is actual when it is directly or personally given to the party to be notified.”

“Actual notice need not be directly proved. Like any other fact, it may be inferred from circumstantial evidence. 20 Am. Jur., Evidence, sec. 272, p. 260, secs. 335, 336, pp. 312, 313; 31 C. J. S., Evidence, S. 178, p. 880; 46 C. J. S., Notice, sec. 110, p. 568; 2 Pomeroy’s Equity Jurisprudence, 5th Ed., Secs. 595, 596, pp. 611-619.”

People v. Juehling, 10 Cal. App. 2d 527, 531, 52 P. 520.

Schleif v. Grigsby, 88 Cal. App. 174, 180, 181, 263 P. 255.

Hawke v. California Realty, etc. Co., 28 Cal. App. 377, 382, 152 P. 959.

Cope v. Davison, 30 Cal. 2d 193, 200, 180 P. 2d 873, 171 A. L. R. 667.

Under Section 78-1-6, Utah Code Ann., it states:

“A deed as between the parties and those having notice thereof is good and actual possession constitutes notice.”

Jordan v. Utah R. Co., 47 Utah 519, 156 Pac. 939.

Gaffmayer v. Wilkenson, 53 Utah 226, 177 Pac. 763.

The appellant was in possession of these mining claims in June, 1948, and had been in possession of them since June, 1942. (Tr. 134) Frank Davis came to appellant and entered into an oral working agreement on the basis of a 50-50 share in the profits from the sale of ores shipped and sold from these claims. Why did he come to appellant if he didn't know of his brother's, John B. Davis, deed to appellant, as the deed from J. W. Jensen had not as yet been executed or received. (Exhibit 3) The court will recall the testimony of Sally Davis, where she states that after Frank had telephoned his brother, John, they called upon appellant at his house. (Tr. 305) The J. W. Jensen deed, Plaintiff's Exhibit 3, was not received until late in June, 1948.

Why did Frank M. Davis and Sally Davis come to see appellant at his home, after telephoning brother John, if John had not informed them of his (John's) deed to appellant over the phone? The evidence quoted above

tells us that no other deed was in existence except Exhibit 1, prior to this time, which time was early in June, 1948.

(c) SOME TITLE MUST BE IN GRANTOR OR
HE CONVEYS NOTHING BY HIS DEED

In 18 C. J., p. 159, 160, we find:

“There should be some title or interest, in law or equity, in the grantor to enable him to convey, and, except under a power of appointment so to do, a grantor can convey no greater estate than he has or in which he has an alienable title or interest. It follows that a deed from a person without title, or interest which he may convey, is inoperative as a conveyance, and the grantees, under a release and quit-claim, will take nothing where the grantor has no interest which he can convey. *So a deed is inoperative where the grantor has previously conveyed his entire title.*

From the foregoing evidence, the law cited, and more to be presented hereafter, we now present further argument as to estoppel. We look first at our statutes, keeping in mind that there was a quit-claim deed from John B. Davis and wife to appellant of all his interest in these seven (7) mining claims, but that said deed had not been recorded at the time John B. Davis executed a deed of AN UNDIVIDED ONE-HALF of his claimed of record THREE-QUARTERS INTEREST to his brother, Frank. Frank had been told about this deed of John's to appellant several times prior to John B. Davis' quit-claim deed to his brother, Frank Davis of August 9, 1948. Frank Davis had been put upon notice of the

existence of this deed which notice he admits in his and his wife's letter to John B. Davis (Exhibit 4).

II. ESTOPPEL

THE APPELLANT WAS NOT ESTOPPED BY THIS SILENCE OR OTHERWISE

The lower court, it appears, based its Finding and Judgment upon the idea that the appellant was estopped by his silence on two occasions and that because of such silence, the validity of the quit-claim deed of August 9, 1948, of John B. Davis to his brother Frank M. Davis, was upheld. The testimony upon which the court held is on the following evidence.

The parties, except Sally Davis, are in the Court-house in Castle Dale, when the following evidence is given:

CROSS EXAMINATION OF J. B. DAVIS BY MOYNIHAN:

“Q. And in the presence of Lawrence Migliaccio and Frank Davis and the county attorney, Mr. Jewkes, didn't you say I want a deed, in substance, I want a deed for part of these Vanadium King Claims to Frank? Would you have time to draw up the deed?

A. No, I did not. Not in front of Lawrence Migliaccio at all. . . .

Q. And didn't Mr. Jewkes tell you that he had time and if you'd come up to his office, he'd make out the deed?

A. Yes, he said he had time to make out the

deed, but we didn't do it in front of Lawrence Migliaccio. (Tr. 99-100)

Q. And after, isn't it a fact that you stated to Jewkes on the 9th day of August in the Clerk and Recorder's office, Castle Dale, Emery County Courthouse, Emery County, Utah, in substance and effort, 'Can you make out a deed from me to Frank for some of these claims?'

A. Yes, sir.

Q. Migliaccio was there?

A. Migliaccio wasn't there. He was in the courthouse, but he wasn't in the presence of where I asked that.

Q. But you then came upstairs with the County Attorney?

A. That was, that question you asked me before was asked in Mr. Jewkes' office. (Tr. 100)

Q. And you had a conversation though, did you not, in the Recorder's office wherein you requested Jewkes, while Migliaccio was in the Recorder's office, if he could make some papers out for these claims to Frank?

A. No, sir.

Q. You didn't say anything to him about making out a deed down there?

A. No, sir, not in front of Migliaccio, I didn't. We asked him up in his room.

Q. Well, did you make it down there, not in front of Migliaccio, did you have any conversation about it down there?

A. Not that I remember about, no.

Q. Were you watching Migliaccio every minute?

A. No, but he was in the Recorder's office and there was nothing said about them papers until we got up in Jewkes' room.

Q. Was there any reason why you didn't want Migliaccio to hear what you were saying that day?

A. Yes, I didn't want him to know that I was doing that.

Q. You came together.

A. I know it. But he didn't know we was going to do that though. (Tr. 101-102)

Q. After you and Migliaccio and Frank talked in June and July, wasn't the agreement that each of you were to have a third interest if Frank would go ahead and develop the claim?

A. In what ore we got.

Q. Isn't that the reason you filed the affidavit that I have heretofore questioned you about?

A. For what ore was dug, yes. (Tr. 105)

Q. Wasn't the consideration for the deed made by you to Frank on the 9th day of August based upon his demand for some interest in the claims before he advanced money for their operation and development?

A. Well, he wanted some protection and I figured because Migliaccio hadn't recorded the one I gave him that I done that and I gave Frank that on." (Tr. 106)

REBUTTAL—J. B. DAVIS BY STEFFENSEN:

“Q. Did you hear the—were you here in this build-

ing before the Clerk's office on the 9th of August and did you hear what Frank said about you?

A. Yes.

Q. Were you three here?

A. Yes.

Q. Was anything said in Lawrence's presence about the deed that was made by Jewkes that day?

A. No, sir.

Q. Are you sure about that?

A. Yes, sir, absolutely.

Q. Was anything said about that deed in Lawrence's presence so he could hear it?

A. No, sir.

Q. When that deed was made by Jewkes and taken down to the County Recorder's office, who took it there?

A. I did.

Q. Was Lawrence there?

A. He was out in the hall.

Q. Did you see you with the deed?

A. No.

Q. And you had it recorded that day?

A. Yes, sir. (Tr. 318-319)

Q. Did you tell your brother before you gave him that deed of August 9th that Lawrence owned that property?

A. No, sir.

Q. Did he ask you?

A. Well, he hinted around about it but I never did deny that Lawrence had a deed.

Q. You never denied it but you say you never told him about it?

A. No.” (Tr. 321)

REBUTTAL—J. B. DAVIS BY MOYNIHAN:

“Q. You could have gone up with Lawrence Migliaccio to Hammond’s office and got that deed and recorded it before the 1st of July when you came back here and avoided all that trouble if you knew?

A. I do not. I definitely could not because Hammond refused to let us have the deed.” (Tr. 323)

DIRECT—FRANK DAVIS BY MOYNIHAN:

“Q. Was anything said to Mr. Jewkes?

A. Yes.

Q. What did you say to him?

A. Well—

Q. In the presence of Migliaccio?

A. Well, I called him over and asked him if he could or would make a quit-claim deed from John to me.

Q. How far was Migliaccio from you when you made that request?

A. Well, he was just, we was just there all together.

Q. You called him from where he was and he came over to where you three were?

A. Yes.

Q. What did you do after you asked him that question? What was his reply?

A. He'd do it.

Q. And where did you go?

A. To his office. (Tr. 247-248)

THE COURT: Did you ever, now listen carefully, did you ever have any conversation with John (Lawrence) Migliaccio about your getting an interest in the ownership of the claims in this case?

A. Yes, sir.

THE COURT: Where did you have such a conversation?

A. At Senior's office.

THE COURT: Who was present?

A. John, Lawrence, and Raymond Senior.

THE COURT: Just to shorten the matter, was that at the time that has been referred to in the evidence here when a certain paper was drawn?

A. Yes, sir.

THE COURT: Now state as nearly as you can what was said and who said it at that time. Now, bear in mind the question is, what was said upon the subject of your getting an interest in the mines, the claims.

A. John told Raymond Senior that he would

give me one-half of his interest.

THE COURT: And what did Migliaccio, was Migliaccio there when that was said?

A. Yes.

THE COURT: What did he say, if anything to that?

A. He said nothing.

Q. At the time on the 28th of June, 1948, can you recall that as the date when Frank and you were in that office? (Senior's office)

A. Yes.

Q. Was Lawrence there?

A. I don't believe he was.

Q. On the 28th?

A. No, sir. (Tr. 317)

Q. Did you hear Mr. Sutch or whatever his name is, I don't remember the name.

THE COURT: Oliver Sutch.

A. No, I don't believe I did.

Q. Were you there when Oliver was there? (In Senior's office)

A. Yes.

Q. Was that the time Lawrence was there?

A. No, sir, he was not there at that time.

Q. He wasn't there at that time?

A. No, sir." (Tr. 317-18)

It is very evidence that Lawrence, the appellant,

never had heard John B. Davis claim that he owned $\frac{3}{4}$ of these seven mining claims. This testimony of John B. Davis is corroborated by Exhibit 3, as its recording date is June 28, 1948, by Lawrence Migliaccio. This definitely establishes that appellant was not in the offices of Senior on the 28th of June—just as this witness states.

“THE COURT: Did you ever, at any time have any conversation in the presence of Migliaccio on the subject of your getting an interest in the claims?

A. John and I—

THE COURT: Just a minute, did you ever at any other time?

A. Yes, sir.

THE COURT: Where were you?

A. We were here in this courthouse.

THE COURT: Who was present?

A. John, Lawrence and myself.

THE COURT: Were in this courthouse?

A. Out by this Clerk's office.

THE COURT: You and John and Lawrence, is that correct?

A. Yes.

THE COURT: What was that date?

A. August 9th.

THE COURT: 1948?

A. Yes, sir.

THE COURT: What was said?

A. We decided—

THE COURT: No. What was said? What do you recall? Now don't say you decided because that is a conclusion. What did you say and what is your best recollection of what was said by you or anyone else there on the subject of your getting ownership in this property?

A. We talked this over and decided—

THE COURT: No, what was said?

A. Well, I don't understand you.

THE COURT: Well, what did Lawrence Migliaccio say at that converence?

A. He was just there listening. John was putting up the talk.

THE COURT: What did John say?

A. He said, 'I will go and we will have you a deed made out.'

THE COURT: Where was Migliaccio when he said that?

A. He was with us.

THE COURT: What did he say, if anything?

A. Nothing.

THE COURT: What did you say?

A. Well, I said, 'We will see Mr. Jewkes.'

THE COURT: Were there any other times when you discussed that in the presence of Mr. Migliaccio? Discussed your getting an interest in the claims?

A. I couldn't say.'" (Tr. 263-264-265-266)

CROSS EXAMINATION OF FRANK DAVIS BY
RUGGERI:

"Q. But did you tak about that deed in the car?

A. Well I couldn't say, but we talked about the deed and we talked about the deed and had the arrangements made in the Recorder's office.

Q. Now as a matter of fact, you and John didn't talk about that deed in the car, did you?

A. We might have, we might not, I don't remember.

Q. You are not sure are you?

A. Not sur,e no, sir. (Tr. 278-279)

Q. That's right, close by and you could have said the same thing to him there couldn't you?

A. Well, I didn't want to disturb the other people. I called him over and we talked by ourselves.

Q. Didn't you want Lawrence to hear what you were going to tell him?

A. He could have heard me.'" (Tr. 279)

DIRECT EXAMINATION OF R. R. JEWKES BY
MOYNIHAN:

"Q. While you were in the Recorder's office, did you have occasion to see Lawrence Migliacio, Frank Davis, and John Davis?

A. I did.

- Q. What were they doing?
- A. As I remember, they were asking the Recorder, or Deputy Recorder, regarding some conveyance. What conveyance I just don't know.
- Q. Did you meet them there?
- A. I was at my abstracting table in the Recorder's office when I looked up and saw the 3 gentlemen at the counter.
- Q. Were any questions asked of you there?
- A. Yes. John or Frank, I was better acquainted with Frank, beckoned with a finger and asked me if I'd help him with a deed.
- Q. Did he say to whom ?
- A. Not in the Recorder's office, I don't think.
- Q. Was Magliaccio there?
- A. He was in the room.
- Q. Was John Davis there?
- A. Yes.
- Q. When he motioned with his finger to you, did you come over to where he was?
- A. I did, went to the counter.
- Q. And was Migliaccio there?
- A. He was in the room, but now his exact position in relation to mine and Davis', I don't feel competent to locate.
- Q. Well, state whether or not they were all—
- A. They were all in the Recorder's office at that time, the three of them, yes. I have a definite

impression that they were.

Q. And where did you go?

A. We proceeded upstairs to my office, County Attorney in the adjoining room there.

Q. What did you do there?

A. I asked him their business and it was the desire of John to have a quit-claim deed made in favor of his brother, Frank, and they asked me if I would help them." (Tr. 214-215)

CROSS EXAMINATION OF JEWKES BY RUGGERI:

"Q. Now, how fare away from Mr. Frank Davis were you sitting when he summoned you up close to him?

A. Oh, approximately less than, less than the distance between you and me.

Q. You'd say about feet?

Q. You were in speaking distance to him right there weren't you?

A. Yes.

Q. He didn't tell you what his business was at that distance did he?

A. No, I came over to the counter. (Tr. 219-220)

Q. Now neither John B. David or Frank Davis told you who they wanted the deed made to did they?

A. Not in the Recorder's office.

Q. Yes, down in the Recorder's office, and did they tell you which property it affected in

the Recorder's office?

A. No.

Q. All of that information wasn't disclosed until after you were up in the County Attorney's office?

A. That is true.

Q. Now, was Mr. Migliaccio in the County Attorney's office on the 9th when this deed was being prepared?

A. I don't recall that he was. I am almost sure that he was not. He had been in my office on several occasions, but not with Frank and John on this occasion.

Q. And he wasn't there on this—

A. I'd say he was not in my attorney's office on this date." (Tr. 220-221)

(b) LAW

Based upon the above evidence, the cases cited below appear to appellant to be applicable. The law of estoppel as it applies to this case follows.

Hilton v. Sloan, et al., 108 Pac. 689 at page 699, the Court by Justice Frick, states:

"The party invoking the estoppel must show that at the time he acted upon what appeared to him to be the real fact, he lacked both the knowledge and the reasonable means of ascertaining the real facts, and that he relied upon the facts and circumstances as they then appeared to him in view of the conduct of the party against whom the estoppel is invoked."

In the case of *Wellsville East Field Irr. Co., et al. v. Lindsay Land & Livestock Co., et al.*, 137 P2 page 634, Sylibus, it says:

“The elements requisite for ‘estoppel’ are substantially those necessary to found an action for deceit, with exception of element of knowledge of falsity.

“An ‘estoppel’ involves turpitude or fraud such as misleading statements or acts, or concealment of facts by silence with result that one party is induced by words, conduct or silence of another party to do things which he otherwise would not have done.”

In Re: Evans, 130 Pac. 217, 42 Utah 282, Justice Straup on page 225 of Pacific has this to say:

“Estoppels are odious, and every presumption is against them until the right to apply them affirmatively appears with certainty by the right record.”

Ut. State Bldg. & Loan Ass’n. v. Perkins, et al., 173 Pac. 950, 53 Utah 474. In the course of the opinion, the Court by Justice Gideon, has this to say about estoppel on facts somewhat the same as those of the instant case:

“It was insisted on by respondent that Perkins, one of the appellants was estopped. (The plaintiff Company is in no position to urge the ground of estoppel.) All the facts surrounding the execution of the conveyances were known to it (respondent), and it cannot, for that reason, claim that it acted to its injury in ignorance of the facts.”

The Idaho Supreme Court, in *Little v. Bergdahl Oil Co.*, 95 P2 433, holds in its opinion at page 838:

“To constitute an estoppel, it must be shown there was a false representation or concealment of a material fact; that it was made with knowledge, either actual or constructive, of the facts; that the party to whom the false representation was made was without knowledge or means of acquiring knowledge of the real facts; that the false representation was made with the intention that it should be acted upon and the party to whom it was made must have relied on or acted upon it to his prejudice.”

See *Tracy Loan & Trust Co. v. Openshaw Investment Co. et al.*, 132 P2 388, 102 Ut. 509.

Cook v. Cook, 174 P2 434 (Utah).

Patters v. Santa Fe Nat. Life Ins. Co., 138 P2 1019, 47 N. M. 202.

In 21 C. J. 1129-30, we quote:

“Necessity of Lack of Knowledge or of Means of Knowledge: As a corollary to the proposition that the party setting up an estoppel must have acted in reliance upon the conducts or representations of the party sought to be estopped, it is a general rule essential that the former should not only have been destitute of knowledge of the real facts as to the matter in controversy, but should have also been without convenient or ready means of acquiring such knowledge. One relying on an estoppel must have exercised such reasonable diligence as the circumstances of the case require. If he conducts

himself with a careless indifference to means of information reasonably at hand or ignores highly suspicious circumstances which should warn him of danger or loss, he cannot invoke the doctrine of estoppel.”

(Utah—*Centennial Eureka Min. Co. v. Juab County*, 22 Utah 395, 62 P. 1024; *Brigham Young Trust Co. v. Wagner*, 12 Utah 1, 40 P. 764; *Poynter v. Chipman*, 8 Utah 442, 32 P. 690.)

(19 F. 2d 781; 242 P. 518; 253 P. 137; 257 P. 406) and other cases cited in the notes.

There are many cases akin to the foregoing. Here we refer to but a few, which hold in acord with the general and universal rule that “the party asserting estoppel must be ignorant of the facts.”

Tomas v. Hellman, 1 P2 31; *Maggini v. West Coast Life Ins. Co.*, 29 P2 263; *California Canning Peach Growers Ass’n. v. Williams*, 69 P2 893; *Killian v. Couselko*, Supreme Do Unias Portuguees De Estado d. Calif.

“Generally, doctrine of estoppel is not regarded with favor and should be applied only when all elements constituting an estoppel clearly appear . . . ”

Susman v. Exchange Nat. Bank of Colorado Springs, 183 P. 2d. 57.

“The essential elements of ‘equitable estoppel’ are false representation or concealment of facts; knowledge, actual or constructive, of the real facts; the person to whom the representa-

tion was made must be without knowledge or means of knowledge of the real facts; representation must have been made with intention that it should be acted upon; and party to whom it was made must have relied on or acted upon it to his prejudice."

Tripp v. Bagley, 74 Utah 57, 176 Pac. 912.

Clarkson v. Van Antwerp, 200 P. 2d 442.

Rosser v. Texas Oil Co., 48 P2 327, 173 Okla. 309.

In Re: *Davis estate*, 101 P2 761.

Mercer Casualty Co. v. Lewis, 108 Pac. 65.

Bank of America Nat. Trust & Savings Ass'n. v. National Finding Corp., 114 P2 49.

Farmers Reservoir & Irrigation Co. v. Fulton Irrigation Ditch Co., 120 P. 196.

Fite v. Van Antwerp, 200 P2 439.

(1) NO ESTOPPEL BY SILENCE, UNLESS THERE IS A DUTY TO SPEAK

The District Court seemingly thought that the appellant was under a duty to speak. It is urged that where the respondent, Frank Davis, had "actual notice" under the statute 78-1-6, Utah Code Ann. 1943, which has been quoted above, it was not the duty of appellant to speak, even if he knew what J. B. Davis and Frank Davis were up to when they made the deed. (Exhibit C) The evidence as to whether appellant heard any conversations between the brothers or that appellant knew anything

about what the Davis Brothers were up to is very meager, uncertain, and at most, not a clear statement by the respondent as to what actually took place. The evidence referred to has already been presented. Appellant's denial of any knowledge of what Frank and John B. Davis were doing is strengthened when we hear what appellant says to these brothers months later, when at the mine, appellant says to both Frank M. and John B. Davis at Transcript pages 145 and 146:

“You know darn well, you guys, that I have got a deed and you know it is to that property.”

The testimony of Frank Davis is certainly not clear as to appellant's participation in the making of the quitclaim deed of August 9, 1948.

The Montana Supreme Court, in the case of *Sherlock v. Greaves*, 76 P2 87 at 91, holds:

“... mere silence cannot work an estoppel. To be effective for this purpose, the person to be estopped must have had the intent to mislead or a willingness that another should be deceived, and the other must have been misled by the silence.”

See also: *Fitzwater v. Norcross et al.*, 37 P2 522.

Even if what Frank Davis states were true, appellant did not actually know the deed had been executed and put on record, for we read: (Tr. pages 101, 102, and Exhibit 4). This testimony here referred is given below.

If appellant did not in some more definite manner participate in the execution of this deed than is indi-

catd in this testimony, he had no duty in fact, in law, or in conscience, to speak. Appellant told Frank many times as appears in the evidence above presented that John B. Davis had quit-claimed all his interests in these claims to him. Why in reason or common sense need he now at the Recorder's office, or should he then tell him again. Frank Davis had had ample opportunity to actually see the deed of John B. Davis to appellant. Such failure to investigate is simply pure neglect and respondent's position as to an estoppel is not worthy of consideration.

Our Supreme Court in the case of *Utah State Building Commission for the Use and Benefit of Mountain States Supply Co. v. Great American Indemnity Co., et al*, 140, P. 2, 763, at page 772, says:

“It is generally held in order for silence to work an estoppel, there must be a legal duty to speak, or there must be something wilful or culpable in the silence which allows another to place himself in an unfavorable position by reason thereof.” (Citing cases.)

From all the evidence, there is grave doubt that appellant had ever heard of the deed of August 9, 1948, or why should he have stated:

“You know darn well, you guys, that I have got a deed and you know it is to this property.”
(Trans. 145-146.)

and if appellant knew, why would John B. Davis say:

“Q. And you had a conversation though, did you not, in the Recorder's Office wherein you re-

quested Jewkes, while Migliaccio was in the Recorder's office, if he could make some papers out for these claims to Frank?

A. No, sir.

Q. You didn't say anything to him about making out a deed down there?

A. No, sir, not in front of Migliaccio, I didn't. We asked him up in his room.

Q. Well, did you make it down there, not in front of Migliaccio, did you have any conversation about it down there?

A. Not that I remember about, no.

Q. Were you watching Migliaccio every minute?

A. No, but he was in the Recorder's office and there was nothing said about them papers until we got up in Jewkes' room.

Q. Was there any reason why you didn't want Migliaccio to hear what you were saying that day?

A. Yes, I didn't want him to know that I was doing that.

Q. You came together.

A. I know it. But he didn't know we was going to do that though. (Trans. 101-102.)

Q. What is the fact as to whether you and Migliaccio and the Davis' went to the office, law office of Senior and Senior in Salt Lake the latter part of June, 1948, for the purpose of discussing this matter?

A. Yes, sir.

Q. You did, didn't you?

A. Yes, sir.

Q. Migliaccio was there?

A. Yes, sir.

Q. Did he assert any claim to anything else except the Jensen interest at that time?

A. There was no claims mentioned at that time.

Q. Senior & Senior gave you some advice, didn't they?

A. Yes, sir. That was on fighting this other case that was coming up?" (Trans. 92.)

If respondent had wanted to participate in the ownership of the mining claims he could have asked appellant to deed directly to himself, Frank M. Davis. Why all the secrecy about the deed of August 9th, 1948? The only answer that has any sense or reason in it is just what John B. Davis states:

"We didn't want Lawrence to know about it." (See Trans. page 101-102.)

The facts in this, our case, will not justify the conclusion that appellant had a duty to speak. Why would it be appellant's duty to reiterate that which he had so many times before then, already told Frank. It looks somewhat as if Frank and John were trying to "put one over" on the appellant, in the hope that appellant could not obtain his deed from Hammond. This inference is strengthened when we read Mr. Hammond's testimony and examine Exhibit 4. Mr. Hammond, in 1943, got

John B. Davis to execute a quit-claim deed (Exhibit 5) to Lawrence Migliaccio. This deed described claims that John B. Davis had never located, but Hammond withheld Exhibit 1 in order to force appellant to record a worthless deed so that Hammond could collect 2½ percent from somebody else. By examining Exhibits 1 and 5, this idea can be seen clearly.

(2) THERE IS NOT ESTOPPEL WHEN PARTIES ARE NEGLECT

The respondents cannot claim estoppel by virtue of their own negligence. The respondents, by Frank Davis' own admissions, had been told several times that John B. Davis had deeded all his interest in the mining claims to appellant. He was told by two persons, Mr. Cooper and Mr. Tomlinson, that the deed was in J. B. Hammond's office. (Transcript pages 174-175-176 and 182-183-184 and 185.) Frank Davis spent much time in Price, within a few steps of where Hammond's office is located. But he never took interest enough in its existence to go and see it.

In the case of *Gordon v. Pettingill, et al.*, 96 P2 416, the Supreme Court of Colorado states on page 418:

“A litigant will not be heard to say he was ignorant of the facts which it was to his interest to know, and which, if awake, he would have known.”

The Idaho Supreme Court in the case of *Kloppen-
burg v. Mayse*, 88 P2 883, at page 18, says:

“Equity will not do for a litigant which he had the power to do and could have done for himself and declined or neglected to do when the choice and opportunity was to protect himself.”
(Citing other Idaho cases.)

At no time after August 9th, 1948, is there any evidence in the record that even hints that appellant looked upon or dealt with the respondents, as interested owners, with himself. On the contrary, the evidence strongly points to the fact that the brothers, J. B. and Frank Davis were working the claims on the basis of a 50-50 agreement to share the profits made from the sales of ores by both appellant and respondents; John B. Davis to receive one-half of what Frank made. (Transcript pages 128.)

“Q. John wasn’t here until you sent for him? Now, Mr. Davis, if Lawrence wasn’t the owner of that property, why did you go to him to enter into a contract to go to work?

A. He and I was just agreeing.

Q. What were you agreeing to?

A. To an operation at the mine.

Q. All right, so that the only agreement between you and Lawrence was a working agreement at the mine, isn’t that right?

A. That’s right, a working agreement.

Q. You were never to get any title from Lawrence or from John, isn’t that right?

A. No, my agreement was to furnish money to start the mine on a paying basis.

Q. That's right and you were to get 50% of the profits, isn't that right?

A. Fifty percent of the profits until John arrived and then it was split 3 ways.

Q. All right that means, or rather the agreement was that the ore shipments and the money therefrom would be split 3 ways?

A. That's right. (Tr. 276-277)

Q. And with that understanding you agreed to put up all the money and still only take back a fifty-fifty profit, is that right?

A. Take back fifty-fifty of the profits and then one third of the profits. After October, we went one-third, before October, Lawrence and I went fifty-fifty.

Q. And you said on direct examination they made a proposition wherein you were to furnish all the money, is that right?

A. Until the property was paid for." (Tr. 274)

A fuller account of this sharing has been given above. Let us here remind this court that "after October we went one-third". Why one-third if appellant only owned one-fourth? But up to October it was 50-50. This was after the deed of August 9, 1948.

3. THE LAW GENERALLY

Our Supreme Court in many cases has laid down the elements of estoppel, but we present here, the case of *Kelly v. Richards, et al.*, 83 P2 731, and a few other authorities which have this to say:

“It is elementary that as a matter of pleading an estoppel in pais exists only when facts are alleged which show that one person has by his words, deeds, or conduct so behaved that another person in good faith relying upon such conduct has been intentionally led thereby to change his position for the worse and who would not have so changed his position except for the conduct of the other party. . . .

“In order to constitute this kind of estoppel there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; *the party to whom it was made must have been without knowledge or the means of knowledge of the real facts*; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice. To constitute an ‘estoppel in pais’ there must concur an admission, statement, or act inconsistent with the claim afterward asserted, action by the other party thereon and injury to such other party. There can be no estoppel if either of these elements are wanting. They are each of equal importance.”

21 Corpus Juris, pp. 1119, 1120; see also, Pomeroy’s Equity Jurisprudence (4th Ed.) P. 1644; Bigelow on Estoppel (6th Ed.) pp. 603-604. . . .

“It is an essential element of estoppel in pais that the person involving it relied upon the representation or conduct of the other party, was influenced in his own conduct by it, and would not have acted as he did but for the acts of which he now complains. If complainant’s act appears

to be the result of his own will of judgment, if it does not appear to be the proximate result of the conduct or representations of the adverse party, there is no estoppel. The conduct must of itself have been sufficient to warrant or induce the course of conduct by the party seeking to invoke estoppel and it must have been made for the purpose of inducing such response and action by the complainant."

In harmony with many other cases including our Utah cases, the California Supreme Court holds in *Moss v. Underwriters Report, Inc.*, 83 P2 03, quoting from page 507:

"The evidence fails to show the essential elements of an estoppel. One relying on a plea of estoppel must have been ignorant of the true state of the facts and must have been intentionally misled by the act of the other to his injury." (citing cases)

The respondent in this case suffered no injury, loss or prejudice. Frank Davis worked the claims for over three months, and respondents' Exhibit "F" shows that he sold, during this time, over \$14,000.00 worth of ore, for which he was paid in cash by the purchaser. He purchased from the money he received from the sale of ores, a \$2,200.00 compressor and over \$1,000.00 worth of other equipment, which he now is employing in his operation on these claims. Respondents are at least better off now than they were on August 9th, 1948 by over \$3,000.00. (Tr. 255-256)

Tuff v. Bagley, et al., 276 Pac. 912:

“One of the essential elements which must enter into and form a part of an equitable estoppel is that the truth concerning the facts relied upon by the person claiming the benefit of the estoppel was unknown. A person may not avail himself of this conduct, act, language, or silence of another under the doctrine of equitable estoppel, unless such person has been misled thereby.”

(Also 2 Pomeroy Eq. Jur. 4th Ed., S. 805.)

Utah State Bldg. & Loan Ass'n. v. Perkins et al.,
173 P. 950, has this to say:

“In order to constitute an estoppel, there must be a misrepresentation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made, must have been without knowledge of the real facts; it must have been made with the intention that it should be acted upon; and that the party to whom it was made must have acted upon it to his prejudice.”

The waiver by appellant that the Court finds of an accounting on appellant's Third Cause of Action was not a general waiver. It was merely a waiver of an accounting as to appellant's Third Cause of Action, a statutory cause of action for trespass. This could not, at the time it was waived, have been a general waiver as at that stage in the trial, there had been nothing appear in the evidence that would indicate that the court would find that the appellant and respondents would be found to be tenants in common—not even the respondents had thought so as they proceeded to make an accounting and would have continued doing so had their

evidence not been objectionable on the grounds of not fulfilling the law and rules of evidence governing such an accounting. The idea appellant had in this early waiver is illustrated in the case of *Lillywhite, et al v. Coleman, et al.*, 52 P2 1157, an Arizona case. It would appear by this ruling that respondents in the present and instant case waived appellant's waiver as a matter of law, for respondent does not take this waiver seriously as they proceed to render an accounting.

Attention is called to the waiver of appellant, in which he does not require the respondents to amend their answer, pleading estoppel. The Court will notice that this waiver occurred at that stage in the trial to only that evidence relating to the presence or absence of appellant, in Senior's law office in Salt Lake City, and it did not extend to the necessity of pleading an estoppel in the relation to the evidence pertaining to the quit-claim deed of August 9, 1948.

Laske v. Lampasoria, 200 P2 826.

"The burden rests wholly upon the respondents to prove their estoppel."

Garrett v. Cook, 200 P2 21.

"Burden rests upon one who relies upon equitable estoppel as a defense to an action to quiet title to satisfactorily prove all necessary elements of his alleged claim in that regard."

ASSIGNMENT OF ERROR NO. 6

THE COURT ERRED IN NOT ORDERING THE

RESPONDENT, FRANK DAVIS TO ACCOUNT FOR HIS ORE SALES DURING THE OCCUPATION OF THE PROPERTY BEFORE THE RESTRAINING ORDER WAS ISSUED AND SERVED.

If, as the lower Court holds, the appellant and respondents were tenants in common, then the duty of each tenant is to account to the other for ores, removed and sold, on their separate operations. If these parties are tenants in common, then the lower court erred by not allowing full accounting and equal set-offs. The Court's decision would be and is in the nature of penalty which is certainly not warranted by the evidence.

Should this Court uphold the Lower Court on its theory of tenants in common, then appellant is entitled to 10/16 interest in the equipment or its value, as it is listed and priced on pages 255 and 256 of the Transcript. Appellant is also entitled on this theory, to a full accounting from the respondents from October 1, 1948, up and including April 13, 1949, the date Frank M. Davis left the property. (Tr. 114) Not having made proper findings on these matters were errors on the part of the Lower Court.

We deem it only necessary to call the Court's attention to this matter as the law is so universal in its application, we feel, as did the attorneys for the respondents in their Lower Court brief, that the article on "Tenancy in Common" in 62 Corpus Juris, beginning at page 401, and especially the following quotations taken

from this brief and from that article are particularly applicable, to-wit:

“MINES AND MINERALS. Two or more persons owning undivided interests in mining ground are tenants in common.”

62 C. J., page 421, S. 26.

“Each tenant in common is equally entitled to the use, benefit, and possession of the common property, and may exercise acts of ownership in regard thereto.”

62 C. J., page 421, S. 26.

“MINES AND MINERALS. In accordance with the general rules relative to the use and enjoyment of the common property, tenants in common in mines and minerals are equally entitled to the use and enjoyment of the common property. One tenant in common may occupy and operate the common property, and is bound to care for it as if it were his own. He cannot exclude his co-tenant from exercising the same rights, and he cannot, by developing the property, obliterate the interest of his co-tenant.”

62 C. J., page 422, S. 27.

“RENTS AND PROFITS RECEIVED . . . the rule may now be stated in general terms to be that the co-tenant receiving more than his just share of the rents and profits as to the common property may be required to account to his co-tenants in proportion to their respective shares for the excess received by him.”

62 C. J., page 448, S. 65.

“Proceeds or profits diminishing corpus of estate. A co-tenant is liable to account for pro-

fits produced by his own efforts if such income is realized through a diminution of the corpus of the estate, as by quarrying, removing minerals or oil, or carrying away timber.”

62 C. J., page 450, S. 65.

“MINING . . . And the tenant in common taking the mineral cannot keep the proceeds of a sale thereof without accounting, on the theory that the portion of land furnishing the coal is no more than his just due.”

62 C. J., page 455, S. 73.

As will be seen from the foregoing general principles, the Lower Court erred in its Finds of Fact, Conclusions and Decree, even on the Court's theory of the case. (Judgment Roll pages 12-22 and 23-28.) It wholly overlooked this important matter and should be reversed on this alone, as the Court made no findings covering this or did the court render any judgment covering the division of their money.

ASSINGMENT OF ERROR NO. 7

THAT THE COURT ERRED IN NOT DETERMINING THE RESPECTIVE INTERESTS OF APPELLANT AND RESPONDENTS IN THE MINING EQUIPMENT PURCHASED BY APPELLANT AND RESPONDENTS AND EMPLOYED IN THEIR MINING OPERATIONS OF THESE CLAIMS.

According to the testimony of Frank M. Davis, the appellant owns at least a ONE-THIRD (1/3) INTEREST in a dump car, a mule and horse worth \$150.00; a

compressor worth \$2,264.00; a jackhammer valued at \$255.00; and 215' of hose valued at \$75.35; 240' of pipe valued at \$56.00. This property totals \$2,975.35. (Tr. pages 253-254.)

That the appellant has this interest is stated definitely by Frank M. Davis as follows:

“Q. Now is all that equipment paid for?

A. No, sir.

Q. How much of it is paid for?

A. A little left on the Compressor.

Q. Is the rest of it all paid for?

A. Yes.

Q. So that you own that, is that right?

A. Yes, sir.

Q. That equipment belonged, half of it to Mr. Migliaccio under the contract?

A. When it is paid for, his interest is in it, sure it is.” (Tr. 288-289)

The Court ignored in its Findings, Conclusions of Law and Decree, this matter. Appellant considers this an important as well as reversible error. But on the basis of the Court's Judgment, appellant should have been found to own not less than 10/16 of this property, but the Lower Court does nothing about it.

Appellant urges that this error is sufficient to require a reversal of the Lower Court's Judgment.

Copy of the foregoing brief is received on this.....

Attorneys for Respondents

K. K. Steffensen, being duly sworn says that he is an Attorney at Law and is the Attorney of Record for the above named Appellant in the above entitled cause, and that his office is in 414 Felt Bldg., Salt Lake City, in the County of Salt Lake, State of Utah. That Luke G. Pappas and Moynihan-Hughes-Sherman are the Attor-

neys of Record for the above named Respondents in said cause and that they, the said Attorneys reside:

Luke G. Pappas—Price, Carbon County, State of Utah.
Moynihan-Hughes-Sherman—Montrose, Colorado.

That in each of the said places, there is a United States Post Office and between said places and Salt Lake City, there is a regular daily communication by mail; that on the day of November, 1949, Affiant served two (2) true copies off Appellant's Brief in the above entitled case on the said Luke G. Pappas and Moynihan-Hughes-Sherman, the Attorneys of Record for the Respondents, by depositing copies of said Appellant's Brief on said date, in the Post Office at Salt Lake City, in the County of Salt Lake, State of Utah, properly enclosed in a sealed envelope, addressed to each of said Attorneys and at their respective addresses given above and pre-paying the postage thereon.

Subscribed and sworn to before me this day
of November, 1949.

NOTARY PUBLIC, RESIDING AT
SALT LAKE CITY, UTAH

My commission expires