

1950

## Lafe Morley v. Earl Willden, T. A. Claridge and Alden Willden : Brief of Respondents

Utah Supreme Court

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Cline, Wilson & Cline; Attorneys for Respondents;

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In the Supreme Court  
of the State of Utah

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FILED

NOV 28 1950

LAFE MORLEY,

*Plaintiff and Appellant,*

vs.

EARL WILLDEN, T. A. CLAR-  
IDGE and ALDEN WILLDEN,  
also known as AL WILLDEN,*Defendants and Respondents.*

Clerk, Supreme Court, Utah

Civil No. 7476

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BRIEF OF RESPONDENTS

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ON APPEAL FROM THE DISTRICT COURT OF  
THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF UTAH, IN AND FOR  
MILLARD COUNTY

HON. WILL H. HOYT, *Judge*

CLINE, WILSON &amp; CLINE,

*Attorneys for Respondents*

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# In the Supreme Court of the State of Utah

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LAFE MORLEY,

*Plaintiff and Appellant,*

vs.

EARL WILLDEN, T. A. CLAR-  
IDGE and ALDEN WILLDEN,  
also known as AL WILLDEN,

*Defendants and Respondents.*

Civil No. 7476

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## BRIEF OF RESPONDENTS

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### STATEMENT OF FACTS

This is an appeal from the judgment and decree of the District Court of Millard County, Utah, Hon. Will L. Hoyt, Judge Presiding. The action was brought by plaintiff Morley against Earl Willden, Al Willden and T. A. Claridge, claiming a partnership between the plaintiff and Earl Willden and T. A. Claridge for the purpose of prospecting for and locating mining claims and for the development and conducting of mining operations

thereon, and asking for a dissolution of the alleged partnership and an accounting between the parties.

The amended complaint (Record 7 to 9), alleges the formation of such a partnership between Morley, Earl Willden and Claridge in May of 1947 (amended to show the date as May, 1948, Tr. 1), for the purpose of prospecting for and locating mining claims and for the development and conducting of mining operations thereon; that since the commencement of such co-partnership Earl Willden and Claridge wrongfully took control of some of the mining claims located for and belonging to the partnership and permitted defendant Al Willden to share in the development thereof; that the defendants took profits therefrom to their own use and therefore became indebted to the co-partnership; that the claims wrongfully taken control of and developed are specifically set forth as Lost Sheep No. 1, Lost Sheep No. 2, Blow Out, Lost Sheep No. 3, Low Boy, Eagle Rock, Low Boy No. 1, Canyon, Low Boy No. 2 and Low Boy No. 3—all lode mining claims; and that the defendants refused to account to plaintiff for profits from operating the above claims. The prayer of the complaint asks that the alleged partnership be dissolved, that a receiver be appointed, that an accounting be had, that the defendants be restrained from further operations; that the property be sold, etc. The answer to the amended complaint (Record 11-12), in effect denies the partnership, denies that Earl

Willden and Claridge took control of any claims located for or belonging to any partnership; denies that they took any receipts or profits from any partnership venture, and denies that the plaintiff either has or is entitled to any right, title, interest or equity in the claims described in the amended complaint. The answer admits that some of the defendants operated the mining claims or a portion thereof, as set forth in the amended complaint, but denies that any of such claims were held or operated as partnership property or that the plaintiff ever had any interest therein.

On these issues the case proceeded to trial, and thereafter the court made findings and conclusions and entered a decree thereon, the decree providing that the plaintiff had no right, title or interest in the claims in question, that he was not entitled to any accounting, and that he take nothing by his complaint (Record 33-34).

The statement of facts in plaintiff's brief encompasses more of his contentions than of actual facts. It sets forth as facts many of plaintiff's contentions, denied by the defendants, and not supported by the findings. It is in many particulars inconsistent with the actual facts and sets forth only that portion of the evidence favorable to the plaintiff and makes no mention of many of the pertinent facts which of necessity must be taken into consideration in a determination of the controversy and which the trial court did take into consideration as ap-

pears from the findings.

For such reasons respondents will set forth a statement of facts which respondents contend are borne out by the evidence and as found by the trial court.

In the spring of 1947 Earl Willden and Claridge were talking in the presence of Morley about going out to Drum Mountain to do some prospecting and Morley asked to be taken along (Tr. 176-177; 314). On May 19th, 1947, the three men went into the district referred to and upon finding some favorable indications of ore located two lode mining claims called Dell and Dell No. 1, the three being equal-co-locators (Tr. 7; 178; 316).

Claridge and Earl Willden were prospectors of considerable experience (Tr. 314); and Morley was engaged largely as a turkey raiser and farmer, and engaged in mining to a limited extent (Tr. 2).

About two weeks later the three men went back for the purpose of prospecting the two claims further and with no discussion about any further locations (Tr. 179-180; 318); and in August of that year Claridge and his son went out and did some further digging on the Dell No. 1 (Tr. 317).

When the three men went out on the first prospecting trip there was no discussion as to how many claims would be located, or by whom (Tr. 70-71); when Claridge went out in the fall with his son and did some little fur-



ther work there was no discussion or conversation about the claims (Tr. 71); the next conversation concerning the claims was in March of 1948 when they decided to prospect the two claims already located, and all that was agreed to was that Earl Willden and Claridge would work out there and Morley, who was busy on the farm and with his turkeys, would hire a man to go in his place (Tr. 72). Al Willden was employed by Morley, and he ~~was~~<sup>went</sup> out to work on the Dell claims (Tr. 72). The expenses of gas, oil, etc., were to be divided three ways (Tr. 75).

In March, 1948, when Al was employed and Earl and Claridge went out, they went for the purpose of exploring the two claims then located, and nothing whatsoever was said about locating any additional claims (Tr. 180-181; 318-319).

Work then commenced on the two Dell claims and continued until about June 15th, 1948, when Earl Willden sold his interest in certain of the Dell group of claims, and when he and Al Willden ceased their work on this group of claims (Tr. 76-77; 190-191).

While the work was being done on the original locations, Claridge, and later Al Willden, did some prospecting on adjoining ground, and they made some locations on claims adjoining and contiguous to the two original claims. All of these claims were located in the name of Morley, Earl Willden and Claridge, excepting Lucky Dan, Dell No. 5, Big Boy, Hill Top and Summit, in which

Al Willden was named as a co-locator. These claims are shown on Plaintiff's Exhibit I as a part of the Willden-Claridge-Morley group.

Al Willden was located in on the five claims above mentioned because he had found some of the ore after working hours, on his own, and the other three voluntarily located him (Tr. 258).

Plaintiff's Exhibit I is a map showing a group of claims inside red lines which are designated on the map as Willden-Claridge-Morley group, and which are designated by the various witnesses as the "Dell Group or south group." The map shows also a group of claims inside green lines which are designated on the map as Willden-Claridge group, and which are designated by the various witnesses as the "Lost Sheep or north group." Also the map shows inside the green lines and south of and not contiguous to the Dell Group, one location called the Eagle Rock. All of the parties agree that the map shows substantially the location of the various claims, excepting that the defendants contend (Tr. 397 to 401) that the Canyon Claim is a full claim not overlapping either the Lost Sheep No. 3 or the Low Boy Nos. 1 and 2, and lying between the Low Boy Nos. 1 and 2 and the Lost Sheep No. 3. This would shift the Lost Sheep Nos. 3 and 1 and Blow Out claims six hundred feet further to the West and six hundred feet farther away from the Dell claims than as shown on the map.

On May 9th, 1948 (Sunday), Claridge, Earl Willden and Al Willden, left Delta and drove out in Claridge's car to the vicinity of the Dell group of claims for the purpose of prospecting, and during that day and at some distance from the Dell group found some indications of ore (float). Earl and Al found indications of ore on claims now known as Lost Sheep Nos. 1 and 2, and Claridge found some indications of ore on the claim now known as Blowout. Claridge wanted to locate his son in on these <sup>claims</sup> ~~findings~~, and it was decided that Earl Willden would locate and own the two Lost Sheep claims, and Claridge and his son would locate and own the Blowout claim. The three went back to Delta that night and Claridge undertook the work of preparing the location notices. Earl and Al Willden went back to work at the Dell claims on Monday and continued their work at the Dell claims through that week. Claridge dated the location notices of the Lost Sheep and Blow Out claims for May 10th, intending to post the notices on that date, but he actually went out and posted the notices on the 11th day of May (Tr. 275 to 277; 209-210; 380 to 404).

Later and during June, August and September several other claims were located by the two Willdens and Claridge contiguous to the Lost Sheep and Blow Out claims, and in August, 1948, the Eagle Rock claim was located by T. A. and Rex Claridge and Earl and Al Willden, this claim being neither contiguous to either the

Lost Sheep or north group of claims or the Dell or south group of claims (Pltf's. Ex. 1).

None of the Lost Sheep or north group of claims are on the same contact as the ore bodies found on the Dell or south group of claims, nor do any of the ore bodies found on the Dell or south group of claims extend into the Lost Sheep or north group. All of the claims in the Dell or south group are either on the same contact, or cross veins or fissures extend from the contact into these claims (Tr. 185; 321 to 324).

During the month of May, 1948, at a conversation held in the cabin at the Dell claims, and in the presence of Earl and Al Willden, Claridge told Morley that "the district was getting pretty well known around the country and there was more people, I thought, would come in to locate claims, and if he and Mr. Price wanted any to go out and get them, as it was every man for himself from now on" (Tr. 331). Plaintiff contended this conversation took place on May 27th, and the defendants contended the conversation took place about May 3rd. However, the court found that the conversation took place on May 27th. (Finding No. 13, Record 28-29). Up to that time there had never been any arrangement or discussion concerning any arrangement whereby Morley was to be included as a co-locator on claims other than those on the Dell contact (Tr. 331-2).

During the early part of June, 1948, Earl Willden

advised Morley that he would have to quit work on the Dell claims and work on the Lost Sheep claims (Tr. 190; 191); and Morley knew that Willdens had located the Lost Sheep claims (Tr. 192; 339-340); and about the same time Claridge advised Morley that the Willdens had located the Lost Sheep claims (Tr. 59; 339-340; 481-482). Morley took it for granted when in June he was advised about the Lost Sheep and Blow Out locations, that he was not made a co-locator (Tr. 482).

At the time Morley was advised concerning the Lost Sheep and Blow Out locations he made no claim to any interest therein, made no objections to not having been made a locator, and did nothing about the matter (Tr. 61 to 65; 193-197; 337); and it was several months after the Willdens had commenced and made several shipments before Morley made any claim to them concerning an interest (Tr. 79).

Morley knew that the Willdens were working on the Lost Sheep claims, had paid for the building of a road to the claims and were furnishing all of the machinery, tools, and paying all of the expenses, but he made no offer to contribute anything, nor made any inquiries concerning the venture until many shipments had been made and the value of the property demonstrated (Tr. 61-62; 129-132; 484; 197-198).

Morley had a contract with Geneva Steel Company for the shipment to it of fluorspar ores and which re-



quired him to ship 500 tons of ore within thirty days (Tr. 111; 194), or at least to make some shipments within a limited period, because on June 22nd Geneva Steel Company inquired concerning shipments (Deft's. Ex. 6), and on June 29th cancelled the contract (Deft's. Ex. 8). Prior to the shipment of the first car of ore by the Willdens on the 18th or 20th of June, Morley asked Earl Willden if the Willdens would ship the first car under his contract to protect it. Willdens agreed, and the proceeds of about \$1500.00 came to Morley by way of a check from Geneva Steel Company. Morley endorsed the check and turned it over to Earl Willden, making no claim to any of the proceeds, making no inquiry about expenses of getting out the car, or of the operations of the Lost Sheep claims from whence the ore came (Tr. 194 to 196). (Tr. 64-65; 112 to 117). After the first shipment the Willdens procured their own contract from Geneva Steel and thereafter shipped in their own names, all without any objection from Morley, even though Morley's contract was being cancelled by Geneva Steel because of non-shipments (Tr. 117-118; 195 to 197).

On June 28th, in reply to the Geneva Steel Company's inquiry about ore shipments, a letter was written by Mrs. Morley in her handwriting and in the presence of Morley and Claridge, and then typewritten at Fillmore and sent by Morley to Geneva Steel, stating that Claridge, Earl Willden and he were working as partners developing a

property called Dell Mining Company; that Willden sold his interest to Claridge and Morley "to finance work on one claim for he and his brother." (Pltff's. Ex. 7, dated July 28th, but admitted by all parties and stipulated by them to have been written on June 28th). (Tr. 338-339).

During the early part of June, 1948, Earl Willden told Morley he would have to quit work at the Dell claims because he was out of money, and would either have to go to work or do some work on the Lost Sheep claims and see if he could not ship a car of ore from there. Morley knew that Earl and Al Willden had located the Lost Sheep claims for themselves (Tr. 76-77-78; 190).

A few days before June 15th Earl Willden sold his one-third interest in the five claims located in the name of Morley, Earl Willden and Claridge, making the sale to Claridge and Morley, for \$1500.00. Morley knew that Earl was making the sale for the purpose of raising money to work the Lost Sheep claims (Tr. 122-123; 124; 128; 191-194). At that time Morley made no claim to any interest in these claims (Tr. 193). Within a few weeks Claridge sold his interest in these claims to the Ward Leasing Company of which Morley was a partner, for \$25,000.00, receiving one-half in cash and the balance in royalties (Tr. 129-130). There was practically no amount of additional development work done on these claims after Willden sold out and before Claridge sold out (Tr. 130). In other words, Willden sold a one-third interest for

\$1500.00 in order to raise money to develop the Lost Sheep, and a one-half interest three weeks later sold for \$25,000.00. Willden, according to Morley, made a sacrifice in disposing of his interest in the Dell claims in order to finance work on the Lost Sheep (Tr. 131).

Morley knew that if the Willdens had more financing and more equipment they could have produced ore from the Lost Sheep considerably faster than they did. There was additional machinery and equipment on the Dell claims not then in use, but Morley made no offer that the machinery be used on the Lost Sheep claims nor suggested assisting in any other way, financially or otherwise (Tr. 129).

When Morley was on the Lost Sheep property a week or ten days after Willdens commenced work there and saw the work progressing he said to the Willdens "It is too bad we wasn't all in on this, you could have had the compressor in on this from the Dell claims." (Tr. 197; 263). On July 11th when Morley was on the Lost Sheep claims, and after the Willdens had shipped several carloads of ore from the claims, and after he had received a check from Geneva Steel Company for \$1,500.00 as the proceeds of the first car, and after he had endorsed the check and delivered it to Earl Willden, he did not discuss with them any ownership he claimed in the Lost Sheep claims (Tr. 64-65; 483-484).

Morley's first demands were made on Claridge and



the Willdens about September 24th or 25th, 1948 (Tr. 55), although he had been on the Lost Sheep property at least a couple of times, once because he was curious about the property, had heard talk about it, and wanted to see for himself what it looked like (Tr. 483-484), and after the Willdens had shipped quite a lot of cars of ore (Tr. 484).

Since many of the court's findings are not challenged, practically all of the testimony on the part of witnesses other than the plaintiff and the three defendants is immaterial and it is not necessary to either refer to or discuss such testimony.

## ARGUMENT

### Plaintiff's Point No. 1

The Trial Court did not err in its Finding No. 16 to the effect there was no agreement between the plaintiff and Al Willden that Al Willden should prospect with or for or locate claims for the plaintiff.

Plaintiff bases his entire argument on the fact that Al Willden was located in as one of the locators on the Lucky Day claim, which bears the location date of May 10th, 1948, the same date given as the location date on the Lost Sheep claims Nos. 1 and 2, and Blow Out claim. It is asserted on Page 16 of Appellant's brief that "had his agreement with Morley permitted him to do so, he would have laid some claim to the Lucky Day, and therefore Al Willden was under an obligation to make Morley

a co-locator in the Lost Sheep and Blow Out group of claims." It is also asserted that the situation was no different concerning the Lost Sheep and Blow Out claims than it was concerning the Lucky Day claim.

Appellant overlooks or disregards Finding No. 15 (Record 29), the correctness of which is unchallenged by him, wherein the court finds that Lucky Day, along with other claims in the Dell or south group which were located after, or notices of location of which were recorded after May 27th, 1948, (Lucky Day claim was recorded June 8th, 1948, Pltf's. Ex. 10), were originally discovered prior to such date, and on which the locations were not perfected or on which the locations were subsequently amended; that all of these claims, including Lucky Day, are contiguous to the other claims making up the Dell group, ~~to wit~~, and Claridge believed the veins or contacts on the Dell and Dell No. 1 would extend into all of these contiguous claims, and for that reason Claridge and Earl Willden felt and recognized an obligation to include the plaintiff Morley as a co-locator therein.

Particularly concerning the Lucky Day claim, the location notice of which is dated May 10th, 1948, while the record is not as clear as it might be, yet it is reasonably clear that the actual location of this claim was prior to May 10th, and the work of completing or perfecting the location was made on May 10th as a relocation or amended location. This same thing was true of one or

two of the other claims as found by the Court in its Finding No. 15. When Earl Willden was testifying on cross-examination the following appears (Tr. 211):

Q. And also referring to notice of location contained within this same exhibit (Pltf's Ex. 10), referring to Lucky Day, do you know if he (Claridge) located Lucky Day on he 10th of May?

A. I think that he re-located it or something there on that day.

Q. Was there any re-location of Lucky Day?

A. Well, it seemed that he had made a mistake in the length of it or something. I believe that is the one that he had made a mistake in the length, a couple of hundred feet.

And when Claridge was testifying on cross-examination concerning the locators of claims, he was asked (Tr. 379):

Q. What location notices did you and Earl Willden appear on in May, 1948?

A. Lucky Day on the amended.

Appellant also overlooks the import of Findings Nos. 11 and 12 (Record 28) to the effect that the most southerly point of any of the Lost Sheep claims located prior to May 28th, 1948, is approximately 3600 feet distant from the most northerly point on any of the Dell claims located prior to that time; that the ore veins or contacts exposed on the Dell claims located prior to May

28th, 1948; are not the same veins or contacts exposed on the Lost Sheep claims—or in effect that the two groups of claims are separate and distinct from each other.

The court's Finding No. 16 is predicated, among other things, on the testimony of Al Willden that he had found some ore on some of these Dell group of claims, after working hours and they located him in; that he was never asked or requested by Morley or Claridge or Earl Willden to include them in on any locations which he might make for himself; that it was never discussed with Morley (Tr. 257-8-9); and on the testimony of Claridge that when Morley, he, and the Willdens were speaking of locating Al Willden in on several of the Dell group no one mentioned anything about claims other than those comprising the Dell group (Tr. 325); that he never instructed either Al or Earl Willden to go out and prospect for other or new claims, but did tell them it would be well to look around and see if they could find some new deposits of ore on the Dell claims; that he never instructed the Willdens to prospect other than on the Dell claims; that he never discussed with Morley, or Morley with him the fact that they were to prospect for claims or hunt ore other than on the contact on the Dell claims; that Morley was never advised or told that if the Willdens or Claridge prospected for ground away from the Dell group and the mining contact on it, it would be for his benefit and he should be a co-locator; that Morley never asked to be lo-

cated in on any other than the Dell group (Tr. 327-328); that he never advised Al Willden that he could not, while working on the Dell claims, prospect for and locate other claims for himself and that there was never any discussion of such a matter (Tr. 329).

The Court found (Finding No. 20, Record 31), and there is ample proof to sustain such finding as we shall discuss later, that as early as the fore part of June, 1948, that Claridge and the Willdens had located two or more claims northerly from the Dell group and that he had not been named or included as a locator on such claims. The Court also found in Findings Nos. 20 and 21, which are unchallenged by the appellant, that in the month of June, 1948, Morley permitted Earl Willden to ship in Morley's name the first car of ore mined from the Lost Sheep claims; that he received a check from Geneva Steel Company in the sum of about \$1,500.00 in payment for this ore and delivered the check to Willden without protest and without claim to any portion thereof; that he made no inquiry concerning any claimed interest he would have in the proceeds, asserted no rights to any interest in the claims and evinced no interest whatever in these claims.

The Court found (Finding No. 21, Record 32), and which finding is unchallenged by appellant that Morley made no demand upon Claridge or Willdens for any share or interest in any of the claims in the Lost Sheep group or for any accounting of proceeds from shipments made

from said claims prior to the latter part of August or September, 1948. It will be remembered that by then the Willdens had shipped a number of cars of ore (Tr. 79; 483-484).

No doubt the Court made Finding No. 16, (having observed the demeanor of the plaintiff and the defendants on the stand, their apparent candor or lack of it, their reluctance or lack of it in testifying), by taking into consideration the fact that Morley himself, by his own actions, disclaimed any interest in the new claims, until the claims were developed to a point where it was obvious they were valuable. In our statement of facts we set forth transcript pages showing where such facts could be found and there is no point in restating the facts in detail or in a further reference to the transcript pages, but we will mention very briefly some of the facts we have in mind.

During the early part of June, 1948, Earl Willden advised Morley that he was going to quit work on the Dell claims and go to work on the Lost Sheep claims, and about the same time Claridge advised Morley that the Willdens had located the Lost Sheep claims. Morley took it for granted when in June he was advised about the Lost Sheep and Blow Out locations that he was not made a co-locator. He made no claim then to any interest in the claims, and made on objection to not having been located in, and it was several months after the Willdens had made a number of shipments before he made his claim.

Morley knew that the Willdens were working on the Lost Sheep claims and that the Willdens had paid for the building of a road to the claims and were furnishing all of the machinery, tools and paying all expenses of operations, but Morley made no offer to contribute anything, nor made any inquiries concerning the venture until many shipments had been made and the value of the property demonstrated; Morley had the contract with the Geneva Steel Company and asked Earl Willden to ship the first car under the Morley contract to protect it. When the proceeds of \$1,500.00 was returned to Morley he turned the money over to Earl Willden, making no claim to any of the proceeds, making no inquiry about expenses of getting out the car or of the operations; that after the first shipment the Willdens procured their own contract from Geneva Steel and thereafter shipped in their own names, all without any objection from Morley, even though his own contract was being cancelled by Geneva Steel because of non-shipments.

On June 28th, in reply to the Geneva Steel Company's inquiry about ore shipments he sent a letter to Geneva Steel Company saying that Claridge, Earl Willden and he were working as partners developing a property called Dell Mining Company and that Willden sold his interest "to finance work on one claim for he and his brother."

That he knew Earl Willden was selling his interest



in the Dell claims for \$1,500.00, for the purpose of raising money to work the Lost Sheep claims. Morley made no offer to contribute anything toward the development of the Lost Sheep, although he knew that Willden was making a sacrifice in disposing of his interest in the Dell claims, and Claridge and Morley each bought one-half of Earl Willden's interest. The interest of Earl Willden in the Dell claims was valuable, and known by Morley to be valuable, because within three weeks after the sale and before much, if any, work was done to develop them further, Claridge sold his interest, then a one-half interest, in the Dell claims, to the Ward Leasing Company of which Morley was a partner, for \$25,000.00. In other words, Willden sold a one-third interest for \$1,500.00 and a one-half interest sold immediately thereafter for \$25,000.00.

Morley knew that if the Willdens had more financing and more equipment they could have produced ore from the Lost Sheep claims considerably faster than they did, and there was additional machinery on the Dell claims not then in use, but Morley made no offer or suggestion to assist with the financing or in any other way. When Morley was on the Lost Sheep property a week or ten days after the Willdens commenced work thereon he made the statement to Earl Willden, "It is too bad we wasn't all in on this, you could have had the compressor in on this from the Dell claims," but he made no offer



to contribute anything and made no claim to any interest in the Lost Sheep claims.

No doubt the court concluded that if Morley, in good faith claimed an interest in the Lost Sheep group of mining claims when he was first on notice that he was not a co-locator early in June, he would have asserted such interest then and there; and he would have insisted on being recognized as an owner, taken an interest in the mining operations, insisted on a settlement as the cars were shipped, etc., etc. No doubt the court concluded from the facts that Morley did not claim any interest in any mining claims other than the Dell group until it was firmly established that they were valuable and until it was obvious to him beyond any question that they would become an asset and not a liability.

The fact of the matter is that if Morley did have it in mind that he could assert an interest, he was very careful to keep such assertion to himself in the first instance and for a number of months, so that if the claims proved without commercial value the Willdens and Claridge could not claim any right against him to contribution for the moneys and labor they had expended. If this be so, then he should not now complain because the court found from his own actions and conduct that there was no partnership arrangement as to the Lost Sheep group of claims.

It is very clear from the evidence that had the Lost

Sheep claims failed to materialize as claims of value, and had the Willdens lost their money, labor and efforts in trying to develop the claims, they could not have enforced any right to any contribution whatsoever from Morley. Until September, when the value of the claims was demonstrated, Morley had not done one single thing from which any court could have found that he was a partner in the Lost Sheep group of claims or was legally bound to share in any part of the losses, and it is quite obvious that he carefully kept himself in that enviable position.

It is asserted by plaintiff in his brief (page 16) that the real reason Morley was not made a co-locator in the Lost Sheep group was because they had found a fortune in the Lost Sheep group. The evidence is undisputed that the original two Lost Sheep and the Blow Out claims were located after one day's prospecting on Sunday, May 9th, and the only indications of ore was some float (Tr. 209-210; 214-224; 275 to 279; 259-260); the location notices were made out that night at Delta and posted two days later on the 11th. Anyone having the slightest experience in mining knows that in order to demonstrate the value of a prospect considerable exploration work must be done and generally considerable money must be spent. Likewise anyone having the slightest experience in mining knows only one out of hundreds of prospects ever makes a mine with commercial possibilities. How then can it be said that after a few hours prospecting on

the surface Claridge and the Willdens knew they had found a fortune? It is more likely that after Morley had spent money on the Dell claims and they had made no shipments after several months of exploration work, and after Earl Willden was not willing to go on with the work there because of his financial inability to do so, that Morley wanted no part of any additional claims, and that he expected none. At any rate his every action and his entire course of conduct from June until September indicated that very thing.

We find no case and appellant cites no case, and we know of no mining custom or law holding that a miner working for wages is required to turn over to his employer mining claims prospected for and located after working hours or on Sundays or holidays, or is required to locate his employer in on any such claims—particularly where the claims are not found and located on the contact or ore bodies of the employer's ground, or running from such ground. And this is particularly true also where the employer knows of such locations, makes no contribution toward the development, makes no claim thereto and evinces no interest therein until after the mine has been developed into a paying deal.

The one case cited by appellant, *Costello vs. Scott*, 93 Pac. 1, to sustain his position is so dissimilar in facts as to be easily distinguishable from the case at bar, as can be determined from even a casual reading thereof.

## Plaintiff's Point No. 2

The trial court did not err in its finding that neither Claridge nor the Willdens started work on the Lost Sheep group until after Earl Willden arranged with plaintiff to cease work on the Dell group in the early part of June.

It is asserted by plaintiff (pages 19 and 20 of his brief) that what Earl Willden said and did about changing work from the Dell claim to Lost Sheep claim is not inconsistent with continuing on with their original arrangement; that Morley's role was to supply finances, supplies and equipment.

Morley himself admits that Earl Willden made a sacrifice when selling his interest in the Dell claims "in order to finance the work on the Lost Sheep" (Tr. 131). (Also see Tr. 192-193). That is apparent from the fact that Willden sold his one-third interest for \$1,500.00 (Morley bought one-half of the one-third for \$750.00), and Ward Leasing Company of which Morley was a partner three weeks later with no additional work done purchased Claridge's half interest for \$25,000.00 (Tr. 129-130). The Willdens built the road from the cabin to the Lost Sheep entirely at their expense (Tr. 198-199). They used their own equipment and tools and paid all expenses of exploration work (Tr. 199; 89-90). How then, can it be contended that what Willden did about changing work from the Dell to the Lost Sheep is not inconsistent with continuing on with the original arrangement concerning

the Dell group? Everything done by Earl Willden indicated that he neither believed or considered that Morley had an interest in the Lost Sheep claims, otherwise why would he make the sacrifice in selling his interest in the Dell claims to spend on the Lost Sheep, rather than discuss with Morley the working of the Lost Sheep under the arrangement where expenses were furnished. Appellant argues that the answer is clear—that they had found a bonanza. As stated before, and as no doubt known by the trial court, a prospect is not known to be a mine of great value by the first day's casual prospecting, or by a little scratching around, and that only one out of a great number of prospects ever pays out. Morley knew that considerable money, time and effort might be spent on these prospects without results, which is the very reason he did not make any move to assert an interest, and made no claim to a right therein until he knew beyond a question that the claims had proven an asset and not a liability.

Al Willden testified, and there is nothing in the record to discredit such testimony, that he did not work on the Lost Sheep claims excepting the prospecting on May 9th and a little additional prospecting once, until after he had quit work on the Dell claims (Tr. 254; 258; 260; 261-262; 276 to 287). Earl Willden testified to the same effect (Tr. 191; 193; 216-7; 221).

Respondents contend, therefore, that not only is the

evidence sufficient to support Finding No. 17, but there is no evidence whatsoever upon which to base any contrary finding.

### Plaintiff's Point No. 3

The trial court did not err in finding in paragraph 18 that there was no express agreement or definite arrangement at any time, either oral or written, between Morley and Earl Willden or Claridge relative to prospecting for or location or ownership of mining claims other than the Dell and Dell No. 1 claims, although Claridge and Earl Willden recognized an obligation to name plaintiff as a co-locator with them on claims adjoining the Dell and Dell No. 1.

Appellant does not contend in his brief, except for the bald statement that the evidence is insufficient to support such finding, that there was any express agreement or definite arrangement relative to prospecting for or location or ownership of claims other than the Dell and Dell No. 1. He does not point out any part of the evidence wherein he claims there was any express arrangement, but contends that there need not be any express agreement or definite arrangement in order to create some obligation relative to prospecting for or location or ownership of mining claims and in that the respondents concur. Respondents have no quarrel with the legal principles quoted on page 22 of appellant's brief. But re-



spondents insist that the evidence as a whole supports the findings and that the findings indicate that whatever business arrangements existed between the parties was limited to the Dell claims, and that the evidence and the findings set forth ample and sufficient facts from which it must be determined that no partnership existed as to the Lost Sheep group of claims.

As quoted on page 22 of appellant's brief, "What is a mining partnership is a question of law. Its existence in a given case, however, *is a question of fact* depending for its solution on inferences to be drawn from the evidence deduced."

A reading of the testimony of the plaintiff and that of the three defendants demonstrates beyond any shadow of a doubt that there was no express agreement or definite arrangement concerning any claims other than the two original Dell claims, and as testified to by the defendants, Claridge and Earl Willden felt and recognized an obligation to include Morley as a co-locator on those claims contiguous to these two original Dell claims and to which the ore contact or ore bodies extended (Tr. 204-5; 356-7).

#### Plaintiff's Point No. 4

The trial court did not err in finding in paragraph 19 of the findings that the plaintiff knew at least as early as the fore part of June, 1948, that Claridge and the

Willdens had located two or more claims northerly from the Dell group and that he had not been named or included as a locator on such claims.

We think the evidence is not only sufficient to support such a finding, but is overwhelmingly so. Certainly it cannot be successfully contended that a finding must be based on the appellant's testimony alone, and that his course of conduct and actions cannot be considered as contradicting his words; nor can it be successfully contended that the court is bound to believe the appellant as against the testimony of the defendants. The questions and answers quoted by appellant <sup>in his brief</sup> do not tell the entire story.

True it is that Morley now insists that the first time he became aware of the fact he was not located in on the Lost Sheep claims was when he went to the Court House in Nephi about September 18th, 1948. Was he advised before then of the situation? What does the record show?

Morley states that in May, "Tass (Claridge) said he and Earl and Al each had a couple of claims down around the point that they had located \* \* \* I didn't know just exactly where I stood on it" (Tr. 59). That Claridge advised him that he (Claridge) and the Willden boys had located some claims *themselves* a little farther to the northwest, and that he understood that the claims Claridge was referring to was the Lost Sheep and Blow Out (Tr. 59-60).



Morley asked Claridge no questions about whether he had been located in because he did not want to create an argument and when Claridge said "We have located holdings, I had one down around the point, I had one in my own name and my boy's name, it may not mean anything because me and my boy had the one," Morley said he "took it that it may not be too important at that time" (Tr. 61).

Q. (Asked of Morley) If I understand correctly, Mr. Claridge told you he had located one or two claims and Willden boys had located the others?

A. Yes.

Q. You knew you hadn't been located in?

A. I didn't know.

Q. You suspected it then?

A. Yes.

Q. When you tell us you didn't know until September 18th, you mean that is the first time you ever went to the records to find out?

A. That is a fact.

Q. Isn't it a fact, Mr. Morley, that as early as the early part of June you knew definitely that you was not located in on the two Lost Sheep claims when the first shipment of ore was made from these claims?

A. No, I didn't know definitely, I hadn't seen the records. (Tr. 62-63).

In the fore part of June Morley wrote a letter to

Geneva Steel Company saying that the Willden boys had located a claim of their own (Tr. 63).

Q. Now, at the time you sent this letter to Mr. Ten Eyck didn't you know that the Willden boys had located these claims, all these claims in this area of their own?

A. I had an idea they had. I was not really positive as to what became of them.

Q. Did you ever discuss with the Willden boys the location of these Lost Sheep claims?

A. No, I didn't. (Tr. 63).

Morley admits that on July 11th he was on the Lost Sheep claims and saw the Willden boys working there. They discussed several things but not the work the Willdens were doing on the claims. The Willdens had previously shipped several carloads of ore, Morley had received the proceeds from one and delivered the entire proceeds to Earl Willden; he did not discuss the ownership of the Lost Sheep property—at least until September; he knew they were working on the Lost Sheep claims in June and that they were shipping steadily, but never discussed with either of them any claim or interest he thought he had, how much they were shipping or where the money was going (Tr. 65-6-7).

Q. When did you first become cognizant of the fact they had made locations in this north group of claims?

A. It was in the fore part of June.

Q. How did you become aware of that?

A. Mr. Claridge told me.

Q. What did he say?

A. He said "I have got a claim down around the corner, down around the point here that I located for Rex and I. I figured it would be the means of giving him a little work through the summer, and we located it for ourselves and the Willdens located a little claim there, but he said 'I don't think they amount to anything'." (Tr. 481).

Q. You say in June he (Claridge) told you the Willdens had located these claims?

A. Yes.

Q. One claim for them, yes. You understood by that that they had located that claim for themselves and without including you as locator?

A. I took it for granted that is the case.

Q. And the same on his (Claridge) own?

A. Yes. (Tr. 482). (See also Tr. 483-4).

Earl Willden told Morley that they had the Lost Sheep claims on which Morley had not been located in (Tr. 190-191). And when buying out Willden's interest in the Dell group Morley said, "You need money to get started over there on those Lost Sheep claims" (Tr. 192). Willden told Morley that he needed the money to get started "on my brother's and my Lost Sheep claims over there, and I would sacrifice my interest in those to get started on the other claims, and see if we could ship a

little ore.” Morley made no claim at that time to an interest in the Lost Sheep property, or prior thereto and afterwards until the latter part of August (Tr. 193).

Claridge testified that he first advised Morley of the fact they had made the Lost Sheep and Blow Out locations a week or two after the locations were made (on May 9th), and that Morley made no claim to an interest in the claims at that time (Tr. 336-337). A few days before Claridge and Morley purchased the Earl Willden interest in the Dell group, Morley told Claridge that “Willdens wanted to go over and work *their* property and he said he thought we could buy their interest for the sum of \$1,500.00 and wanted me to speak to the Willden boys regarding it” (Tr. 340).

It would be well here to call attention again to the fact that all through Morley’s testimony, both direct and cross, when interrogated regarding why he made no inquiries concerning the Lost Sheep group of claims and made no claim to an interest therein, or asserted any act of ownership therein, his answer was about as set forth on Transcript page 116: “I figured that we would get together sometime and we would get that all figured out. I felt like there was a feeling we would get the thing straightened out in the meantime”; and on Transcript page 59: “I was misled a little by this, I don’t know just exactly where I stood on it”; and on Transcript page 61: “I didn’t say anything. I just thought, ‘Well now, I cer-

tainly don't feel good about this, but I don't like to come up and create an argument"; and on page 61 of the Transcript, in answer to the question "Why didn't you ask them why you weren't located in?" Morley replied: "I just figured in time—there had been a little feeling—and we would get it ironed out later, and it would come out all right." This course of conduct was quite cagey—it left Morley in the most enviable position of not committing himself to any ownership or interest in the claims if the question of liability or contribution arose, and yet left him free, as he thought, to claim a partnership interest later if the claims proved of value and an asset instead of a liability.

#### Plaintiff's Point No. 5

The trial court did not err in its first Conclusion of Law in concluding that the plaintiff Morley and the defendants should be considered joint venturers or partners in equal shares in the development work done prior to about June 15, 1948, on the Dell group of claims.

If the findings of the trial court are sustained, then the only conclusion that could possibly be made and supported by the evidence is the above first Conclusion.

True it is that Morley prevailed in his contention that he and Claridge and Earl Willden had formed a mining partnership. But concerning which claims? Also it is true that plaintiff Morley prevailed in his contention that

May 27th, 1948, was the earliest date on which any notice was given of the termination of that partnership. But again, concerning which claims?

Claridge is quite clear in his testimony (Tr. 356-7; 367) that any joint venture or partnership was limited to the Dell group of claims. It is doubtful whether there was either legal or moral obligation to include Morley as a co-locator on any of the Dell group other than the original two claims, Dell and Dell No. 1. However, as a matter of fair play and decency, both Claridge and Earl Willden felt and recognized an obligation to include the plaintiff Morley as a co-locator in any claims contiguous to these original locations, or on which they believed the veins or contacts would extend (Finding 15, Record 29). This portion of said finding is not challenged by the appellant.

The conversation of May 27th, 1948, as found by the court, related to or could be considered a termination of the partnership arrangement which then existed and which was limited to the Dell group of claims, and served notice on Morley that any further locations, even if contiguous to the Dell claims, would be made independently of him. The evidence clearly shows and the court so found, that Morley himself made no timely or valid claim to any interest in the north group of claims or the Eagle Rock.

It is quite significant that Morley claims he first

learned that he was not located in on the north group of claims and the Eagle Rock claim on September 18th, 1948, although he had a number of months, from May to September 18th, to make such inquiry. September 18th just happens to be a few days later than the location of any of the claims involved in this litigation. The last two locations, Canyon and Low Boy Nos. 2 and 3 were made on September 21st.

### Plaintiff's Point No. 6

The trial court did not err in its first Conclusion of Law in that the court went outside of the pleadings and in the trial of the case to make its decision and judgment.

The amended complaint is predicated on the allegations that the defendants wrongfully took control of some of the mining claims located for and belonging to the partnership called the Dell Mining Company and the mining claims referred to in the amended complaint are the Lost Sheep or north group of claims and the Eagle Rock claim (Record 7-8).

The answer denies that the defendants wrongfully or otherwise took control of any claims located for or belonging to any co-partnership or that they permitted Al Willden to share in the development of any co-partnership claims; they denied they have taken any receipts or profits from any partnership venture and deny that the claims described in the amended complaint were located

as partnership property or that the plaintiff has or is entitled to any interest therein (Record 11-12).

The clear-cut issue in the trial was whether the claims described in plaintiff's amended complaint were or were not partnership property, and whether the moneys received from sale of ores taken from such claims were partnership assets. The case was tried on that theory, as is evident from the entire record, and the court found upon such clear-cut issue, making voluminous findings, to support Conclusion of Law No. 1 and No. 2.

Respondents cannot agree with appellant that the primary issue was whether Morley, Earl Willden and Claridge formed and entered into a partnership, but insist that the primary issue under the pleadings and trial was whether the claims mentioned and described in plaintiff's complaint were part of the partnership or joint venture between the three. The court expressly held (Conclusion No. 2, Record 32) that no partnership arrangement was effected between plaintiff and defendants covering the prospecting for or location of mining claims other than those embraced within the Dell group.

In the case of *Evans vs. Shand*, 74 Utah 451, 280 Pac. 239, cited by appellant, it is held that "on an appeal the parties are restricted to the theory on which the case was prosecuted or defended in the court below," and that "a valid judgment must not only rest on pleadings, but also on findings," and that there are no findings made on the



theory urged by the respondent. Just how the appellant can derive any comfort from the Evans vs. Shand case we cannot comprehend.

### Plaintiff's Points Nos. 7, 8, 9, 10 and 11

Respondent contends that all of the conclusions of law are supported by the trial court's findings, most of which are not challenged by the plaintiff, and those findings which are challenged by plaintiff have been previously discussed in this brief. The findings made by the trial court tell the whole story, and we believe it will save this Court's time in searching the record, and will most clearly answer the plaintiff's contentions in this regard, if we set forth the findings and conclusions verbatim. Since transcript references have been previously given in our statement of facts we deem it unnecessary to repeat them with reference to or in support of the findings quoted.

### FINDINGS OF FACT

1. That during the month of May, 1947, the plaintiff, Lafe Morley, and the defendants, T. A. Claridge and Earl Willden, went together on a prospecting trip into an area about 52 miles northwesterly from the city of Delta in Millard County, Utah, and which area is located in Juab County, Utah; and, finding some favorable indications of ore located two lode mining claims on low hills lying west of a small valley known as "The Dell" or Dell Valley; they named these claims Dell and Dell No. 1

and located the same as equal owners each holding an undivided one-third interest therein;

2. That the defendants, T. A. Claridge and Earl Willden, were prospectors of considerable experience and the plaintiff, Lafe Morley, had had little, if any, previous experience as such;

3. That prior to May, 1947, the plaintiff, Morley, and the defendant, Claridge, had been engaged together in several minor or temporary joint ventures such as purchasing and disposing of houses from the Topaz Japanese Relocation Center in Millard County, Utah, but had not been general partners in any such business;

4. That in or about the month of August, 1947, the defendant, Claridge, and his son spent two days in further prospecting on the Dell and Dell No. 1 mining claims;

5. That in the early part of 1948 the defendants, Claridge and Earl Willden, and the plaintiff, Morley, after several conversations, decided to do some development work on the claims they had located as aforesaid and accordingly and in order to do such development work they together arranged to borrow or otherwise acquire possession of a compressor for use on said claims and in doing such development work. That said Claridge and Earl Willden and the defendant, Alden Willden, brother of Earl Willden, transported the said compressor and also some flat sections of a house which Claridge and Morley

had purchased at and moved from said Topaz Japanese Relocation Center, to the said Dell Mining claims, and there erected from said house sections a small cabin or shack for use in doing such prospecting work; that the said three defendants began work in a drift on the Dell No. 1 Lode mining claim after taking said compressor to said property and after building the said cabin or shack;

6. That the plaintiff, Morley, during the spring of 1948 was engaged in turkey raising and farming at or near Delta, Utah, and did not personally engage in prospecting work on the said Dell claims; he arranged with the defendant, Alden Willden, to work for wages in his place. It was agreed between Claridge, Earl Willden and plaintiff Morley that the expense of operations, including labor, should be borne equally between them; that defendants Claridge and Earl Willden would furnish their labor in doing the development work and the plaintiff Morley would employ Alden Willden and pay Alden Willden for such labor; that it was decided by the plaintiff, Morley, and the defendants, Claridge and Earl Willden, that they would conduct their mining operations on the said Dell claims under the name of Dell Mining Company; that there was no written agreement under which said Dell claims were located or under which a partnership was either formed or contemplated or under which said parties carried on their mining operations; nor was there any definite oral plan or understanding for the forming

of a partnership. In arranging for powder and supplies for the prospecting and development work done on the Dell claims none of said parties used a company name, but charged such purchases in their individual names.

7. That under the above arrangement Earl Willden and Alden Willden worked upon a drift on the Dell No. 1 claim and did some small amount of prospecting elsewhere on the Dell group of claims until about June 5th, 1948; plaintiff Morley furnished a 1½-ton truck which was used in going to and from the claims, a pickup truck belonging to Claridge was also used and Earl Willden occasionally used his automobile. Morley and Claridge (and sometimes Morley, Claridge and Earl Willden) got together about once a week to go over bills for expenses incurred in the mining operations; Earl and Alden Willden frequently procured gas and other supplies used in the mining operations on the Dell claims and had them charged in Morley's name, Morley paid all the bills charged in his name and thereafter as the parties got together and checked over such expenses proper adjustment was made so that Morley, Earl Willden and Claridge each paid for his respective share.

8. That after the first several weeks of prospecting and doing work on the said Dell claims Claridge did little mining, but spent considerable time prospecting on the ground immediately adjacent to the Dell and Dell No. 1 claims. He located additional claims adjoining the

Dell and Dell No. 1 property and posted location notices thereon and thereafter caused such notices to be recorded as follows:

Name of Claim	Names on Notices	Date on Notices	Date of Recording
Dell No. 2	Lafe Morley T. A. Claridge Earl Willden	8 March 1948	13 April 1948
Dell No. 4	T. A. Claridge Lafe Morley Earl Willden	23 March 1948	13 April 1948
Dell No. 5	T. A. Claridge Lafe Morley Earl Willden Al Willden	6 April 1948	13 April 1948
Red Hill	T. A. Claridge Earl Willden Lafe Morley	1 May 1948	24 May 1948
Dell No. 5 (Amended)	T. A. Claridge Lafe Morley Earl Willden Al Willden	10 May 1948	8 June 1948
Lucky Day	T. A. Claridge Lafe Morley Earl Willden Al Willden	10 May 1948	8 June 1948
Big Boy	T. A. Claridge Lafe Morley Earl Willden Al Willden	24 May 1948	23 June 1948
Hill Top	T. A. Claridge Lafe Morley Earl Willden Al Willden	5 June 1948	8 June 1948
Dell No. 3 (Amended)	T. A. Claridge Lafe Morley Al Willden	5 June 1948	8 June 1948
Summit	T. A. Claridge Lafe Morley Al Willden Earl Willden	17 June 1948	29 June 1948

That thereafter Claridge and Earl Willden and Al Willden staked said mining claims and perfected the said locations.

That it was agreed between plaintiff Morley and defendants, at or prior to the time of location of the Dell No. 5, Lucky Day, Big Boy, Hill Top, Dell No. 3 (Amended) and Summit claims, that Al Willden should be included as a co-locator on these claims;

9. That on Sunday, May 9th, 1948, defendants Claridge, Earl Willden and Al Willden went in Claridge's pickup truck from Delta, Utah, to an area about one mile northwesterly of the northwest corner of the Dell claim (and about two or three miles by way of the old road or trail from the cabin near the Dell claims) and there prospected during the day. They discovered some favorable specimens of float and decided to locate three claims. Claridge wanted to make his son a co-locator on one of these claims and it was agreed between Claridge and Earl Willden and Al Willden that Earl and Al Willden would locate two claims, namely the Lost Sheep No. 1 and Lost Sheep No. 2 claims in their names as joint locators and that Claridge would locate one claim, namely, the Blow Out, in the names of himself and his son Rex. They had no location notices with them at the time and upon returning to Delta Claridge prepared three notices of location, one for each of the above claims. On Tuesday, May 11th, Claridge posted location notices on



the claims and thereafter caused same to be recorded as follows:

Name of Claim	Names on Notices	Date on Notices	Date of Recording
Lost Sheep No. 1	Earl Willden Al Willden	10 May 1948	24 May 1948
Lost Sheep No. 2	Earl Willden Al Willden	10 May 1948	24 May 1948
Blow Out	T. A. Claridge Rex Claridge	10 May 1948	24 May 1948

10. That defendants subsequently did additional prospecting on the ground adjoining the three claims above mentioned and Claridge prepared and posted location notices and made locations for himself and Earl Willden and Al Willden as follows:

Name of Claim	Names on Notices	Date on Notices	Date of Recording
Lost Sheep No. 3	Earl Willden Al Willden	24 May 1948	2 June 1948
Low Boy	Al Willden Earl Willden Tass Claridge	21 June 1948	22 June 1948
Low Boy No. 1	Earl Willden Al Willden T. A. Claridge	5 August 1948	14 Sept. 1948
Eagle Rock	T. A. Claridge Rex Claridge Earl Willden Al Willden	15 August 1948	14 Sept. 1948
Low Boy No. 2	T. A. Claridge Al Willden Earl Willden	21 Sept. 1948	1 Oct. 1948
Low Boy No. 3	Al Willden Earl Willden T. A. Claridge	21 Sept. 1948	1 Oct. 1948
Canyon	Earl Willden Al Willden T. A. Claridge	21 Sept. 1948	1 Oct. 1948



11. That all of the foregoing claims set forth in paragraphs 9 and 10 of these findings (hereinafter referred to as the Lost Sheep group) lie northwesterly from the Dell group of claims mentioned in paragraphs 1 and 8 of these findings (excepting the Eagle Rock claim which lies about 1500 feet southeasterly from the southernmost point of the Dell group). That the southeast corner of the Low Boy No. 3, which is the southernmost of the Lost Sheep group of claims, is approximately 810 feet northerly from the most northerly point of the Summit claim which is the most northerly of the Dell group;

12. That the most southerly point on any of the Lost Sheep claims located prior to May 27th, 1948, is approximately 3600 feet distant from the most northerly point on any of the Dell claims located prior to that date. That the ore veins or contacts exposed on the Dell claims located prior to May 27th, 1948, are not the same veins or contacts exposed on the Lost Sheep claims located prior to that date;

13. That on May 27th, 1948, a conversation took place at the cabin near the Dell claims at which Morley, Claridge, Earl Willden, Al Willden, and one Leslie Price were present. Price was a foreman for the Ward Leasing Company, a company engaged in mining and other operations. Plaintiff Morley was a partner or shareholder in the Ward Leasing Company. Claridge was perturbed at Morley for bringing Price out and suspect-

ed that Morley was trying to give the Ward Leasing Company some information or advantage concerning the mining district. He said to Morley in substance: "This district is getting pretty well known and if you want any more claims you had better get out and locate them yourself. It is every man for himself from now on."

14. That if any arrangement, understanding or agreement existed between Morley, Claridge and Willden as to a partnership in, or as to co-ownership of, mining claims located or to be located by Claridge or Willdens, this statement by Claridge is the first statement or declaration by either of the three as to termination of such co-ownership or partnership arrangement;

15. That the Dell No. 5, Lucky Day, Big Boy, Hill Top and Dell No. 3 claims which were located after, or notices of location of which were recorded after, May 27th, 1948, were claims originally discovered prior to such date, and on which the locations were not perfected, or on which the locations were subsequently amended; that shortly prior to June 17th, 1948, a road was being built which would cross over the ground embraced within the boundaries of the Summit claim; that Claridge believed that the building of said road might uncover indications of ore and he therefore located the Summit claim for himself, Earl Willden, Al Willden and Morley to protect any ore body or vein that might be uncovered; that all of said claims in this finding mentioned are contiguous

to the other claims making up the Dell group, to-wit, Dell, Dell No. 1, Red Hill and Dell No. 4, and Claridge believed the veins or contacts on the Dell and Dell No. 1 claims would extend into all of these contiguous claims, and for that reason Claridge and Earl Willden felt and recognized an obligation to include the plaintiff Morley as a co-locator therein;

16. That Al Willden was not interested in and took no part in the prospecting trip which resulted in the location of the Dell and Dell No. 1 claims and that there was no agreement between the plaintiff and Al Willden that Al Willden would prospect with or for, or locate claims for the plaintiff or that plaintiff should be named as a locator in any claim which he, Al Willden, might locate;

17. That neither Claridge, Earl Willden nor Al Willden charged against the plaintiff any labor or expense of work of improvements on the Lost Sheep group of claims either in locating the claims or the subsequent development thereof; that plaintiff did not pay or offer to pay for any work or materials or supplies used on the Lost Sheep group of claims. The compressor borrowed for use on the Dell group was not used on the Lost Sheep group, nor was plaintiff's truck used either in prospecting for, locating or developing said claims; that neither Claridge nor the Willdens started work on the Lost Sheep group until after Earl Willden arranged with plaintiff to cease work on the Dell group some time in

the early part of June, at which time he notified plaintiff that it was necessary for him to stop work on the Dell claims and try to develop some shipping ore from his claims around the point to the north, (meaning and referring to the Lost Sheep claims). That plaintiff did not voice any objection to this and did not at that time or any time prior to August, 1948, assert to Willden any right to an interest in such claims. That a few days prior to about June 12th, 1948, Morley asked Earl Willden if he would be interested in selling his one-third interest in Dell, Dell Nos. 1, 2, 3 and 4, and Red Hill mining claims, and Willden stated that he would consider the matter, that he needed money to start work over on the Lost Sheep claims. That later and on or about the 12th day of June, 1948, Willden sold his one-third interest in these claims, one-half thereof to Claridge for \$750.00 and one-half thereof to Morley for \$750.00. That when making the sale to Morley about June 12th, Willden stated to Morley that he disliked selling the interest at that price and again stated he needed the money to work on the Lost Sheep claims; that plaintiff did not at that time either offer to assist in financing or working on the Lost Sheep claims and did not assert any interest therein; that about six weeks later Claridge sold to the Ward Leasing Company his one-third interest in the Dell, Dell Nos. 1, 2, 3, and 4, and Red Hill mining claims, plus the one-sixth interest he purchased from Willden for the sum of \$25,000.00, and received one-half thereof as an initial

cash payment;

18. That there was no express agreement or definite arrangement at any time, either oral or written, between the plaintiff and either Earl Willden or T. A. Claridge relative to the prospecting for or ownership of mining claims other than the Dell and Dell No. 1 claims, although Claridge and Earl Willden recognized an obligation to name plaintiff as a co-locator with them on claims adjoining the Dell and Dell No. 1;

19. That plaintiff knew at least as early as the fore part of June, 1948, that Claridge and the Willdens had located two or more claims northerly from the Dell group and that he had not been named or included as a locator on such claims;

20. That on May 4th, 1948, plaintiff procured an order or contract from Geneva Steel Company for purchase of fluorspar ore and in the month of June permitted Earl Willden to ship in plaintiff's name under this contract the first car of ore mined by Willden from the Lost Sheep claims. That plaintiff received a check from Geneva Steel Company in the sum of about \$1,500.00 in payment for this car of ore and upon request from Willden delivered the check to Willden without protest and without claim to any part or portion thereof. In turning the check over to Willden plaintiff made no inquiry concerning any claimed interest he would have in any of the proceeds, asserted no rights to any interest in the

claims from which the ore was being procured and shipped and evinced no interest whatever in said claims;

21. That plaintiff made no demand upon Claridge or the Willdens for any share or interest in any of the claims in the Lost Sheep group or for any accounting of proceeds from shipments made from said claims prior to the latter part of August or September, 1948.

And as conclusions of law from the foregoing facts the Court finds:

1. That the plaintiff Morley and the defendants Claridge and Earl Willden should be considered joint venturers or partners in equal shares in the development work done prior to about June 15th, 1948, on the Dell group of claims;

2. That no partnership arrangement was effected between the plaintiff and the defendants or either of them covering the prospecting for or location of mining claims other than those embraced within the Dell group;

3. That there was no legal or equitable obligation on the part of either Claridge, Earl Willden or Al Willden to include the plaintiff's name as a co-locator or co-owner with them in any of the mining claims referred to as the Lost Sheep group or in the Eagle Rock claim;

4. That the plaintiff has no right, title, equity or interest in any of the claims referred to as the Lost Sheep



group or in the Eagle Rock claim, and is not entitled to any accounting for ores taken from any of said claims;

5. That defendants are entitled to judgment of no cause of action against plaintiff and are entitled to their costs.

There can be no question but what members of a mining co-partnership are held to the exercise of the utmost good faith in their dealings with each other. And the books are replete with cases holding that one co-partner cannot cheat or defraud his co-partner. But equally so, one cannot claim to be a partner *after* locators have expended their own time and money and effort in developing a mining property, *after* it has been found to be valuable and *after* the element of risk is removed, when he who later claims to be a partner has known he is not so recognized by the locators, yet remains silent, permitting the locators to make large personal and financial sacrifices in developing the property; when he who later claims to be a partner has ample time to make his claim, yet studiously avoids doing so, carefully keeping himself in such position that he can neither be called upon for financial contribution nor be compelled to share in any losses. That is what Morley did, and the trial court so found.

The principle involved has long been recognized by the Courts. While respondents do not plead laches because they have contended, and do now contend, and the



findings and conclusions bear them out, that there was never a partnership between the plaintiff and defendants in the Lost Sheep group, the following cases serve to illustrate what courts have heretofore said regarding a course of conduct such as that exhibited by plaintiff.

Now, if a person has a just right to mines of which he is not in possession, as against those who are in possession of and working them, and if he claims to be the rightful owner (the person in possession being aware of his rights or supposed rights), if such owner, not being prevented by fraud or concealment, stands by for a long period of time while those in possession are working the mines, the court will not lend him any assistance \* \* \*. It is not equitable to allow him to wait till it is ascertained that the persons in possession have succeeded or may have been ruined, and if the subject result in profits, to ask to put that in his pocket; if in loss, to repudiate the loss. It is not necessary, even if possible, to prove whether he acted from premeditated design or carelessness. *Great West Min. Co. vs. Woodmas of Alston Min. Co.*, 23 Pac. 908 (Colo.) at page 910.

“While we have not been inclined to apply the doctrine of laches within the period of statutory limitation, we have, in common with other courts, held that the doctrine is peculiarly applicable where mining property is involved \* \* \*. It is because mining property is speculative in character and subject to sudden and violent fluctuations in value, and what may be worthless today may become of great worth through the faith and industry of one owner as against a lagging, noncontributing partner \* \* \*. ‘The injustice, therefore, is obvious of permitting one holding the right to assert an

ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.' '' *Twin-Lick Oil Co. vs. Marbury*, 91 U. S. 587, 592, 593. Cited in *Roche, et al., vs. Madar, et al.*, 181 Pac. 857 (Wash).

We ask in all earnestness—could anyone furnishing materials to the Willdens in the work done on the Lost Sheep group have shown that Morley was a partner in the development of those claims? Is there anything in the record by way of admissions on the part of Morley, or by his course of conduct or actions, from which a court could have held that he was a partner in the operation of any claims other than the Dell group? Did Morley not keep himself very much in the clear; from his own testimony is it not apparent that any claim to the Lost Sheep property he may have had was by way of mental reservation?

We quote, as did appellant, from *Lindley on Mines*, Vol. 3, Third Ed., page 1961, Section 797:

“What is a partnership, is a question of law. Its existence in a given case, however, is a question of fact, depending for its solution upon inferences to be drawn from the evidence adduced.”

*Caley vs. Cogswell*, 55 Pac. 939, Colo.

*Hollingsworth vs. Tufts*, 162 Pac. 155, Colo.

While the facts are not entirely analogous, yet the principle announced in the case of *Bradley vs. Andrews*,

14 Pac. (2nd) 1086 (Colo.), is applicable. It is there said:

“If the prospector, during the life of a contract, makes a discovery and conceals the fact from his associate with intent to acquire the property for himself after the contract is terminated, and does so acquire it, a court will award to the associate the latter's contract share or interest. No such situation is presented by the record in the present case. Whatever knowledge or information Bradley acquired, either prior to the making of the contract or during its life, was communicated to Andrews before the contract was terminated. \* \* \* Now that Bradley, after an expenditure by him and his new associate of considerable time and money, is reaping the fruits of his industry, Andrews seeks to take from Bradley a substantial part thereof. He ought not, under the law he cannot succeed in this attempt.”

And again, in the case of *Cameron vs. Burnham*, 80 Pac. 929 (Cal.), while the facts are not entirely analogous, it is said:

“The plaintiff, after having neglected and refused to perform any part of his agreement, after standing by for five months watching the other parties spending their money in search of this gold that no one knew existed, all the time declaring he was out of it \* \* \* now seeks in this equitable action to compel the defendants to share with him the profits of their industry and expenditures of moneys. This he cannot do in a court of equity.”

“Delay to assert an interest in the discoveries is fatal.” *Cisna vs. Mallory*, 84 F. 851, 19 M. R. 227.

Certainly the burden of proof in showing that a partnership existed is upon the plaintiff. We believe the true rule is as stated in *Caley vs. Coggsell*, 55 Pac. 939 (Colo.), "The settled rule requires stricter proof when it is sought to establish a partnership in an action between the reputed parties to the partnership." This was a suit for wages claimed to have been earned by plaintiff while employed as a miner by the defendant in the working of a certain mining property operated under a lease. The defense was that the plaintiff and defendant were partners in the mining operations. The court made the statement: "The evidence was not sufficient to establish a partnership so far as plaintiff was concerned, even in an action between the partners and a third person, and the settled rule requires stricter proof when it is sought to establish a partnership in an action between the reputed parties to the partnership."

"A prospecting or grubstake contract creating a prospecting partnership is an agreement between two or more persons to locate mines upon the public domain by their joint aid, effort, labor or expense, whereby each is to acquire, by virtue of the act of location such an interest in the mine as is agreed on in the contract. While such contracts are said to partake of the character of qualified partnerships, unless the agreement goes beyond the mere furnishing of supplies in consideration of a participation in the discoveries, a prospecting partnership agreement or grubstake contract does not create a mining partnership. In a prospecting partnership there is a presumption

against the existence of a partnership generally or of a partnership for developing or working the claims.

“The existence of a prospecting partnership is dependent on the agreement and intention of the parties to share interests in claims to be acquired, and does not result from mere association of the expedition.

“Grubstake agreements must be definite; and they will be enforced by the courts only in like manner as other contracts and must be supported by satisfactory proof of all the essential elements.” 58 C. J. S. *Mines and Minerals*, Section 249, pages 704-5.

Respondents contend that there is ample proof in the record to support the findings, and that the findings are ample to support the conclusions of law. It would seem unnecessary to cite either the rule or cases to support the rule that the Supreme Court will not disturb findings of fact unless the evidence clearly preponderates against the findings as made by the lower court. However, following are a very few of the many pronouncements of this Honorable Court.

“The Supreme Court on an appeal in an equitable action will consider questions of fact as well as questions of law, but will not disturb findings of fact where the evidence is conflicting, unless it is made to appear that the findings are *clearly* against the evidence. *Gee, et al., vs. Baum, et al.*, 58 Utah 445, 199 Pac. 680.

And in the above case the Court said: “The reason

for the rule must be apparent to all. The trial court has the opportunity to both hear and see the witnesses and observe their demeanor while testifying. The court, therefore, is in a better position to judge the weight that should be given to the testimony of the witnesses in case of conflict or disagreement amongst them respecting any material fact concerning which they testify.”

See also:

*Turnbull vs. Meek*, 58 Utah 23, 196 Pac. 1008,  
*Singleton vs. Kelly*, 61 Utah 277, 212 Pac. 63,  
*Stanley vs. Stanley*, 97 Utah 520, 94 Pac. (2nd)  
 465.

In the Singleton case above cited this Court stated “unless the evidence clearly preponderates against the findings as made by the lower court its decision must stand.”

And in the Stanley case above cited this Court has held: “In equity case findings of trial court on conflicting evidence will not be set aside unless it manifestly appears that the court has misapplied proven facts or made findings clearly against the weight of the evidence.”

Tested by the above rules, respondents submit that the decree in the case at bar must be affirmed.

*Respectfully submitted,*

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*Attorneys for Respondents.*