

1954

# Walter F. Morgan et al v. Bert Sorenson et al : Brief of Defendants and Appellants

Utah Supreme Court

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## Recommended Citation

Brief of Appellant, *Morgan v. Sorenson*, No. 8153 (Utah Supreme Court, 1954).

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER F. MORGAN, MRS. WALTER F. MORGAN, )  
HAROLD T. MORGAN, MRS. HAROLD T. MORGAN, )  
GEORGE CROMAR, MRS. GEORGE CROMAR, LESLIE )  
CROMAR, MRS. LESLIE CROMAR, WILLIAM CROMAR, )  
MRS. WILLIAM CROMAR, EUGENE CROMAR, MRS. )  
EUGENE CROMAR AND ARLENE CROMAR GETER, )

Plaintiffs,

vs.

BERT SORENSON, DICK WIND, MRS. BERT  
SORENSON, AND MRS. DICK WIND,

Defendants,

and

VERRUE THEOBALD, Administrator of the  
Estate of James T. Morgan, deceased,  
VERRUE THEOBALD, Administrator of the  
Estate of Frank A. Cromar, deceased,  
MRS. FRANK CROMAR, JOHN BARNARD and  
HAROLD EVANS,

Cross-Defendants.

BRIEF OF DEFENDANTS AND APPELLANTS

APPEALED FROM THE DISTRICT COURT OF UTAH IN  
AND FOR MILLARD COUNTY.

Will L. Hoyt, Judge

ELDON A. ELIASON, Attorney for  
Defendants and Appellants



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CASE ' ' .

IN THE SUPREME COURT

of the

STATE OF UTAH

WALTER F. MORGAN, HAROLD T. MORGAN,  
GEORGE CROMAR, LESLIE CROMAR, WILLIAM  
CROMAR, EUGENE CROMAR AND ARLINE CROMAR  
GEER,

Plaintiffs and Respondents,

vs.

BERT SRENSON, DICK WIND, MRS. BERT  
SRENSON AND DR. DICK WIND,

Defendants and Appellants,

and

VERRUE THEOBALD, ADMINISTRATOR of the estate  
of James T. Morgan, deceased, VERRUE THEOBALD  
ADMINISTRATOR in the estate of Frank A. Cromar,  
deceased, MRS. WALTER F. MORGAN, whose true  
and correct name is otherwise unknown, MRS.  
HAROLD T. MORGAN, whose true and correct name  
is otherwise unknown, MRS. GEORGE CROMAR, whose  
true and correct name is otherwise unknown,  
MRS. LESLIE CROMAR, whose true and correct name  
is otherwise unknown, MRS. WILLIAM CROMAR, whose  
true and correct name is otherwise unknown, MRS.  
EUGENE CROMAR, whose true and correct name is  
otherwise unknown, MRS. FRANK CROMAR, whose true  
and correct name is otherwise unknown, JOHN  
BARNARD, and HAROLD EVANS,

Cross-Defendants.



## APPELLANTS' BRIEF

Plaintiffs Walter F. Morgan, Mrs. Walter F. Morgan, Harold T. Morgan, Mrs. Harold T. Morgan, George Crenar, Mrs. George Crenar, Leslie Crenar, Mrs. Leslie Crenar, William Crenar, Mrs. William Crenar, Eugene Crenar, Mrs. Eugene Crenar and Arlene Crenar Gear are herein referred to as Plaintiffs or Respondents.

Bert Sorenson, Dick Wind, Mrs. Bert Sorenson and Mrs. Dick Wind are herein referred to as Defendants or Appellants.

Cross-Defendants Verruo Theobald, Administrator of the estate of James T. Morgan, deceased, Verruo Theobald, Administrator of the estate of Frank A. Crenar, deceased, Mrs. Frank Crenar, John Barnard and Harold Evans are referred to herein by name.



## STATEMENT OF FACTS

The question involved in this action relates to the forfeiture and abandonment of certain lode mining claims known as the Black Jack claims Nos. 1, 2, 3, 4 & 5. The original location on these claims was made by James Morgan and Frank Gromar, with the said James Morgan having a  $3/4$  interest and Frank Gromar a  $1/4$  interest. The plaintiffs George Gromar, Mrs. George Gromar, Leslie Gromar, Mrs. Leslie Gromar, William Gromar, Mrs. William Gromar, Eugene Gromar, Mrs. Eugene Gromar and Arlene Gromar Gier claim an interest in the mining claims as the heirs and/or legal representatives of Frank Gromar, who died prior to April 10, 1949.

On April 10, 1949 James Morgan executed a quit claim deed to Harold F. Morgan and/or Walter F. Morgan to all the mining claims in question. The deed is identified as exhibit No. 7. That the deed was acknowledged before a Notary Public on the said date, namely April 10, 1949 and was delivered to the plaintiff Walter F. Morgan shortly after it was signed (Tr 7.8.13.305). That the plaintiff Walter F. Morgan held the deed in his personal possession and recorded it



October 1, 1951.

That in 1943 and prior while the mining property was yet in the name of James Morgan certain assessment work had been done at the instance and request of James Morgan, that after the year 1948 any labors or assessment work was discontinued except perhaps the moving away of equipment in April of 1949, which would not have had the effect of developing or improving the said mining property, that the inactivity and lack of labor on the said mining claims continued until June 15, 1951, at which time the defendants located the said property under their locations known as the Black Queen Nos. 1, 2, 3, 4, 5 and the Johnny Boy.

That the United States congress passed an act known as Public Law No. 107 providing for the suspension of labor to all mining claims in the United States until the hour of 12 o'clock meridian of the 1st day of July, 1949; provided that every claimant of any such mining claim in order to obtain the benefits of such act shall file, or cause to be filed in the office where the located notice or certificate is recorded on or before 12 o'clock meridian August 1, 1949, a notice of his desire to hold said mining claim under this act, it provided further, that any labor performed



or improvements made on any such mining claims during the year ending July 1st, 1949, may be credited against the labor or improvements required to be performed for the year ending 12 o'clock meridian on the 1st day of July, 1950.

That James Morgan who conveyed by quit claim deed the said mining claims in question on April 10, 1949, had during his life time numerous mining claims both in Yocela and in Juab Counties. That on July 23, 1949, three and one-half months after James Morgan had conveyed by quit claim deed to Harold T. Morgan and Walter F. Morgan the property in question he filed in the office of County Recorder in Juab County, Utah, a notice of intention to hold mining claims under U.S. 1764 Public Law 107 of the 81st Congress as shown by plaintiffs exhibit B.

That the notice of intention to hold said Black Jack mining claims Nos. 1, 2, 3, 4 & 5 was not made for or on behalf of the claimants or owners of the property under the conveyance of April 10, 1949, nor is there any association or privity claims either in the filing of this notice or at any time in the history of the said claim. That the conveyance from



James Morgan to Harold T. Morgan and/or Walter F.

Morgan was absolute in its terms (Exhibit 7) without any conditions, restrictions or reservations.

That James Morgan died in November of 1949. That the plaintiffs Walter F. Morgan and Harold T. Morgan claim their title and right to possession to the said Black Jack mining claims by reason of the deed from their father executed April 10, 1949, (Tr 213,303).

That the defendants having observed the inactivity and lack of assessment work or labor of any kind upon the property and having checked the records of the Juab County Recorder and Tooele County Recorder observed that no assessment work had been filed for the year ending July 1st, 1950, the defendants regarded the property as forfeited under the mining laws of the United States and the State of Utah and also regarded it as having been abandoned and on June 15, 1951, after assuring themselves that no person or persons were active in performing work or labor or had filed notices upon the property the defendants located the same and have been active and aggressive ever since in developing the said mining property.



## STATEMENT OF POINTS

### Point I

That the evidence is insufficient to support the findings of the court that more than Five Hundred Dollars worth of labor was performed upon the Black Jack Lode Mining Claims Nos. 1, 2, 3, 4 and 5, for the purpose of developing the claims by the plaintiffs or anyone in privity with them, for the year ending July 1, 1950.

### Point II

The evidence is insufficient to support the findings of the court that Walter F. Morgan and Harold T. Morgan acquired any benefits from 1948 labor by reason of the Act of Congress for the suspension of assessment work under Public Law 107, or rights from his notice to hold.

### Point III

That the evidence is insufficient to support the findings of the court that the quit claim deed from James Morgan to his sons Harold T. Morgan and/or Walter F. Morgan was not delivered timely, or was intended as a deed of gift to take effect upon the death of the grantor, and was ineffective to convey a present title to the grantees.



#### Point IV

That the court erred in concluding that notice of intention to hold mining claims as required by Congressional Act when filed upon property by a stranger or one not in privity with the claimants can operate to avoid a forfeiture.

#### Point V

That the Court erred in not finding as a matter of law that the failure of the claimants to perform any assessment work upon the Black Jack mining claims 1 to 5 inclusive in 1949 and to June 15, 1951, constituted a forfeiture as well as an abandonment of said mining claims rendering them open to relocation.



## Point I

The evidence is insufficient to support the findings of the court that more than \$500. worth of labor was performed upon the Black Jack mining claims Nos. 1, 2, 3, 4 & 5 by the plaintiffs or anyone in privity with them for the year ending July 1, 1950.

As this case deals with a forfeiture and/or abandonment of lode mining claims a brief consideration of the law as it relates to forfeiture and abandonment is herein felt advisable.

It is generally held by the courts that failure to perform the necessary work required by law upon a mining claim with a subsequent relocation constitutes a forfeiture, (60 A.L.R. p. 926; 2 Lindly on Mines 2nd Edition, p. 1193.) The requirement to perform annual work upon a mining claim of the value of \$100 is in accordance with the provisions of section 2324 of the Revised Statutes of the United States, Title 30, Sec. 28, U.S.C.A. The last-mentioned section provides in part that:

"Upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made."



For additional authority on this subject we

quote from the case of *Heuser v. ...*, 140 Cal. 357 at page 36.

"A forfeiture of a mining claim occurs by operation of law when the locator fails to preserve his rights by complying with the conditions imposed by the mining law whether the statute expressly so provides or not, and a forfeiture becomes effectual upon a valid relocation of the same mining claim."

Of the same holding is the case of *Herbst v. ...*

*Miner v. ...* 112 P. 701.

Although it is held that the burden is upon him proving the forfeiture by clear and convincing evidence, with reasonable doubts resolved in favor of the validity of the mining claim, it is still the general position of the courts that when a party relying upon a forfeiture of a mining claim shows that no work was performed by the original locator within the period of one year as required by law, he establishes a prima facie case entitling him to possession, in the absence of evidence to the contrary. 40 Cal. J. 4.

In the present case the evidence established a

prima facie case showing that Walter F. Herpin, Harold

F. Herpin, the defendants' attorneys and the counsel

responsible for the holding through any of them from



the original locators forfeited their rights to the claims which are involved in this action, for failure to perform the necessary work thereon for the year ending July 1, 1950, (another and different case exists for forfeiture and abandonment subsequent to said July 1, 1950), and rendered the claim subject to relocation. The evidence supporting such a forfeiture will be reviewed here but lightly as effects the lack of work and expenditures for the year ending July 1, 1950, because such evidence showing a definite lack of work and interest by the plaintiffs was so extensive and so slightly contradicted; and because the plaintiffs and cross defendants apparently base their claims and justify their non-performance on a temporary resolution of Congress chapter 221 Public Law 107, which will be discussed at some length hereafter. But for the purpose of aiding the court on forfeiture occasioned by lack of assessment work we refer to the following cases: Russell vs. Broeseau 4 F. (43); Clark vs. Mallory, 70 F2 664; Karner vs. Shaddock, McBean & Co. 85 F2 552; New Mercer Mining Co. vs. So. Mercury 128 F2 26; Utah Standard Mining Company vs. Tintic



It is pointed out in support of such point that the following reputable witnesses took the stand and testified of the definite absence of assessment work from July 1, 1949 through June 15, 1951: Gilbert Jenson, Ray Spor, Wesley Sampson and John Jenson (Tr 45,20). Frequent visits dating from June 1, 1949 to June 15, 1953 to the mining property were described in detail by these witnesses, which if believed at all would rule out the slightest possibility of any work, labor or improvements having been made upon the property during the period in question, (Tr 10,105)<sup>100,73,201</sup>. The dates and circumstances were definitely stated and without any contradiction, (Tr 10,105)<sup>100,73,201</sup>. The testimony becomes the more convincing and effective when viewed in the light of statements made by the plaintiffs' witnesses. According to the testimony of plaintiffs' witness Harold Evans all the machinery and equipment at the Black Jack mining claims was removed and taken to the Ida Mining property or elsewhere in April 1949, (Tr 237,242). That there was no further intention on the part of Evans or anyone working with him to return



to the said Black Jack claims, and that he forfeited his lease and told James Morgan he did not intend to do any further mining work at the Black Jack property.

(Evans deposition p. 8). In the deposition of

Harold Evans as contained in Defendants Exhibit #2,

Harold Evans testified as follows:

Q: How much did you spend on the Black Jack after July 1, 1949?

A: That is about the time I switched over, and if that is the time I switched over, I didn't spend any more money on the Black Jack.

Q: And is that the Black Jack No. 1?

A: That is right.

Q: All the money that you spent on the Black Jack was spent before you pulled the equipment was it?

A: That is right.

Q: And none was spent after you pulled the machinery and equipment?

A: No.

The testimony produced at the trial by the plaintiffs gave possibility for only two occasions when work or improvements could have been made on the Black Jack mining claims after July 1, 1949. The first such occasion Harold Evans testified that he returned to the Black Jack claims between July 7 and July 17, 1949, and pumped water from the mine on the claim.

(Ex 226, 227 <sup>238a</sup>). This is not only a direct contradiction of his former statement but is also contradicted and made impossible if the testimony of plaintiffs' other



witness, Victor Gray is to be believed. It will also be recalled that Mr. Evans produced a book, (DE. Exhibit No. B) which apparently was a record kept by him from which he could establish dates of his operations. The demeanor of the witness on the stand showed definite hesitancy and fear regarding the alleged records, and the witness said, "You can take them for what they are worth," (Tr 227). When pointed out on cross examination that all of the entries in his book were shown in chronological sequence and written with blue black ink except two entries, one of which appeared below the margin of the page of his book, and the other at the end of all his entries, he was unable to make explanation. These later two entries were entered with a violet blue ink apparently having been made at the same time and not four months apart as the witness would seek to imply. One entry showed the date of leaving the Black Jack property as being April 1949, and the other entry when the witness was pumped with the date of leaving then shown as July 17, 1948. These entries were made to fix a record.

Considered with the testimony of John Eberenson as to a conversation between Harold Evans and Walter



Morgan in the waiting room at the time of the taking of the deposition "That they would fix and alter their records to perfect their case (Tr 311), the purpose of those entries becomes explainable.

It will also be remembered that on direct examination Harold Evans testified that when he went to pump the wints in July 1949, that five persons, whose names he gave accompanied him in the performance of the work (Tr 225) but on cross examination he found that such was not the facts and could easily be disproved and changed his story so that he and his son-in-law were the only ones doing the pumping, (Tr 239).

It is interesting that Victor Bray, another Plaintiffs' witnesses testified going to the property with James Morgan on the 11th of July 1949, and remained for three days, (Tr 256) and then when pointed out on cross examination that that was the exact time when Harold Evans was supposed to be pumping the water from the wints, he conveniently changed the date of his visit to the property to that of July 12, 1949, (Tr 258) which was the second day after the pumping operations were allegedly completed, yet he saw no evidence of any pumping, or where any water had been



pumped, or when any equipment had recently been.  
He claimed he did a few "odds and ends" like cleaning  
around the track, but he failed to see Gilbert Sorenson  
and Ray Spar who were there the 20th of July 1949,  
(Tr 266).

The entire testimony of the plaintiffs with re-  
lation to any work done or improvements made from  
July 1, 1949 to June 15, 1951, is broken down and  
contradicted within itself, and made further impos-  
sible and unbelievable by the testimony of the de-  
fendants' witnesses, that they were upon the property  
nearly every month of the period in question, and ob-  
served no labor or improvements whatsoever even by  
going into the shaft looking for improvement.

## Point II

That the evidence is insufficient to support the  
findings of the court that the quit claim deed from  
James Morgan to his sons Harold T. Morgan and/or  
Walter F. Morgan was not delivered orally. The definite  
lack of any assessment work having been performed up-  
on the Black Jack mining claims by the plaintiffs  
from July 1, 1949 to and including July 1, 1950,  
prompted the plaintiffs to rely upon the provision of



an act of the United States Congress known as Public Law 107, which provisions read as follows:

The provision of Sec. 2324 of the Revised Statutes of the United States which require on each mining claim located and until patented not less than \$100 worth of labor to be performed or improvements aggregating such amount to be made each year be, and the same is hereby suspended as to all mining claims in the United States until the hour of 12 o'clock meridian of the 1st day of July 1949; Provided, that every claimant of any such mining claim in order to obtain the benefits of this act shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian of August 1, 1949, a notice of his desire to hold said mining claim under this act. Provided further, that any labor performed or improvements made on any such mining claim during the year ending July 1, 1949, may be credited against the labor or improvements required to be performed or made for the year ending at 12 o'clock meridian on the first day of July 1950. (Underlining ours)

The plaintiffs contend that such statute absolves them from the performance of assessment work for the year 1949-1950, that they may thus be given credit for the work and improvements which James Morgan performed or caused to be performed upon the said claim in the year 1948.

Such temporary suspensions from doing assessment work are common in the mining history of the United States, and the cases are numerous in defining the provisions of such statutes, and their effects.



The benefits of the suspension under the act of Congress are contingent upon two things, which the United States Courts have held in a similar case to constitute the creation of "a condition precedent." The first is a strict compliance by the claimant with the provisions of the act in filing or causing to be filed by a given date, notice of his desire or intention to hold said mining claim under said act.

In interpreting such provisions the courts have held to a strict compliance. First the word "Claimant" is considered, and from the Case United States Smelting Co. vs. Low 74 Fed. Supp 917, at page 926, the Court states as follows:

Attention is called to the use of the word claimant in describing one upon whom the burden of proof was to be placed if there was a failure to file an affidavit of annual labor. That is a word which is seldom used with reference to a party to a suit in court. An examination of the land office rules with reference to procedure for getting patents to mining claims shows that in the first 108 regulations the word "claimant" is used 32 times to describe the applicant for a patent.

As the statutory rule of construction is that words are to be given their common meaning unless the statute shows they were used with some other meaning, the word claimant in the Waskay Act should be presumed to refer to the applicant for a patent in the land office.



In this case cited a member or members belonged to several different partnerships and they were contending that even though an association which was not the claimant or locator had filed an intention to hold, that the locator or claimant should receive the benefit of such notice. In answer the Court further said on page 926:

There is no reason for giving any more attention to the argument that one association is the same as another if there is a common member among the many of each association. To argue that several different partnerships were the same because a member or members of one was likewise one of the members of another would receive scant attention.

Only tenants in common or one in privity with the locators were entitled to the benefits of a secretarium statute dispensing with performance of annual labor on mining claims, under the ruling of the aforementioned case.

As is more definitely hereinafter shown by the effect of the conveyance of April 10, 1949, James Morgan was in July 1949, a trespasser or stranger to the title of the property, and unless acting at the instance and request and in behalf of the owners could do nothing more than any other stranger to perfect claimants interest in said claims. The same



proposition is expressed in Lindly on Mines 3rd Edition 322-6 in discussing by whom labor must be performed:

"Manifestly, the mines must be represented, and the annual work performed by, or at the instance of the owner or someone in privity with the owner. Work done by a mere trespasser or stranger to the title not in privity with the owner will not inure to the benefit of the locator, although ultimately paid for by the claimant; but work done for the benefit of the claim by one holding the equitable title will operate to preserve the claim from forfeiture and inure to the benefit of the claim.

Cases cited in support of the aforementioned proposition, Little Gurnell Mining Company vs. Kimber 1 Harr. Min. Rep. 536, Fed. Case No. 4892; Hesbitt vs. De Lamar's Nevada Gold Mining Company 77 American State Reports 807, 52 Pac. 609.

Quoting from the case of Hesbitt vs. De Lamar's Gold Mining Company Nevada 52 Pac. 610 the court reports states:

It is true that work done by a mere trespasser or stranger to the title will not inure to the benefit of the locator.

The case very nearly in line with the case at Bar is that of Pine Grove Nevada Gold Mining Company vs. Truman 171 Pac. 2d 366 in that a California Court held and quoting from the opinion of Judge Hereross

In Re Sacramento Packers Inc. 34 Pac. 2d 1000 stated:



"It is certain that the plaintiff in the instant case, by its neglect and failure to cause to be filed the required notice of suspension and intervention to hold, for the assessment year commencing at 12 o'clock meridian July 1, 1943 and ending at 12 o'clock meridian July 1, 1944, deprived itself of the benefit of said act, H.R. 2370, 'Providing for the suspension of annual assessment work on mining claims held by location in the United States including the Territory of Alaska,' approved May 3, 1943. The filing of such notice was a condition precedent to the operation of such suspension in plaintiff's favor, and such condition not having been complied with, the suspension provided by the act was, by the very terms of the act itself, not operative as to the plaintiff. The plaintiff was, therefore, required, the same as though no such act had been passed, to do the assessment work for the said assessment year of 1943-1944, unless plaintiff could bring itself within the scope of the extension of the very limited conditions of facts and circumstances, which, the authorities generally hold, may be the basis of extending a claim owner from the performance of the assessment work which is required by Section 2324 of the Revised Statutes of the United States, 30 U. S. C. A. 723.

The question in this case regarding the suspension order and notice of intention to hold having been filed by a stranger and one not in privity with the locator is answered definitely and conclusively in the case of *Little Russell Mining Company vs. Winter* 15 Fed. Cases page 630, Circuit Court, Denver, Colorado, Case No. 4102 where in answer to the precise question as presented here the court stated:

"It is not pretended that the plaintiff did such work before Jan. 1, 1975, and the failure in that



respect was, such an abandonment of the claims, as authorized anyone to go on the property and relocate it. In respect to that matter defendant's counsel have asked me to say, and it is quite correct to say, that if you find from the evidence that no work was done by the plaintiffs on the property in controversy during the year 1874, then that such property on the 1st day of January, A.D., 1875, was abandoned and forfeited, and subject to the occupation and relocation on said 1st day of January, 1875, and that any person, a citizen of the United States, over the age of 21 years, had a legal right to enter into and occupy the same, on the said 1st day of January, A.D., 1875, unless the plaintiff was at that time in the possession and occupancy of the property, and had resumed work thereon. And so also it should be said that the work done under the statute must have been done by the plaintiff acting through its agents, and not by another whose right was purchased by plaintiff. On that point I give the instruction of defendants as asked, which is as follows:

The court instructed the jury that any work done upon the property in controversy during the year 1874, by Miller, Lynn and Gray, on their own account, and not at the instance of plaintiff, cannot inure to the benefit of the plaintiff by virtue of any payment for or pretending purchase of such labor made by plaintiff after the commencement of this action.

In the present case the condition precedent to obtaining the benefits of the said statute are outlined in the statute itself as they were in the case of *In Re Suncrest Packers, Inc.* of P. Supr. 917-30 and in the same language namely:

"That every claimant of any such mining claim in order to obtain the benefits of this act shall file, or cause to be filed, in the office where



the location notice or certificate is recorded, on or before 12 o'clock meridian of August 1, 1949, a notice of his desire to hold said mining claim under this act.

In the present case the plaintiffs Walter Morgan and Harold T. Morgan claim to be the owners of such mining property since April 10, 1949, at which time they received a quit claim deed to the said property from James Morgan (The effect of which deed will be discussed later) That at no time from April 10, 1949, to and including 12 o'clock noon August 1, 1949, is there any evidence or documentary proof of said Walter Morgan or Harold T. Morgan or any person acting through them or for them, filing or causing to be filed, for such claimants the necessary notice, which the cases hold to be a condition precedent to obtaining the benefits under the said act. Nor is there any evidence, oral or documentary where James Morgan, the grantor in said deed of conveyance filed or caused to be filed prior to April 10, 1949, while he was yet owner of the said mining property any notice as required by law in the statute.

A case involving a statute similar in nature to that act of congress referred to in this case and which also provided for a temporary suspension is the case



of *Fraser vs. Gladding, McLean & Co.* 35 22 552, at page 59; we quote:

"The appellant asserts that Frederick H. Hixie did not forfeit his right to the claims for non-performance of his assessment work after 1933 for the reason that Congress adopted resolutions in 1931, 1932, 1933 and 1934, temporarily suspending the statutory requirement of performing the assessment work on mining claims pursuant to sec. 2324 of the United States Revised Statutes, 30 U. S. C. A. Sec. 28, during those current years on account of the depression which existed. We are of the opinion there is no merit in this contention for the reason that in 1933 and 1934 the suspension of annual assessment work on mining claims for those current years was authorized only conditionally, and not as an absolute right. 48 U. S. Stats. p 72, and p 777, 29 and 30 U. S. C. A., Sec. 24a, note. The resolutions for 1933 and 1934 both include a similar condition. The 1933 resolution suspending for that year the necessity of performing assessment work of the value of \$100 as provided by Sec. 2324 of the Revised Statutes of the United States contains the following proviso: "That the provision of this act shall not apply to the case of any claimant not entitled to exemption from the payment of a Federal income tax for the taxable year 1932; Provided further, that every claimant of any such mining claim, in order to obtain the benefits of this act, shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian, July 1, 1933, a notice of his desire to hold said mining claim under this act, which notice shall state that the claimant or claimants, were entitled to exemption from the payment of a Federal income tax for the year 1932."

After citing with approval the case of *In Re Sacramento Packers, Inc.* D.C. 8 F. Supp. 217, 720, where such provisions were construed as conditions precedent,



the Court further states on page 555 of said case:

In the present case no such notice was filed by Mr. Rindge so as to exempt him from the performance of the required annual assessment work during the years 1933 and 1934. Having failed to perform the assessment in those two years, we must assume in support of the findings and judgment, that the claims in the language of Sec. 2324 of the U. S. Revised Statutes, thereupon became "open to relocation," in performing the work according to the provisions of the resolution above quoted. It follows that there is a prima facie showing in this case of the forfeiture of Mr. Rindge's title to the mining claims in question."

It is submitted that in the present case no different conclusion can be arrived at than that held in the cases quoted above.



### Point III

That the evidence is insufficient to support the findings of the court that the Quit Claim Deed from James T. Morgan to his sons Harold T. Morgan and/or Walter F. Morgan was not delivered timely or that it was intended as a deed of gift to take effect upon the death of the grantor and thereby not convey a present title to the grantees.

The evidence in support of the validity of the Quit Claim deed and the intention of the parties in relation thereto was gone into extensively on the witness stand with the grantee Walter F. Morgan himself and the testimony of Walter Morgan is hereafter set out which testimony appears to establish a valid and timely delivery and an intention of the parties to pass a present title.

Q: Were you present when this purported deed was signed by your father?

A: No.

Q: Do you know when it was signed by him?

A: It stipulates on the deed.

Q: I just asked you if you know when it was signed by him?

A: No, I don't know.

Q: According to the recording notation you had the deed recorded October 1, 1951, is that right?

A: Yes sir.

Q: Why didn't you present it earlier for recording Mr. Morgan?

A: I didn't think it was necessary.



After several questions regarding the whereabouts of Harold T. Morgan the questions and answers continued thusly:

Q: It purports, from the deed, that it was prepared on the 10th of April, 1949. Do you know whether there were any witnesses present when the deed was prepared.

A: I do not.

Q: From whom did you receive the deed?

A: My father.

Q: And when did he give it to you?

A: Well, I don't remember the exact date, but it would be shortly afterwards that he signed it.

Q: Shortly after he signed it did you say.

A: Yes.

Q: Who was it held by until it was recorded in 1951?

A: By me.

Q: Where did you have it, in your possession, or in the bank?

A: In my possession.

Q: And what if any, comment did your father make to you when he delivered the deed?

Objection, discussion, objection overruled.

Q: Well, what comment was made by your father at the time he gave this to you?

A: His exact words I don't remember, but he just wanted us to have all of his personal holdings because he was getting old.

Q: Where were you at the time he handed you this instrument?

A: In my shop in Santaquin.

Q: In your shop at Santaquin. Who else was present, anyone?

A: My son.

Q: Your son. Anyone else?

A: No.

Q: What did you give your father, if anything, in return for this instrument?

A: One Dollar.

Q: Did you give him a dollar there at the time in the shop at Santaquin?

A: That is right.



Later Walter Morgan was again called as a witness by the plaintiffs and upon cross examination testified as follows:

Q: Do you know, Mr. Morgan, whether or not your brother, Harold T. Morgan has caused any other or additional work to be done on any of these claims since you became the owner of them, other than what you have described?

A: No, he hasn't.

Q: Do you know whether Mr. Cronar had done any work, or caused any to be done on any of these claims since you and Harold T. Morgan became owners of the property, or claim ownership in them?

A: Have not.

Q: Nothing besides what you have testified to?

A: They have not.

Q: You and your brother Harold claim whatever right or interest that you have in the Black Jack properties by reason of this quit claim deed issued by your father do you?

A: That is right.

Q: You claim to have acquired no interest other than what your father deeded to you in 1949?

A: In mining claims?

Q: In these Black Jack mining claims.

A: Yes, I claim an interest. I have done a lot of work out there.

Q: Do you claim any interest other than what was deeded to you by your father?

A: Of course not, because they were in his name and Mr. Cronar's name before they were deeded to me.

Q: Your sole right of possession to them is through this deed of your father's?

A: That is right.

Q: Had you testified before, Mr. Morgan, that this deed was delivered to you by your father on the date on here April 15, 1949?

Mr. Anderson objection, MR. ANDERSON: He said his father gave it to him and he has had possession ever since.

Mr. Eliason: April 10th.

Mr. Anderson: Yes, right after it was executed,



he didn't know the exact date.

From the above testimony it is evident that there was an actual delivery of the deed from James Morgan to Walter Morgan. That it was delivered at the premises of Walter Morgan at his shop at Santaquin shortly after it was signed by the grantor himself. James Morgan delivered it in person in the presence of the son of the grantee. There was a definite acceptance of the deed by the grantee. These matters tend to establish positively the signing, acknowledging, delivering and accepting of the deed. A consideration was therein stated and it is contended that the consideration was adequate whether gift or nominal consideration. There is not from the testimony the slightest reason to believe there was not a timely delivery. It is not even contended in the testimony of the plaintiff's that the delivery was not timely but on the other hand the testimony was to the opposite effect that the deed was delivered shortly after the grantor signed it and again to more positively state the delivery Mr. Anderson, Attorney for plaintiff, when plaintiff was asked again as to when the deed was delivered answered: Yes, right after it was executed.



he didn't know the exact date. That the cases presume a timely and valid delivery when a deed is held or found in the possession of the grantee and clear and positive evidence is necessary to overcome such presumption. In the present case all the evidence upholds and sustains the presumption of an immediate and timely delivery.

What of the intentions of the grantor and grantee with relation to the time the deed should be effective as a conveyance. The cases herein after cited will establish the proposition that a present conveyance of title is intended and in fact effected unless parties otherwise intend. To determine the intention of the parties we go to the testimony. What comment was made by your father at the time he gave the deed to you?  
A: His exact words I don't remember, but he just wanted us to have all his personal holdings because he was getting old. Such is the testimony of the grantee himself.

If the conveyance had been intended to take effect at the time of the death of the grantor such statement would certainly have been made between the grantor and



the grantee but no such statement was ever made. Neither was the deed placed in the hands of a third party for delivery to the grantee at the time of the death as is customary practice in the event that the conveyance is not to become effective until the death of the grantor. The statement of the grantee on the witness stand is unambiguous and susceptible of but one meaning and that is "father wanted us to have all his personal holdings", hence the conveyance. An immediate transfer of ownership was accomplished by the said deed and was intended to pass an immediate conveyance without any reservation, condition, covenant or restriction, had it been otherwise the grantee would have been obligated to make reference to it in the executed instrument.

To argue that the grantor did not intend a present delivery, or an immediate transfer of title is to put words in the mouth of the witness which were never uttered and to give interpretation to the provisions of a deed for which there is entirely no basis or foundation and would have the further effect of upsetting the entire body of the law as it relates to



execution, delivery and effect of delivered, accepted, and recorded deeds.

The discussion of the authorities in relation to the effect and intent of delivery we quote from Thompson on Real Property, Permanent Edition page 556, Sec. 4111.

Delivery is a work of well defined meaning in the law. It is the act however, evidenced by which the instrument takes effect and title thereby passes. Delivery of a deed which has been knowingly executed with the intentions of transferring title complete to the transaction so far as the title is concerned and vests the title in the grantee.

Thompson on Real Property, page 550, Vol. 7, Sec. 4126.

A deed must take effect upon its execution if at all. It must pass a present interest to the grantee, though his rights to enter into possession may be deferred to a future time. If the intention is manifest that the deed should not take immediate effect, but shall be operative only upon the grantors death it will never take effect at all, unless it is executed with such formalities that it may be given, the effect of a testamentary disposition.

If placed in the hands of a third person to be effective on date of death, or if grantor wills a life estate then such a reversion of interest to grantor can be recognized as pointed out on page 552 Thompson Sec. 4127.

From Corpus Juris Secundum, page 258 Sec. 53, we quote the following:

A deed in the absence of a contrary statutory provision takes effect from the date of its delivery, not from the time of its record.



Clokey v. Farish 21 L. R. 272 28 1875, or date or sign -  
the deed cannot be set aside for operation cannot be  
affected by proof of any agreement in conflict with the  
plain terms of the instrument.

So where a deed is delivered but not recorded be-  
cause of an undertaking between the parties that in  
the event of death of grantee before the grantor it  
shall be destroyed it is nevertheless to be given  
its strict legal effect as vesting title in the  
grantee.

Where the grantor parts with this deed with intent  
of making a present delivery he cannot acquire  
additional rights against the grantee through the  
fact that the grantee delays his acceptance until  
he has made a further examination of the title. The  
operative effect of a delivered deed is not impaired  
by minor defect for which a party may have an  
adequate remedy at law. 37

The execution and delivery of a deed by which the  
title and right of possession is transferred to the  
grantee is generally regarded as equivalent to de-  
livery of seisin and to give constructive possession  
of the property conveyed.

3. Completed delivery of a deed divests the grantor  
of title and renders him without power to invalidate,  
alter or affect the instrument, by any subsequent  
act; it cures the grantee's title to become perfect  
and binds him to the conditions and limitations of  
the deed.

Completed delivery of a deed irrevocably passes title  
out of the grantor and he cannot by any act subse-  
quent to the delivery invalidate, alter or affect  
the instrument. 47 22 924. So where there has been  
a sufficient delivery of a deed the title of the  
grantee becomes perfect on delivery to and accrues to  
him of the deed. By acceptance of the deed he  
becomes bound by the stipulations, recitals and con-  
ditions and limitations therein contained. Hogbacki  
vs. Hogbacki 215 NW 2d. Hammond vs. Todd  
119 P 2d.



Where in the case at bar the plaintiff, Walter F. Morgan and Harold T. Morgan proved their claim to the ownership of the mining claims and the right of possession thereof by introducing in evidence the quit claim deed of James Morgan, grantor, to Harold T. Morgan and Walter F. Morgan, grantees and claim a prompt delivery and an intention to transfer all the holdings of the grantor the plaintiff<sup>they</sup>/should now be precluded from reversing their positions and be permitted to receive that inference that the deed was not an immediate conveyance at all but would seek to convey title only at such time as it appears to their interest to have the title conveyed. The famous case of In Re Campbell's Estate 13 N I S 2d 773 provides for the following:

One who accepts a benefit under a deed must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it.

Of the same opinion is the case of Gulf Red Cedar Lumber Co. vs. O'Neal 30 So. 466 wherein Washburn on Real Property 5th Ed. page 393, Sec. 21 is quoted as follows:

And if once delivered it cannot, if valid be defeated by any subsequent act, unless it be by virtue of some conditions contained in the deed itself.



The rule and the holding of the cases on each point is well stated in the case of *Klinger v. Ottinger* 22 North Eastern 2d 305 where the court states as follows:

Appellants stand upon the well recognized principle that when a deed is once delivered no subsequent act of the grantor can impair the validity of the conveyance and that the title in the grantee can only be divested by reconveyance or legal proceedings.

The supreme court of the State of Utah has spoken on the subject in the case of *Chamberlain et al v. Larson et al*, 29 Pac. 2d 361 where we quote from the able opinion as follows:

Let us now consider the sufficiency of the evidence to support the finding of non-delivery. Necessarily the burden of showing such non-delivery was upon the plaintiffs who alleged that the deed though recorded had never been delivered. The rule seems to be well settled that a deed duly executed and acknowledged and shown to be in the possession of the grantee is self proving both as to execution and delivery, and that the recording of a deed is likewise evidence of delivery. It is thus stated in *Devlin on Deeds* (3d ed.)

"The possession of a deed, duly executed, in the hands of the grantee, is prima facie, but not conclusive, evidence of its delivery. It therefore follows that he who disputes this presumption has the burden of proof, and must show that there has been no delivery. And not only must this presumption be overcome, but it is held that there is such a strong implication that it is found in the hands of the grantee that only strong evidence can rebut the presumption."







Where a warranty deed, absolute on its face, has been executed and delivered, which does not contain any reservation of title and no limitations or condition appears therein, the grantor cannot introduce parol, contemporaneous evidence to vary the terms of said deed.

The Supreme Court of Utah *Knight v. Manning et al*, 33 Pac. 2d 405 has stated a presumption exists in delivery and in favor of genuineness unless the same is overcome by clear and satisfactory evidence. The stronger language of the court is as follows:

In such case and in the absence of evidence to the contrary, a presumption of fact or inference arises of the execution and delivery of the deed at about the date stated in the deed, and the burden cast on those claiming non-delivery of it to show such fact, not by mere doubtful inferences or suspicious circumstances, but by clear and satisfactory evidence.

The California case of *Knox v. Kearney et al* 130 Pac. 661 has held in relation to delivery and valid conveyance of deeds the following:

In the case at Bar the court found that there was a complete delivery of the deeds by the grantor to the grantee without any conditions or reservation.

(1) The title thereupon, it is clear, passed to the grantee, and this irrespective of whether the deeds were recorded, or the delivery thereof was accompanied by a change of possession. As between the parties the performance of neither of these things is essential to a valid conveyance; nor is there any violation of law nor infringement of public policy by the grantee failing to place his deed on record,



or by the grantor retaining possession of the  
pre carty, Fisher . . . , 6 Cal. App. 2d, 91  
No. 151.

From the cases herein above cited the matter of  
delivery of a deed, its acceptance, the intention  
of the parties, the present conveyance of the title  
transferring from the grantor all right, title and  
interest unless specific reservations are contained in  
the deed or are stated by the parties has been thoroughly  
and adequately covered. The holdings of the cases  
appear to be harmonious with the position of the defend-  
ants in the case at bar. The writer has been unable  
to find one case where the holding of the courts has  
been different from that cited in this brief.

Such is the opinion of the case holder Bank  
Company 243 Pac. 2d 692 and Borotch v. Bailey et al,  
203 Pac. 2d 153, and such is the provision of the Utah  
Code Annotated 77-25-7.



#### Point IV

That the court erred in concluding that notice of intention to hold mining claims as required by congressional act when filed upon property by a stranger or one not in privity with the claimants can operate to avoid a forfeiture. From the cases herein before quoted particularly in *Re Ducrest Packers, Inc.* 8 Fed. Supp. 917; *United States Smelting & Mining Co. vs. Lane* 74 Fed. Supp. page 226; *Little Connell Mining Co. vs. Kinter* 15 Fed. Supp. page 630; *Hosbitt vs. De Lator's Nevada Gold Mining Company* 52 Pac. 619; *Fraser vs. Gladding, Heenan & Co.* 35 Pac. 24 351; the law is definitely to the contrary. And the cases uniformly hold that a stranger or one not in privity with the owner or claimant cannot perform assessment work, cannot file notice of intention to hold under a suspension statute and have it effective to avoid a forfeiture under the mining laws of the United States and the State of Utah.

Inasmuch as there was no attempt to show privity between the grantor James Morgan and the grantees Harold T. Morgan and Walter F. Morgan or to show any



relationship of to each in common or to show that the  
greater sought by covenant, reservation or otherwise  
intended to retain any interest whatsoever in the  
property after April 10, 1949, to conclude that the  
notice filed by said James Morgan on July 23, 1949,  
would be effective in enabling claimants or owners  
to avoid a forfeiture would be contrary to the law in  
all of these cases and the texts upon the subject.

#### Point V

That the court erred in not finding as a matter of  
law that the failure of the claimants to perform any  
assessment work upon the Black Jack mining claims 1  
to 5 inclusive in 1949 and up to June 1, 1951 con-  
stituted a forfeiture as well as an abandonment of  
said mining claims rendering them open to relocation.

It should be remembered that at all times the title  
to the property in question was with the United States  
of America and that the privilege of claiming property  
for mining purposes from year to year is permitted only  
by a strict compliance with the provisions of the  
statute relating to such mining claims and that when  
claimant fails to perform under the conditions and  
requirements of the statutes respecting mining claims



that its interests are forfeited back to the government and that the property then is subject to relocation as though in its first and former state. In the case at bar there was no showing or finding of assessment work between July 1, 1949 and July 1, 1950 and even up to June 15, 1951. To permit the claimants after such a prolonged period of inactivity and abandonment of the claims to come in after a valid relocation had been made under the laws of the United States and to claim under some unusual presumption that the property was not to be forfeited would upset the mining law of the country and would be disparaging to claimants as well as prospectors who had established a good and valid claim only to have a former owner claim the benefits of the new development. There was no showing of good faith or intentions on the part of the plaintiffs in holding or developing this property. Every bit of evidence is to the contrary and supports forfeiture and abandonment and the court should have found that a forfeiture existed and that a valid relocation had been made upon the property by the defendants as of June 15, 1951.



## CAPITULATION

It is respectfully submitted that the points relied upon by the appellant for a reversal of the judgment of the lower court are well taken; that there was insufficient evidence to establish that any development or assessment work was performed on the claims from July 1, 1949 to July 1, 1950; that filing of the notice to hold as required under the provisions of Congressional Act 147, which conditions were precedent to the operation of such suspension and such conditions not having been complied with the suspension provided by the very terms of the act itself, were not operative as to the plaintiff. That the plaintiff was therefore the same as though no act had been passed to do the assessment work for the year ending July 1, 1950 unless the plaintiff could bring itself within the scope of the limited conditions of the act which he did not even attempt to do and that consequently a forfeiture existed by reason of a <sup>lack of</sup> compliance with the Revised Statutes of the United States Section 2324, 30 U. S. C. A. 2324 and that consequently a valid relocation was made by the defendant and extensive development work done by them in full compliance with the said statute.



The judgment should be reversed with costs to the  
defendants and appellants in this court.

Respectfully submitted

ALDEN A. ELIASON, Attorney  
for Defendants and  
Appellants.