

1956

H. Knight and Orson Doyle Stilson v. Flat Top Mining Co. et al : Brief of Plaintiffs and Appellants, Defendants, Cross Plaintiffs and Joint Appellants

Utah Supreme Court

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Hanson and Ruggeri; Hammond and Hammond;

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IN THE SUPREME COURT
of the
STATE OF UTAH

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H. KNIGHT and ORSON DOYLE STILSON,
sometimes otherwise known as ORSON
DOYLE,

Plaintiffs and Appellants

vs.

FLAT TOP MINING COMPANY, a corpora-
tion, ABE GLASSMAN, J. W. HUMPHREY,
JEANETTE GLASSMAN, EDNA EKKER, Ad-
ministratrix of Estate of Cornelius Ekker,
deceased, CONSOLIDATED URANIUM
MINES, INC., a corporation, and NEW
MEXICO URANIUM CORPORATION, a cor-
poration,

Defendants and Respondents,

and

LORAN HUNT, et al,

*Defendants, Cross-Plaintiffs
and Joint Appellants.*

FILED

JUL 10 1956

Supreme Court, Utah

Case
No. 8439

BRIEF OF PLAINTIFFS AND APPELLANTS, DEFENDANTS,
CROSS PLAINTIFFS AND JOINT APPELLANTS

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LORAN HUNT, et al,

*Defendants, Cross-Plaintiffs
and Joint Appellants.*

Case
No. 8439

**BRIEF OF PLAINTIFFS AND APPELLANTS, DEFENDANTS,
CROSS PLAINTIFFS AND JOINT APPELLANTS**

STATEMENT OF FACTS

By this action the plaintiffs and appellants seek to quiet title to certain mining claims in Emery County, State of Utah. Said mining claims were designated Battle Mountain and Battle Mountain Nos. 1 to 4. (See Notices of Location, Plaintiffs' Exhibit B, pages 51 to 56).

The plaintiffs and appellants filed their complaint Oct. 3, 1953. At the time plaintiffs and appellants commenced said action they filed and recorded their Notice of Lis Pendens Oct. 14, 1953. (See Plaintiffs' Exhibit B, page 62).

By leave of Court plaintiffs and appellants on Sept. 14, 1954, filed an amended complaint, adding parties defendant.

To both the original and amended complaint, the defendants, Flat Top Mining Co., a corporation, Consolidated Uranium Mines, Inc., a corporation, New Mexico Uranium Corporation, a corporation, J. W. Humphrey and Bonnie Humphrey, his wife, Jeanette Glassman, Edna Ekker, Administratrix of the Estate of Cornelius Ekker, deceased, Abe Glassman and "Jane Doe" Glassman, his wife, Loran Hunt, John Burton, Charles Burton, Wayne Johnson, Harvey Thomas and Belmont Richards answered, counterclaimed and cross-claimed. (See Index of Pleadings, pages 1 and 2).

The area claimed, commonly known as Flat Top, is approximately 2500 feet in length and 600 to 800 feet in width, running North and South. Close beneath the summit, and running around the Flat Top Mountain is a wide reddish belt of sandstone, impregnated with van-

adium and uranium ores. Because of this apparently mineralized belt, Flat Top Mountain has always attracted prospectors, the first recorded location having been made Dec. 13, 1915. (See Affidavit of E. A. Dufford, Plaintiffs' Exhibit B, page 105) by E. A. Bricker and E. E. Jones, the original locators, who evidently abandoned their claims.

On July 28, 1931, Cornelius Ekker and Abe Glassman (M. Glassman, father of Abe Glassman, acting in behalf of Abe Glassman) relocated two claims on part of Flat Top Mountain, namely, Flat Top and Flat Top No. 1. (See Plaintiffs' Exhibit B, pages 87 and 88).

The Court found as to these claims that no discovery of ore was made, and that the locators had apparently relied on the mineralized belt hereinabove mentioned.

The Court also found that these claims were not in good standing on July 1, 1937.

On July 1, 1937, Jeanette Glassman, sister-in-law of Abe Glassman, and both defendants in this action, relocated a part of the area with two claims, Flat Top Lode and Flat Top Lode No. 1. (See Plaintiffs' Exhibit B, pages 73 and 73 A). She adopted the alleged discovery and corner monuments of the previous claims, Flat Top and Flat Top 1. These relocations, including the reconstruction of the old discovery and corner monuments, were made in about an hour's time. That part of the area covered by Jeanette Glassman's claims is not precisely known. Some fifteen years later, Horace Ekker and Harold Ekker revisited the area and compiled a map as to the probable location of these claims, verifying it by their signatures. This map was not produced at the trial,

but an inverse carbon copy of the same was received in evidence. (See Plaintiffs' Exhibit N.)

This "copy" map placed the Jeanette Glassman claims on the East side of the Mountain, and embraced approximately the East half of the mountain, lengthwise.

Defendants' Exhibit 14 also places Flat Top Lode and Flat Top Lode No. 1 on the East Half of the Mountain, embracing, however, a slightly greater area than the "Ekker" map.

No work was done, or caused to be done on these claims by Jeanette Glassman, and no Affidavit of Labor were ever filed by her, or by anyone in her behalf. However, Abe Glassman asserts that he secured some papers from Jeanette Glassman, in the fall of 1937, which purportedly transferred to him the relocated claims of Jeanette Glassman. These papers have never been recorded and were not produced at the trial, on the pretext that the same were lost.

On request of his attorney, (See Plaintiffs' Exhibit H) Abe Glassman obtained a so-called replacement deed from Jeanette Glassman, which was recorded Oct. 4, 1954. (See Plaintiffs' Exhibit B, page 147). This deed was not a part of the abstract admitted at the pre-trial, but was later added to the abstract. No proof of execution of this deed or the purported first papers was offered. The so-called replacement deed was recorded one year after the Notice of Lis Pendens filed in this action.

Abe Glassman asserts assessment work for the

years 1940-1941. The plaintiffs and appellants rebut this assertion.

On July 26, 1940, J. W. Humphrey, a defendant herein, staked three claims on the Flat Top Mountain, namely: Flat Top, Flat Top South Extension and Flat Top North Extension. (See Plaintiffs' Exhibit B, pages 115, 116, and 117). The Court found that he had abandoned these claims.

The Court found that twenty-two days after plaintiffs had filed their action, the defendants, Jeanette Glassman, J. W. Humphrey, Edna Ekker, Administratrix of the Estate of Cornelius Ekker, and Abe Glassman executed a lease to the defendant, New Mexico Uranium Company, who later assigned it to the defendant, Consolidated Uranium Mines, Inc., and which lease provides for a net ten per cent royalty, plus \$1.00 bonus for each ton mined shared equally by the above named lessors. (See Plaintiffs' Exhibit Q).

On Dec. 1, 1940, C. R. Hanks and John G. Adams located two claims, namely, Sinbad Nos. 1 and 2, embracing Flat Top Mountain. (See Plaintiffs' Exhibit B, pages 118 and 119, and Plaintiffs' Exhibit X).

On April 4, 1948, April 14, 1948, and April 21, 1948, Loran Hunt, John Burton, Charles Burton, Harvey Thomas, Wayne Johnson and Belmont Richards located three claims on Flat Top Mountain, namely, Beehive, Beehive Nos. 2 and 3. (See Plaintiffs' Exhibit B., pages 142, 143, 144, 145, and 146) (and Plaintiffs' Exhibit Y), which claims embraced practically all of the mountain.

The Court found that these claims were in good

standing until Oct. 1, 1950, and worked a forfeiture of all prior claims on Flat Top Mountain, not in good standing, prior thereto; and further, as to claims allegedly located on Flat Top Mountain up and to Oct. 1, 1950, that they were of no legal effect, void and a nullity.

On the Jeanette Glassman claims, assertedly claimed by Abe Glassman, Abe Glassman did no work until 1949, but in lieu thereof caused to be filed by his attorney, T. N. Jensen, Notices of Intention to hold these claims, for the years 1942 and up to and including the year 1950. (See Notices of Intention to Hold, Plaintiffs' Exhibit B., pages 124, 125, 126, 128, 129, 131, 132A, 135, 136, 137). The Court found that while the said attorney filed them by virtue of a power of attorney, none was ever recorded; and held also that he filed the same under his general authority as attorney for Abe Glassman.

The Court found, in addition to these Notices of Intention, that Abe Glassman had performed, or caused to be performed, the required assessment work for the years 1949 and 1950. This the plaintiffs refute.

On March 25 and 26, 1949, Orson Doyle Stilson, F. M. Stilson, O. D. Stilson, J. L. Stilson, V. A. Stilson and June Stilson, allegedly located four claims embracing the Flat Top Mountain, namely Flat Tops 1 to 4 (Plaintiffs' Exhibit B, pages 1 to 4). On Nov. 5, 1949, A. E. Williams allegedly located Flat Top claims 1 to 4, and 5 to 11, embracing Flat Top Mountain, which claims were later conveyed, Jan. 7, 1950, to Continental Mine & Milling Co. (See Plaintiffs' Exhibit B., pages 20 to and including 39).

On Nov. 9, 1949, the Stilson locators of Flat Top 1 to 4 conveyed the same to Frank Dean et al, who later conveyed these claims to Continental Mine & Milling Co. (See Plaintiffs' Exhibit B, pages 8, 49 and 50).

In Case No. 1755, Civil, Emery County, Utah, V. R. Ekins et al vs. A. E. Williams, Continental Mine & Milling Co., the Court set aside that deed, and restored the property to the Stilson locators and their assignees. In that action, also, the locators of the Beehive claims were joined, and while the issues between the plaintiffs therein, and the litigants claiming under said deed, were resolved by trial, a default judgment quieting title without proof being offered was taken against the locators of the Beehive claims. (See Plaintiffs' Exhibit N, and Plaintiffs' Exhibit B, pages 152 and 153).

The Flat Top Mining Co. failed to comply, in its incorporation, with the laws of Utah, relating to organization of corporations, but the Court held that such failure did not deprive it of the power to receive property; that the Flat Top Mining Co. had succeeded to the interests of the Stilson locators of Flat Top 1 to 4 claims; that the only proof of labor offered for these claims for the assessment year 1950-1951 was an affidavit filed July 27, 1951, which recited work done in Aug., 1949, to June, 1950, and not work performed in the assessment year claimed for, and was held insufficient proof.

E. G. Frawley, as President of Continental Mine & Milling Co. (See Plaintiffs' Exhibit B, pages 45-46) filed affidavit of work performed on Flat Top claims Nos. 5 to 11, for road work, consisting of ten days work with men and equipment, said work being performed between

Oct. 1, 1950, and June 20, 1951, and said affidavit was recorded June 23, 1951.

Also, E. G. Fawley, as President of Consolidated Mines, Inc. (See Plaintiffs' Exhibit B, page 75) filed affidavit of work performed on over fifty claims, claiming the expenditure of \$50,000.00 in mining operations, and of the claims listed, Flat Top Lode and Flat Top Lode No. 1, were among them.

At the trial, affiant, E. G. Fawley stated that of the \$50,000.00 work done, some \$900.00 was performed on Flat Top Lode and Flat Top Lode No. 1. He stated the work was done by Kenneth Faulk, working for Thorberg Construction Co., but under his direction and while he was present, and consisted of road work on the road to Flat Top Mountain, done between May 7 to May 15, 1951, and his check as Pres. of Consolidated Uranium Mines, Inc., in the amount of \$2,298.00 (See Defendants' Exhibit 18) to Thornburg Construction Co. was offered, as proof of payment of this work and other work performed by Thornburg Construction Co. for his company. Also, the work slips of Kenneth Faulk on which had been written "Flat Top" were offered. (See Defendants' Exhibit 16).

Kenneth Faulk stated that he performed no work on "Flat Top" and the work on the road, as he walked his caterpillar over it, except for a "cut" was less than 30 minutes, valued less than \$20.00; and that the other work done as evidenced by "slips" was performed on the Muddies." He stated further his slips when written never bore the notation "Flat Top," and they were offered to show this (See Plaintiffs' Exhibit T).

The plaintiffs and appellants properly located Battle Mountain and Battle Mountain Nos. 1 to 4 claims, making discovery of ore thereon, and erecting their discovery and corner monuments; and that they have maintained their claims in good standing; and that in locating and marking off their locations they made new locations and erected new discovery and corner monuments. And that while Battle Mountain Claims 1 to 4 embraced the area covered by Flat Tops 1 to 4 claims, these claims also took in new area, and that Battle Mountain covered additional territory. (See Plaintiffs' Exhibit A, and Plaintiffs' Exhibit B, pages 51 to 56, and pages 1 to 4).

The Court found that Flat Top Lode and Flat Top Lode No. 1 were in good standing since 1937, and the area embraced therein not open to location, but as to remainder of the area not included in these claims, Battle Mountain and Battle Mountain 1 to 4 were in good standing, but that since Battle Mountain 1 to 4 included Flat Tops 1 to 4, the plaintiffs' title to these claims was quieted in the plaintiffs and appellants, subject to a trust imposed upon them on Battle Mountain Nos. 1 to 4 for Flat Top Mining Co., successors in interest to Flat Top 1 to 4 claims.

Also, after the trial had progressed for several days, the Court, upon the application of defendant, Flat Top Mining Co., made an order precluding and restraining the Beehive locators from further participating therein on the ground that a default judgment had been taken against them in the quiet title action of V. R. Ekins et al vs. A. E. Williams, et al, in that certain action filed in the District Court of the County of Emery, State of Utah,

Civil No. 1755. (See Plaintiffs' Exhibits N, and B, pages 152 and 153) and the matter was res adjudicata. Upon denial of motions for new trial, timely filed by both the plaintiffs and appellants and the defendants, cross-plaintiffs and appellants, this appeal followed.

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN FINDING THAT THE CLAIMS OF JEANETTE GLASSMAN, FLAT TOP LODE AND FLAT TOP LODE NO. 1 WERE NOT FORFEITED AND ABANDONED, AND IN QUIETING TITLE THERETO IN THE ALLEGED OWNER, ABE GLASSMAN,

POINT II.

THE COURT ERRED IN NOT QUIETING TITLE IN THE PLAINTIFFS AND APPELLANTS IN THE ENTIRE AREA EMBRACED IN THE BOUNDARIES OF THEIR CLAIMS, BATTLE MOUNTAIN NOS. 1 TO 4, INCLUDING IN THAT AREA THE TERRITORY EMBRACED WITHIN THE BOUNDARIES OF THE JEANETTE GLASSMAN CLAIMS, FLAT TOP LODE AND FLAT TOP LODE NO. 1, FREE AND CLEAR OF ANY TRUST IMPOSED UPON THE PLAINTIFFS AND APPELLANTS FOR THE BENEFIT OF FLAT TOP MINING CO.

POINT III.

THE COURT ERRED IN FINDING THAT THE DEFENDANTS, CROSS-PLAINTIFFS AND JOINT APPELLANTS, LORAN HUNT, JOHN BURTON, CHARLES BUR-

TON, HARVEY THOMAS, WAYNE JOHNSON AND BELMONT RICHARDS WERE BARRED FROM ASSERTING THEIR TITLE TO THEIR CLAIMS, BEEHIVE AND BEEHIVE NOS. 2 AND 3, IN THIS ACTION.

ARGUMENT

POINT I.

THE COURT ERRED IN FINDING THAT THE CLAIMS OF JEANETTE GLASSMAN, FLAT TOP LODGE AND FLAT TOP LODGE NO. 1, WERE NOT FORFEITED AND ABANDONED; AND IN QUIETING TITLE THERETO IN THE ALLEGED OWNER, ABE GLASSMAN.

Jeanette Glassman's claim, Flat Top Lodge and Flat Top Lodge No. 1, are invalid because there was no discovery of a lode or vein of ore on these claims July 1, 1937, the time of location.

The Court found that for her discovery she relied solely on the apparently mineralized belt of sandstone running close beneath the summit clear around the mountain. Horace Ekker, who as her agent, made these locations, testified that he made them in an hour's time; that he did not look for or discover any lode or vein of ore; and that he just supposed it was there. See Tr., Vol. 2, Test. Harold Ekker, Lines 7, 8, 9, 10, 11, page 496, Lines 11, 17, 18, 19, 20, 21, 23, 24, 26, 27, page 500).

It is requisite to a valid location, and to the ownership of the lode mining claim, that there should be a discovery of ore bearing mineral in rock. Mere indica-

tions of mineral, however strong, are not sufficient to comply with the mandatory requirement of the law. (See *Gibbons vs. Frazier*, 249 P. 272, *Torrible Mining Co. v. Argentine Mining Co.*, 89 F. 583, *Iron Silver Mining Co. vs. Mike & Starr Mining Co.*, 12 S. Ct. 543, 143 U.S. 394) And a belief in the existence of mineral not based on any discovery or tracing does not meet the requirements of the law. (See *Iron Silver Mining Co. vs. Reynolds*, 8 S. Ct. page 598, 12 U.S. 374, 31 L. Ed. 366, *Noyes vs. Clifford*, 94 P. 843).

Also, since there was no discovery of ore bearing mineral in rock on the Cornelius Ekker and Abe Glassman locations July 28, 1931, by the locators (the Court having held these claims forfeited and abandoned as of July 1, 1937) the use of the old monuments by Jeanette Glassman in the relocation of her claims did not cure this invalidity. The Court found here also that the 1931 locators relied on said mineralized belt. Horace Ekker testified that while he was on Flat Top Mountain in 1931 he could not remember much about it, nor did he see these old monuments, or know where they were. (See Tr. of Ev., Direct Test. H. Ekker, Vol. 2, Lines 12, 13, page 386, Lines 5, 6, page 387, Lines 24, 25, 29, 30, page 388, R. T., H. Ekker, Line 30, page 487, Line 1, page 488). The law is settled that if a locator of a claim is not the discoverer of ore bearing mineral in rock upon which it is based, the locator must know of and claim said vein in order to give it validity. (*Erwin v. Perigo*, 93 F. 608, *McMillen v. Torribo Mining Co.*, 28 S. Ct. 533, 197 U. S. 343, 49 L. Ed. 784).

Further, the defendant, Jeanette Glassman, for-

feited and abandoned her claims, Flat Top Lode and Flat Top Lode No. 1 by failing to do the required annual assessment work and by failing to file the affidavit of work done and posting a copy thereof on the claims, as required by Sec. 40-1-5, 40-1-6, Vol. 5, Utah Code Annotated, 1953.

Jeanette Glassman, locator of Flat Top Lode and Flat Top Lode No. 1, never did any work on her claims, or ever filed any affidavits of work done, as required by law. The record, and lack of proof as to her activity on these unpatented mining claims clearly shows that she lost any title thereto, for a mining claim, until a patent therefor has been issued, is held by a peculiar title, which is never complete and absolute; and which only can be maintained by the annual expenditures thereon for work thereon as required by law. (See *Haws vs. Victoria Copper Mining Co.*, 16 S. Ct. 282, 160 U. S. 303, 40 L. Ed. 436, *El Paso Brick Co. vs. McKnight*, 34 S. Ct. 498, 233 U. S. 250, 58 L. Ed. 943).

But here we have a peculiar circumstance. The defendant, Abe Glassman, one of the locators of the 1931 claims, Flat Top and Flat Top 1, found by the Court to be forfeited and abandoned, now comes forth and asserts title to Jeanette Glassman claims, Flat Top Lode and Flat Top Lode No. 1.

His claim is that in the fall of 1937, his brother, Oscar, gave him a deed or a paper from his sister-in-law, Jeanette Glassman, or she gave it to him direct, he is not sure which, to two claims. What claims were therein stated he is not altogether sure, as he did not remember reading the same, though he may have, but

he knew it mentioned only two claims, and he thought Flat Top Lode and Flat Top Lode No. 1. He never recorded it and states that he lost it. He admits that he was not present when it was prepared in New York, but that he thought it was prepared by his brother's attorney, Sidney B. Alexander, whom he knew well. He stated he did not know it was lost until 1953 and that he searched for it but had never found it. He admitted that he did not find a copy of it, but at the request of his attorney in this action (See Plaintiffs' Exhibit H) he forwarded the deed prepared by this attorney that had been sent to him to his sister-in-law, Jeanette Glassman, and that she returned it to him. He then mailed it to his attorney in this action. (See Plaintiffs' Exhibit B, page 147). He admitted this was not a duplicate deed or paper like his brother had given him, or his sister-in-law had given him, for while he was not sure he had read the deed or paper given him, he remembered that it referred only to two claims, what ones he was not exactly certain about. He stated he got a "replacement" deed from his sister-in-law, Jeanette Glassman, which, as he stated was returned to his attorney and later recorded, Oct. 4, 1954, by this attorney. (See Tr. of Ev., Direct and Cross, Abe Glassman, Vol. 2, page 602, lines 4 to 30, page 603, Lines 1 to 20, page 629, lines 19 to 23, page 630, lines 8 to 30, page 631, Lines 1 to 12, page 663, Lines 8 to 30, page 664, Lines 1 to 30, pages 665, 670, 672, Lines 1 to 20. Also, See Direct Testimony, Hyrum Moulton, Tr. of Ev. Vol. 4, Page 1549, Lines 1 to 11, P. 1551, P. 1553, Lines 9 to 19, P. 1554, Lines 1 to 23, P. 1556 to 1560, P. 1561, Lines 1 to 5, and 23 to 27.)

As to the alleged deed, claimed by Abe Glassman,

given to him either by his brother, or Jeanette Glassman, which he claims he lost, the plaintiffs and appellants denied it and claimed that no such deed ever existed.

As to the so-called replacement deed it was recorded one year after the Lis Pendens was filed. This deed was clearly shown (See Plaintiffs Exhibit H) to have been taken with this and other litigation in mind.

Unpatented mining claims can be conveyed, it is true, but they are subject to the rules and regulations of the mining district, and State law (See *Copper Globe Min. Co. vs. Allan*, 23 U. 410, 64 P. 1019, *Lockart v. Willis*, 54 P. 336).

Sec. 57-3-3, Vol. 6, Utah Code Annotated, 1953, provides that any conveyance not recorded shall be void against subsequent purchasers in good faith and for a valuable consideration. Locators of unpatented mining claims come within the purview of the statute, for such claims are held in a peculiar title, which is never complete and absolute, and which can only be maintained by annual expenditures. The locator makes his location in good faith, expends time and effort in discovery and making of his locations, and has to expend at least \$100.00 per year to maintain the same. Where as here, a claim of an unrecorded lost deed is made, hoping by that pretext to avoid forfeiture of claims already forfeited except for such unrecorded conveyance, certainly it should be held void, and of no effect in founding a new title thereon, to the detriment of other locators, who have in good faith made their discovery and perfected their locations.

Also, a mere statement that such a lost and unre-

corded deed was in existence, and given to the grantee, is not sufficient proof of its existence. The plaintiffs and appellants denied its existence, and Sec. 78-25-16, Vol. 9, Utah Code Annotated, 1953, provides that no evidence of the contents of such lost unrecorded instrument should have been admitted, where the original has been lost or destroyed, without proof of the loss or destruction first having been made. This was not done here. (See Tr. of Evid. Direct Testimony, Abe Glassman, Vol. 2, Page 602, lines 4 to 30, page 603, Lines 1 to 10.)

It was not the best evidence available, (See Jones on Evidence, 4th Ed., Vol. 1, Sec. 229) Here, if there was such a deed in existence, a copy of the alleged deed could have been obtained, as the defendant, Abe Glassman, stated it was probably prepared by his brother's attorney. The plaintiffs and appellants have grave doubts that such a deed was ever in existence, for as late as July 20, 1953, in No. 1866, Civil, Emery County, Utah, in an action entitled Flat Top Mining Co. vs. Abe Glassman et al, in an answer and counterclaim filed in that action never claimed title other than by his original locations, in 1931, Flat Top and Flat Top 1, which the Court found abandoned. If at that time such a conveyance was in existence he probably would not have overlooked making his claim on the basis of that instrument; he has done it here. (See Tr. of Ev., Vol. 2, page 615, 616, 617, 618, 619, Line 1) and see also Lampe v. Kenndey, 14 N. W. page 45, which case in reference to such deeds as claimed here, holds as follows:

“These observations are made on the hypothesis that there is proper evidence in the case to show

the existence of the deed to Howell. But such is not the fact. Regularly, after proving destruction of the instrument its contents should be proved by the best evidence obtainable. Here we have proof that Goodsel made a deed of the lot to Howell. Instead of giving the contents of the instrument the witness merely states his conclusion of law that it was a deed and says nothing of the manner of its execution. This is clearly insufficient. We regret that this protracted litigation cannot be terminated now and here. But no alternative is left to us. The judgement must be reversed and the case remanded for a new trial."

Based on the alleged existence of the deed which was never proved and should not have been admitted, Abe Glassman asserted that his agent, J. W. Humphrey, and under a lease arrangement in the latter part of June 1, 1940, Cornelius Ekker, Horace Ekker, Bruce Ekker, and Glen Ekker, took possession of said Jeanette Glassman claim; and in mining the leased premises, work was done which could be counted as assessment work for the years 1940 and 1941.

While he claimed he owned the Jeanette Glassman claims since the fall of 1937, he admitted, and the Court so found, that no assessment work was done, or affidavits of work filed, on said claims from July 1, 1937, to June 1, 1940. The Court also found that during this period no locations were made on this area. He admitted that while he claimed assessment work done for the years 1940 and 1941, no affidavits of work done were posted on the claims or filed in the office of the County

Recorder of Emery County, where the claims are situate.

The filing of such affidavit is mandatory under our statute, as Sec. 40-1-6, Vol. 5, Utah Code Annotated, 1953, in part provides:

“The owner of any quartz lode or placer mining claim who shall do or make, or cause to be done or made, the annual labor or improvements required by the laws of the United States, in order to prevent a forfeiture of the claim, must, within 30 days after the completion of such work or improvements, file in the office of the County Recorder of the County in which such claim is located, his affidavit, or the affidavits of the persons who performed or directed such labor or made or directed the improvements.”

Because of his failure to comply with the statute, these claims were forfeited, for while J. W. Humphrey, who located Flat Top, Flat Top South Extension, and Flat Top North Extension July 26, 1940, situate on Flat Top Mountain, because of his obvious interest in making the Jeanette Glassman claims good (since he had a leasehold interest therein, as the Court found) stated his locations were located at the bottom of the mountain, C. R. Hanks and John Adams had also located on the mountain, Dec. 1, 1940, two claims, called the Sinbad claims No. 1 and 2. The location of these claims under our statute worked a forfeiture, even if the so-called work was done in behalf of Abe Glassman, which the plaintiffs and appellants deny. It is true that this Court in the case of Murray Hill Min. and Milling Co. vs. Havenor, 24 Utah 73, 66 P. 763, on a stipulated state of facts of

actual occupancy, held that filing an affidavit of labor after 30 days did not render the claims forfeited, but this action is distinguishable because here we have no affidavit ever filed or posted on the claim. The case just cited here was a hardship case; and hardship cases sometimes produce an interpretation of law that have different effects than were first anticipated.

Our statute is mandatory because it is necessary to know what claims are in good standing; since Sec. 2324, Rev. stat. of U. S. provides that upon the failure to comply with these conditions (which are the performance of the labor and making the improvements required by statute) the claim or mine shall be open to relocation in the same manner as if no location had been made. Without such a statute and without holding to a strict compliance therewith, we impede the exploration and development of the public domain, for when such a statute is left open to question it leads to endless litigation and possible fraud. The rules and regulations provided by our statutes were evolved out of the customs and rules of the miners and are for their benefit. The statute should be strictly construed, for it is for the benefit of all and makes it possible to have prospectors prospect for and locate property with some assurance of acquiring title thereto. The strict construction of our statute also prevents the wholesale location of property, for if the statute is strictly construed the claims are free again upon the failure to file and post the affidavits. This was the purpose of the statute.

These statutes have been upheld and followed, and because of the Utah case cited here there has always

been a question as to what the law in Utah would be where no affidavits are filed or notices posted.

The majority rule in the construction of such statutes similar and almost identical to ours, follows the strict construction thereof and they have been supported by numerous decisions and particularly in jurisdictions where mining is a large part of economy as is the case in our State. (See *Sessons vs. Sommers*, 53 P. 823, 24 Nev. 370; *Northmore vs. Simmons*, 97 Federal 386; *Upton vs. Santa Rita Mining Company* 89 P. 275, 14 N. M. 96; *Butte City Water Co. vs. Baker*, 25 S. ct. 213, 186 U. S. 170; 49 L Edition 409).

Here we have two witnesses to establish the claim of work done in behalf of the defendant, Abe Glassman, to-wit: J. W. Humphrey and Horace Ekker. J. W. Humphrey, the Court found, twenty-two days after this action was commenced, joined in a lease with the defendant, New Mexico Uranium Company (and assigned to the Consolidated Uranium Mines Inc.) to mine the Jeanette Glassman claims, if the owner thereof, Abe Glassman, prevailed in this action, he sharing with the other lessors in the royalties and bonuses provided by such lease.

Horace Ekker is the son of Edna Ekker and an heir of Cornelius Ekker; and Edna Ekker as administratrix of the estate of Cornelius Eker, joined in said lease; and the estate would also share equally with the other lessors in the royalties and bonuses provided by said lease.

Their testimony, and they were the only witnesses in behalf of Abe Glassman as to the alleged work done, must be taken in the light of their self interest in the outcome of this case.

And, for that matter, so should the fact that Jeanette Glassman gave a replacement deed (see Plaintiff's Exhibit B, page 147 and particularly that part of the deed which recites "and which deed has either been destroyed or misplaced and is not recorded in the Emery County Recorder's Office") be taken in light of her self interest as she is also a lessor sharing equally with the other lessors in the royalties and bonuses provided therein; and while her replacement deed allegedly conveys her interest to Abe Glassman, yet, by virtue of her joining said lease, she still has an interest in the litigation.

Against the statements as to work done, made by defendants' witnesses, the plaintiffs offered many witnesses whose evidence is set forth in the transcript, namely, Charles Hanks, John Adams, H. W. Balsley, William Pollock, Raymond A. Fuller, Mort Robinson, Elwin Robinson and Lillie Denny.

If there had been an Affidavit of Work filed, we would have some documentary proof thereof, but as it is, we have testimony given some fourteen years later that work was performed on isolated claims situated in a remote mining district, and certainly because of this, the testimony of the witnesses must be considered in light of their interest in the outcome of the litigation.

If the statute is strictly construed, as it should be, it would serve the best interest of the public and promote the development of such unpatented mining claims by making definite the forfeiture of claims upon which such affidavits have not been filed or posted.

Today in Utah, under the present status of our law,

locators face possible litigation on any area no matter how open to location it appears. This will not create an additional burden upon the locator, for it protects him by law if he complies, and it prevents locators who do not intend to develop the property from monopolizing the public domain.

Be that as it may, the work by Abe Glassman for the years 1940-41 cannot be counted as assessment work.

It is admitted and testified to by Horace Ekker, that the Ekkers, Cornelius, Horace, Bruce, and Glen, went on said property under a lease arrangement, whereby they could keep what they could find, paying their own expenses, and while their going upon the said property is a resumption of possession in behalf of the defendant, Abe Glassman, the nature of the work performed by them does not constitute assessment work as required by law. Assessment work requires the expenditure of labor and money for the benefit of the property by the claimant. There was no plan, no development, and no exploration work, and the property was in no way benefited. Horace Ekker testified that all they did was to go up on Flat Top to an old hole that had been mined in previous years (and which hole the claimant or the locator under whom he claimed, was in no way responsible, for the Court found that there was no work done on this property from July 1, 1937, until in June, 1940, the time when the Ekkers went there) Out of this hole they took some ore, from that they realized \$36.00. (See Transcript of Evidence, volume 2, Testimony of Horace Ekker, page 419, lines 14 to 32, page 420 lines 18 to 30, page 421 lines 1 to

11, page 425 lines 29 to 30, page 426 lines 1 to 10, page 430 lines 29 to 30, page 431, lines 1 to 10, page 522 lines 9 to 30, page 523, page 524, page 525 lines 1 to 6).

They admitted that they did not develop the hole, but "high-graded" for ore, and such "high-grading" did not promote the development and exploration of the claims or benefit the same in any way.

The work done was not for the development or the benefit of the claims, nor was it so intended, the lessees going on the property simply to high grade ore sufficiently to make a living. (See Tr. of Ev., Vol. 2, p. 431, Lines 1 to 8). The defendant expended no money for work or improvements, and this work is not such as can be counted as assessment work. (See *New Mercur Mining Co. v. South Mercur Mining Co.*, 102 Utah, 131, 128 Pac. (2nd) 269; *Klopenstine v. Hays*, 20 U. 45, 57 P. 712, *Hall vs. Kearney*, 18 Colo. 505, 33 P. 373).

The Jeanette Glassman claims, Flat Top Lode and Flat Top Lode No. 1, because of the failure to do assessment work and because of the claimants failure to file affidavit or post notices as required by law, were open for relocation in the year 1940, and when John Adams and C. R. Hanks located on Dec. 1, 1940, their Sinbad claims, these claims were forfeited as of that time. (See Plaintiffs' Exhibit B., page 118 and 119, and Plaintiffs' Exhibit X).

In lieu of assessment work for the years 1942 to 1950 (See Notices of Intention to Hold, Plaintiffs' Exhibit B, pages 124 to 137) the claimant, Abe Glassman,

for himself alone and for his claims, caused to be filed notices of desire to hold for these years.

The act of 1942 (Act July 3, 1942, c 46, 56 Stat. 647) provided for the suspension of annual work on all valid mining claims situated in the United States within the exterior limits of any area withdrawn by executive order for purposes of national defense. No proof of such executive order was ever offered, and to the best of their search, the plaintiff and appellants find the only withdrawal order affecting this territory was in 1946.

In 1943 (by Act of May 3, 1943, c 91, 57 Stat. 74) it was provided that every location of any such mining claim, in order to obtain the benefits of same, 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 July 1 for each year that this act remains in effect, a notice of his desire to hold said mining claim under this act. This act was extended by successive Congressional enactments until Oct 1, 1950.

Since the notice of desire to hold has been held in lieu of the annual assessment work, these notices to hold must have some reference to the act, and meet the requirements similar to those required by Sec. 40-1-5 and Sec. 40-1-6, Utah Code Annotated, 1953, in that they have to name the claim and where it is situated, and post a copy of such notice on the claims. No notice was ever posted on said claims and no proof of such posting was ever made.

An examination of the notices filed (See Notices, Plaintiffs' Exhibit B, pages 124 to 137) shows that all

that was ever filed was simply the name of the claim, and no mention was made of where it was situated, and no reference as to its date of location, or recording given. Any person searching the records could not ascertain where the claim was located, and with no notice posted on the claims, since we have no cross-index system in Utah in the recording of unpatented mining claims, he would be at a loss to know what property was claimed; this requirement that location or where situated be stated is definite in our statute. The regulation is not unreasonable, and has been held within the power of the State in which the particular claims are located to enact. The notices filed by the claimant are fatally defective, because of failure to state location or where situated, and it is as if no notice had been filed, and the property becomes subject to forfeiture. *Kramer vs. Gladding, McBean and Co.* 85 P. (2nd) 552.

See *Morgan v. Sorenson*, 3 U. R. 2nd, 428, 286 P. (2nd) 229, in which the Court held:

“It seems inescapable that the purpose of requiring assessment work and of requiring the filing of a “Notice of Intention to hold” is the same — to require evidence of diligence and good faith in the developing of claims and give notice to others.”

Certainly, since Utah requires the affidavit of labor to be filed, and with notice of where claim is situated, it seems to be the law in this jurisdiction that the notice of Intention to hold should meet the same requirement if the benefit sought thereunder is to be obtained.

Also, the said notices do not invoke the benefits

claimed under said act for another reason. They were not filed or caused to be filed by the claimant. An examination of the so-called notices of intent to hold reveal they are joint notices by joint owners of a series of mining claims, and in some of which each of the joint owners states which of the group of claims he wants, and in some of the affidavits the joint owners claim them all as a group. They are not filed by a person acting in behalf of the claimant; they are allegedly filed by one T. N. Jensen, by alleged power attorney from the group owners, Peter H. Riley, C. A. Gibbons, Oscar Glassman, C. T. Humphrey, and Abe Glassman, dated June 27, 1942, which was never recorded; the person filing the affidavit never acted for the claimants individually, but only as a group, and such filing does not gain the benefits of the act especially in view of the fact that there is no reference made to any instrument. For without some reference as to how they claim them as a group, there is no privity between the parties sufficient to file such group intention to claim the benefit of the act. No reference is made and none is of record to any conveyances between them jointly vesting in them joint title so as to claim the benefit of the Act for these two claims, which were located in the name of Jeanette Glassman, and not Abe Glassman. While Abe Glassman claims such claims aforementioned, by virtue of an alleged lost deed, the existence of such deed is denied and not proven under the authority of the cases quoted. In addition thereto, under the further authority of Capel et al vs. Fagan, 77 Pac. 55, and Cross v. Patch, 297 P. (2nd) 319, and from the record, he is a stranger to the title. His filing does not invoke the benefits of the act, for only a claim-

ant having some privity therein may claim the benefit of the act by filing such notice of intention. And here, no notice of intention to hold was filed by him under any theory; a group of owners filed it and without their group interest being shown in the respective claims, and of record, they cannot as a group invoke the benefit of the act, right of the group to file might have been revealed in the alleged power of attorney claimed by T. N. Jensen from the group, dated June 27, 1942, but the same was never recorded, and under Sec. 57-1-8, Utah Code Annotated, 1953, it is provided as follows:

“Every power of attorney, or other instrument in writing, containing a power to convey any real estate as agent or attorney for the owner thereof, or to execute as agent or attorney for another any conveyance whereby any real estate is conveyed, or may be affected, shall be acknowledged or proved, and certified and recorded as conveyances whereby real estate is conveyed or affected are required to be acknowledged or proved and certified and recorded.”

And where as in the case of an unpatented mining claim, as here in litigation, where the title is never complete, and can always be lost by failure to do the work, or in lieu thereof, file a notice under the act suspending suchwork if such notice is filed, such power of attorney relating to the filing of notices affect real estate, and should be recorded. And if not recorded, as here required, the party claiming the alleged power of attorney is without right to file such notices.

Here, they offered testimony of Abe Glassman

that since the latter part of 1937 Mr. C. F. Humphrey of San Francisco was his attorney and that Mr. Humphrey retained Mr. Jensen to handle the affairs at this end for Mr. Humphrey, that he may have given Mr. Jensen a power of attorney in 1941, but none was produced or offered at the trial; and that power of attorney is not the one referred to in the group filing of notice of intention, it is the one dated June 27, 1942, executed by all the parties. It was also claimed that Mr. Jensen was the attorney for Mr. Glassman by association of counsel, but there is no evidence in the record that Mr. Glassman ever retained Mr. Jensen in the matter only that Mr. Humphrey had him do certain matters for him, and in this action, Mr. Frandsen appeared for Mr. Glassman, and there is testimony that in 1941 Mr. Frandsen was the attorney retained by Mr. Humphrey and later Mr. Frandsen had Mr. Jensen handle some matters for him, in connection with these claims. The plaintiffs and appellants contend that these alleged notices of intention do not comply with the act, requiring a claimant to file on behalf of his claim, and that Mr. Jensen had no authority to file the same, nor could they be of any legal effect, without the power of attorney being recorded. Mr. Jensen admitted this when he filed the notices by special reference to such a power of attorney. No proof was offered as to the group power of attorney as claimed by Mr. Jensen, and it was admitted no power of attorney was ever recorded, and in failing to record the same, the notices had no validity, because Mr. Jensen is a stranger to the title, and without proof of his right to file, it is as if no notices had been filed. (See *Morgan v. Sorenson*, 3 Utah Reports, 2nd, 428, 286 P.

2nd 220) See Transcript of Test. Abe Glassman, Vol. 2, P. 580, Lines 21 to 30, page 581, Lines 1 to 6, page 607, Lines 5 to 24, page 608, Lines 1 to 24, Trans. of Test. T. N. Jensen, Vol. 3, page 1151, Lines 1 to 4, page 1159, Lines 21 to 25, page 1164, Lines 27 to 30, page 1165, page 1168, lines 8 to 21.

The plaintiffs offered and evidence was received as to other locations, made on Flat Top Mountain, and embracing the area, including the claims of Abe Glassman, (called the Jeanette Glassman claims, Flat Top Lode and Flat Top Lode No. 1, to distinguish them from the locations of Cornelius Ekker and Abe Glassman, dated July 28, 1931, and called Flat Top and Flat Top 1, and which the Court found had been abandoned) during the period when the records were silent as to work done for the years 1937 to 1943, and while the alleged notices of intention to hold were on file in lieu of assessment work in behalf of the Abe Glassman's Jeanette Glassman claims; and before any other entry on the area was made by the claimant, Abe Glassman, except the alleged entry by the Ekkers in June of 1940.

Dec. 1, 1940, C. R. Hanks and John Adams located the Sinbad claims No. 1 and 2, on said Flat Top Mountain, embracing the total area (See Plaintiffs' Exhibit B, page 118 and 119; Plaintiffs' Exhibit X).

April 4, 14, and 23, 1948, Loran Hunt, et al, located the Beehive claims, Beehive, Beehive No. 2 and 3, on said Flat Top Mountain, taking in the total area. (See Plaintiffs' Exhibit B, page 142 to 146 and Plaintiffs' Exhibit Y); and which claims the Court found were in good stand-

ing until Oct. 1, 1950 (See Act of June 29, 1950, c 404, Stat. 275).

The first locations, the Sinbad claims, were valid locations, under the plaintiffs and appellants' theory that the land embraced in the alleged Abe Glassman claims (Jeanette Glassman claims Flat Top Lode and Flat Top Lode No. 1), was open to relocation. The locators thereof admitted that they did no further work, or filed any notices of intention to hold in lieu of work on their claims after location, but the Court held they were admissible to show that such locations were made when the land was open for relocation, and held in force until they were forfeited when the Beehive locations were made. (See Lockhart v. Farrell, 31 U 155, 86 P. 1077).

The second location, the Beehive claims, were valid locations under the plaintiffs' and appellants' theory that the land embraced in the Abe Glassman claims, (Jeanette Glassman's claims Flat Top Lode and Flat Top Lode No. 1,) was open to relocation, and they were admitted to show such location was made.

The locators of these Beehive claims, the defendants cross-plaintiffs and joint appellants, never admitted that their claims were no longer subsisting and valid claims, as they claimed that the Abe Glassman, (Jeanette Glassman claims) had been abandoned and forfeited by the failure to do the assessment work required, and that such forfeiture had been worked by their relocation. They further questioned the plaintiffs and appellants' locations, as invalid, even though they admitted no work done after Oct. 1, 1950, and that they had not gone back on the land until Dec., 1954.

The Court found that their claims were good and subsisting claims until October 1, 1950, but barred the defendants, cross-plaintiffs and appellants from proceeding further in the case upon the motion of the defendants who claimed they had been barred from further asserting any claim to the territory embraced in their claims, because of the naked default taken against them in the case of V. R. Ekins, et al. (See Plaintiffs' Exhibit N. and Plaintiffs Exhibit B., pages 152 & 153.)

The plaintiffs and appellants claim that the land embraced in their claims, Battle Mountain and Battle Mountain 1 to 4, was open for relocation July 1, 1951, when they made these locations, but contend that the defendants, cross-plaintiffs and appellants had a right to remain in the action to pursue their case to the end, come what may, and the Court erred in barring them from asserting their title in said action.

The Court's action is open to question under our statute relating to quiet title actions since no proof as required in default actions was taken, and also on the grounds of jurisdiction, because the mining claims upon which the Ekins case was founded were void, and at best they did not embrace the whole area of Flat Top Mountain. This we will discuss further under Point III.

On July 1, 1949, Abe Glassman caused to be filed on his said claims a Notice of Intention to Hold, which said notices already have been discussed. In addition thereto, an Affidavit of Labor by Thomas Skidmore (see Plaintiff's Exhibit B page 136A) covering work allegedly done on 40 claims, two of which were these Abe Glassman claims. Other than the Affidavit, no proof was

offered, nor was it shown that Skidmore performed work on Flat Top Mountain or in the immediate vicinity thereof.

It is also admitted that these claims were three miles away from the Temple Mountain Claims where Skidmore was leasing, and that the only work done by Skidmore was on a road leading from Temple Mountain Junction some 10 miles away to Temple Mountain (see Cross Examination, T. N. Jensen, Volume 3, pages 1152, lines 27 to 30, page 1170, lines 7 to 30, page 1171, lines 14 to 30, and page 1172, lines 1 to 18).

The work claimed is lumped together, and while such work on the part of the contiguous group of claims can only apply to those claims that are contiguous, the two claims in question were some three miles distant from the Temple Mountain claims, and the work could not benefit them, they not being a part of the Temple Mountain Group.

The plaintiffs offered the testimony of Doyle Stilson and J. L. Stilson that they, and their successors in interest were in continuous actual occupancy and possession of said property in 1949, and no work was done on the said claims other than that by them or their successors in interest and not by Thomas Skidmore on these particular claims.

Since no proof was offered supporting the Affidavit as to what work was done on Flat Top Mountain, and since the defendants' witnesses admitted no work was done, the Affidavit being but prima facie evidence, the proof offered by plaintiffs' witnesses, coupled with the admissions of no such work by defendants' witnesses, fully rebutted the same.

July 1, 1950, T. N. Jensen filed a joint notice of intention to hold on behalf of the co-owners named therein, of which Abe Glassman was one. The Act of June 29, 1950, c. 404, 64 Stat. 275, only extended the time in which assessment work could be done until Oct. 1, 1950.

Since there was no suspension of the requirement that assessment work had to be done, as required by Sec. 2224, Rev. Stat. of U. S., the affidavit served no purpose, as the work had to be done for that year.

Dec. 1, 1950 (See Defendant's Exhibit 2) E. G. Frawley filed what he denominated a Supplemental Affidavit for work done on these two claims, the Jeanette Glassman locations, Flat Top Lode and Flat Top Lode No. 1.

He admitted that in 1950 he did not know where the Jeanette Glassman claims, Flat Top Lode and Flat Top Lode No. 1 were located, except they were on Flat Top Mountain. He admitted that in 1952 he was apprised by the Ekkers that these claims only covered part of the mountain, and that there was an overlap of two claims.

On Dec. 1, 1950, when he filed this affidavit, the Continental Mining & Milling Co., of which Mr. Frawley is President, was in possession of the said total area, claiming ownership thereof by virtue of their locations, Flat Top Nos. 5 to 11 (See Plaintiff's Exhibit B, page 25 to 32) and also by virtue of a conveyance from the Stilsons as to Flat Top claims Nos. 1 to 4. (See Plaintiffs' Exhibit B, pages 1 to 4).

The claims of the Continental Mining & Milling Co.

as far as the filing of affidavits of labor is concerned were in good standing, Mr. Frawley having filed two affidavits in behalf of that company for its aforesaid claims on Feb. 6 and on Feb. 8, 1950. (See Plaintiffs' Exhibit B., pages 42, 43 and 44).

At the same time Mr. Frawley filed this affidavit, he was, as President of the Continental Mining & Milling Co., defending a suit brought against his company, entitled V. R. Ekins et al vs. A. E. Williams, Continental Mining & Milling Co. (Civil, No. 1755, District Court, Emery County, Utah) wherein the Stilsons were seeking to void the deed which Continental Milling and Mining Company held, having secured it from their predecessors in interest, and which deed on April 7, 1951 (See Plaintiffs' Exhibit B, page 152) the Court set aside thereby restoring the property to the Stilsons, and other parties holding under them.

The point here is that at the time he filed the Affidavit in behalf of the record owners, the Continental Mining and Milling Company, of which he was president, he was holding the area as owner thereof by virtue of his locations.

Here we have an affiant occupying a novel and dual position; that is to say holding property as an officer of the corporation under a claim of title, and yet filing affidavits of labor, claiming adversely to the company he was an officer of, and because of this dual position he occupied, his testimony bears close scrutiny.

To support his supplemental affidavit Mr. Frawley stated that immediately after May 16, 1950, road work

was done on the road leading to Flat Top and on the access road leading to Flat Top, amounting to over \$900.00.

The plaintiffs and appellants offered the testimony of J. L. Stilson, who during that period lived at Flat Top, and was in actual possession of the property and denied that any work was done on the road leading to Flat Top, or on the access road leading up Flat Top. (See Test. of J. L. Stilson, Vol. 4. P. 461, lines 6 to 30, page 462.

On June 20, and June 21, 1951, E. G. Frawley filed two affidavits of labor. One was filed in behalf of the locator and owner of Flat Top Nos. 5 to 11 claims, the Continental Mine & Milling Co., and he recited in the affidavit that he was the President of the company. The affidavit recited that the road work was performed with 4 men and equipment, and some 10 days was expended therein, taking out some 1900 cubic yards of earth, having value of \$750.00, and performed between Oct. 1, 1950, and June 20, 1951.

The other affidavit was filed in behalf of the alleged owner of the Jeanette Glassman claims, Flat Top Lode and Flat Top Lode No. 1, which are on Flat Top Mountain and embraced within the boundaries of the said Flat Tops Nos. 5 to 11. He recited in the affidavit that he was the President of the Consolidated Uranium Mines, Inc., and that on over 100 claims listed in the affidavit \$50,000.00 had been expended in mining and working said claims. The claims listed were contiguous, except the said two Jeanette Glassman claims, which are separated some three and one half miles away from the other claims.

While work done on part of a contiguous group of claims may be claimed for the benefit of all, if it can be shown to benefit the same as a group, yet work done on such contiguous group of claims cannot be claimed to benefit two claims separated by a distance of 3 and one half miles. Because of this, and because the work specified was general in nature, and because it was challenged by the plaintiffs and appellants, the testimony of Mr. Walter Day and Mr. E. G. Frawley was offered in support of the affidavit, and to prove that the annual assessment work for the assessment year 1950-1951 on the two Jeanette Glassman claims was performed.

Mr. Day stated he was an employee of Mr. Frawley, later stating it was Mr. Frawley's company, and that he worked under the direction of Mr. Frawley. Mr. Day testified that the assessment work claimed was road work, and was performed on the road leading from South Temple to the Flat Top, and the access road up Flat Top Mountain. He testified the work was performed by two tractors, belonging to Thornburg Construction Co., who were building a road to "Muddy" Springs some distance from this territory. He stated that under his direct supervision the work was performed on May 7 to 11, 1951, on said roads by Thornburg Construction Company operators, that it totaled 61 hours, and had a value of \$15.00 per hour, or a total of \$915.00; and that this was the only work done as assessment work on said Jeanette Glassman claims. To show the work, the daily work slips were offered (Defendants' Exhibit 16) and these work slips bore the notation "Flat Top,"

which the said Walter Day testified was put there by the operators when they turned their slips into him each night, and was for the purpose of clearly allocating the work to that particular job. (See Test., Walter Day, Vol. 2, Trs. of Ev., P. 704, Lines 18 to 21, 28 to 30, P. 705, Lines 5 to 13, 22, P. 787, Lines 23 to 26, P. 708, Lines 28 to 30, P. 709, Lines 1 to 6, 6 to 19, 29 to 30, P. 711, Line 9, P. 712, Lines 25 to 26, 28 to 29, P. 713, Line 3, P. 713, Lines 4 to 6, 8 to 30, P. 714, Lines 1 to 30, P. 715, Lines 1 to 9, 13, 16, P. 716, Lines 6 to 18, P. 720, 14 to 19, 20 to 30, P. 721, P. 722, Lines 1 to 16, P. 723, Lines 3 to 5, 7 to 19, 26 to 29).

E. G. Frawley stated that Mr. Day was working for him, and was assigned to do this road work in May of 1951; that he was present at Temple Mountain during May of 1951, and saw the work done, and that of the check given Thornburg Construction Co., (See Defendants' Exhibit 18) in the total amount of \$2,298.00, \$900.00 or \$950.00 thereof was given to Thornburg Co. in payment of the amount they had coming for the work done, under Mr. Day's direction, as evidenced by the work slips (Defendants' Exhibit 16). (See Test., Tr. of Ev., E. G. Frawley, Vol. 3, P. 812, P. 813, P. 814, Lines 7 to 21, P. 816, Lines 24 to 26, P. 817, Lines 21 to 30, P. 818, Lines 1 to 12, 19 to 30, P. 819, Lines 1 to 6, P. 824, Line 30, P. 825, Lines 22 to 34, P. 826, Lines 2, 3, 8 to 30, P. 827, Lines 1 to 4, P. 830, Lines 1 to 30, P. 832, P. 833, P. 834, Lines 1 to 4, P. 836, Lines 6 to 24, P. 862, Lines 8 to 9, P. 894, Lines 2 to 3, P. 895, Lines 10 to 11, P. 896, P. 897, Lines 1 to 8, P. 899, Lines 10 to 16, P. 900, Lines 14 to 30, P. 901, Lines 1 to 12.

Plaintiffs' witness, Kenneth Faulk, one of the operators, testified he was working for Thornburg Construction Co. during the period and under the direction of Mr. Walter Day, and that he signed the daily work sheets for May 7 to May 11, 1951, totaling 61 hours of caterpillar work, and that the notation "Flat Top" evident on the carbon copies (Defendants' Exhibit 16 identified by Day as the ones he kept each day, sending a copy to the home office of the Consolidated Uranium Mines, Inc.) did not appear on the originals which he, Faulk, made and turned over to Thornburg Construction Co. (See Plaintiffs' Exhibit T) and that the notation "Flat Top" appearing on the carbon copies was not placed there by him. He further testified that out of the work performed as represented by said work sheets, only 30 minutes of it was on the road leading from South Temple to Flat Top, and that the company was receiving \$16.00 to \$18.00 per hour for tractor work.

The plaintiffs offered testimony of numerous witnesses to show that no such assessment work was done (See Testimony, H. Knight, J. S. Stilson, Orson Doyle Stilson, Elwin Robinson), but the plaintiffs and appellants take the position that the defendants are bound by the testimony of Mr. Day and Mr. Frawley, and that by such testimony, they failed to prove the performance of the annual assessment work on the Jeanette Glassman claims, Flat Top Lode and Flat Top Lode No. 1. The work done if the road work can be considered assessment work, as the benefit is remote, was clearly insufficient, it being under the value of \$20.00.

It is the contention of the plaintiffs and appellants that when the affiant who files the affidavit and causes the work to be done points out and says this is the work which he performed, and this is the work he claims credit for, he cannot gainsay it. And here, especially, Mr. Frawley is not in a position to do this, for he testified that in 1950 and in 1951, he did not know where the Jeanette Glassman claims, Flat Top Lode and Flat Top Lode No. 1 were, and not knowing where the claims were, yet claims he did road work which benefitted the area. The claimant, Abe Glassman, did no work, relying on Mr. Frawley to do it, and when Mr. Frawley failed to do it, he must suffer the consequences. Mr. Frawley, by other and numerous affidavits on record, claims that other work was being done on the said property. He must be judged strictly here because he occupies a dual role, to-wit: an officer of the company, Continental Mine & Milling Co., for whom he filed affidavits of labor, and as an individual filing for a claimant for work done, under an alleged lease with another company, Consolidated Uranium Mines, Inc., of which he is an officer, and which claims to the same territory are in direct conflict.

The Jeanette Glassman claims, Flat Top Lode and Flat Top Lode No. 1, claimed by Abe Glassman, were therefore open for relocation.

POINT II.

THE COURT ERRED IN NOT QUIETING TITLE IN THE PLAINTIFFS AND APPELLANTS IN THE ENTIRE AREA EMBRACED WITHIN THE BOUNDARIES OF THEIR

CLAIMS, BATTLE MOUNTAINS NOS. 1 TO 4, INCLUDING IN THAT AREA THE TERRITORY EMBRACED WITHIN THE BOUNDARIES OF THE JEANETTE GLASSMAN CLAIMS, FLAT TOP LODGE AND FLAT TOP LODGE NO. 1, FREE AND CLEAR OF ANY TRUST IMPOSED UPON THE PLAINTIFFS AND APPELLANTS FOR THE BENEFIT OF THE FLAT TOP MINING CO.

Lockhart vs. Farrell, 31 Utah 155; 86 P. 1077, is authority for the proposition that where the plaintiff is adverting the defendant as to the same particular territory the plaintiff may show that when the defendant made his location that he relies upon, the land was under a subsisting location by some one else not a party to the action.

The defendant, Flat Top Mining Co., claims Flat Tops Nos. 1 to 4, asserting to have succeeded in interest to the alleged claims. (See Plaintiffs' Exhibit B, pages 1 to 4). These claims were allegedly located March 25, 26, 1949, and embrace the total area of Flat Top Mountain. At the time the alleged location of these claims was made on the land, the area embraced therein, was under subsisting locations, to-wit: the Beehive claims (See Plaintiffs' Exhibit B, pages 142 to 146, and Plaintiffs' Exhibit Y), made by Loran Hunt, John Burton, Charles Burton, Harvey Thomas, Wayne Johnson and Belmont Richards, the defendants, cross-plaintiffs and joint appellants, who were barred from this action, and that these claims also embrace the total area of Flat Top Mountain. Both of these locations included within their boundaries the Jeanette Glassman claims, Flat Top Lodge and Flat Top Lodge No. 1.

The Court found as to the Beehive claims that the same were subsisting claims, in good standing, until Oct. 1, 1950, and that the attempted locations, Flat Top Nos. 1 to 4, were of no legal effect or consequence, being founded in trespass, as stated in Lockhart vs. Farrel, 31 Utah, 155, 86, P. 1077,

"When the respondent located the ground then covered by the South Mountain, a valid and subsisting claim, he did what the law forbids. Hence his location was not only void as to the locators of the South Mountain, but void ab initio as to all the world. He did not do that which the law declares shall be done as a prerequisite to a valid location, make a discovery of a vein or lode on unoccupied mineral lands of the United States, but he was a mere trespasser seizing that which belonged to another * * * No legal right can be created which is dependent upon a trespass or tortious entry for its validity."

(See also Bell vs. Meagher, 104 U. S. 279, 284, 30 L. Ed. 735).

The plaintiff, Orson Doyle Stilson, was one of the locators of the alleged Flat Top 1 to 4 claims; he was also one of the locators of Battle Mountain and Battle Mountain 1 to 4 claims.

The Court found that the location of Battle Mountain claim made by the plaintiffs and appellants was good, and that all prior locators on territory embraced within that claim had forfeited and abandoned the same, and title in that claim was quieted in the plaintiffs and appellants.

The Court quieted title in Battle Mountain No. 1 to 4 claims in the plaintiffs and appellants, but imposed a trust on them in favor of Flat Top Mining Company.

The Court found that the Battle Mountain claims were properly located and treated as new mining locations (See Transcript, Testimony of Orson Doyle Stilson, page 1671, lines 1 to 30; page 162, lines 1 to 20; page 1639, lines 20 to 25; page 1640, lines 13 to 30; page 1641, lines 1 to 30) but, because one of the plaintiffs and appellants, Orson Doyle Stilson, was also one of the locators of the alleged locations, Flat Top 1 to 4 claims, and the other plaintiff and appellant, H. Knight, had knowledge that the area embraced in the alleged locations, Flat Top 1 to 4, was a part of the area embraced in Battle Mountain 1 to 4, the Court imposed a trust upon the plaintiffs in behalf of Flat Top Mining Company, successors in interest of the alleged locations. Plaintiffs respectfully assert that the Court erred in this since the alleged locations, Flat Top 1 to 4, were a nullity, no legal right being created by the attempted location. The alleged locators never acquired a joint or common interest in the same, for as said in Lockhart vs. Farrell, 31 Utah, 155, 86 P. 1077, "being void from beginning no life thereafter could be breathed into it. No legal right can be created which is to be dependent upon the trespass or a tortious entry for its validity."

The locators of Flat Top 1 to 4 had nothing because the alleged locations were, as the Court has so aptly said in the case above cited, void ab initio.

The Court permitted the plaintiffs to show, and also found that Flat Top claims 1 to 4 had no legal being; and as stated in Costigan on Mining Law, Hornbrook Series, page 311, "while the cases so far decided have not allowed one who called his claim a relocation to deny the validity of a prior claim it is not believed that he would be estopped thereby to show that the previous location was absolutely void for want of a discovery or one of the necessary acts of location" and in this case no location could ever be made as valid subsisting claims existed at the time. (See Lockhart vs. Farrell, 31 Utah 155, 86 P. 1077; also Moffit vs. Blue River Gold Excavating Company, 80 P. 139).

Here it is claimed that because the Notices of Location for Battle Mountain 1 to 4 claims stated that the respective claims had been formerly known as Flat Top 1 to 4, such would bar plaintiffs from showing that these claims had never in fact existed. The Court, however, permitted the plaintiffs and appellants to show that these claims never in fact existed and had no being.

While it is true that the alleged locators of alleged claims, Flat Top No. 1 to 4 believed they acquired something by their attempted locations, it is also true that under the law, their alleged locations being founded in trespass, or a tortious entry, were void ab initio, and created no legal right.

The locations of Battle Mountain and Battle Mountain No. 1 to 4 were not made in furtherance of a prior location (for in the eyes of the law these attempted locations being founded in trespass were as if they never

had been made. (See *Burke vs. South Pacific Railroad Co.*, 34 St. Ct. 907, 234 U. S. 699, 58 L. Ed. 1327).

The plaintiffs, Orson Doyle Stilson and H. Knight, were not tenants in common, or co-tenants, with the other alleged locators, for the alleged locations of Flat Tops 1 to 4 gave rise to no legal rights; and none could be created, as they were tortious and founded in trespass and had no possible legal effect. The alleged claims being void ab initio, there was no estate in which a co-tenancy could be created. (See *Westerman v. Dinsmore*, 68 W. Va. 594, 71 S.E. 250).

It is true that the Courts have imposed a trust on one co-tenant for the benefit of another co-tenant where there has been a previous valid location. But here this is not the case. The attempted locations being void, no act thereafter done by prior locators, or anyone else, could confer validity upon them.

The plaintiffs were free to locate; and if they had not, the territory embraced within their claims would still be open, or have gone to some subsequent locator.

To impose a trust in the Battle Mountain claims of the plaintiffs and appellants, for the benefit of the alleged locators of the alleged claims, Flat Tops Nos. 1 to 4, serves only to penalize the locators of Battle Mountain Claims Nos. 1 to 4, without any justification in law or equity, since the attempted locations were founded in trespass, and tortious entry, and since it gives to them an interest in valid claims, which by their attempted locations they never have had, nor could ever

acquire, for attempted locations, founded in trespass, are void.

There is another point here. Can the Court impose a trust upon a uranium mining claim, when title to the ore is held in the United States, and secondly, the only right given to the locator is a mere possessory right, subject to forfeiture at any time, the paramount title being in the United States. (See American Sodium Co. vs. Shelly, 276 P. 11, 51 Nev. 354).

If the plaintiffs and appellants contention, as set forth under Point I is correct, then the areas embraced within the Jeanette Glassman claims, Flat Top Lode and Flat Top Lode No. 1 were open for relocation; and as they are included in plaintiffs' and appellants' claims, Battle Mountain Nos. 1 to 4, should also be quieted in the plaintiffs and appellants, since that area would also be subject to relocation and come within the plaintiffs' and appellants' valid claims, Battle Mountain Nos. 1 to 4.

POINT III.

THE COURT ERRED IN FINDING THAT THE DEFENDANTS, CROSS-PLAINTIFFS AND JOINT APPELLANTS, LORAN HUNT, JOHN BURTON, CHARLES B. BURTON, HARVEY THOMAS, WAYNE JOHNSON AND BELMONT RICHARDS, WHO WERE BARRED FROM ASSERTING THEIR TITLE TO THEIR CLAIMS, BEEHIVE AND BEEHIVE NOS. 2 AND 3, IN THIS ACTION.

The defendants, cross-plaintiffs and joint appellants, hold, and in which the plaintiffs and appellants join, that the Court erred in barring them from further

proceeding in this case, because of the decree, taken against them in the case of V. R. Ekins et al vs. A. E. Williams et al, Civil No. 1755, District Court of Emery County, Utah, involved the same property.

They contend that the Decree rendered in that case is not conclusive and binding against them because the same was obtained by default upon their failure to answer in that action, and without proof or evidence of plaintiffs' title or possession being offered, or any evidence relating to the defendants' title being offered. They contend that under Sec. 78-40-13, Utah Code Annotated 1953, the Court must require evidence, and since none was given such Decree is not conclusive against them.

It was admitted that in that action in which judgment by default was taken against them, the default was taken before the issues had been tried, or any evidence heard at all. (See Pre-trial Order, Vern R. Ekins et al vs. A. E. Williams et al, dated March 13, 1951, Plaintiffs' Exhibit N; see Memorandum Division, Plaintiffs' Exhibit B, page 152).

Under provisions of Sec. 78-40-13, Utah Code Annotated 1953, the Court is limited in its authority to render such a decree quieting title, even against defaulting defendants, where no proof is offered; and in this case the Court was without jurisdiction to grant the decree, and therefore it is not binding upon the defaulting defendants, and in this action when raised as a bar here, the question of its validity, being jurisdictional in nature, could be raised. The Court erred in this matter, and the defendants, cross-plaintiffs and joint appellants

should be permitted to go forward with their defense and cross-complaint in the said action.

CONCLUSION

In conclusion, the plaintiffs and appellants state that the District Court erred in not finding the total area of Flat Top, including the claims of Jeanette Glassman, Flat Top Lode and Flat Top Lode No. 1, was open for relocation at the time that the plaintiffs and appellants located Battle Mountain Nos. 1 to 4, and in quieting title to plaintiffs and appellants not only for Battle Mountain claim but Battle Mountain claims Nos. 1 to 4; and further the District Court erred in not holding that the plaintiffs and appellants were under no obligation to hold said Battle Mountain claims 1 to 4 in trust for Flat Top Mining Co., successor in interest to the alleged locators of Flat Top Claims No. 1 to 4. And, the defendants, cross-plaintiffs and joint appellants state that the Court erred in barring them in going forward in this action and proving title to their claims, Beehive, Beehive No. 1 and 2.

Respectfully submitted,

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