

1956

# H. Knight and Orson Doyle Stilson v. Flat Top Mining Co. et al : Brief of Respondents

Utah Supreme Court

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Frandsen and Keller; G. H. Taylor; Gustin, Richards, Mattsson & Evans;

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Case No. 8439

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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  
corporation, ABE GLASSMAN, J.  
W. HUMPHREY, JEANETTE  
GLASSMAN, EDNA EKKER, Ad-  
ministratrix of Estate of Cornelius  
Ekker, deceased, CONSOLIDATED  
URANIUM MINES, INC., a corpo-  
ration, and NEW MEXICO URANI-  
UM CORPORATION, a corporation,

*Defendants and Respondents,*  
and

LORAN HUNT, et al.,

*Defendants, Cross-Plaintiffs  
and Joint Appellants.*

---

**RESPONDENTS' BRIEF**

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*Defendants and Respondents,*

and

LORAN HUNT, et al.,

*Defendants, Cross-Plaintiffs  
and Joint Appellants.*

Case No. 8439

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## RESPONDENTS' BRIEF

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### STATEMENT OF FACTS

Insofar as the appellants have correctly stated the material facts the respondents agree therewith. In view of the fact, however, that the statement of facts in ap-

pellants' brief contains immaterial matters and omits facts upon which the decision of the court below was rendered and states other facts not in the record, respondents deem it necessary to make a further and additional statement.

As stated in appellants' brief, the area involved, which is commonly referred to as the Flat Top, is a distinctive and unusually prominent formation. Uranium and vanadium ores are exposed and their existence has been known for many years. The claims were first located by the Ekkers, Glassmans and one C. A. Gibbons as early as 1931, long prior to the present uranium boom and when such ores were only valuable for very special purposes.

The action here involves four principal sets of locations. The original location by Cornelius Ekker and M. (Mose) Glassman in 1931, the location by Jeanette Glassman, the daughter of M. (Mose) Glassman, in 1937, the location of the appellants in March of 1949 and the location by the appellants in 1951. The claims located in 1931 were called the Flat Top and the Flat Top No. 1. Contrary to the statement in appellants' brief, the court found that the two Flat Top claims located in 1937 were located on open ground by reason of the abandonment and forfeiture of the 1931 claims and not by reason of a lack of discovery in 1931. The 1937 claims covered the identical ground and were named the Flat Top Lode and Flat Top Lode No. 1. The claims located in 1949

by the appellants were named the Flat Top Nos. 1, 2, 3 and 4 and embraced all of the lands covered by the two earlier locations. The 1951 locations by the appellants were called the Battle Mountain Nos. 1, 2, 3 and 4 and were identical in every respect to the Flat Top Nos. 1, 2, 3 and 4. The respondent Abe Glassman relies on the title to the Flat Top Lode and the Flat Top Lode No. 1 claims originally located in the name of Jeanette Glassman. The location of the Flat Top Nos. 1, 2, 3 and 4 by the appellants in March of 1949 was found by the trial court to be invalid by reason of the fact that the ground was covered by prior existing claims, namely: the Flat Top Lode and Flat Top Lode No. 1 and certain Beehive claims. The respondent Flat Top Mining Company claims title to the Battle Mountain Nos. 1, 2, 3 and 4 claims by reason of the judgment and decree of the lower court. The respondent Consolidated Uranium Mines, Inc., had acquired the leasehold interest by reason of agreements entered into with the locators and owners of the Flat Top Lode and Flat Top Lode No. 1 and the interests of the Flat Top Mining Company as it was finally determined by the trial court in the Battle Mountain Nos. 1, 2, 3 and 4.

The fact situation as to the two Flat Top claims located in 1931 and 1937 is distinct and separate from the fact situation relating to the 1949 Flat Top Nos. 1, 2, 3 and 4 and the 1951 Battle Mountain claims. Because of this the statement of facts will be set forth in two parts.



## PART 1

THE 1931 FLAT TOP AND FLAT TOP NO. 1 AND 1937 FLAT TOP LODE AND FLAT TOP LODE NO. 1.

The Flat Top Lode and Flat Top Lode No. 1 claims were full lode claims, being of the dimension of 1500 feet by 600 feet, and located so that the 1500 foot side lines ran North and South and so that the claims overlapped to a certain extent on the North end of the Flat Top Lode No. 1 claim and the South end of the Flat Top Lode. The formation was a more or less flat bed of uranium-vanadium ore and was mined from a tunnel, which, when extended, would recover the ore body underlying both claims (R. 593, Ex. 14). The Flat Top Nos. 1, 2, 3 and 4 were full lode claims located in a manner opposite to the other two claims with the 1500 foot side lines running East and West. The ore was determined to be located principally in the North end of the Flat Top and in the area where the Flat Top Lode and the Flat Top Lode No. 1 claims overlap.

In the latter part of June in 1937 Abe Glassman went on the Flat Top with Horace Ekker for the purpose of relocating the Flat Top claims (R. 592). At that time they built a discovery monument on the North end of the Flat Top as a monument for the Flat Top Lode claim. This monument was made of rock 3 feet high and was just above the ledge where the uranium-vanadium ores were exposed, which ores the two men could see and knew the presence of by reason of the prior discoveries by the Ekkers and Glassmans. They erected a similar monu-



ment on the South end of the Flat Top just above the ledge where the uranium-vanadium ores were exposed as the discovery monument of the Flat Top Lode No. 1 claim (R. 394). As to each claim they reconstructed the corner and side line monuments by piles of rocks about 3 feet high. In the discovery monument of each claim they placed a notice of location (R. 593-595). In performing the work of building the twelve rock monuments that were necessary the two men spent a day on the Flat Top (R. 595). The notices of location were thereafter recorded in the office of the County Recorder at Castle Dale (R. 597).

An engineer, Wesley Moulton, testifying on behalf of the defendants, stated that he was on the claims in June of 1954 and surveyed the discovery monuments of the two claims, which were still in existence, tying them to the Temple Mountain mineral monument (R. 456, Ex. 14). In January of 1955 the witness testified that he was again on the Flat Top for the purpose of performing further surveys. At that time he was accompanied by Horace Ekker who pointed out to him the monuments he and Abe Glassman had constructed in 1937, and with the help of Ekker, who pointed out the monuments, surveyed the Flat Top Lode and Flat Top Lode No. 1 claims (R. 463-469, Ex. 14).

The question of assessment work relates only to the Flat Top Lode and Flat Top Lode No. 1. While assessment work had not been done in every year since their location in 1937, no intervening claims were located in

the years in which assessment work had not been performed. The important periods are the assessment years 1939-1940, 1940-1941, 1947-1948, 1948-1949, 1950-1951 and 1951-1952. Beginning with 1942 affidavits of labor or intentions to hold had been filed every year up to and including the time of trial.

The Ekkers were pioneers in developing the Temple Mountain area of which the Flat Top is a part, they being long time residents of Hanksville, Utah. The Glassmans were originally from Huntington and Castle Dale, Utah, and were jointly interested in the area with the Ekkers. It was as a result of this joint interest that the claims were originally staked in 1931 and the Ekkers, on their own behalf and on behalf of Glassman, worked the claims and mined and removed small amounts of ore in the earlier years at a time when the activity involved more effort than money. The claims had been transferred to Jeanette Glassman as the result of a series of transfers from the original locators. The chain of the record title was considerably confused and defective. In 1937, obviously recognizing these title difficulties and that failure to perform assessment work would make the claims subject to forfeiture, Horace Ekker and the respondent Abe Glassman relocated the claims in the name of Jeanette Glassman. It was not until 1940 that there was any visible interest in uranium and vanadium ores, at which time the Ekkers and the Glassmans re-entered the claims, performed assessment work and removed small amounts of ore for sale. In 1940 the three Ekker brothers and their father went on the Flat Tops to

do assessment work and mine ore (R. 412). They had hand tools, powder, caps and fuses and a string of five horses and were there for a period of from eight to ten days (R. 422). During the time the Ekkers were camped on the claims they repaired the horse and mule trails so they could get the horses near enough to remove the ore that was mined and extended the tunnel they originally started (R. 407, Ex. 14) and mined ore where they could find ore of high enough grade to justify hauling it to Moab, Utah. The witness testified that the prevailing rate for rental on a horse was \$2.00 a day and that the prevailing rate for a miner was \$1.50 per hour, resulting in an expenditure of substantially more than the required \$200.00. In July of 1940 Horace Ekker testified that his father and two brothers worked on the claims for a period of from ten to fifteen days and conducted similar operations with the same equipment for that length of time (R. 420-421).

In the year 1942 Abe Glassman, at that time living in San Francisco, made arrangements with Therald N. Jensen, an attorney residing at Price, Utah, to take care of all matters necessary to maintain his mining claims. In order to enable Mr. Jensen to perform this service Mr. Glassman executed a written power of attorney in Jensen's favor. While the power of attorney was not recorded it was delivered to Jensen and the intentions to hold and the affidavits of labor, which were filed, showed on their face that Jensen was acting under a power of attorney and for and on behalf of Abe Glassman, the owner of the claims. Jeanette Glassman had previously

executed a deed to Abe Glassman and all notices and records showed Abe Glassman to be the owner of the mining claims.

In the assessment years of 1947-1948 and 1948-1949 due and proper notices of intention to hold, pursuant to the existing Act of Congress, were filed as to the Flat Top Lode and Flat Top Lode No. 1. It was in March of 1949 that the appellants located the Flat Top Nos. 1, 2, 3 and 4. During the assessment year 1950-1951 the respondent Consolidated Uranium Mines, Inc., or its predecessor, had acquired the leasehold interest in the Flat Top Lode and Flat Top Lode No. 1 located by Jeanette Glassman. During that assessment year crawler type tractors were used to construct roads for the purpose of transporting the ore to be mined from the Flat Top claims. The roads existing at the time were inadequate or non-existent and the testimony is substantial that such road work was necessary for the development of the two claims as mining properties (R. 817, 818, 830). Work was also done in extending and preparing the tunnels for further mining (Ex. 14) and approximately \$2298.00 was spent in assessment work in the year 1950-1951 on the claims (R. 829).

In the assessment year 1951-1952, the year in which the Battle Mountain Nos. 1, 2, 3 and 4 were located, the defendant New Mexico Uranium Corporation, a predecessor of Consolidated, performed assessment work on the Flat Top Lode and Flat Top Lode No. 1 claims. This work was performed by the witness Lopez and consisted mainly of tunnel work. He testified that 39 feet

of tunneling was accomplished in June of 1952 (R. 1131-1133), that the amount expended was in excess of \$200.00 and was for the purpose of working the claims as a mining property (Ex. 14).

## PART 2

THE 1949 FLAT TOP NOS. 1, 2, 3 AND 4 AND THE BATTLE MOUNTAIN NOS. 1, 2, 3 AND 4.

The Flat Top Nos. 1, 2, 3 and 4 were located in 1949 by the appellant Orson Doyle Stilson, his father, mother and brother. Subsequent to the location of the claims in 1949 the Stilsons entered into agreements with other parties and conveyed away a portion of their interest in the claims. The transfers that were made by the Stilsons resulted in the filing of an action entitled Ekins et al. v. Williams, et al., Civil No. 1755, in the Seventh Judicial District Court, in and for the County of Emery, State of Utah. The Stilsons were parties plaintiff with Ekins, one of the persons with whom they had entered into an agreement and had transferred an interest in the claims. The defendant Williams had also acquired a deed from the Stilsons and one of the facets of the lawsuit was an attempt to set aside the deed to Williams and confirm the title of the Flat Top Nos. 1, 2, 3 and 4 in Ekins and the Stilsons as against all of the defendants named therein, including the cross-plaintiffs and joint appellants, Loran Hunt et al. who were parties defendant therein, and the Beehive claims allegedly located by them. They are the same claims and the same parties that are involved in this action.

In the Spring of 1951 discussions between Ekins and the Stilsons had progressed to a point where it was determined that a corporation would be formed for the purpose of operating the mining claims. The respondent Flat Top Mining Company was the corporation ultimately formed as the result of the agreements between Ekins and the Stilsons. In the Spring of 1951 appellant Stilson became dissatisfied with the agreement with Ekins and the interest he was to acquire in the proposed corporation (R. 1659). The Stilsons had agreed with Ekins to perform the necessary assessment work on the claims, but in spite of the understanding the appellant Stilson failed to do the assessment work, knowing that the other members of his family and Ekins were relying on him to do so (R. 1223). To defeat the rights of the other members of his family and Ekins appellant Stilson testified that he obtained the cooperation of the appellant H. Knight. Knight, who was related to Stilson by marriage, knew of the arrangement the appellant Stilson had with Ekins and other members of his family and was acquainted with all of the facts surrounding the location of the claims in 1949, and the suit of Ekins v. Williams (R. 1206, 1682). Knight testified that he agreed to assist the appellant Stilson in attempting to defeat the rights of Ekins and the other locators. Both testified that they located the claims in the name of Orson Doyle and H. Knight, leaving out the name Stilson and including Knight, an apparent stranger, to avoid a connection with the 1949 claims (R. 1204). This action on the part of the appellants was done at a time when Ekins, at his own



expense, was prosecuting an action to quiet title to the four Flat Top claims, in which proceeding Stilson participated on his own behalf as a party and a locator (R. 285, 1226). The appellants admitted their actions were calculated to avoid their agreements and for the purpose of defeating the rights of his family and Ekins to the claims (R. 1209, 1224, 1226).

To be sure that no affidavit was filed, Stilson and his co-conspirator, H. Knight, stationed themselves in the office of the County Recorder of Emery County on the 30th day of June, 1951, and until noon of July 1st that year (R. 1213). At noon on the latter date Stilson and Knight proceeded to the Flat Top and relocated the ground covered by the Flat Top Nos. 1, 2, 3 and 4, using the identical discovery and corner monuments and filed notices of location, renaming the claims as Battle Mountain Nos. 1, 2, 3 and 4 and made specific mention in the notices of location that the claims were formerly the Flat Top claims (R. 1213).

The Flat Top Mining Company was organized in July, 1951, and the mining claims were transferred to it by Ekins and the locators, except the appellant Stilson (R. 1534). He finally transferred his interest in 1952 and his proportionate share of stock was then issued (R. 1497). In August of 1951 the court held the Flat Top Nos. 1, 2, 3 and 4 to be valid and subsisting as against all assertions of title by the defendants in Civil No. 1755.



The parties designated as cross-plaintiffs and joint appellants, Loran Hunt et al., were purported to have located three claims on the Flat Top called the Beehive claims in April of 1948. These claims and the locators were the subject of and parties to the said case of Ekins et al. v. Williams et al. The default of the parties named herein as cross-plaintiffs and joint appellants was duly and properly entered, the record of Civil No. 1755 having been introduced in evidence and the court having satisfied itself that the parties claiming under the Beehive locations were properly served with summons in said case and failed to answer. All of the defendants in Civil No. 1755 were enjoined and restrained from asserting any right, title or interest in the four Flat Top mining claims and lands embraced therein. The court heard evidence on the location of the Flat Top claims and upon the evidence sustained their validity.

As the result of a motion made by respondent Flat Top Mining Company in the present action the court asked the cross-plaintiffs and joint appellants what relief they claimed they were entitled to be granted. In response their counsel stated that the Beehive claims were not valid and subsisting at the time of trial as no assessment work or intentions to hold had been filed since their location. Upon the record in Civil No. 1755, and the admission that no relief was claimed, the court dismissed the cross-plaintiffs and joint appellants and ruled, that as a result of said judgment they were barred from asserting any rights to the Beehive claims in the present

action adverse to the Flat Top Nos. 1, 2, 3 and 4. (R. 1187-1189).

## STATEMENT OF POINTS

### POINT I

THE COURT PROPERLY FOUND THAT THE FLAT TOP LODE AND FLAT TOP LODE NO. 1 WERE VALID AND SUBSISTING CLAIMS.

### POINT II

THE COURT PROPERLY IMPOSED A TRUST ON APPELLANTS' CLAIMS BY REASON OF THEIR BREACH OF DUTY TO THEIR CO-LOCATORS.

### POINT III

THE COURT PROPERLY DENIED THE CROSS-PLAINTIFFS AND JOINT APPELLANTS FROM ASSERTING TITLE AGAINST THE FLAT TOP NOS. 1, 2, 3 AND 4.

## ARGUMENT

### POINT I

THE COURT PROPERLY FOUND THAT THE FLAT TOP LODE AND FLAT TOP LODE NO. 1 WERE VALID AND SUBSISTING CLAIMS.

The appellants in their first point argue that the claims relied upon by the defendant Abe Glassman were forfeited and abandoned. In their argument it is not plain whether they base the statement upon a failure of discovery, a failure of assessment work or the deed from Jeanette Glassman to Abe Glassman, which

they view with such concern. Of course, it has been established for many years, and all courts apparently concur in the matter, that no right is initiated in a mining claim until such time as there has been a discovery. If no rights were acquired by reason of the lack of discovery, then there is no point in talking about abandonment and forfeiture. Because the appellants have raised a question of discovery we are compelled to direct our attention to it. Section 40-1-1, *Utah Code Annotated* 1953, describes the requirements as to the discovery of a vein or lode. The mining law in the State of Utah by statute or decision has never required any particular location work, the only requirement being that the locator discover ore in place. The question of discovery was decided by this Court in 1928 in the case of *Pitcher v. Jones* (1928), 71 Utah 453, 267 P. 184, and the Court has seen fit, as we believe it must under the Statute, to follow the decision since it was rendered. The Court, in discussing the nature of the discovery, made the following statement:

“Nor is it essential that the locator of a mining claim should be the first discoverer of a vein or lode in order to make a valid location, and if it appears that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, he may base his location upon it and thus avoid the necessity of making a discovery for himself. 18 R. C. L. 1122; 40 C. J. 785.”

In the instant case the Ekkers and Glassmans in every sense of the word pioneered the Temple Mountain

area and located the ground in 1931. The court found there was a discovery of mineral in 1931. The court found that the claims had been abandoned by reason of failure to perform assessment work, the very thing that prompted the Ekkers and Glassmans to cure the defects by the locations of 1937. The 1937 location work done by Ekker and Glassman for Jeanette Glassman was work done by the successors to the interest of the original locators for the purpose of curing defects. The defects did not relate to change of boundary but merely to assessment requirements and record title defects. There was no claim by the appellants of any intervening rights between 1931 and 1937. Such work has long been recognized and is in accordance with mining practice everywhere. 2 *Lindley on Mines*, Section 396. In some jurisdictions there is some distinction between amendment and relocation, particularly where original locators relocated the ground, and sometimes such activity is frowned upon, particularly when the name of the claim and its original identity is attempted to be changed. Here the name remains substantially the same, the word "Lode" being the only addition, and while located by Jeanette Glassman was certainly identifiable with the original locators. This Court in the case of *Warnock v. DeWitt* (1895), 11 Utah 324, 40 P. 205, held that the original locators may renew their rights by acts of relocation and have the same right to relocate as a stranger.

Horace Ekker and Abe Glassman were on the claims in 1931, knew what had been discovered and, as a matter

of fact, were sent to do the work by their elders. Under the ruling of *Pitcher v. Jones*, supra, it cannot be effectively disputed that the 1937 locators made a discovery. Further, it will be noted that the only ore or mineralized substance which is involved in this action or has ever been the subject of location in the Temple Mountain area is uranium and vanadium. The appellants in making their locations in 1951 did exactly what Horace Ekker and Abe Glassman did in 1937. Appellants in one breath say they made a location in the identical manner of respondents which was valid and deny the discovery on the part of the respondents made in 1937. The Court in the *Pitcher* case also stated that where a subsequent locator of the same mineral is trying to invalidate a discovery of a prior locator a liberal construction is placed upon the rules relating to discovery.

“But when the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery is more liberal than in a controversy between a mineral claimant and the government or between him and an agricultural claimant. Especially is that true in a contest between two mineral claimants as here, where the subsequent locator is seeking to invalidate a prior location on the ground of an insufficient discovery of mineral within the limits of the prior location.” *Pitcher v. Jones*, supra.

It has been recognized since the case of *Ickes v. Virginia-Colorado Development Corp.*, (1935), 295 U.S. 639-647, 79 L. Ed 1627, that the failure to do annual assessment work does not work a forfeiture of the claims.

It merely subjects the claims to forfeiture where rights intervene prior to the resumption of work. In this action the appellants claim there was an attempt at locating the ground by other persons in 1940, by the Beehive claims in 1948 and the Battle Mountain claims in 1951. There is nothing in the record sufficient to support a location by anyone in 1940, but substantial testimony was taken by the court relating to assessment work.

In their brief appellants do not state in what particular manner the work done by the Ekker family in 1940 does not constitute assessment work. They apparently claim the forfeiture on the basis that an affidavit was not filed. The statute provides that the owner of a lode claim, in order to prevent a forfeiture of the claim, must file in the office of the County Recorder an affidavit. It further states that the affidavit, or duly certified copy thereof, shall be prima facie evidence of the facts therein stated. The statute is manifestly a procedural statute. The Federal law requires that the annual assessment work be done (Title 30, Section 28, *United State Code Annotated*), and it is recognized that within the limits of the Federal statute the states may make additional requirements. However, if the work is actually accomplished as provided, the claim cannot be forfeited. In 2 *Lindley on Mines*, Section 636 at pages 1581-1582, it is stated that the failure to file the affidavit is accompanied by no serious penalty, and that the provisions of the various State statutes relating to affidavits do not provide that the mere failure to file will work a forfeiture. The author further states



that if such were done it would undoubtedly be unreasonable and repugnant to general law. In the case of *Murray Hill Min. & Mill. Co. v. Havenor* (1901), 24 Utah 73, 66 P. 762, the first point was urged and the Court held as follows:

“It follows that the respondent did not forfeit its right by failing to file with the county recorder the affidavit required by section 1500, Rev. St. Utah, and that the trial court did not err in permitting, over the objection of the appellants, the respondent to introduce evidence tending to show that it had performed the labor and made the improvements on its said claims as required by section 2321, Rev. St. U. S.”

Counsel for the appellants cites the *Murray Hill* case and seems to think that it is not in point, but we submit that such is not the case.

As stated before appellants do not point out in what particular the assessment work performed was defective, except on the ground that the testimony was discredited because of the interest of the witness. Apparently the trial court gave the testimony of the assessment work complete credibility because it found in favor of the respondents. They also attempt to seek some comfort in the fact that the work was accomplished by one other than the locator, but here again the trial court believes the work was done for and on behalf of the owner. Appellants also urge this same proposition in relation to the intentions to hold filed by Therald Jensen merely because the power of attorney was not of record. However, the trial court found that the intentions to



hold on their face indicated they were filed by reason of a power of attorney and that no one was misled or deceived thereby.

In the recent case of *Morgan v. Sorenson* (1955), 3 Utah 2d 428, 286 P.2d 229, this Court discussed the philosophy and the intention of the statutes and we believe the case to stand for the proposition that the courts will not declare a forfeiture upon the grounds urged by the appellants. Appellants cite the case for the purpose of giving it a harsh effect rather than for the proposition that forfeitures on such ground are not favored.

From 1940 appellants assert no intervening right calculated to forfeit the Glassman claim in the Flat Top Lode and Flat Top Lode No. 1 until 1948. In that year an intention to hold was filed by the attorney-in-fact of the owner of the claims which adequately protected respondents' rights. *Morgan v. Sorenson*, supra.

In the years 1951 and 1952 considerable work was done on the Flat Tops by the lessor, Consolidated Uranium Mines, Inc., and its predecessor. It was adequately shown that road work was accomplished and the tunnel work was done in contemplation of mining the ore underlying the two Flat Top claims. The body of ore, as defined by the drilling that was accomplished, demonstrated that the ore was in a single bed substantially in the North end of the Flat Top Mountain as shown by Exhibit 14. The appropriate affidavits were posted on the ground and it was demonstrated that the ore body

could be mined from the tunnel in which the lessor performed the actual labor. *Parker v. Belle Fourche Bentonite Products Co. et al.*, (Wyo. 1948), 189 P.2d 882.

It is apparent from the record that the appellants, stimulated by the increased activity relating to uranium ore and the hope of fantastic profits, sought by surreptitious and clandestine methods to create a right in the Public Domain for the purpose of defeating the rights of those people who had labored on the ground for many years without profit and who had expended their time and efforts in maintaining the claims when fortune was not foreseeable. The hazard of mining on the Public Domain on unpatented claims is recognized in that discovery, location work and assessment work are questions of fact and sustaining a title resting on that premise is always difficult and uncertain. A review of the record will show that the appellants were able to find a witness to contradict every fact of respondents' location and maintenance of the claims. Nineteen witnesses were available to appellants who were able to contradict all of the respondents' testimony and this is a remarkable feat in view of the lapse of twenty-eight years in an area of wilderness as remote as any in the State of Utah, and in spite of the fact that a relatively few days were required to perform the necessary acts. One witness was called and recalled by appellants seven times and in each instance was in the right place at the right time to observe that either the respondents were not there or they did not do what they claimed. The trial court observed these witnesses over more than

nineteen trial days and resolved the question of credibility in favor of the respondents. Giving the respondents the advantage of all reasonable inferences and looking at the testimony most favorable on their behalf (*In Re Richards' Estate* ..... Utah ....., 297 P.2d 542) compels the conclusion that the mining claims asserted by respondents were validly located and maintained at all of the times in dispute. It is plain that the appellants failed to meet the burden of proof required by one asserting a failure to do assessment work. The United States Supreme Court has laid down the rule that forfeiture must be established upon clear and convincing proof of the failure of the owner to have work performed or improvements made in the amount required by law. *Hammer v. Garfield Mining and Milling Co.* (1889), 130 U.S. 291, 9 Sup. Ct. Rep. 548, 32 L. Ed. 964.

## POINT II

THE COURT PROPERLY IMPOSED A TRUST ON APPELLANTS' CLAIMS BY REASON OF THEIR BREACH OF DUTY TO THEIR CO-LOCATORS.

It has been recognized by the courts, and in particular the Supreme Court of the United States, that the Public Domain and the mineral deposits contained therein are open to occupation and purchase by all those who come within the provisions of the statute and who initiate their rights in conformity therewith, and who do so peaceably and in good faith. The Courts have also recognized that a valid mining claim cannot be initiated by trespass, by fraud or by act which constitutes bad

faith. The doctrine has been developed to the extent that as between co-locators and co-owners there is a relationship of trust and confidence which prevents one from defeating by fraudulent and deceitful methods the rights of others. In the case of *Miller v. Chrisman* (1903), 140 Cal. 440, 73 P. 1083, 74 P. 444, 197 U.S. 313, 25 Sup. Ct. Rep. 468, 47 L.Ed 770, it was held that one who in good faith makes a location and with due diligence prosecutes his work thereon is fully protected against all forms of force, fraud or surreptitious or clandestine entries or intrusions upon his possession. It has been held by the Supreme Court of the United States that a co-owner who amends his notice of location and acquires a patent will not be permitted to exclude the other owners, but will be declared to hold the title acquired in trust for all. *Lockhart v. Leeds*, (1904), 195 U.S. 427, 25 Sup. Ct. Rep. 76, 49 L. Ed. 263. The Supreme Court of the United States in *Turner v. Sawyer* (1893), 150 U.S. 578, 14 Sup. Ct. Rep. 192, 37 L.Ed 1189, states the general rule as follows:

“\* \* \* that ‘such a purchase’ (of an outstanding title or incumbrance upon the joint estate for the benefit of one tenant in common) ‘enures to the benefit of all, because there is an obligation between them, arising from their joint claim and community of interest; that one of them shall not affect the claim to the prejudice of the others.’”

Where one locator failing to do assessment work relocates a claim under circumstances where it is for the purpose of defeating the rights of co-locators, the subsequent location would inure to the benefit of all the

locators. In *Hunt v. Patchin*, 35 Fed. 816, an original locator who, with the consent of all of them, relocated the claim in his own name was not thereafter permitted to claim the entire title as against his original cotenants. In the instant case the appellant Stilson was in the relation of trust and confidence with his other co-tenants who were relying upon him to perform assessment work. He stationed himself in the office of the County Recorder on the 30th day of June and until noon on the 1st day of July, 1951. When no affidavit of assessment work was filed as to the Flat Top Nos. 1, 2, 3 and 4 by any of his cotenants, he and his co-conspirator, the appellant H. Knight, went upon the ground and, using the same discovery and corner monuments, made new locations, changing the name of the claims, and attempted to hide his identity by locating under the name of Orson Doyle, leaving off the name Stilson. It cannot be conceived of any situation which falls more directly within the language and the prohibitions of the authorities cited. Knight and Stilson were at the time participating in sustaining the title of the claims they were jumping as against the claims of the Hunts in the Beehive claims which are one of the four principal sets of claims involved here.

The appellants unequivocally and without hesitation testified that it was their intention in relocating the claims in 1951 to defeat the interest of their co-owners in the property. The services of appellant Knight as a co-conspirator were obviously obtained by Stilson to avoid the obvious intention of his acts and to create



rights in an apparent stranger which could not be defeated by his deception and thereby protect him from a claim by his co-locators. The fact that a stranger to the original claims joins with a co-locator in the relocation does not make any difference nor does it avoid the trust or defeat its imposition.

The rule is set forth in 58 *C. J. S.* 147, Section 86(b), as follows:

“Where a relocation by one coowner in his own name is in breach of the trust relation existing between him and his coowners, the relocation will inure to the benefit of all the coowners, and he will hold it as trustee for their benefit, and the mere fact that a stranger to the original claim joins with such joint owner in the relocation and acquires title jointly with him to the relocated claim does not avoid the trust or defeat its enforcement. However, the remaining coowners may lose their rights by laches in asserting them. A failure to perform the assesment work on a claim constitutes neither an abandonment nor a forfeiture thereof so as to subject it to location by one of its part owners to the exclusion of the others, and a coowner who relocates on a claim, open because the assessment work was not done, acts just as much for his coowner as for himself, regardless of his intention.”

To the same effect is the case of *Stevens v. Grand Central Mining Company*, 133 Fed. 28, a case arising in Utah in the Eighth Circuit Court of Appeals. In considering the question as to whether a stranger with a co-owner avoided the trust, the Court said:

“Nor will the trust be avoided or its enforcement defeated merely because a stranger to the original claims participates with the unfaithful co-owner in the proceedings to wrongfully exclude his companions in interest and jointly with him acquires the title to which they are entitled.”

In view of the foregoing rules and authorities and the fact that H. Knight joined with Orson Doyle Stilson in relocating the Flat Top claims, we submit that there can be no question but what a trust is imposed upon the Battle Mountain claims and that H. Knight and Orson Doyle Stilson hold the Battle Mountain claims in trust for the use and benefit of the owners of the claims. The evidence shows conclusively that the owners of the Flat Top Nos. 1, 2, 3 and 4, including the appellant Orson Doyle Stilson, have all conveyed to the Flat Top Mining Company. Consequently, the trust inures to the Flat Top Mining Company.

To avoid the imposition of a trust appellants argue that as the location of the Flat Top Nos. 1, 2, 3 and 4 are held to be invalid the trust cannot be imposed. Since the case of *Belk v. Meagher* (1881), 104 U.S. 291, 26 L. Ed. 735, the Supreme Court of the United States has held that where one relocates the original lode claims he impliedly admits the validity of the prior location. The Supreme Court of New Mexico made a detailed and exhaustive analysis of the case of *Belk v. Meagher* and concluded that a relocater admits, as a matter of law, the validity of the prior location and that such holding was not dicta and was binding on the New Mexico Court.



The following language of the New Mexico Court in *Wills v. Blain* (1889), ..... New Mex. ...., 20 P. 798, sets forth the proposition:

“The relocater, when he so describes himself in the notice, solemnly admits, in an instrument which is made a matter of record, that he is not a discoverer of mineral, but an appropriator thereof, on the ground that the original discoverer had perfected his right. The notice becomes in some sense an instrument of title, - a record. It is the equivalent of an admission of record to the original locator that the relocater claims a forfeiture by reason of a failure on the part of the first locator to make his annual expenditure. This we believe to be the doctrine of *Belk vs. Meagher*, *supra*, and on that authority sustain the instruction of the court below on that point.

\* \* \*

“The defendants, by the recitals of their relocation notice, had conclusively, as we think, admitted the validity of plaintiffs’ original location; so there was but the single issue of fact before the jury, and that was as to the performance of the annual labor each year as required by law.”

The appellants’ position in this regard is calculated to avoid their acts of bad faith and by indirect means avoid the imposition of a trust. The policy of the law has never been to the effect that one should be able to do indirectly what cannot be done directly. The factual

situation creating this circumstance is pointed out by the position of the so-called cross-plaintiffs in the trial of the action. As hereinbefore stated the Beehive claimants failed to assert the title against the Flat Top Nos. 1, 2, 3 and 4 in the Ekins action. *It is properly inferable that they did not believe they had valid mining claims as against the Flat Top locations.* The cross-plaintiffs were brought into the action on the theory that if they could be used to show the invalidity of the Flat Top claims the appellants would avoid the penalty of their acts. They asserted no present right and affirmatively stated to the court that they sought no relief. This was done in spite of their cross-complaint and their prayer for relief. All they wished to do was to invalidate the Flat Top claims but did not want to risk going so far as to invalidate the Battle Mountain claims. In the trial of the matter counsel for the appellants, one of whom originally appeared for the cross-plaintiffs, controlled the presentation of their case, even to the point of making their argument to the court. The validity of the Flat Top claims is inconsequential. They had been held valid as against the Beehive claims in the Ekins case. Evidence was taken as to the location of the Beehive claims but always subject to the objection of the respondent Flat Top Mining Company. Upon the dismissal of the Beehive claimants, which we believe proper, this evidence disappeared. The cooperation between the Beehive claimants and the appellants was such as must have been repugnant to the sense of equity of the court and such is reflected in its decision imposing a trust. If the ap-

pellants can now assert the invalidity of the Flat Top claims as it relates to their obligation to deal fairly with their co-locators, then they have by deception accomplished what the Supreme Court of the United States and all other courts have said cannot be accomplished. If the Battle Mountain claims are valid, as the court has held, and if the location was accomplished in breach of trust, as the court has held, then the rights and benefits acquired by the location must inure to the benefit of those who stood in a position of trust and confidence with the appellants.

### POINT III

THE COURT PROPERLY DENIED THE CROSS-PLAINTIFFS AND JOINT APPELLANTS FROM ASSERTING TITLE AGAINST THE FLAT TOP NOS. 1, 2, 3 AND 4.

Point number 3 urged by the appellants would appear to be moot. The Beehive claimants in open court stated that their claims, if valid in the first instance, had been abandoned and forfeited. It is not ascertainable upon what grounds it can be argued that the ruling of the trial court was erroneous. What right they wanted to assert in the face of the admission that their claims had been abandoned and forfeited is not disclosed by the record, and their brief fails to disclose such a claim.

### CONCLUSION

We believe the facts and the law, both as they relate to questions of title and to the conduct of the parties

as they relate to a claim made in good faith, sustain the rulings of the trial court, and the judgment entered therein should be affirmed.

Respectfully submitted,

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