

1967

Mervin J. Russell and Ada J. Russell, His Wife v.  
Geyser-Marion Gold Mining Company, a  
Corporation, The Bothwell Corporation, a  
Corporation, et al : Appellant's Petition For  
Rehearing

Utah Supreme Court

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FILED

IN THE SUPREME COURT  
of the  
STATE OF UTAH

MARVIN J. RUSSELL and  
ADA J. RUSSELL, his wife,  
*Plaintiffs,*

vs.

GEYSER-MARION GOLD  
MINING COMPANY, a  
corporation, THE BOTHWELL  
CORPORATION, a  
corporation, et al,  
*Defendants.*

Case No.  
10577

APPELLANT'S PETITION FOR REHEARING

Appeal from Judgment, District Court,  
Tooele County  
Honorable R. L. Tuckett

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

MARVIN J. RUSSELL and  
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*Defendants.*

Case No.  
10577

APPELLANT'S PETITION FOR REHEARING

Petitioner and appellant, Geyser-Marion Gold Mining Company, petitions for a rehearing of the decision of this court filed February 3, 1967 and respectfully requests that the Honorable A. H. Ellett participate in the consideration of this petition.

Petitioner bases its request for rehearing on the following grounds:

POINT I

THE RIGHT TO HAVE AN ADJUDICATION OF ALL ISSUES AND POINTS RAISED ON APPEAL WHICH ARE SUPPORTED BY THE RECORD IS AN INDISPENSIBLE REQUISITE TO THE FULFILLING OF THE RESPONSIBILITY BY THE APPELLATE COURT.

In *LeGrande Johnson Corporation vs. Peder-*

son, 420 P.2d 615, this court has decided that a party has a right to resort to the courts for adjudication and settlement of disputes and grievances, which right is a fundamental and important one.

Appellant and defendant, plead and proved continuous adverse possession of all claims involved in the lower court.

Appellant raised this point on appeal before this court, see Point VIII, appendix page 1 which is page 28 from appellant's original brief filed in this matter.

This point was never discussed, considered or adjudicated by the Supreme Court.

Appellant has appended to this brief, pages from appellant's original brief on appeal. Appellant refers to the appended pages in this brief as appendix. (and each page bears the same page number it had in appellant's original brief.)

Plaintiff and respondent's case in the lower court failed to sustain the burden of proof of adverse possession and failed to rebut appellant defendant's proof of adverse possession as follows:

#### PLAINTIFF'S AND RESPONDENT'S PROOF ASSERTED POSSESSION 1945-1957

1. Plaintiff claimed possession by Tony Castagno from 1945 to 1957. Tony Castagno had no map of the claims and he never did use a map to

locate any claim, T 56-4, appendix 5. Tony Castagno admitted he could not locate where the claims were located that were involved in this litigation, appendix 4, T 45-30. He did not even know which claims were involved in this litigation, appendix 5.

2. Tony Castagno named claims not involved in this litigation as being involved, appendix 5 and 6, and asserted he did not know whether his livestock ever grazed the Heclas or the largest group of claims in the upper group, appendix 5, T 92-22.

3. Tony Castagno knew that Ault was running sheep on the area involved during the year of 1945, appendix 2, T 46-22, and he also stated he knew that Ault ran sheep there from 1945 to 1956, T 46-25. Tony Castagno made no complaints to Ault or defendant.

#### ASSERTED POSSESSION 1957-1960

4. Plaintiff asserts possession from 1957 to 1960 by Rose Castagno.

5. Rose Castagno did not possess a map and could not locate any claim. Rose Castagno did not know where the claims were located with respect to Sparrow Hawks Spring or the Milk Ranch, T 62-6, appendix 6. Rose Castagno did not know where the graveyard was in relation to the claim, appendix 6 and 7. T 64-14.

6. Rose Castagno did not know there was an upper group of claims and a lower group of claims separated by several miles, appendix 9, T 62-29.

## ASSERTED POSSESSION 1960-1964

7. Plaintiff respondent asserts possession of the claims personally from 1960 to 1964. Plaintiff respondent Russell had no map to identify or locate said claims, appendix 7, page 10, T 35-20. He never did locate any particular claim, T 36-1, appendix 7.

8. Plaintiff respondent admitted Ault grazed the area, where plaintiff respondent thought the claims were located, for ten years prior to the commencement of this action, appendix 7, T 14-9. Plaintiff respondent admitted that he knew Ault had grazed livestock in the area for 20 years, appendix 7, T 13-28, and he knew that Ault had leased the claims from Bothwell or defendant, appendix 7, T 14-27.

9. Plaintiff respondent attempted to keep Ault from grazing said claims by complaining to the Bureau of Land Management in 1964 just prior to the commencement of this action. His complaint was about Ault grazing the lower group of claims, appendix 8, T 17-6. This amounts to an admission by plaintiff respondent that his livestock had not grazed the claims in question and that Ault's livestock had grazed the claims in question. The record is also silent as to any one including plaintiff ever making any complaint to Bothwell or defendant at any time.

## APPELLANT DEFENDANT'S PROOF IN LOWER COURT

1. Appellant defendant paid all of the taxes

assessed against said claims involved in this litigation for all years from and after the year 1932 and this proof was supported by tax receipts, Exhibit 6.

2. In the pleadings and Request for Admissions, plaintiff respondent admitted that he had neither paid any taxes on said claims in question nor had he tendered any money to appellant defendant from the year of 1944 either personally or by predecessors in interest to defendant.

3. Appellant defendant collected rental from the lessee, Ault for all years from the year of 1944, see Exhibit 14 for lease and Exhibit 25 for checks and receipts. T 154-9 for testimony that Ault paid rental on all claims every year, appendix 10.

4. Appellant defendant had no notice of any adverse claims or use by plaintiff respondent or his predecessors at any time after 1944, appendix 2, T 268-1. Ault never complained to defendant about anyone using or grazing said claims, appendix 11, T 159-19 and 155-28.

5. Appellant defendant gave actual and implied notice to plaintiff respondent and his predecessors in interest and all the world that appellant defendant claimed exclusive possession through its lessee Ault, appendix 2.

6. Because of the above-named reasons, notice of use and use by Ault, such rights of plaintiff respondent were extinguished, appendix 1, 2 and 3.

7. Because of the above, plaintiff respondent



is presumed to have abandoned any rights to the claims involved, appendix 1, 2 and 3.

8. Ault, his wife and his son all testified they were present on the claims involved every day of the grazing season and they controlled the only water in the area to be used to water the livestock and let it out of a pipe where the valve was in a box locked with a key, T 192-22 and 224-30, appendix 11a, and also testified that those hearing livestock were positive livestock grazed the claims until all feed was gone, appendix 12, T 287-16, and see appendix 13 et seq.

Moreover, for 20 years Ault kept the map, Exhibit 18, on which he colored in green each claim and thus identified every claim he grazed and paid rent on, appendix 10. Appendix 13 et seq. shows possession and grazing of all claims by Ault.

Defendant collected substantial rental from lessee Ault every year since 1944. No complaints were made to Ault until 1964 just immediately preceeding commencement of this action either by plaintiff or any predecessor. Defendant had neither actual knowledge nor constructive knowledge of possession by plaintiff or plaintiffs predecessor since Ault paid rental and made no complaint for 20 years.

Under these facts how could the court find plaintiff had possession for 30 years, and that defendant, who lived in Salt Lake City, should have

protested. Equity Appeals are supposed to review the evidence, and the above demonstrates the necessity for a rehearing.

Plaintiff respondent offered no proof of seizure and possession within seven years prior to the commencement of this action as required under Utah Code Annotated section 78-12-5 and as treated in appellant defendant's original brief Point XII, appendix 12a.

Appellant defendant plead and proved continuous adverse possession of all claims involved in this litigation in the lower court and again raised the point on appeal in this court.

Appellant defendant is entitled to have an adjudication on this point.

WHEREFORE, petitioner respectfully requests a rehearing for a determination on Point VIII and XII.

Respectfully submitted,

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*Defendant and Appellant*

#### POINT VII.

A PARTY SEEKING TO QUIET TITLE TO REALTY, OR REMOVE A CLOUD THEREON WILL, AS A CONDITION PRECEDENT TO THE RELIEF, BE COMPELLED TO DO EQUITY.

This point is a direct quote from 74 C.J.S. 142 Par. 94.

Plaintiffs claimed under the pre-trial order R 46, that they were entitled to possession by reason of adverse possession. Such a position supported by some evidence that they had used the land for grazing without tendering one-half of the taxes for the use they had made or will in the future make is offensive to equity or the requirement that "he who seeks equity must do equity" which should require judgment for defendants. This is particularly true where the recorder's office charges them with notice.

#### POINT VIII.

PAYMENT OF ALL TAXES ASSESSED AGAINST ALL MINING CLAIMS AND COLLECTING ALL RENT-ALL FROM A TENANT WHO USED SAID CLAIMS FOR GRAZING PURPOSES WITH NO NOTICE TO DEFENDANTS OF ADVERSE CLAIMS SINCE 1945 EXTINGUISHED ANY RIGHTS OF PLAINTIFFS AND ESTABLISHED TITLE IN DEFENDANT.

Where the owner of land leases it to a tenant who annually without interruption pays rental thereon with no complaints of any adverse claims, or others using the land since 1945, the owner is presumed to have exclusive possession, and has extinguished any rights of others whether by license contract or otherwise. Under these facts, plaintiffs and

who seeks equity must do equity” or “performance” or “showing a tender of performance” or “clean hands.” Moreover, plaintiffs never did claim performance and could not when as an alternative remedy they claimed by adverse possession. Russell testified that he was acquainted with the claims for 30 years, T6-4, and that he knew of Aults operation in the area for 15 to 20 years T13-29, and Russell knew Ault leased from Bothwell. This was all before he obtained his alleged grazing rights. Russell also knew the claims were not used for mining purposes T 22-6 and that Owen Ault was leasing said claims and using the same for grazing purposes. From the record plaintiff was also charged with knowledge of the fact that to enjoy grazing rights one-half of the general taxes must have been paid to defendant. Yet he had no information concerning whether any predecessors had or had not paid one-half of said taxes, T18-13. Plaintiff never tendered any taxes or any portion of same to defendant even though he claimed to have grazed said claims for three years. Plaintiffs neither plead nor carried the burden of proof of “confession and avoidance” by confessing they owed one-half of the taxes on a plea to avoid payment. Moreover the facts neither supported a prima facie case for the relief which the court granted, nor did they show a contract if one was in force.

the predecessors must be presumed either to have *abandoned* their rights or recognized that the contract was not assignable and that they had no rights. Castagno saw Aults cattle on what he thought were the claims involved in the year 1945, T 46-22. Castagno talked with Ault at that time, and it must be presumed that Castagno either concluded he had no rights or abandoned any he had since there is no further evidence of any discussion, or complaints after 1945 by Castagno.

Moreover, where defendant has paid all taxes assessed on the claims since 1934, plaintiffs have no claim or right of any kind much less the right to enjoin this defendant from interfering with their use of said claims.

After defendants plead and proved exclusive use and collection of all the rentals on all mining claims since 1944 and proved payment of all the taxes on all mining claims since 1934, and that they had never had any notice, actual or constructive, of anyone interfering with the possessory rights of their tenant, defendant should prevail. There was direct uncontradicted evidence that defendants had no notice of adverse claims, T268-1, and there was no evidence to the contrary. In the other hand, all defendants' predecessors and the world knew defendants had leased said claims to Ault, and that Ault was using said claims for grazing purposes and paying rent to defendant for said grazing rights.

Plaintiffs not only had the burden of proof

but also offered no proof to the contrary or offered any proof that anyone complained to defendants or their predecessors in interest or gave them any notice of any adverse claims or trespass, or that there was any reason why a reasonable person should have known of adverse claims under constructive notice, since rental was paid annually without complaint and Ault testified he never complained to defendant about Castagno being on the property, T155-27.

Defendant also plead, 78-12-5.1, 78-12-5.2, 78-12-12.1 R 21 and 78-12-12, U.C.A. 1953 R 45 which under the facts should not only prevent the relief granted plaintiff by the lower court but also establish all rights in said claims in defendant. Let the plaintiff show the court any evidence that will support plaintiffs seven years possession and payment of taxes immediately prior to the commencement of this action or at any time.

#### POINT IX.

A SUCCESSOR TO A GRANT IS ESTOPPED TO ASSERT ANYTHING IN DEROGATION OF THE DEED AS AGAINST A GRANTEE OR THOSE IN PRIVITY WITH HIM.

After the recording of Ex. 2 on May 24, 1934, all subsequent assignees of the Jorgensens including all of plaintiffs' predecessors in interest and plaintiffs were put on notice that there was no severance of the surface rights or use of water rights. The only right retained was a conditional license which

numbers from the leases and located said claims physically on the ground by blazes on trees and monument numbers and colored the area in green on Ex. 18, his map, T148-24.

All facts above related are undisputed, with no evidence to the contrary.

## ARGUMENT ON THE FACTS

### POINT I.

WHERE EVIDENCE IS CONTRARY TO THE FINDING OF THE COURT PLAINTIFF FAILS IN BURDEN OF PROOF AND DEFENDANT PREVAILS PARTICULARLY IN AN EQUITY CASE.

From the entire period from 1944 to 1957 Tony Castagno is the only predecessor, through which plaintiffs must prove possession or the grazing of said mining claims or any rights with respect thereto. Castagno admitted that he had never tried to locate a mining claim and could not locate a claim, and on direct examination for plaintiffs' case, testified as follows:

T45-30 Q. Mr. Castagno, are you acquainted with the general location of the mining claims described in the deed I showed you on the ground?

A. Well, I couldn't point them out just where they was, no."

Despite the fact that plaintiffs' proof failed to show the grazing of a single mining claim for even a day from 1945 to 1957, their case was even weaker after cross examination since Castagno did not even

know which mining claims were involved in this litigation.

Castagno also indicated that he couldn't tell if he was trespassing and could not identify where any particular claim was.

T 56-4 Q. "I ask you a question. I want you to answer it, Mr. Castango, as to whether or not you personally took a map and identified any one of these claims?

A. No.

Q. But you didn't take a map and try to identify where these particular claims were?

A. No.

Q. You knew, did you not, that some of these trees had blazes on them with numbers on them?

A. Yes."

T 91-29 When asked whether his cattle were on Gold Coin, he claimed they were, and when it was pointed out to him that Gold Coin claims were not involved in this litigation, and he was asked to name a single claim involved in this litigation and he stated that he could, he named Gold Bug, and Gold Bug is not a claim involved in this litigation T 92-22.

Q. "You don't know whether your cattle were on the Heclas or not do you?

A. No I don't."

The Heclas, constituting a group of five mining



claims, was the largest area of claims (just north of Mercur) involved in this case. The witness was then asked:

T92-25 Q. "Alright, you can't identify a single claim's name that your cattle were on, can you?"

A. Yes.

Q. Which one?

A. Gold Bug.

Q. Gold Bug?

A. Yes.

Q. The Gold Bug isn't even involved in this litigation.

A. It sure is."

Actually the Gold Bug claim is not involved in this litigation as disclosed from the pleadings. Castagno also indicated he did not know where any particular claim was or whether he was trespassing, T91-24. The questions and answers demonstrate that the witness did not even know what mining claims were involved in this litigation much less their location or whether he had grazed any of them.

From 1957 to 1960 Rose Castagno was the immediate predecessor to plaintiff. Rose Castagno was even more confused than was Tony Castagno. She did not even know where the claims were located with respect to Sparrow Hawk Spring or the Milk Ranch, T62-6. She did not even know where the grave yard was, which was identified as being on

the northeast edge of the lower group of claims, T64-14.

Plaintiff, Russell claimed he started grazing in the spring of 1961, T25-16. Russell had no map to identify where the mining claims were. T35-20. He never did locate any particular claim, T36-1. He admitted that he knew that Ault's livestock had grazed the area where he purportedly thought said mining claims were located for a period of ten years, T14-9. He also admitted that he knew that Ault had been operating sheep in the area for up to 20 years, T13-28, and he knew that Ault leased from the Bothwells, T14-27.

Under all of plaintiff's evidence there was not a scintilla of evidence to show that any particular claim had ever been grazed in any particular single year or for any period, even one day. Yet the lower court found:

"3. For many years last past plaintiffs and their predecessor in interest have used the surface of said mining claims for livestock grazing."

The evidence is conclusive that Ault, defendant's lessee, had exclusive possession of and grazed all of said mining claims from and after 1944.

Ault claimed that he never at any time had any interference by Castagno in grazing said claims, T155-30.

The defendant Russell under his testimony claimed that subsequent to 1961 he grazed part of

7 years immediately prior to the commencement of this action.

1. Respondent admitted that Appellant's lessee (Ault) had sheep in the area for:

T13-28 'Fifteen or twenty years.'

2. Respondent admitted that Appellant's lessee (Ault) had his sheep all over the area which would include the public land as well as the mining claims here involved, T26-27. Russell also admitted that he knew Ault leased said claims from Bothwell, T14-26.

3. The lower group of said claims is very narrow, dividing two large areas of land leased by the United States Bureau of Land Management to Respondent. Respondent further testified that he called the B.L.M. to resolve the problem of Ault's sheep grazing said claims.

T17-6

"Q: He showed the lease to B.L.M.?"

A: Yes.

Q: What did B.L.M. say?

A: The B.L.M. Just left it up to us to straighten that out."

The B.L.M. after examining Respondent's deed and the lease held by Appellant, refused to be involved in the matter and left it up to Respondent and Ault

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to straighten the matter out, after which Respondent filed this suit.

The law is well settled in Utah in an opinion written by Justice McDonough that where premises are rented and rents collected under a claim of right in facts similar to the case at bar that plaintiff and Respondent is not seized or possessed.

*Pender vs. Bird*, 224 P2d 1057 119-U-91:

“ . . . the third amended complaint shows on its face that defendants Bird were then in possession of at least some portion of the premises under a claim of right and *were collecting the rents, issues and profits*. In face of such allegation, the court could not, on the pleadings, hold that defendants were not seized nor possessed of the property in question within seven years before the commencement of the action.” (Emphasis supplied)

### III

Counsel for Respondent at Page 7 of Respondent's brief represents to the Court that Owen Ault personally herded sheep on the lower group of claims or the Mercur Bench only three times and; therefore, Ault's sheep grazed the lower group of claims only three times. This is inaccurate and misleading for the following reasons:

1. The transcript of testimony contains pages of testimony demonstrating that Ault's son herded Ault's sheep on the Mercur Bench or the lower group while his father herded other sheep and livestock at

years before commencement of the action as required by Section 78-12-5 U.C.A. 1953. While admitting the necessity of being seized and possessed for seven years the record cited by Respondent entirely fails to support said seizen or possession.

# I.

## SEIZEN AND POSSESSION FROM 1957 THROUGH 1960.

1. Respondent asserts that he was seized and possessed of the property for the years from 1957 through 1960 through a predecessor, Rose Castagno. These years constituted the initial years of Respondent's alleged seven years. The only citation of the transcript referred to by Respondent to support seizen and possession of the property from 1957 through 1960 is Page 64 of said transcript. An examination of T64-12 reveals the following:

Rose Castagno on direct examination stated,  
"A: I don't know where the graveyard is.  
Q: You don't?  
A: No."

Inasmuch as all the witnesses testified the graveyard was located immediately adjacent to the northerly portion of the southerly group of claims, T213-25, see also Exhibit 18, this definitely establishes the fact that Rose Castagno did not know where the mining claims she is asserted to have possessed were even located.

2. The only statement upon which Respondent could possibly rely is that Rose Castagno stated she did see cattle in the area around Milk Ranch T64-4. She did not state whose cattle they were or that she owned them. Milk Ranch was located on Exhibit 18 by a red cross, T156-19. Milk Ranch is located on the Silver Cloud claim, T157-6. Silver Cloud claim is not involved in this litigation and is about a thousand feet west of the Hecla claim (the nearest claim to Milk Ranch in the upper group is T157-13, and is more than a mile from the Black Shale claim in the upper group, Exhibit 18.

3. Rose Castagno did not even know that said claims consisted of two groups, to-wit: an upper group and a lower group, which claims are separate several miles from each other, T62-29. Rose Castagno did not know where the claims were in relation to Sparrow Hawks Spring or the Milk Ranch T62-8, demonstrating that she could not possibly have known whether her livestock were on the above described claims or not. The court's attention is again invited to the fact that this testimony was given on direct, not cross-examination.

4. Respondent claims seizen and possession from the years 1960 to 1964 or the last part of said seven years by himself personally. Respondent did not have a map and testified he was not able to identify the location of said mining claims. (This point is fully treated on Page 10 of Appellant's

dent and director of defendant, Geyser-Marion since 1942, T136-17, and had handled matters of the company in dealings with Mr. Ault who leased the mining claims involved in this litigation from Geyser-Marion. Ault testified that he presumed the Bothwells owned the Geyser-Marion claims, T152-12. Ault testified that he ran livestock on said mining claims every year without missing a year since 1944 or 1945 and that he has never missed a payment for the leasing of said claims, T154-9, and Castango admitted Ault grazed same, T46-27, T48-8, T53-26 as also did Russell, T26-1.

T136-5 is further varification that Ault paid the money to Bothwells as are the records produced by Bothwell, president of Geyser- Marion, Ex. 11, 12 and 13. See also T204-19 and also Ex. 25 containing the checks and rental receipts produced by Ault under subpoena.

Ault ran 1,400 head of shep on said claims for 20 years, T146-11.

Ault stated he ran 40 head of cattle on said claims since 1945, T159-1 to 4.

Exhibit 18 is the personal map owned by the lessee, Ault, which he produced under subpoena in court, T24-20.

Ault spent all of his time in said area for 20 years, T145-27.

To color the map, Ex. 18, Ault took the claim (Go to Appendix 4 (to complete sentence.)

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Herein, Geyser-Marion Gold Mining Company and its predecessors in interest shall be referred as defendant or Geyser-Marion and present plaintiffs, Russell, and plaintiffs' predecessors in interest shall be referred to as plaintiff.

The mining claims involved in the litigation amount to about 608 acres. From and after 1900 Owen Ault grazed livestock on and leased all said mining claims from and paid rental to defendant each and every year until the commencement of this action. Ex. 14 is the lease between Geyser-Marion and Owen Ault involving the period immediately preceding the filing of this action. Ex. 11, 12, 13 show the payment of rental by Ault to defendant and Ex. 25 is the receipts and checks for rental payments on said claims which Ault produced under subpoena. Said lease, Ex. 14, contains about 2,200 acres, which defendant leases to Ault. Only 608 acres are involved in this litigation, they being mixed in among the other 1,500 acres, and some being southwesterly of Mercur and the others being scattered among the said 1,500 acres in the vicinity of Mercur, see Ex. 19. Ault also leased about 400 acres of mining claims from Gover Gold Mining Company and about 480 acres of mining claims from McCormick T204-1. The aggregate acreage of mining claims leased by Ault was about 3,080 acres forming the solid area colored in green on Ex. 18, 203-28.

Mr. Roy Bothwell is and has been the president.



fically asked whether he had seen Castagno's or Russell's cattle up by Sparrow Hawk or near the northern groups of claims in connection with the water that was used and he indicated he had not and that no one had interfered with same, T-159-18.

Ault stated he built a reservoir about seven years ago near the Sparrow Hawk Spring which spring is shown on Ex. 19 as being on the south easternly portion of the Black Shale claim involved in this litigation, and it was not disputed that there was not water in the water trough by said spring, Castagno T278-18, Ault T235-30, except as turned therein through the pipe.

Ault indicated he leased said mining claims every year since 1944, ran sheep on them and paid rental for the use of said claims, and that he never missed a payment on said lease, T154-9; and that prior to the commencement of this action he never complained about anyone else using said claims, T155-17; and prior to 1964 he never complained to the Bothwells about Russell trespassing, T155-19; and he never complained to Bothwell about Castagno trespassing, T155-28; and that Castagno never ran any cattle on any of the claims he was leasing from Bothwell, T155-30. After Ault built the reservoir no one else's cattle used the same, T158-16. Russell could not get in to use the Hecla claims or the Mary Jean claims or the Douglas claim without trespassing on other claims leased by Ault,

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the claims in common with Ault; however, the transcript discloses the following evidence from Ault: T155-30

Q. "Did Mr. Castagno ever run any sheep or cattle on any of the claims that you were leasing from Bothwell?

A. Never run any sheep on there that I know anything about.

Q. Never had any sheep on any of them?

A. No."

Mr. Mervin Russell plaintiff testified that he ran sheep in common with those of Ault and Ault upon being cross examined by counsel as to whether or not Russell ever had any livestock on said claims Ault answered:

T 199-84 "There has been no sheep in there outside of mine at no time.

Q. You are positive of that?

A. I am positive of it."

Moreover, Ault's cattle consumed all of the growth available for grazing and he observed it and so testified, T167-5 and testified that only his cattle had been in the area since 1944, T167-19.

The Mercur Bench area is where the lower group of mining claims are located and when Ault was asked whether he had seen anybody's cattle on this lower group of claims since 1945, he testified that he had not, T170-21 to 28. When he was speci-

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Appendix 13

T161-9. Neither Russell nor the Castagnos ever grazed said claims, T161-18. Ault had no trouble with either Castagno or Russell running their sheep north of Mercur, T167-2, and no one else ever ran any livestock near the Milk Ranch since 1944, T167-19. Ault leased the mining claims known as the Milk Ranch since 1944, T168-4. Milk ranch was on claims Ault leased but not involved in this case and was west of the Hecla group see Ex. 18, and T156-9. Ault was in the area during the grazing seasons several times a week, T168-24. No cattle except Aults were near the Heclas, T170-14 since 1945, T170-24. Ault visited the spring near Sparrow Hawk nearly every day, T180-27, and he examined the area and found that no cattle had ever watered there except his own, T179-26. All of the water that left the spring was contained within a pipe and none escaped, T192-22. They had a big box with a lock and a key where they could turn the water out, T224-30, and all of the water ran to Mercur, T234-12; Ault passed the area practically every day, T181-21. Ault claimed that no other cattle had ever been in the Milk Ranch area T198-21, and he was positive of it, T199-8.

All water at Sparrow Hawk Spring flowed into a pipe and all of it went to Mercur and the water had to be turned out of the pipe to put any water in the trough or in the reservoir, T193-14. There was a box over the spring which had to be unlocked to control or release any water, T224-27. No water

flowed out of the mine and was all contained within the pipe, and was turned out of the pipe into the trough, T196-2, and was all under Bothwell's or Ault's control.

Ault was at the reservoir almost every day and there was no evidence that anyone else even used the water that he placed in the same, T222-17, and no livestock but his own used said reservoir, T179-30, as was disclosed from his visits practically every day, T-180-27.

A son of Ault's herded sheep for him for about 20 years, T283-20 between Sunshine Canyon and the grave yard which included all of the mining claims in the lower group which made a complete circle for grazing as is shown colored green on Ex. 18, and (Ault's son) never saw any of Castagno's sheep in said area at any time, and he grazed Ault's sheep there, T284-17, until all of the feed was gone, T284-18. Mrs. Ault, the wife of lessor, had knowledge of Aults sheep grazing there and hauled water into this area to water the sheep, T213-19 and had personal knowledge of her husband placing sheep on the southern area of claims, T214-20 and on the Black Sheep claim T230-18, and knew that her husband had had sheep in Mercur Canyon since 1922, T-224-5, and Ault himself had never seen any other livestock on the Mercur Bench area or the southern group of claims, T170-22.

The claims were even named that were involved

Mercur and north of Mercur on the northerly mining claims and on Sections 17 and 20 which were owned by Ault and on which he had a summer home. T144-30.

2. Ault's son (Harold Ault) herded Ault's sheep on the lower group of claims from the time he was 14 years of age to the time of his testimony in court. Harold Ault was at the time of the trial 34 years old, T283-19.

3. In speaking about herding on Mercur Bench Harold Ault stated:

“A: Every spring we have come down Mercur Canyon.” T287-16.

On cross-examination Harold Ault was asked whether he just drove the sheep on the claims, and he testified:

“A: Not driven them, we have grazed them there.

Q: Grazed them?

A: Until the feed was gone and then went on up.” T284-16.

4. Virginia Ault testified she had been with her husband whose livestock had been grazing on the mining claims in the summer.

T210-7

“A: Most of the time” T209-29 Since “1922”  
and that Aults sheep had “been there all  
the time” T214-26.

Mrs. Ault lived in the area during the grazing  
season, and drove the water truck.

The Court’s attention is further invited to the  
fact that Ault paid rent for the grazing use of said  
claims. He possessed a map with claim numbers  
thereon, which he had colored in green to enable  
him to locate the claims and graze them.

For the foregoing reasons Appellant respect-  
fully submits to the Court that Respondent not only  
failed to sustain the burden of prof, but also by his  
own admissions proved that Appellant was seized  
and possessed of the property in question for the  
seven years immediately prior to the commencement  
of this action.

Respectfully submitted,

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E. J. Keen