

1940

Laura Morris and Lucy Pocatello Johnson, Maude Pocatello Racehorse, Josephine Pocatello and Ray Pocatello v. Amasa L. Clark, Joseph E. Robinson, and Box Elder County : Abstract of Record Volume 1

Utah Supreme Court

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Recommended Citation

Abstract of Record, *Morris et al v. Clark et al*, No. 6248 (Utah Supreme Court, 1940).

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IN THE
SUPREME COURT
OF THE STATE OF UTAH

LAURA MORRIS, Special Admin-
istratrix of the estate of Washington
Pocatello and Minnie Pocatello, his
wife, both deceased, and LUCY
POCATELLO JOHNSON,
MAUDE POCATELLO RACE-
HORSE, JOSEPHINE POCA-
TELLO and RAY POCATELLO,
Heirs of Washington Pocatello and
Minnie Pocatello, deceased,

No. 6248

Plaintiffs and Appellants,

vs.

AMASA L. CLARK, JOSEPH E.
ROBINSON, and BOX ELDER
COUNTY,

Defendants and Respondents.

ABSTRACT OF RECORD
VOLUME I.

P. C. O'MALLEY and GEORGE M. MASON
Attorneys for Appellants and Plaintiffs

STEPHENS, BRAYTON & LOWE
*Attorneys for Respondents and Defendants, Amasa L. Clark and
Joseph E. Robinson*

FILED

JUN 1 1940

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IN THE
SUPREME COURT OF THE STATE OF UTAH

)
LAURA MORRIS, Special Administratrix
of the estate of Washington Pocatello
)
and Minnie Pocatello, his wife, both
)
deceased, and LUCY POCATELLO JOHNSON,
)
MAUD POCATELLO RACEHORSE, JOSEPHINE
POCATELLO, and RAY POCATELLO, Heirs
)
of Washington Pocatello and Minnie
Pocatello, deceased;

Plaintiffs,

) THIRD

) AMENDED

) COMPLAINT

-vs-

)
AMASA L. CLARK, JOSEPH E. ROBINSON
)
and BOX ELDER COUNTY.

)
Defendants.)

A B S T R A C T O F R E C O R D

Transcript

0182

IN THE

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF BOX ELDER,
STATE OF UTAH.

Hon. Lewis Jones, Judge.

THIRD AMENDED COMPLAINT.

This action was first filed by, and in the

name only of the heirs of the estate of Washington
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Transcript

0182 Pocatello, deceased, asking the court to quiet title to an undivided 1/3 interest in the following described real property, and asking for an accounting of the rents and profits of the said undivided 1/3 interest. A demurrer having been filed, and one of the grounds of demurrer was that the heirs did not have the capacity to sue for the rents and profits, the court having sustained the demurrer on that ground, and granting plaintiffs extension of time to further plead sufficient to permit the appointment of a special administrator, and such special administrator having been appointed, who joined with the heirs as party plaintiff, and filed a second amended complaint. Defendants demurred, and moved to strike, and also moved to have plaintiffs separately state their causes of action. At the hearing the court overruled the demurrer and denied the motion to strike, but granted defendants motion to have plaintiffs separately state their causes of action.

FIRST CAUSE OF ACTION

I

Plaintiffs for first cause of action allege;

Transcript

0182 that Laure Morris was on the 14th day of February, 1939, duly and legally appointed Special Administrator of the estate of Washington Pocatello, and Minnie Pocatello, his wife, both deceased, and said Laura Morris did qualify for said office, and is at the time of filing this amended complaint the duly qualified and acting Special Administrator of the estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased, and brought in this action as one of the parties plaintiff, by order of this court first had and obtained.

II

That the other plaintiffs, Lucy Pocatello Johnson, Maude Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, are the only heirs of Washington Pocatello and Minnie Pocatello, deceased; that at all times hereinafter mentioned, they were and now are full blooded Indians, members of the Western Shoshoni Tribe of Indians and at all times herein mentioned were and now are wards of the United States Government, residing on the Fort Hall Indian Reservation,

Transcript

0183 in Idaho, and were at the time of filing this action all past the age of 21 years of age, and joins as plaintiffs in this action with the Administratrix of the estate of Washington Pocatello and Minnie Pocatello, deceased, for the recovery of real property belonging to the estate, and to the above named heirs, by and with permission of the Superintendent of the Fort Hall Indian Agency of the United States Department of Interior, Office of Indian Affairs, of Fort Hall Indian Reservation of Fort Hall, Idaho, first had and obtained, if such permission be found by this court to be necessary or required.

III

That Washington Pocatello died on or about the 27th day of April, 1917, at Fort Hall, Idaho; that during his lifetime and at the time of his death, he was the only heir by blood, of an Indian woman of the name of Yaotes Owa, and also, of a daughter of Yaotes Owa, commonly known and called Jane; that Minnie Pocatello, his wife, died at Fort Hall, Idaho, on or about the 28th day of May, 1928.

IV

That Yaotes Owa died in Box Elder County, Utah,

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Transcript

0184 sometime in the late 80's; that at the time of her death she was the owner of a certain 80 acres of land located in Box Elder County, Utah, described as follows, to-wit:

E. $\frac{1}{3}$ of SE. $\frac{1}{4}$ of Sec-12. T.11 N.R. 3 W. SLM.

That besides the said Washington Pocatello, Yaotes Owa left surviving her as heirs one daughter known as Jane, who died sometime in the late 90's, without issue, but leaving surviving her as heirs, a husband named James Brown, and Washington Pocatello, a descendant by half-blood.

V.

That no probate proceedings was commenced on the estate of Yaotes Owa, or on the estate of her daughter Jane, until in the year of 1917; that during the years 1917, 1918 and 1919, full probate proceedings were had on both the estates, and decrees by this court determining heirship, and of distribution in both estates was made and entered on the 7th day of November, 1919, and both estates

Transcript

0184 were fully and finally closed and the administrator discharged, on or about the day of November, 1919.

VI.

That on the 7th day of November, 1919, Justin D. Call, Judge of this court, did make and enter two decrees determining heirship, and of distribution, one in the estate of Yaotes Owa, and one in the estate of Jane Brown and James Brown; in each decree of distribution there is decreed an undivided $2/3$ interest to James S. Brown, the son of James Brown, the husband of the Indian woman Jane, the daughter of Yaotes Owa, and an undivided $1/3$ interest to the estate of Washington Pocatello, deceased, each decree describing the same 80 acres of land located in Box Elder County, Utah, described as follows, to-wit:

$E\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec-12, T. 11 N.R. 3W SLM.

That a copy of the decree in the estate of Yaotes Owa was filed for record by the administrator on the 8th day of November, 1919, as recorded in Book H, Miscellaneous Records, at page 319, of the Records of Box

Transcript

0185 Elder County, Utah, that a true and exact copy of said decree is hereto attached, marked plaintiff exhibit "C", and made a part of this complaint, as if fully written out herein; that a copy of the decree of distribution made and entered in the estate of Jane Brown and James Brown was by the administrator filed for record on the 8th day of November, 1919, and recorded in Book H, Miscellaneous Records, at page 320 of the Record of Box Elder County, Utah, that a true and exact copy of this decree is attached hereto, marked plaintiffs exhibit "D", and made part of this complaint as fully as if written out in full herein.

VII.

That at the time the said decrees were made and entered the said 80 acres of land was in a good state of cultivation and at the time had a reasonable value of \$15,000.00; that when the said decrees were made and entered, the distributees, James S. Brown, and the heirs of the estate of Washington Pocatello, deceased, became owners in common of the said 80 acres of

Transcript

0 / 85 November, 1919, that the heirs of the estate of Washington Pocatello were and now are the owners in comm of an undivided $1/3$ interest in and to the above described 80 acres of land, and at all times since said date the estate of Washington Pocatello, deceased, and his heirs, was, and is now entitled to one-third of all the rents and profits derived from the whole of said property less a one-third of all taxes and legal assessments levied against said property; that no part of the said rents or profits were ever paid over to or received by any administrator of the estate of Washington Pocatello, deceased, or paid to any one of the heirs of the estate, or to anyone for or **their** behalf, and that all of the same is now long past due and unpaid.

VIII

That on February 2nd, 1917, a short time prior to the death of Washington Pocatello, and also, prior to any proceedings having been commenced to probate either the estate of Yaotes Owa, or of Jane Brown, her daughter and prior to any legal determination by any court as to

Transcript

0/85 Albert Saylor, believing that Washington Pocatello was the only surviving heir of Yaotes Owa, entitled to inherit the said 80 acres of land, came to Fort Hall, Idaho, and induced and persuaded Washington Pocatello and his wife, Minnie Pocatello, to enter into a contract of sale of the whole of the said 80 acres of land, to one U. F. Diteman, for a consideration of \$3200.00, payable \$200.00 cash, and the balance of the purchase price to be paid in annual installments of \$300.00, payable on the 20th day of December each year until the full sum of \$3200.00 was paid, the last installment falling due on the 20th day of December, 1926. And at the same time, the said Albert Saylor secured from Washington Pocatello and Minnie Pocatello, his wife, a warranty deed for the whole of the 80 acres of land to U. F. Diteman; said deed reciting the same considerations, and that Washington Pocatello was the sole heir of Yaotes Owa, and at the same time the said Albert Saylor had Washington Pocatello to enter into an escrow agreement with U. F. Diteman, as grantee,

Transcript

0186 and the First National Bank of Pocatello, Idaho as escrow depositary, and the said Bank did accept the terms and obligations of the escrow agreement which were that the escrow depositary was to hold the said warranty deed, and to accept the annual payments, and pay the same over to Washington Pocatello until the full sum of \$3200.00 was paid to said depositary, at which time the deed left in escrow was to be delivered by the depositary to the said U. F. Diteman; the terms of the escrow agreement were plainly written on the envelope containing the escrow papers; the following is a true and correct copy of an affidavit made at that time by the cashier of said depositary, and filed of record in the county records of Box Elder County, Utah, at the request of U. F. Diteman, describing the terms of the escrow agreement.

Copy of Recorded Instrument.

Kind of Instrument - Affidavit - Date of Inst.,
April 18, 1917. Recorded April 19, 1917 at 2:50 P.M.
in F of Misc., page 613.

State of Idaho)
County of Blaine) ss

W. D. Service, who being first duly sworn on

Transcript

0186 oath says: That on the 1st day of January, 1917, he was and ever since has been and now is the Cashier of the 1st National Bank of Pocatello, Idaho; that on the 2nd day of February, 1917, Washington Pocatello and Minnie Pocatello, his wife, executed and placed in escrow with the 1st National Bank of Pocatello, Idaho, their deed conveying to U. F. Diteman of Seattle, Washington, the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Sec. 12. T. 11, N.R. 3W, SLM in Box Elder County, Utah; that the said deed is now in the possession of the said First National Bank of Pocatello, Idaho, and to be delivered to the said U. F. Diteman when all the following payments shall have been made at the said Bank for an in behalf of the said Washington Pocatello, to-wit: \$300.00 on December 20, 1917, and \$300.00 on December 20, of each and every year thereafter up to and including December 20, 1926.

W. D. Service.

Subscribed and sworn to before me this 18th day of April, 1917. Paul M. Bryan, Notary Public, Residence Pocatello, Idaho. (Seal).

That said escrow agreement was entered into before Washington Pocatello had acquired any title in the premises, and he had never occupied the land, all of which facts were well known to U. F. Diteman, as probate proceedings were shortly after commenced to probate the estate of Yaotes Owa, deceased, as stated in Paragraph Five.

IX.

That right after the court announced its de-

Transcript

0187 crees, but before the decrees of distribution in the estate of Yaotes Owa and Jane Brown, heretofore mentioned, was made and entered, U. F. Diteman, the grantee in the warranty deed on escrow with First National Bank of Pocatello, Idaho, together with one A. I. Grover, did, wrongfully, unlawfully, corruptly, and intentionally to defraud the estate of Washington Pocatello, deceased, and to defraud the heirs of the estate of Washington Pocatello, paid to the said depositary only \$1000.00 on the purchase price of \$3200.00 named in said deed, and in said escrow agreement, and did wrongfully, and unlawfully, secure from the said depositary the said warranty deed; that the said depositary, did, unlawfully, wrongfully and contrary to the express terms and obligations of the said escrow agreement, accept the \$1000.00, and delivered to the said U. F. Diteman, and A. I. Grover the said deed; that at the time of the delivery of said deed, the said U. F. Diteman, A. I. Grover and the said depositary, all had knowledge that Washington Pocatello was dead for more than one year previous to the delivery of

ranscript

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said deed, and that no administrator had been appointed for his estate; that the said U. F. Diteman and A. I. Grover, upon securing the possession of said deed, did, unlawfully, illegally and for the avowed purpose of cheating and defrauding the estate of Washington Pocatello, and his heirs, out of the true value of the said undivided $1/3$ interest in the property which the said U. F. Diteman and A. I. Grover well knew had a value of about \$5,000.00 at that time, filed the said deed of record in Box Elder County, Utah, on the 10th day of November, 1919, and said deed was recorded in Book 15, Page 440 of Deeds of said County; that the said A. I. Grover, by virtue of obtaining and recording said deed, attempted to take from the estate of Washington Pocatello, and from the heirs of the estate, a valuable property right, and henceforth claimed ownership of same; that plaintiffs allege that the said deed was and is void, and never was of any force or effect, and passed no title to the undivided $1/3$ interest to U. F. Diteman, for two reasons: First, that the depository

Transcript

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had no right to deliver the deed without a full compliance with the terms and obligations of the escrow agreement, that the delivery of the deed by the depository, the acceptance of and the recording of the deed, was a fraudulent transaction; Second, that the depository and U. F. Diteman and A. I. Grover all knew that Washington Pocatello had died long before the property was decreed to his estate, and knew that on account of his death that his estate would have to be probated, and that if the contract was enforceable at all, it could only be enforced at that time under Section 7741, Revised Codes of Utah.

X

That A. I. Grover, on the 3rd day of November, 1919, before the decrees of the court, as heretofore mentioned, was made and entered, secured from U. F. Diteman and Josia Diteman, his wife, a quit claim deed, releasing and quit claiming all their right, title and interest in and to the said 80 acres of land to the said A. I. Grover, and the said A. I. Grover caused said quit claim deed to be filed for record, on the 11th

Transcript

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day of November, 1919, which was recorded in the Book 15 of Deeds, at page 442, of the deed record of Box Elder County; that the said A. I. Grover had knowledge that his grantors in said quit claim deed had no legal title to the undivided 1/3 interest in the property decreed to the estate of Washington Pocatello, deceased; that the said A. I. Grover did connive and conspire with U. F. Diteman to secure the warranty deed executed by Washington Pocatello and Minnie Pocatello without paying any just consideration for the same; that A. I. Grover was the one who unlawfully and wrongfully filed the said deed for record; that the said A. I. Grover did admit by affidavit dated the 10th day of February, 1920, that he knew the said deed was in escrow; that it was obtained without full compliance with the obligations of the escrow agreement; that it was obtained long after the death of Washington Pocatello, and caused his affidavit to be filed of record on the 10th day of February, 1920, and it was recorded in Book H of Miscellaneous Records, page 529, of Box

Transcript

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Elder County, Utah. A true and correct copy of said affidavit, marked plaintiffs' Exhibit "E" is hereto attached and made a part of this complaint, as if fully written herein.

XI

Plaintiffs allege, that in truth and in fact, it was the said A. I. Grover who fraudulently obtained the Washington Pocatello deed and filed it for record; that after A. I. Grover secured the quit claim deed from U. F. Diteman that he, the said A. I. Grover, assumed the management of and the rental of said premises, and collected all of the rents and profits of the whole, without making any account to the estate of Washington Pocatello, up to and including the year 1924, and until he sold the said premises in the spring of 1925 to the defendants Amasa L. Clark and Joseph E. Robinson; plaintiffs further allege that the said A. I. Grover, when he assumed control over the premises, knew that the estate of Washington Pocatello deceased, and the heirs of the estate owned an undivided 1/3 interest in the premises and that he was fraudulently cheating the heirs of the estate out of said interest; that

Transcript

0189

during the years ... I. Grover had control of the property, he was an owner in common with the heirs of the estate of Washington Pocatello, and collected the rents as a co-tenant with the heirs of the estate of Washington Pocatello, deceased, and held the same under a constructive trust for said heirs.

XII

That on the 12th day of March, 1925, that the said ... I. Grover, also known as Albert I. Grover, and Hortense Grover, his wife, conveyed by warranty deed all of their right, title and interest in and to the said 80 acres of land to the defendants, Amasa L. Clark and Joseph E. Robinson, and the said named persons have, since March 12th, 1925, exercised control and management over all of the said premises, and ever since said date, and at the time of filing this suit, and now claim in themselves ownership to the said undivided $1/3$ interest in said property, as against the heirs of the estate of Washington Pocatello, deceased. That said named defendants have since the 12th day of March, 1925, collect-

Transcript

0189

ed all of the rents and profits of said land, and has failed and neglected to make any accounting of, or distribution of, the rents and profits derived from the undivided $1/3$ interest in said real property to any administrator of the estate of Washington Pocatello, deceased, or to the heirs of said estate, or to any one for and on behalf of the plaintiffs, or any one of them.

XIII

0190. Plaintiffs allege that the defendants, Amasa L. Clark and Joseph E. Robinson, were not innocent purchasers for value, and received no title to the said undivided $1/3$ interest in said property that was decreed to the estate of Washington Pocatello, deceased, and since said decree owned by the heirs of the said estate; plaintiffs further allege that the said named defendants purchased the said 80 acres of land from A. I. Grover with full knowledge and with full notice that their grantor did not own, and had no title or interest in, the said undivided $1/3$ interest; that they had knowledge that their grantor, A. I. Grover, had fraudulently and wrong-

Transcript

7190 fully obtained the deed executed by Washington Pocatello and Minnie Pocatello, and wrongfully and unlawfully caused the same to be filed for record, without paying any just consideration for the said interest; that defendants had knowledge that the deed of Washington Pocatello was delivered by the depositary after his death and contrary to the terms of the escrow agreement; that they know the quit claim deed of U. F. Diteman and his wife to A. I. Grover, their grantor, conveyed no title to the undivided 1/3 interest; that the said named defendants had full knowledge and notice of the fraudulent acts of A. I. Grover and U. F. Diteman; that they connived and conspired in obtaining the said deed and filing the same of record, without paying any just consideration for the same; that they knew the said undivided 1/3 interest had not been properly probated and had not at any time been legally transferred from the estate of Washington Pocatello; that they knew their Grantor, A. I. Grover, was at all times an owner only of an undivided 2/3 interest in the property and held the same in common with the heirs of the estate who owned the other undivided

Transcript

0190 1/3 interest; that the plaintiffs are informed and believe, and basing this allegation on such information and belief, allege the facts to be that when the said defendants purchased the property from A. I. Grover, they paid no consideration for the undivided 1/3 interest; that said defendants only purchased what right, title and interest A. I. Grover and Hortense Grover had a right to convey; that during all of such time the defendants have been owners only of 2/3 interest in said premises, and have held the same as owners in common with the heirs of Washington Pocatello, who have owned the other 1/3 interest; and that the defendants during the years since they purchased the property, have collected the rents and profits from the said undivided 1/3 interest and held the same as co-tenants with the heirs of Washington Pocatello under a Constructive Trust.

XIV

0191 Plaintiffs allege the facts to be that neither one of the defendants, Amasa L. Clark or Joseph R. Robinson, or either or any of their predecessors, or any one for or on **their** behalf, ever actually, constructively or

Transcript

0191 otherwise, or at all, by any act, deed or writing, gave any notice of any kind or nature to the heirs of Washington Pocatello, or to any legal representative of said estate, or of said heirs, that they, the said defendants, or any one of their predecessors, were holding, or had ever held, the said undivided $1/3$ interest adversely or otherwise, against the rights of the heirs of the estate of Washington Pocatello, deceased.

XV

That on or about the 3rd day of December, 1919, one Charles E. Foxley, filed in the probate division of this court a petition for letters of administration on the estate of Washington Pocatello, deceased, and after due and legal proceedings had, the said Charles E. Foxley was appointed administrator of said estate, and letters of administration was on the 12th day of January, 1920, issued out of this court to the said Charles E. Foxley on said estate; that the said Charles E. Foxley as administrator of said estate failed, refused and neglected to take any legal steps

Transcript

0191 to recover the said undivided $1/3$ interest in said 80 acres of land from A. I. Grover, and took no steps to notify the heirs of the estate of Washington Pocatello, or anyone on the heirs' behalf, what U. F. Diteman and A. I. Grover had done, but on the other hand, plaintiffs allege that the said Charles E. Foxley, as administrator of said estate, did fraudulently connive and conspire with the said I. A. Grover and the said A. I. Grover did fraudulently connive and conspire with the said Charles E. Foxley, as administrator of said estate, to have the said administrator accept from the First National Bank of Pocatello, Idaho, the \$1000.00 paid to said Bank for the deed executed by Washington Pocatello and Minnie Pocatello, and thereby defrauded and cheated the heirs of the estate of Washington Pocatello, deceased, out of the reasonable value of the said undivided $1/3$ interest in said 80 acres of land; that the said Charles E. Foxley, did, in connivence and conspiracy with the said A. I. Grover, file a copy of his letters of administration with the First National Bank of Pocatello, Idaho, and demand from said Bank the \$1000.00

Transcript

0192 paid to said bank, for the purpose of obtaining the deed of Washington Pocatello and Minnie Pocatello, thereby attempting to validate the delivery of said deed; that the said Charles E. Foxley later appropriated the said \$1000.00 to his own use and benefit, and did, in the early part of 1922, leave the County of Box Elder, State of Utah, and did abscond, desert and abandon the administration of the estate of Washington Pocatello, deceased, without initiating any legal steps or procedure to properly and legally administer the estate of Washington Pocatello, deceased, all of which matter was of record in this court; and part of the title record to said 80 acres of land; that Charles E. Foxley never did return to Box Elder County or the State of Utah, and no other administrator was ever appointed in the place of the absconding administrator, and no further steps of any kind were taken in the estate of Washington Pocatello, deceased, until the appointment of the present Special Administratrix, one of the plaintiffs in this action.

Transcript

0192

XVI

That the defendants Amasa L. Clark and Joseph E. Robinson, at the time they purchased the said 80 acre of land from I. A. Grover, possessed the knowledge and notice that Charles E. Foxley had been appointed administrator of the estate of Washington Pocatello, deceased, and had knowledge and notice of the fraudulent acts of I. A. Grover, their grantor, and the said Charles E. Foxley, as administrator of the estate of Washington Pocatello, deceased; said defendants had knowledge and notice that I. A. Grover and Charles E. Foxley had connived and conspired to cheat and defraud the estate of Washington Pocatello and the heirs of said estate; that by reason of such fraudulent procedure that their grantor, I. A. Grover did not own and had no legal title to the said undivided 1/3 interest of the land they purchased; that at all times since March 12, 1925, the said defendants have exercised supervision and control over said undivided 1/3 interest wrongfully claiming ownership of said undivided 1/3 interest, as against the rights of the estate of Washington Pocatello and the heirs of said estate; plain-

Transcript

0193 tiffs allege that during all of said years that the ownership of said named defendants was confined only to an undivided $2/3$ interest in said land, and that said defendants were tenants in common with the heirs of Washington Pocatello, deceased.

XVII

That the plaintiff, Ray Pocatello, arrived at the age of majority within one year last past before the commencement of this suit; that the plaintiffs, Lucy Pocatello Johnson, Maud Pocatello Racehorse, and Josephine Pocatello, did not discover or know, or have any knowledge of the attempt to cheat and defraud the heirs of the estate of Washington Pocatello, deceased, out of the undivided $1/3$ interest in the said 80 acres of land, and had no knowledge of the escrow agreement, or that a deed had been placed in escrow; did not know that U. F. Diteman, and A. I. Grover, had secured said deed and filed the same of record, did not know anything about the said 80 acres of land, what it was like or what was its value, had not seen the said land, or received any particular information

Transcript

0193 about the land, and did not know that the estate of Washington Pocatello, and they as heirs, were being defrauded and cheated out of a valuable property right, until within one year last past before the commencement of this action.

XVIII

That none of said heirs have ever been in Box Elder County, Utah, except once; that was the time of the hearing on the petition for settlement of the account, and of distribution in the estate of Yaotes Owa, which occurred about November 1, 1919; that Minnie Pocatello, with all of the four children, two of which were very young at that time, made their way to Brigham, Utah, arriving at the courthouse in said County in the afternoon of the last day of said hearing; that when they arrived in the courtroom the court was informed who they were and the Judge, Justin D. Call, inquired of them if they knew what the nature of the procedure was, or if they had a lawyer to represent them, and they informed the court they had not, and he then asked them if they knew any lawyer in Brigham, and they informed the court they did not know any person

Transcript

0194 in the County, and that they did not know what to do or how to proceed, or what it was all about; that the court then said to them he would find them a lawyer to represent them, and the Judge went to his office and came back and told them he had telephoned a lawyer and he would be there soon; that a few minutes later one Charles E. Foxley came to the Courthouse and said the court called him to be their lawyer; that neither Minnie Pocatello or any one of the heirs ever knew or heard anything about Charles E. Foxley; that the lawyer took them out in the hall and talked to them just a few minutes, and they then went back into the courtroom, and they were there about one hour; they did not know or fully understand what took place in the courtroom during that time, but that Foxley told them the hearing was over, and for them to go with him to his office, and when they got to his office, he told them that they would get $\frac{1}{3}$ interest in the estate of Yaotes Owa, but he did not tell them anything about the estate, what it consisted of or what its value was; he did, however, tell them that it

Transcript

0194 would be necessary to probate the estate of Washington Pocatello, and that it could not be settled until it was probated, and said something to them about a guardian would have to be appointed for the two minor heirs, and that if they would sign a writing he would prepare that he would be appointed by the court and that he would look after their interest and see that they would get all that was coming to them, and that they could go back home and need not bother further about it; that he would look after everything for them; that they did not know anything else to do; Charles E. Foxley was selected for them by the court and for that reason, they reposed implicit confidence in him to do right by them, and Minnie Pocatello, Lucy Pocatello Matsaw, and Maude Pocatello signed the paper the lawyer had prepared, and all they knew about it was that they were asking the court to appoint an administrator to look after their interest in the estate of Washington Pocatello, and the next day they left for home and have never been back to Brigham since; that they never received any further information from Charles E.

Foxley, or any other person, as to what was being done, d

Transcript

0195 not know or hear a thing about the matter until some time in the summer of 1921, that Superintendent Donnor called Minnie Pocatello and her two oldest daughters in to his office and said that Charles E. Foxley reported that he had about \$995.00 belonging to the estate of Washington Pocatello, and that the estate was indebted to him in the sum of about \$504.00 attorney's fee and costs, leaving about \$490.00 for the heirs; there was no explanation of how Foxley got this money, but it did say that was all that was coming to the heirs of Washington Pocatello; that Superintendent Donnor said he did not approve of that settlement without knowing more about it, and said something about having the matter investigated; that several months later they were informed from the Superintendent's Office that Charles E. Foxley, the administrator, had left the State of Utah and taken the money with him, and that there was nothing further could be done in the matter; that at different times they appealed to the Superintendent's Office to make an investigation of the settlement, that there must be something

Transcript

0195- wrong, that they were entitled to 1/3 of the estate, and that they should get something, but they were always told that there was nothing could be done; that the heirs could not do anything for themselves for the reason that the only money and means that any one of the heirs possessed during all those years was money derived from their property rights on the Indian Reservation, and all of that money passes through the hands of the agency, and is only paid out to them on orders approved by the Superintendent; that when their mother died, the children again sought an investigation, but received no encouragement, they were told nothing could be done; that about one year ago, when Ray Pocatello became of legal age, they again took the matter up with the present Superintendent, and he made some investigation and advised that they get an abstract of the property and he approved such an expenditure, and advised to have the abstract examined by a lawyer, which was done, and then for the first time the heirs discovered and were advised of the fraud that was perpetrated upon them, and that they were during all this time owners of an undivided 1/3 in-

Transcript

1916 interest in the said 80 acres of land and entitled to a settlement of the rents and profits for all of the years.

XIX

That the estate of Washington Pocatello, deceased, and/or the heirs of said estate, has paid all taxes and legal assessments of whatever kind or nature that were assessed against the undivided 1/3 interest of said property, each and every year since 1919, to and including 1938.

XX

That the physical conditions and improvements on the said 80 acres of land have practically remained unchanged since the day the court decreed the property to the heirs of Yaotes Owa; that the value of the said land is practically the same today as it was at that time; that neither A. I. Grover or the defendants, Amasa L. Clark and Joseph E. Robinson, ever lived upon the said land, and never occupied it as a home; they were at all times absentee landlords of the premises, and rented it out each year for a cash rental.

Transcript

0196

XXI.

That the plaintiffs, Laura Morris, as administratrix of the estate of Washington Pocatello and Minnie Pocatello, both deceased, and the plaintiffs, the said mentioned heirs of the said Washington Pocatello and Minnie Pocatello, bring this action jointly against the defendants and each of them, and asks the court to first cancel and hold void the warranty deed executed by Washington Pocatello, and Minnie Pocatello, his wife, and filed for record on the 10th day of November, 1919, and recorded in Book 15 at page 440 of the Deed Records of Box Elder County, Utah, on the ground that the possession of said deed was fraudulently and unlawfully obtained, and it was fraudulently and unlawfully filed of record, without paying any just consideration for the same, or complying with the terms of the escrow agreement, and was obtained contrary to the provisions of Section 7741 of the Revised Codes of Utah; and to make and enter a proper decree quieting title in the plaintiffs, Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello and Ray Pocatello, and thereby remove the cloud from their title.

Transcript

0197 in and to an undivided one-third interest in the said **described** 80 acres of land.

XXII

at Box Elder County, Utah, has or claims some right, title or interest in a small portion of said land, comprising about one acre more or less, by virtue of a warranty deed made and executed by Joseph E. Robinson and Elizabeth Robinson, his wife, and Amasa L. Clark and Susan L. Clark, his wife, to said County, dated August 25th, 1926, recorded in Book 28, at Page 589 of Deeds of Box Elder County, Utah, on the 18th day of September, 1926; that plaintiffs allege that said deed conveyed no right, title or interest to said Box Elder County, to any part of the said undivided $1/3$ interest of the land owned by the estate of Washington Pocatello, deceased;

XXIII

That a true description of the real property involved in this action is as follows, to-wit:

E $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 12, T. 11, NR 3 W, SLM

Transcript
0197

XXIV

That plaintiffs have no plain, speedy or adequate remedy at law.

XXV

That the rights of all the defendants, or any other person holding under or by any conveyance, lease or any other instrument made and executed by the defendants, or any other person, is inferior and subordinate to the undivided $1/3$ interest of the plaintiffs in the above described real property and the rents and profits derived from said undivided $1/3$ interest:

SECOND CAUSE OF ACTION

Comes now plaintiff Laura Morris, as administratrix of the estate of Washington Pocatello, deceased, and for a second cause of action against the defendants, Amasa L. Clark and Joseph E. Robinson, and as against these two defendants only, complains and alleges as follows, to-wit:

I

That plaintiff Laura Morris was on the 14th day of February, 1939, duly and legally appointed Special

Transcript

0198 Administratrix of the estate of Washington Pocatello, and Minnie Pocatello, his wife, both deceased, and said Laura Morris did qualify for said office and is at the time of filing this amended complaint the duly qualified and acting Special Administratrix of the estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased, and brought in this action as one of the parties plaintiff, by order of this court first had and obtained.

II

That plaintiff in this, the second cause of action, hereby refers to and makes a part of the second cause of action all of paragraphs numbered II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXIII, and XXV of the first cause of action set forth in this third amended complaint, and makes all of said paragraphs enumerated a part of this complaint in the second cause of action as fully and for all intents, purposes and effect as if all of said paragraphs enumerated were written out in full herein.

Transcript

0198

III.

That the said 80 acres of land at all times here in mentioned was of and now is of a reasonable value of \$15,000.00, and at all times herein mentioned was rented each year for about \$900.00 cash rent per year; that the defendants Amasa L. Clark and Joseph E. Robinson have collected all of the yearly rental for 14 years; namely, the years from 1925 to 1938, both years inclusively, that the value of the rental for the undivided $1/3$ interest of said land each year was approximately \$300.00 per year, amounting to a total for the 14 years of about \$4200.00, which sum the said defendants have received and converted to their own use and benefit, and have failed and neglected to make any accounting with the estate of Washington Pocatello, or the heirs of said estate, for the said undivided $1/3$ of same, that the same is all long past due and unpaid save and except the sum necessary to pay the taxes and legal assessments on the undivided $1/3$ interest which was paid each year, and which said defendants are entitled to credit for.

Transcript

0199

IV

That the court demand and cause the said defendants, Amasa L. Clark and Joseph E. Robinson, to make an accounting to Laura Morris, the Administratrix of the estate, of one-third of the rents and profits collected and received by them for the said premises for the period of 14 years; namely, for the years 1925, to 1938, both years inclusive, and an accounting of the taxes and any legal assessments levied against said land, and that one-third of said taxes and legal assessments be deducted from the total amount of one-third the rents and profits, and that judgement be entered against the said named defendants, Amasa L. Clark and Joseph E. Robinson, and in favor of Laura Morris, as Administratrix of the estate of Washington Pocatello and Minnie Pocatello, deceased, for the balance due of said rents and profits, with legal interest computed to date on all yearly balances of such rents and profits.

WHEREFORE: Plaintiffs pray judgment against the defendants on their first cause of action, as follows,
to-wit:

Transcript

0199

1. For judgment against all of the defendants and favor of the plaintiffs, Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, heirs of the estate of Washington Pocatello and Minnie Pocatello, deceased, cancelling the deed made and executed by the said Washington Pocatello, and Minnie Pocatello, wife, deceased, to U. F. Diteman, and a decree in favor of said Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello and Ray Pocatello, quieting title in them and removing the cloud from their title to an undivided $1/3$ interest in and to the foregoing described real property.

2. That the plaintiffs and each of them have such other or further relief in the premises on their first cause of action as to this court may seem meet and equitable between all the parties involved, and for plaintiffs costs and disbursements in this suit.

WHEREFORE: Plaintiff Laura Morris, as Special Administratrix of the estate of Washington Pocatello and Minnie Pocatello, deceased, prays judgment against the

ranscript

2200 defendants, Amasa L. Clark and Joseph N. Robinson only, and against each of them, as follows, to-wit:

1. For judgment in favor of plaintiff Laura Morris, as Special Administratrix of the estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased, and against the defendants Amasa L. Clark and Joseph E. Robinson, for accounting of the reasonable one-third rental value of said premises for the years 1925 to 1938, both years inclusive, amounting to about \$4200.00, more or less; that a true account of all the taxes and legal assessments levied against said property, during said years, be made; that after deducting a one-third of the legal assessments and taxes paid from the amount found due for the rents, that judgment be entered in the name of the said Laura Morris, Administratrix of the estate of Washington Pocatello and Minnie Pocatello, and against Amasa L. Clark and Joseph E. Robinson for the total of the yearly balances of the one-third of all yearly rentals received from said premises, together with legal interest computed upon all yearly balances, to date of judgment.

Transcript

0200

2. That the plaintiff have such other or further relief in the premises on this second cause of action, as to this court may seem meet and equitable between all the parties involved, and for plaintiffs costs and disbursements in this suit.

P. C. O'Malley

Attorney for Plaintiffs;
Residence Pocatello, Idaho

B. H. James

Attorney for Plaintiffs;
Residence Brigham, Utah.

(Duly Verified)

Filed May 18th, 1939

Copy served May 15th, 1939.

mscript

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PLAINTIFF'S EXHIBIT "C"

tract No. 16592 Item No. 15 Rec. N. 3768e, Kind of
t. -- D E C R E E -- Date of Inst. Nov. 7, 1919, Rec-
ed Nov. 8, 1919 at 10:05 a.m. in H of Misc. Page 320.

(Title of Court omitted)

the Matter of the Estate of)	DECREE
ates Owa,)	OF
Deceased)	DISTRIBUTION

This case having been duly called for trial Septem-
ber 8, 1919, and continued to November 1, 1919, upon the
petition for decree of distribution and determination of
heirship by W. E. Getz, the administrator of the Estate
Yaotes Owa, deceased, and the counter and cross peti-
tion of Johnnie Bat Yaotes, sometimes known as Johnnie
Bat, and the contest will and cross petition of Mary
Whiskey Jim and the contest and cross petition of William
Hoochew and the heirs of Washington Pocatello through
their attorney, Charles E. Foxley, having asked per-
mission to make contest in behalf of the heirs of Wash-
ington Pocatello, Johnnie Timmoke and George Timmoke,
appearing and protesting through their attorney Riccy H.
Jones, and having request to contest petition filed; B. C.
Hall, appearing as attorney for the administrator, W. E.
Getz; W. J. Lowe, Esq., appearing as attorney for Johnnie
Bat Yaotes, sometimes known as Johnnie Bat, Chez and
Baker appearing as attorneys for Mary Whiskey Jim, LeRoy
Young, appearing as attorney for William Hoochew;
Charles E. Foxley appearing as attorney for the heirs of
Washington Pocatello; and George Elk appearing and giving
testimony in his own behalf and all of the said parties
having introduced their evidence as to their respective
claims as to the heirship and relationship to Yaotes Owa,
John Brown and James Brown, deceased, and the court hav-
ing announced in open court that if there was anyone
present who desired to present any claim to said
estate to come for-

Transcript
0202

ward and do so and having been stipulated by an between the respective parties that the heirship of the estate of Jane Brown and James Brown would be heard and considered at the same time and in the same hearing as that of the estate of Yaotes Owa and the case having been submitted and the question of heirship having been argued the respective counsel and the matter having been submitted to the court for its decision, and the court having made and filed its findings of fact and conclusions of law in favor of the estate of Washington Pocatello for a one-third interest of said estate, and James S. Brown for a two-thirds interest of said estate and against all other claimants and orders that judgment be entered in accordance herewith.

It is therefore ordered, adjudged and decreed that James S. Brown is the son of James Brown who was the husband and sole and surviving heir of Jane Brown, who was the sole and surviving heir of Yaotes Owa, the surviving wife of Tosewitch or Poe Owa, is the owner and is entitled to $\frac{2}{3}$ of the property now in the possession of the said Administrator of the estate of Yaotes Owa and of Jane Brown and James Brown, her husband, and that the said Washington Pocatello was the sole and surviving heir of Bingwa, a daughter of Tosewitch or Poe Owa, by a first marriage, and his estate is the owner of and entitled to $\frac{1}{3}$ rd interest all of the property now in possession of the said Administrator of Yaotes Owa, deceased, and of Jane Brown and James Brown, her husband.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED: that the property belonging to said estate be distributed as follows:

To James S. Brown an undivided $\frac{2}{3}$ rd interest and to the following described land, situated in Box Elder County, Utah, to-wit: $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 12 T. 11 N. R. 3 SLM.

To the estate of Washington Pocatello, deceased an undivided $\frac{1}{3}$ interest in and to the E $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. T. 11 N. R. 3 W. SLM.

And judgment is hereby ordered accordingly.

Followed by usual Clerk's Certificate. Justin D. Call,

Transcript

0203

PLAINTIFF'S EXHIBIT "D"

Abstract No. 16592 Item No. 14 Rec. No. 3767e
Kind of Inst. --- D E C R E E --- Dated Nov. 7, 1919.
Recorded Nov. 8, 1919 at 10 a.m. in H. of Misc.,
Page 319.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF UTAH, IN AND FOR BOX ELDER COUNTY.

In the Matter of the Estates of)	
Jane Brown and James Brown,)	DECREE OF DISTRIBUTION
Deceased)	

This case having been duly and regularly called for trial on September 8, 1919 and continued to the 1st of November, 1919, upon the petition for decree of distribution and determination of heirship by W. E. Gatz the administrator of the estate of Yaotes Owa, deceased, and the counter and cross petition of Johnnie Bat Yaotes, sometimes known as Johnnie Bat, and the contest and cross petition of Mary "hiskey Jim and the contest and cross petition of William Hoochow and the heirs of Washington Pocatello, through their attorney, Charles E. Foxley, having asked permission to make contest in behalf of the heirs of Washington Pocatello, Johnnie Timmoke and George Timmoke, appearing and protesting through their attorney, Micy H. Jones, and having requested to contest petition filed, B. C. Call, Esq. appearing as attorney for the Administrator, W. E. Getz, W. J. Lowe, Esq., appearing as attorney for Johnnie Bat Yaotes, sometimes known as Johnnie Bat, Chez and Barker, appearing as attorneys for Mary Whiskey Jim, LeRoy B. Young, Esq., appearing as attorney for William Hoochow, Charles E. Foxley, appearing as attorney for the heirs of Washington Pocatello and George Elk appearing in his own behalf, and all of the said parties having introduced their evidence as to their respective claims as to the heirship and relationship to Yaotes Owa, Jane Brown and James Brown, deceased, and the court having announced in open court that if there was anyone

Transcript

0203 also present who having been stipulated by and between the respective parties that the heirship of the estate of Yaotes Owa would be considered at the same time and in the same hearing as that of the estates of Jane Brown and James Brown, and the case having been submitted to the court for its decision and the court having made and filed its findings of fact and conclusions of law in favor of the estate of Washington Pocatello for a $1/3$ interest of said estate and James S. Brown for a $2/3$ interest of the estate and against all other claimants and orders that judgment be entered in accordance herewith.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED AND DECREED: That James S. Brown is the owner and entitled to $2/3$ of all property now in possession of said administrator and Washington Pocatello is entitled to $1/3$ interest in said estate.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED: that the residue of the said estate of Yaotes Owa and Jane Brown and James Brown, her husband, be and the same is hereby distributed as follows:

To James S. Brown an undivided $2/3$ interest in and into the following land situated in Box Elder County, Utah.

The $E\frac{1}{2}$ of the $SE\frac{1}{4}$ of Sec. 12 T. 11 N. R. 3W.SLM.

To the estate of Washington Pocatello, deceased, an undivided $1/3$ interest in and into the $E\frac{1}{2}$ of the $SE\frac{1}{4}$ of Sec. 12 T. 11 N. R. 3 W. S.L.M.

And judgment is hereby ordered accordingly.

Justin D. Call, District Judge.

Followed by usual Clerk's certificate.

inscript

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PLAINTIFF'S EXHIBIT "E"

Abstract No. 16592 Item No. 19 Rec. No. 5248e
 and of Inst. --- AFFIDAVIT --- Date of Inst. Feb. 10,
 20. Recorded Feb. 10, 1920, at 11:40 a.m. in H. of
 sc., page 529.

State of Utah)
 County of Box Elder) ss

A. I. Grover, being first duly sworn, deposes and says: I am the owner and in the possession of the land described in loan application No. 3477 to the State Board of Land Commissioners of the State of Utah, having purchased the same from U. F. Diteman as is shown by entry #16 of Abstract to Title which accompanied the application for loan; that there is no outstanding lien against said property in the sum of \$7500.00 or otherwise, and if the application shows such statement, the same was erroneously inserted therein; that the title to the said premises came through the estate of Yaotes a who was the original patentee; that the court first decreed the title to said property to Johnnie Bat Yaotes and William Hoochew as is shown by entry #6 of the abstract, that subsequently thereto application was made to set aside said decree and for a new hearing, which was granted and that on the subsequent hearing, the court reversed its former findings as to heirship and made and entered its decree as is shown by item 2 of the abstract decreeing one third of the estate of the estate of Washington Pocatello and 2/3 to James Brown, as will more fully appear by an abstract of the probate proceedings in the said estate of Yaotes a, deceased, that after the entry of the first decree, wherein a portion of the said estate was given to Johnnie Bat Yaotes, this deponent entered into a contract for the purchase of the interest of the said Johnnie Bat Yaotes and as part consideration made and delivered to the said Johnnie Bat Yaotes a mortgage for \$1500.00, as is shown by entry #10 of the abstract; and upon the subsequent decree of the court, wherein

Transcript

0204 the said Johnnie Bat Yaotes was awarded on part of the said estate, the notes mentioned in said mortgage were cancelled and from the fact that the said Johnnie Bat Yaotes ultimately obtained no title to said property, he has no property to convey and this deponent has been unable to locate the said Johnnie Bat Yaotes who is an Indian residing in Idaho, that he might procure a formal release of said mortgage shown by entry #10 of the abstract, but that the said notes mentioned therein were left for safe keeping in the bank and were cancelled after the said subsequent decree; that I was acquainted with Washington Pocatello in his lifetime and knew his family; that he was an Indian residing at Fort Hall, Idaho; that during his lifetime he and wife made, executed and left in escrow a warranty deed in favor of U. F. Diteman, which said deed was to be delivered to the said U. F. Diteman upon the payment of the consideration mentioned in the said escrow agreement; that subsequently the said Washington Pocatello died and his heirs appeared as contestants in the probate proceedings referred to in entry #12 of the abstract; that in said hearing the estate of the said Washington Pocatello was given a one-third interest in said premises and thereafter the said U. F. Diteman paid to the bank the money sufficient to procure the said warranty deed so held in escrow and procured the said deed and subsequently conveyed his interest to deponent as shown by entry #16 of the abstract and that thereafter an administrator was appointed for the estate of the said Washington Pocatello and the said administrator received and accepted the money paid by the said U. F. Diteman for the Warranty Deed in his favor from the said Washington Pocatello and his wife that Mary Whiskey Jim and others referred to in entry #12 of the abstract were claimants in the said estate of Yaotes Owa and that the court found against the claims of said parties and all other persons except the claim of the said Washington Pocatello and James S. Brown, which said last named decree became final and was never appealed from; that the premises herein particularly described as the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Sec. 12 T. 11 N. R. 3 W. SLM.

A. I. Grover

Transcript
0205-

Subscribed and sworn to before W. J. Lowe,
Notary Public on February 10, 1920. Commission expires
on April 8, 1922.

(SEAL)

SHERIFF'S RETURN SERVICE THIRD AMENDED COMPLAINT

(Title of Court and Cause.)

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

I hereby certify and return that I received
the within and hereto annexed Third Amended Complaint
on the 13th day of May, 1930, and served the same on
William J. Lowe, the attorney for defendants herein,
by delivery to na peaving with said defendant in Salt
Lake City, Salt Lake County, State of Utah, a true
copy of said Third Amended Complaint on the 15th day
of May, 1939.

S. Grant Young, Sheriff -
Salt Lake County, State of
Utah. By M. Landa, Deputy.

Subscribed and sworn to.
Filed May 19th, 1939.

Transcript

The following titled Instruments in the Judgment Roll are omitted, for the reason that the court overruled and denied same and directed defendants to answer, and no exception was taken by the defendants to the ruling of the Court.

(TITLE OF COURT AND CAUSE OMITTED IN EACH INSTANCE.)

Defendants' Demurrer to Third Amended Complaint.
Filed May 20th, 1939.
0206-0209.

Defendants' Motion to Strike Parts of Third Amended Complaint.
Filed May 20th, 1919.
0208-0209.

Defendants' Motion to Dismiss the Cause of Action.
Filed May 20th, 1919.
0213-0214.

Affidavit of Defendants Amasa L. Clark and Joseph E. Robinson, in support of Motion to Dismiss.
Filed May 20th, 1919.
0210-0212.

Affidavit of Service by Mailing of the Foregoing Enumerated Papers.
Filed May 20th, 1919.
0215

Plaintiffs' Motion to Dismiss Defendants' Motion to Dismiss the Cause of Action.
Filed May 27th, 1919.
0216

Transcript

Affidavit of Counsel for Plaintiffs in Support of Plaintiff's Motion To Dismiss Defendants' Motion.

Filed May 27th, 1919.

0217-0222

Affidavit of Services by Mailing.

Filed May 27th, 1919.

0223

The foregoing enumerated instruments cover 17 pages of the Judgment Roll, single spaced, and contain nothing material to the decision of the case now. And would greatly increase the bulk of this Abstract.

(Transcript pages 0206 to 0228)

Transcript

0397

(Title of Court & Cause)

May Term, 1939, Thursday, the 20th day of July, 1939.

MINUTE ENTRY

The matters herein came on regularly for hearing upon defendants' demurrer to plaintiffs' third amended complaint and defendants' motion to strike, P. C. O'Malley, Esquire, and George M. Mason, Esquire, appearing as counsel for plaintiffs, and William J. Lowe, Esquire, of counsel appearing as counsel for defendants. Said demurrer and motion to strike were argued by counsel for the respective parties, and being submitted, said demurrer is overruled and defendants given twenty-five (25) days without notice to answer, and the motion to strike is denied.

It is Ordered the above case be set for trial September 14, 1939, at ten o'clock A.M.

Transcript

0229

(TITLE OF COURT AND CAUSE)

A N S W E R

Come now Amasa L. Clark and Joseph E. Robinson and as answer to the first cause of action of the plaintiffs' third amended complaint admit, deny and allege as follows:

1. As answer to paragraph 1 thereof, defendant admit that on or about February 14th, 1939, an Order was entered appointing Laura Morris special administratrix of the estates of Washington Pocatello and Minnie Pocatello, his wife, both deceased, and that on or about said date said Laura Morris filed her Bond and that Special Letters of Administration were issued to her and that said letters have not been revoked.

2. As answer to paragraph 2 thereof, said defendants admit that Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello and Ray Pocatello are the only heirs of Washington Pocatello and Minnie Pocatello, deceased; admit that they are Indians and were at the time the filing of the complaint herein all past the age of twenty-one years; otherwise for lack of information suffi-

Transcript

2229 cient to form a believe, said defendants deny the allegations of said paragraph 2.

3. As answer to paragraph 3 thereof, said defendants admit that Washington Pocatello is deceased and are advised and therefore allege that he died on or about December 14th, 1918; admit that during the lifetime and at the time of his death he was an heir of Yaotes Owa, an Indian woman, and further admit that he was likewise an heir of a daughter of Yaotes Owa, commonly known and called Jane; also admit that Minnie Pocatello, the wife of said Washington Pocatello, died at Fort Hall, Idaho, on or about May 28th, 1928.

4. As answer to paragraph 4 thereof, defendants admit all the allegations thereof.

5. Defendants admit paragraph 5 thereof.

6. Defendants admit paragraph 6 thereof.

7. As answer to paragraph 7 thereof, said defendants admit that at the time of said decree of distribution said eighty acres of land were under cultivation, but deny that said land then had a reasonable value of \$15,000.00, but allege that in said estates

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0230 said land was appraised at \$4,900.00, which said appraisement was the maximum value of said land at said date; defendants deny all other allegations of said paragraph 7 thereof, except as is hereinafter expressly admitted.

8. As answer to paragraph 8 thereof, defendants have no knowledge or information sufficient to form a belief as to the allegations of said paragraph 8 and for that reason deny all of the allegations of said paragraph 8 except defendants admit that an Affidavit dated April 18th, 1917 was recorded on April 19th, 1917 at 2:50 P.M., in Book F of Miscellaneous records in the County Recorder's Office of Box Elder County at page 613 thereof, and that a copy of said instrument is set out in said paragraph 8.

9. As answer to paragraph 9 thereof, defendants have no knowledge or information sufficient to form a belief as to the truthfulness of said allegations and for that reason deny all of the allegations of said paragraph 9 except defendants admit and allege that the

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230 First National Bank of Pocatello, Idaho, delivered said Deed to U. F. Diteman, or some person acting for him, and that said Deed, which on its face recited a consideration of \$3200.00, was regularly filed for record in the office of the County Recorder of Box Elder County and on November 10th, 1919 at 4 P. M., as recorded in Book 15 of Deeds at page 440.

10. As answer to paragraph 10 thereof, defendants admit that under date of November 3rd, 1919, U. F. Diteman and Josie A. Diteman, his wife, made, executed and delivered a Quitclaim Deed to A. I. Hoover covering said premises and that said Deed was recorded in the office of the County Recorder of Box Elder County on November 11th, 1919 at 11:10 A. M., in Book 15 of Deeds at page 442; admit that A. I. Hoover filed an Affidavit which was recorded in the Office of the County Recorder on February 10th, 1920 in Book H of Miscellaneous at page 529, and that a copy of said Affidavit is marked Exhibit "E" and made part of said complaint, otherwise defendants deny

Transcript

0230 all of the allegations of said paragraph 10.

11. As answer to paragraph 11 thereof, defendants admit that A. I. Grover, their immediate predecessor in interest, immediately after acquiring Deed from said U. F. Diteman and Josie A. Diteman, his wife, to said premises under date of November 3rd, 1919, entered into the possession of said premises and assumed the management of and the rental of said premises and collected all the rents and profits of said property without making any account to the Estate of Washington Pocatello or any other person to and including the year 1924 and until said premises were sold to these defendants in the Spring of 1925; otherwise the defendants deny all of the allegations of said paragraph 11.

12. Defendants admit all of the allegations of paragraph 12 thereof.

13. Defendants deny each and every allegation of paragraph 13 thereof.

14. Defendants deny all of the allegations of paragraph 14 thereof and as further answer thereto allege

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230 that immediately upon purchasing said premises the Warranty Deed under which they claim title was under date of March 28th, 1925 duly recorded in the office of the County Recorder of Box Elder County, as aforesaid, and that at all times since said date defendants have claimed, occupied and farmed said premises each and every year as their property, that during all of said years defendants have claimed said premises in fee simple, have each year and at all times cultivated and improved the same and protected said premises by a substantial enclosure and have each year paid all taxes levied and assessed against said land and have continuously, openly, notoriously, peaceably and under claim of right claimed to be the owners of said property as against the plaintiffs and all the world, and that at no time until the filing of the complaint herein was any claim made by the plaintiff or any other person as to the ownership of said premises hostile to these defendants.

transcript

0231 15. As answer to paragraph 15 thereof, defendants have no knowledge or information sufficient to form a belief as to the truthfulness of said allegations and for that reason defendants deny all of the allegations of said paragraph 15, except defendants admit that on or about the 3rd day of December 1919 one Charles E. Foxley filed in the probate division of said Court a Petition for Letters of Administration on the Estate of Washington Pocatello, deceased, and that after due and legal proceedings had, the said Charles E. Foxley was appointed administrator of said Estate and letters of administration were on the 12th day of January, 1920 issued out of said Court to the said Charles E. Foxley on said estate; further admit that the said Charles E. Foxley, as administrator of said estate at no time took any legal steps to recover any pretended interest in said eighty acres of land.

16. As answer to paragraph 16 thereof, defendants deny each and every allegation therein contained except defendants admit that at all times since acquiring title to said premises they have claimed to

transcript

0231 be the owners of said property in fee simple.

17. As answer to paragraph 17 thereof, defendants deny each and every allegation therein contained.

18. As answer to paragraph 18 thereof, defendants have no knowledge or information as to the truthfulness of the allegations therein contained except defendants are now advised for the first time and upon such information admit that Minnie Pocatello and her four children, the plaintiffs herein, on or about November 1st, 1919 attended the Court of the Honorable Justin D. Call, then Judge thereof, and that they then and there had a conference with said Judge and at the suggestion of said Court had a conference with Charles E. Foxley, an officer of said Court then practicing law before said Court; that on or about said date the said Minnie Pocatello and the plaintiffs herein by written instrument requested the Court to appoint the said Charles E. Foxley as administrator of the Estate of Washington Pocatello, deceased, and that said Charles E. Foxley was thereafter, as aforesaid, regularly

transcript
023 / appointed administrator of the Estate of
the said Washington Pocatello, deceased, and subsequent-
ly qualified and acted as such administrator; that de-
fendants are now for the first time further advised and
upon such information admit that the said Charles E.
Foxley reported certain cash from the sale of said
premises as being an asset of the Estate of said Wash-
ington Pocatello, deceased, and further admit upon in-
formation now for the first time acquired, that the
Superintendent of the Indian Agency at Fort Hall, Ida-
ho, at various times inquired regarding the rights
of plaintiffs in and into a one-third interest in said
property and are advised that he took no action upon
the grounds that the plaintiffs herein had no rights
in and into said premises, all of which said informa-
tion was at all times possessed by the said Charles E.
Foxley as administrator of said estate and by the plain-
tiffs herein. That except as herein admitted, defend-
ants deny all of the allegations of said paragraph 18.

19. Defendants deny paragraph 19 thereof.

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23) 20. As answer to paragraph 20 thereof, defendants deny all of the allegations thereof except defendants admit that they have annually rented said premises for a cash rental.

21. Defendants deny paragraph 21 thereof.

22. Admit that Box Elder County claims a certain right-of-way by virtue of a warranty deed heretofore given by said defendants, otherwise defendants deny all of the allegations of said paragraph 22.

23. Defendants admit paragraph 23 thereof.

24. Defendants deny paragraph 24 thereof.

25. Defendants deny paragraph 25 thereof.

26. Defendants deny each and every allegation contained in the first cause of action of the plaintiffs' third amended complaint not hereinbefore expressly admitted.

As further answer and by way of separate defense to plaintiffs' first cause of action, these defendants allege:

27. That defendants, as aforesaid, claim said premises as owners in fee simple; that defendants pur-

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0232 chased said premises in absolute good faith and without notice or knowledge of any claims or matters set out by plaintiffs in their complaint herein, except as is hereinbefore expressly admitted; that defendants were furnished with an abstract of title covering said premises, which abstract of title had been approved by the Attorney General of the State of Utah in the making of a loan on said premises by the State of Utah, and that said abstract of title was approved by attorneys for these defendants; that A. I. Grover, defendants' immediate predecessor, entered into the possession of said premises under claim of ownership on or about November 3rd, 1919, and on or about said date began to farm said premises as the owner thereof; that at all times since on or about the 3rd day of November, 1919, until the 12th day of March, 1925, when the said Grover conveyed said premises to defendants, the said Grover occupied and cultivated and improved said premises, protected the same by a substantial enclosure, paid all taxes each year levied and assessed upon said lands and claimed the same continuously, openly, notoriously, peaceably and under claim of right each and every year as his property as against all

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232 persons whomsoever, and that since the said conveyance to defendants under date of March 12th, 1925, these defendants have claimed, occupied and farmed said premises each and every year as their property and defendants during all of said years have claimed said premises in fee simple, have each year and at all times cultivated and improved the same and protected said premises by a substantial enclosure, and each and every year have paid all taxes levied and assessed against said land and have continuously, openly, notoriously, peaceably and under claim of right claimed to be the owners of said premises in fee simple as against the plaintiffs, the administrator of said estate and all the world, and that at no time until the filing of the complaint herein was any claim made by the plaintiffs or any other person as to the ownership of said premises hostile to these defendants; that when said A. I. Grover entered upon said premises the property was uneven and had insufficient water right and could not be farmed to the best advantage; that the said A. I. Grover and these defendants spent much time, labor and money in the im-

Transcript

0232 provement of said premises and in the purchase of additional water right for said premises, all of which said amounts were paid by the said Grover and these defendants; that if the plaintiffs herein were defrauded by the acts of any parties, that they should obtain redress against said parties and that these defendants ought not, after more than twenty years lapse of time, now be required to defend the plaintiffs' action herein; that after the great length of time and by reason of the death of parties, loss of papers, death of witnesses, change of title, intervention of equities and other causes, that there is great danger of doing injustice and there can no longer be a safe determination of the controversy herein complained of; that defendants know none of the parties mentioned in the plaintiffs' complaint herein other than A. I. Grover and that the said A. I. Grover is now dead; that defendants are now advised and believe and therefore state the fact to be, that Albert Saylor, mentioned in plaintiffs' complaint, is long since dead; that U. F. Diteman is no longer a resident of this State and is now aged and infirm well past eighty-five years of age and is unable to remember

transcript

233 ber or testify as to any facts in this case; that the First National Bank of Pocatello, Idaho, is insolvent, has been liquidated and that defendants can obtain no records from said Bank relating to the alleged Escrow Agreement; that in said First National Bank of Pocatello, Idaho, Escrow Holder, made an unauthorized delivery of said deed, then the Administrator of the said Washington Pocatello Estate and the heirs of said Estate, by their subsequent acts, waived the performance of the conditions and ratified said delivery and by said subsequent acts raised a presumption of ratification of said delivery and are estopped to deny the validity of said delivery; that Charles E. Foxley is no longer a resident of the State of Utah and his whereabouts are unknown; that by reason of the long lapse of time, to-wit, more than twenty years, and by reason of the facts aforesaid, these defendants are unable to procure testimony to refute certain of the claims of the plaintiffs herein and that plaintiffs' claims are now stale and defendants allege that plaintiffs and each of them should now be estopped by reason of laches, silence and other conduct

Transcript

○ 233 on their part and on the part of the administrator therein, from at this time prosecuting this action

28. The plaintiffs' alleged first cause of action is barred by the provisions of Sections 104-2-5; 104-2-6 104-2-19 and Subdivision 3 of Section 104-2-24 of the Revised Statutes of Utah, 1933.

As answer to the second cause of action of the plaintiffs' Third Amended Complaint, defendants admit, deny and allege as follows:

1. As answer to paragraph 1 thereof, defendants admit that on or about February 14th, 1939, an Order was entered appointing Laura Morris special administratrix of the estates of Washington Pocatello and Minnie Pocatello, his wife, both deceased, and that on or about said date the said Laura Morris filed her Bond and that Special Letters of Administration were issued to her and that said letters have not been revoked.

2. Defendants as answer to paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23 and 25 of plaintiffs' second cause of action, hereby refer to paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10,

Transcript

233 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23 and 25 of their answer to plaintiffs' first cause of action and by reference make said paragraphs a part of their answer to the plaintiffs' second cause of action as fully and for all purposes as if all of said paragraphs enumerated were copies and set out in full herein.

3. Defendants admit that each and every year they have collected all rentals from said premises and that they have never accounted to the Estate of Washington Pocatello or the heirs of said estate for any portion of said rental; otherwise these defendants deny all of paragraph 3 thereof.

4. Defendants deny the right of the Court to require these defendants to make an accounting in said matter and deny all allegations of paragraph 4 thereof.

5. Defendants deny each and every allegation contained in the second cause of action of the plaintiffs' third amended complaint not hereinbefore expressly admitted.

6. As further answer and by way of separate

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0 2 3 3 defense to the plaintiffs' second cause of action, these defendants hereby refer to paragraph 27 of their answer to the plaintiffs' first cause of action and by reference make said paragraph a part of their answer to plaintiffs' second cause of action as if fully copied and set out herein.

7. That plaintiffs' alleged second cause of action is barred by the provisions of Subdivision 1 of Section 104-2-22, Subdivision 3 of Section 104-2-24 Revised Statutes of Utah, 1933, and Section 104-2-23 Laws of Utah, 1935.

WHEREFORE, defendants pray judgment:

0 2 3 4

1. That plaintiffs' first cause of action be dismissed at plaintiffs' costs.

2. That a Decree of this Court be entered declaring defendants to be the owners seized in fee of said premises and that title thereto be quieted in them.

3. That plaintiffs' second cause of action be dismissed at plaintiffs' costs.

4. That defendants have such other and further relief in the premises as to this Court may seem meet and

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0234

equitable.

STEPHENS, BRAYTON & LOWE
Attorneys for defendants,
Amasa L. Clark & Joseph
E. Robinson.

(Duly verified)

Filed August 13th, 1939.

Copy served August 13th, 1939.

Transcript
0236

(Title of Court & Cause)

REPLY TO FURTHER ANSWER AND
SEPARATE DEFENSE OF DEFENDANTS.

Comes now the plaintiffs and each of them, and answering paragraph 27 of the Answer of the defendants, Amasa L. Clark and Joseph E. Robinson, in the above entitled action as their further answer and separate defense, plaintiffs admit, allege and deny as follows, to-wit:

1. Replying to paragraph 27 admits that the defendants, Amasa L. Clark and Joseph E. Robinson, claim said premises as owners in fee simple; but these plaintiffs and each of them deny that the defendants aforesaid have any right, claim or title to an undivided 1/3 interest in said premises; that plaintiffs deny that the said named defendants purchased said premises in absolute good faith and without any notice or knowledge of any of the claims or matters set out by plaintiffs in their complaint; plaintiffs admit that defendants were furnished with an abstract of title covering said premises but plaintiffs

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236 allege that the said abstract of title was sufficient to give the aforesaid defendants notice that their grantor, A. I. Grover, had no title to the undivided 1/3 interest; that it is immaterial and no defense to this action that the abstract of title had been approved by the Attorney-General of the State of Utah in making loan on the said premises by the State of Utah; and that it is immaterial and no defense that said abstract of title was approved by attorneys for these defendants; the plaintiffs deny that A. I. Grover, defendants' immediate predecessor, entered into the possession of said premises under claim of ownership on or about November 3, 1919, for the undivided 1/3 interest owned by the plaintiffs and denies that about said date the said Grover began to farm said premises as the owner of said undivided 1/3 interest; plaintiffs deny that the said Grover from on or about the 3rd day of November, 1919, until the 12th day of March, 1925, occupied, cultivated and improved said undivided 1/3 interest of said premises and denies he protected the same by a substantial enclosure and denies that he paid all taxes each year

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0236 levied and assessed upon said undivided $1/3$ interest and denies that he claimed the said undivided $1/3$ interest continuously, openly, notoriously, peaceably or otherwise under claim of right each and every year as his property as against all persons whomsoever; further answering said allegations admits that the said Grover claimed the ownership of said undivided $1/3$ interest but denies that he had any title to said undivided $1/3$ interest and denies that he performed any act or acts that would be notice to the plaintiffs that he was the owner of said undivided $1/3$ interest until the 12th day of March, 1925, when the said Grover conveyed said premises to the defendants admits that these defendants have claimed ownership to said undivided $1/3$ interest but plaintiffs deny that defendants occupied and farmed said undivided $1/3$ interest, said premises each and every year and deny that defendants have each year and at all times cultivated and improved said undivided $1/3$ interest and protected the said undivided $1/3$ interest by a substantial enclosure and deny that each and every year the said defendants have paid all taxes levied and assessed against said undivided $1/3$ interest and deny

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7 that said defendants have continuously, openly, notoriously and peaceably and under claim of right been owners of said undivided $1/3$ interest in fee simple as against the plaintiffs or against the administrator of said estate or against the world; further answering said allegations, allege the facts to be that the said A. I. Grover, predecessor of defendants and the said defendants were at all times tenants in common with the plaintiffs and the possession of the said A. I. Grover and of the afore-said named defendants was at all times and is at present in the possession of the plaintiffs, the heirs of the estate of Washington Pocatello, deceased, and was not notice to the plaintiffs or to the world that defendants were occupying and claiming said undivided $1/3$ interest hostile to plaintiffs; plaintiffs allege that under the facts pleaded in this case that it is immaterial and no defense; that at no time until the filing of the complaint therein that any claim was made by said plaintiffs to the said undivided $1/3$ interest; plaintiffs deny that when the said A. I. Grover entered upon said premises that the undivided $1/3$ of said property was uneven and had insufficient

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0237 water right and could not be farmed to best advantage; denies that said A. I. Grover and these defendants spent much time, labor and money in the improvement of said undivided $1/3$ interest and in the purchasing of additional water rights for said premises and denies that all of said amounts were paid by the said Grover and these defendants; further answering said allegation, alleges the facts to be that the property was in as high a state of cultivation the day it was decreed by the Probate Court as it is today; that about 60 acres of the premises was then enclosed with a substantial enclosure; that the land at that time was irrigated through water rentals or some other process or system the same as other lands in the same community were irrigated; that on March 31, 1919, seven months prior to the decree of the Probate Court that a contract for purchase of 60 acres of water for this particular tract was signed by A. I. Grover, long previous to his having any right, title or interest whatsoever in the said premises; that the said water right cost the sum of \$3000.00, which plaintiffs admit was paid to the Utah-Idaho Sugar Company by the said A. I. Grover, but plaintiffs

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7 further allege that the said A. I. Grover received and collected fully \$400.00 or more rent each year from plaintiffs' undivided 1/3 interest, which more than paid for plaintiffs' undivided 1/3 interest of said water right and more than an undivided 1/3 of all the taxes and water assessments levied against said premises during the five years that A. I. Grover claimed ownership of said undivided 1/3 interest; plaintiffs allege that it is no defense for the aforementioned defendants that plaintiffs could or should obtain redress against any other parties whatsoever that the plaintiffs might have had a cause of redress against; and that it is no defense to the aforementioned defendants in this case that more than 20 years have elapsed and that they should not now be required to defend the plaintiffs action for the reason that defendants are not innocent purchasers; that defendants voluntarily and of their own free will purchased the property and as plaintiffs alleged in their complaint the aforesaid named defendants had full knowledge and notice of all the fraud and deception that was practiced upon the plain-

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0237 tiffs; that defendants had full knowledge and notice that the heirs of Washington Pocatello were full-blooded Indians, living under tribal relations on the Fort Hall Indian Reservation in Idaho and were wards of the government and that Washington Pocatello and Minnie Pocatello did not have any right or authority to execute the deed in the first place, for the reason that no Certificate of Competency had been issued by the United States Government to either Washington Pocatello or Minnie Pocatello before this deed was executed by them, that said conveyance was not submitted to or approved by the Secretary of the Interior of the United States as is provided for by Act of Congress of May 27, 1902, c. Sec. 7, 32 Stat. at Large, 275, also that the execution of said deed by Washington Pocatello and Minnie Pocatello and the escrow agreement entered into by them was made and all acts done by them and by U. F. Ditoman in violation of Sec. 3, Act of Congress dated March 3, 1871, 16 Stat. at Large, 570, prohibiting contracts by or with Indians who are wards of the government except under the conditions provided for in said Act and with the approval of the Department and the Secretary

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238 of the Interior; that defendants knew and had all notice that the said deed was obtained by fraud and wrongfully delivered and filed of record without any consideration being paid for the same and that the heirs of the estate of Washington Pocatello was intentionally and deliberately robbed of the undivided $1/3$ interest in said property; further answering said paragraph 27, plaintiffs deny that the death of any party changes in one iota status of title to this property, or changes in one iota the facts to be submitted by either plaintiff or defendant; deny that there is any loss of papers or any death of witnesses; denies that any change of title or intervention of any equity or other cause that in any way, manner or form did or could effect the defendants in their voluntary purchase of the premises; that there is no great danger or any danger of doing any injustice to the defendants and denies that there can no longer be a safe determination of the controversy herein complained of; and further answering said allegation, alleges that all of the facts are practically matters of record and can be easily proven without injustice to anyone; further answering said para-

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○ 238 defense that the defendants knew none of the parties mentioned in plaintiffs complaint other than A. I. Grover and that the said A. I. Grover is now dead; that it is immaterial and no defense to the defendants that they are advised and believe that Albert Saylor is dead; that it is no defense that U. F. Diteman is no longer a resident of the State of Utah or that he is now aged and infirm and well past 85 years of age and is unable to remember or testify as to any facts in the case; plaintiffs allege that the abstract of title on which defendants rely proved everything that could be proved by U. F. Diteman; plaintiffs further allege that it is immaterial and no defense that the First National Bank of Idaho is insolvent, has been liquidated and that defendants can obtain no records from said bank relating to the alleged escrow agreement; further answering said paragraph 27, plaintiffs emphatically deny that if the First National Bank of Pocatello, the escrow holder, made an unauthorized delivery of the deed that the administrator of the said Washington Pocatello estate and the heirs of said estate by their subsequent acts waived the performance of the conditions and

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34 ratified said delivery and by said subsequent acts raised a presumption of ratification of said delivery and are estopped to deny the validity of said delivery; further answering that allegation of said paragraph, plaintiffs allege the facts to be that Charles E. Foxley, although appointed administrator of the estate of Washington Pocatello, deceased, by the Probate Court of Box Elder County never had any jurisdiction whatsoever to in any way bind the heirs of the estate of Washington Pocatello, they being full-blooded Indians, wards of the government and non-residents of the State of Utah, that neither the appointed administrator nor the Probate Court Division nor the District Court of Box Elder County, Utah, had any jurisdiction whatsoever to attempt to exercise any control over the money that was paid into the First National Bank of Pocatello, Idaho; that the said Charles E. Foxley had no jurisdiction, authority or right to send a certified copy of his letters of administration to the First National Bank of Pocatello in the State of Idaho and demand that

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0234-9 that money be sent to him at Brigham City, Ut
that the said Charles E. Foxley had no authority, juris-
diction or right to attempt to ratify the escrow agree-
ment or to attempt to validate the delivery of said deed; fu-
ther answering said paragraph 27, plaintiffs allege that
it is immaterial and no defense that Charles E. Foxley is
no longer a resident of the State of Utah and his where-
abouts are unknown; plaintiffs deny that by reason of the
long lapse of time, to-wit, more than 20 years, and by
reason of the facts attempted to be pleaded in said para-
graph 27, that the defendants are unable to procure tes-
timony to refute certain other claims of the plaintiffs
herein; and plaintiffs deny that plaintiffs' claims are
now stale and that plaintiffs and each of them should not
be estopped by reason of laches, silence and other con-
duct on their part and on the part of the administrator
therein from at this time prosecuting this action; plain-
tiffs further allege that no act, word or deed by any one
of the said plaintiffs or any act of Charles E. Foxley in
any way, form or shape can be shown to be misleading or
any way influencing or inducing the defendant, when they

ranscript

239 voluntarily purchased said property from A. I.

rover.

2. Answering paragraph 28 of Defendants' answer to the Plaintiffs' First Cause of Action, plaintiffs deny that this action is barred by the provisions of section 104-2-5, 104-2-6, 104-2-19 and Subdivision 3 of section 104-2-24 of the Revised Statutes of Utah, 1933, or any other Statutes of the State of Utah, for the following reasons:

a. That the plaintiffs, Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello and May Pocatello, the heirs of the estate of Washington Pocatello and Minnie Pocatello, and their parents, both Washington Pocatello and Minnie Pocatello, were at all times mentioned in the complaint, and the said named heirs now are, full-blooded Indians, at all times mentioned in the complaint living under the Indian tribal relations on the Fort Hall Indian Reservation of the State of Idaho and were at all times mentioned in said complaint non-residents of the state of Utah and wards

the United States government and that for said reason

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0239 that none of the provisions of any Statute of Limitations of the State of Utah runs against the United States government as trustees of said Indians or against the said Indians as wards of said United States government save and except in the case of the transfer of real property when the said transfer of said real property has been approved by the Secretary of the Interior of the United States government as provided for by the Act of Congress dated May 31, 1902, c. Sec. 1, 32 Statutes at Large, 284, which said statute reads as follows:

"In all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession of or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, ~~where~~ a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply, and it shall be a complete defense to such action if the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians."

That the deed upon which defendants rely, executed

by Washington Pocatello, which was placed in escrow

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239 with the First National Bank of Pocatello,
Idaho, was not at any time in any manner or form ever
submitted to or approved by the Secretary of the Inter-
ior as provided for in said Statute; that said deed was
executed without such approval.

b. That the said sections of the Utah Statute
heretofore enumerated by the defendants does not apply
in this case for the reason that the deed to the said
premises executed by Washington Pocatello and Minnie
Pocatello, relied upon by the defendants was obtained
by and through gross fraud without any consideration
being paid for the land; that advantage was taken of
the incompetency of the plaintiffs, it being well
known to the heretofore named defendants and their
grantor that the plaintiffs were full-blooded Indians
not being familiar with and having no knowledge of the
laws of any state, not being subject to the laws of
any state, and possessing no knowledge or information
whatsoever of the laws of any state relative to des-
cent and distribution or the laws governing probations

Transcript

0240 of estates or of executors and administrators and for the further reason that the fraud perpetrated upon the plaintiffs was not known to them or discovered until less than two years previous to the commencement of the action and within two years since one of the plaintiffs, Ray Pocatello, arrived at the age of majority; that the said statutes enumerated by the defendants cannot be invoked against these plaintiffs in this case because the District Court of Box Elder County happened to appoint Charles E. Foxley administrator of the estate of Washington Pocatello, deceased, as the only jurisdiction that said court or that the administrator appointed by said court would or could have in the estate of Washington Pocatello, deceased would be to determine the heirs and decree any real property found to belong to the estate in the state of Utah to such heirs; that plaintiffs allege the facts to be that the pleadings and records show that the said A. I. Grover had obtained the deed executed by Washington and Minnie Pocatello and filed the same of record prior to the decree of distribution, distributing the undivided $1/3$ interest to the estate of Washington Pocatello, deceased, and more

mscript

than one month previous to the petition for letters of administration filed by the said Charles E. Foxley; that Charles E. Foxley at the time he filed said petition for administration knew and had full knowledge that the said A. I. Grover had obtained said deed and filed same of record and was claiming ownership and title to the said undivided $\frac{1}{3}$ interest; that his first petition for letters of administration, filed by Charles Foxley, was false and known by him to be false, when he described the character of the property in said petition for letters of administration as an undivided $\frac{1}{3}$ interest in the E. $\frac{1}{2}$ of the S.E. $\frac{1}{4}$ of Sec. 12, Township 11, N. Range 3W., S.L.M. valuing the same at \$1500.00; that the said Charles E. Foxley filed an amended petition for letters of administration which were false and known to him to be false when he described the character of the property as the E. $\frac{1}{2}$ of the S.E. $\frac{1}{4}$ of Sec. 12, Township 11, N. Range 3 W., S.L.M. valuing the same at \$1500.00; that the said Charles E. Foxley knew at the time that he filed said petitions that A. I. Grover had filed the deed of Washington Pocatello of record

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0240 and was claiming title and ownership to the said undivided $1/3$ interest and knew that if this deed was genuine that the estate of Washington Pocatello had no property whatsoever in the state of Utah and that the heirs of the estate were non-residents and there was nothing in the state of Utah to give the probate court jurisdiction either over the estate or over the heirs of Washington Pocatello; that the said Charles E. Foxley by filing said petition for letters of administration on the estate of Washington Pocatello perpetrated a fraud upon the court and wrongfully obtained letters of administration from the court upon the estate of Washington Pocatello, deceased, by fraudulent representations to the court; that Charles E. Foxley as administrator filed no inventory and no inventory was ever filed showing that the estate of Washington Pocatello, deceased, had any property in Box Elder County or in any other county in Utah, that would give the court jurisdiction to appoint an administrator; that Charles E. Foxley, as administrator appointed by the District Court of Box Elder County, had no right, authority or jurisdiction whatsoever to either demand or have taken any money deposited in the

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First National Bank of Pocatello, Bannock County, to the credit of Washington Pocatello or to the of his estate, and had no right or authority to certified copy of his fraudulently obtained letters ministration on the estate of Washington Pocatello, based, to the First National Bank of Pocatello, Idaho, and demand that the thousand dollars paid into said bank . F. Biteman or A. I. Grover, or either one or both them, be sent to him to Brigham City, Utah; that the money deposited in the First National Bank of Pocatello, whether done rightfully or wrongfully, was beyond jurisdiction of Charles E. Foxley, as administrator, was beyond the jurisdiction of the District Court of Elder County sitting either as a probate court or otherwise; that the said Charles E. Foxley had no right authority and no jurisdiction to take or obtain said and dollars and any of the acts that either Charles Foxley under said letters of administration subsequently done after he wrongfully obtained the said thousand dollars was not and is not in any way binding on the plaintiffs in this case and did not and could not in any

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0240 way validate the delivery of said deed or the lawful and wrongful acts of U. F. Diteman and A. I. Grover and did not and could not cause the Statute of Limitation under any law in the State of Utah to commence to run against the plaintiffs in this case and said acts did not and could not create in any manner or form any element of estoppel against the plaintiffs in this case and did not mislead or induce or in any way cause the defendants, Amasa L. Clark and Joseph E. Robinson, to purchase the said premises; that on the other hand, all such matters were of public record and of sufficient notice to warn the said named defendants that A. I. Grover did not have any title to the undivided 1/3 of said premises when they purchased the same; that the record in the probate court of Box Elder County was full notice to the Defendants and to all the world that Charles E. Foxley had obtained the letters of administration on the estate of Washington Pocatello, deceased, through false and fraudulent misrepresentation to the court in his petition; that the said record was notice to the defendants and notice to the world that Charles E. Foxley had not filed an inventory; that he had listed A. I. Grover and U. F. Diteman as

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41 heirs of Washington Pocatello, deceased; that the heirs to the estate mentioned in said petition were aliens and non-residents of the state of Utah, and that no inventory was returned showing property belonging to the estate of Washington Pocatello within the state of Utah that neither the court nor the administrator had any jurisdiction whatsoever in the matter; that the record in said probate proceedings on file in the records of Box Elder County was notice to the defendants and to the world that Charles E. Foxley, instead of filing any inventory, filed a so-called final account and petition for distribution and the said final account and petition for distribution was notice to the court and to the world that the Court of Box Elder County, Utah, never had jurisdiction to appoint an administrator on the estate of Washington Pocatello, deceased; the said so-called final account and petition for distribution was notice to the court and to the defendants and to the world of the fraudulent and unlawful acts of the said Charles E. Foxley; that said record further shows that a protest was filed to the said final account and petition for distribution, that directly

Transcript

0241 raised the question of the jurisdiction of the court, as said protest alleged that no inventory was filed in the estate; that it is elementary that unless an inventory was filed showing property within the state of Utah, that the court had no jurisdiction to even appoint the administrator and said letters of administration should have been revoked; the said probate court records in the estate of Washington Pocatello, deceased, was notice to the court to the defendants and to the world that the court never took any action in the estate of Washington Pocatello, deceased, subsequent to the wrongful issue of letters of administration to Charles E. Foxley, who the court had recommended to those untutored and uneducated Indians, wards of the government, living on an Indian reservation outside of the state of Utah, as a proper person to represent them, save and except to enter in the record different orders continuing hearings on the matter, the record showing the last order continuing the hearing to the 13th day of February, 1922, and there being no further action taken either by the court or the clerk of the court in this matter, this court cannot now say to those untutored, uneducated, non-resident

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241 of the State of Utah and wards of the United States government that such a record invokes against you the Statute of Limitations of the State of Utah and that you are guilty of laches and that from the long lapse of time in which this court failed to take any action upon the acts of the administrator it appointed, there is a great danger of injuries being done to the defendants, notwithstanding the defendants had full notice of all these facts, and full access to the records in the case.

Comes now the plaintiffs and replying to the answer of the defendants to the Second Cause of Action the plaintiffs Third Amended Complaint admits, denies and alleges as follows, to-wit:

1. Plaintiffs hereby refer to paragraphs one and two of their reply to the Answer to plaintiffs First Cause of Action and by reference make said paragraphs one and two a part of their reply to the Answer to plaintiffs Second Cause of Action as fully and for all purposes as if all of said paragraphs one and two of said reply were copied and set out in full herein;

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0242 2. As a reply to the further Answer and separate defense of defendants to plaintiffs Second Cause of Action and especially replying to paragraph seven of said Answer to said Second Cause of Action, said plaintiffs herewith enumerate and reiterate all of the allegations in paragraphs one and two of plaintiffs reply to defendants Answer to the First Cause of Action and allege that Subdivision 1 of Section 104-2-22, subdivision 3 of Section 104-2-24 Revised Statutes of Utah, 1933, and Section 104-2-23 Laws of Utah, 1935, does not apply in this case against the defendants for the following reasons:

a. That no legal deed was executed and delivered by Washington Pocatello and Minnie Pocatello approved by the Department of Interior transferring title to the said undivided $1/3$ interest in said premises and therefore the Statutes of Limitations of the State of Utah cannot be invoked against these plaintiffs as provided for by the Act of Congress dated May 31st, 1902, c. Sec. 1, 32 Statutes at Large, 284, as herein before quoted;

b. That the Statute of Limitations of the State of Utah, does not apply in this case because the deed relied

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12 on by the defendants was wrongfully delivered
out any consideration being paid for same and the
named defendants were at all times tenants in
common with the plaintiffs; that in justice laches can-
be invoked against plaintiffs who at all times were
under tutelage of the United States government and who
had no knowledge of what to do to defend their rights;

c. That the title relied upon by the defendants to
said undivided $1/3$ interest and the possession claim-
under the said title was secured and obtained by gross
fraud; that said defendants are not innocent purchasers,
without full knowledge and notice of said fraud; that the
plaintiffs had no knowledge of the fraud and did not
discover the fraud perpetrated upon them until within
two years before the commencement of this suit and that
plaintiff, Ray Pocatello, did not arrive at the age
of majority until within two years before the commence-
ment of the suit;

WHEREFORE, Plaintiffs pray judgment;

1. That defendants take nothing by their fur-

Transcript

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ther Answer and Separate Defense and that the
plaintiffs be given judgment as pleaded for in their
First and Second Cause of Action.

P. C. C'MALLEY

Attorney for Plaintiff;
Residence: Pocatello, Idaho

GEORGE M. MASON

Attorney for Plaintiff;
Residence: Brigham City, Ut

(Duly Verified)

Filed: August 16, 1939.

Copy served: August 16, 1939.

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(Title of Court and Cause Omitted)

AFFIDAVIT OF SERVICE OF
PAPERS BY MAIL.

STATE OF IDAHO)
) ss
COUNTY OF BAINBRIDGE)

P. C. O'MALLEY, being first duly sworn, deposes
and says: that he is one of the attorneys for all of
the plaintiffs in the above entitled action; that he
served the following pleading; to-wit Reply to Fur-
ther Answer and Separate Defense of Defendants upon
the defendants, Amasa L. Clark and Joseph E. Robin-
son, by depositing a true copy thereof in the United
States Post Office, at Pocatello, Idaho, postage pre-
paid, on the 15th day of August, 1939, enclosed in an
envelope addressed to Stephens, Brayton & Lowe, Attor-
neys and Counselors, Walker Bank Building, Salt Lake
City, Utah; that being the Post Office address of said
Stephens, Brayton & Lowe, the said Stephens, Brayton
& Lowe being the attorneys of record for the defen-
dants, Amasa L. Clark and Joseph E. Robinson, and that
upon said 15th day of August, 1939, there was regular

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0244 communication by mail between said Pocatello,
Idaho, and said Salt Lake City, Utah.

P. C. O'MALLEY

Subscribed and sworn to before me this 15th
day of August, 1939.

H. J. SWANSON

Notary Public for Idaho;
Residing at Pocatello, Idaho

My commission expires:

November 16th, 1942.

Filed: August 16th, 1939.

mscript

44 (TITLE OF COURT & CAUSE OMITTED)

STIPULATION

It is hereby STIPULATED AND AGREED between counsel plaintiff and counsel for defendants Amasa L. Clark Joseph E. Robinson, as follows:

That at the trial of said cause the following instruments may be offered in evidence, subject only to objection as to the materiality of the same and that no objection will be raised that said instruments are not the best evidence:

1. Photographic copy of Envelope containing Escrow agreement written on the front part of a First National Bank envelope.

2. Photographic copy of Letter of Albert Saylor, sent for U. F. Diteman, dated December 14th, 1917, to First National Bank of Pocatello, Idaho.

3. Photographic copy of Albert Saylor letter dated December 24th, 1917, addressed to First National Bank of Pocatello, Idaho.

4. Photographic copy of Albert Saylor Letter dated December 24th, 1917, addressed to First Savings Bank, Pocatello, Idaho.

5. Photographic copy of Albert Saylor Letter dated February 23rd, 1918, addressed to W. D. Service, Cashier, First National Bank, Pocatello, Idaho.

6. Photographic copy Special Power of Attorney for U. F. Diteman to A. I. Grover, dated November 8th, 1918.

7. At the trial of said cause, it will be stipulated that there was on file with the First National Bank of Pocatello, Idaho, Certified Copy of Decree of Distribu-

Transcript

0246 tion in the Yaotes Owa Estate, dated November 7th, 1919; also certified copy of Letters of Administration in the Washington Pocatello Estate in favor of Charles E. Foxley, dated January 15th, 1920, and that photographic copies of said instruments need not be made,

8. It will further be stipulated at the trial of said cause that W. D. Service was the former cashier of the First National Bank of Pocatello, that said Bank was subsequently liquidated by the First Security Bank of Idaho, and that W. D. Service is the Assistant Manager of said last named Bank; that the foregoing are all of the instruments relating to said Escrow Agreement now in the effects of said First National Bank of Pocatello, Idaho, or its successor First Security Trust Company; that a further search may be made of the records of said old First National Bank of Pocatello and that any additional records, if found, may be photographed, and that such additional records may be offered along with the foregoing instruments; that if no additional records are found it may be stipulated in open court that there are no further records of said old First National Bank of Pocatello now available relating to said Escrow Agreement and that any additional records have been destroyed.

9. It may be further stipulated that if W. D. Service were present in Court, that he would testify that as Cashier of the old First National Bank of Pocatello, he handled this Escrow Agreement and that by reason of the elapsed time, he has no memory regarding the transaction except he recalls that the memorandum on the Escrow Agreement is in the handwriting of Albert Saylor; that said W. D. Service would further testify that he has no memory regarding any other matter whatsoever regarding said Escrow Agreement.

10. It will further be stipulated on the trial of said cause that certified copies of Homestead Proof on file in the General Land Office covering Homestead Entry #2400 may be offered at the trial of said cause subject only to the objection regarding the materiality of same.

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Dated this 22nd day of August, 1939.

(Signed) P. C. O'Malley)
George M. Mason) Attorneys
for Plain-
tiff.

(Signed) Stephens, Brayton & Lowe

Attorneys for defendants, Amasa
L. Clark & Joseph E. Robinson.

led: August 21, 1939.

Transcript

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(TITLE OF COURT & CAUSE OMITTED)

SUPPLEMENTAL ANSWER

Come now Amasa L. Clark and Joseph E. Robinson, leave of Court having first been had and obtained, and file this further and supplemental answer to plaintiffs' third amended complaint, and allege:

1. If this Court should find that the plaintiffs herein are wards of the United States Government, then these plaintiffs are incompetent to sue in this action and such suit must be brought and maintained by the United States Government.

2. That all restrictions in the original United States Patent issued to Yaotes Owa as patentee, have long since expired and that the said lands had passed to the said Yaotes Owa, her heirs and assigns, forever, in fee simple, free and clear of all jurisdiction on the part of the United States Government; that on or about the 23rd day of July, 1919, in the matter of the Estate of Ar-rineap; on the 18th day of December, 1918, in the matter of the estate of Geeump; on the 21st day of June, 1919, in the matter of the Estate of Angichah; and on the 23rd day

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47 of July, 1919, in the matter of the Estate of
gaged, complainant, by Hon. W. W. Ray, its then duly
ointed, qualified and acting United States Attorney
the State of Utah, acting under the direction of the
orney General of the United States, filed in the Dis-
et Court of the First Judicial District of the State
Utah in and for the County of Box Elder, wherein each
the foregoing estates were then in process of adminis-
ation, its petition in intervention wherein and whereby
plainant sought to intervene in behalf of each and all
the heirs at law of each of the aforesaid deceased
tencees; that each petition in intervention were similar
form and each set forth substantially the same facts
pleaded in plaintiffs' third Amended Complaint, and
plainant sought by said petitions to obtain an order
decree from said Court in each of said matters that
titions for distribution then pending be dismissed, and
o probate proceedings be quashed, and decreeing that
id court was without jurisdiction to probate either of
id estates or make distribution in accordance with the

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247-8 prayers of said petitioners then on file, or to make any order or decree affecting the title to or right of possession in said lands, or any part thereof; that upon the filing of said petitions, the above named Court, on the day whereon each of said petitions were filed, entered therein its order authorizing complainant to intervene in each of said estates; that thereafter, to-wit, on the 28th day of July, 1921, the United States Government by Hon. Charles M. Morris, its then duly appointed, qualified and acting United States District Attorney for the State of Utah, under the authority of and by the direction of the Attorney General of the United States, filed with said Court in each of said estates written motions to dismiss said petitions; that thereupon said Court entered its written Order dismissing each and all of said petitions and said Court thereafter entered therein its Decree of Distribution distributing each of said estates in accordance with the laws of succession of the State of Utah, and in accordance with petitions then on file; that the defendants and their predecessors in interest learned of the foregoing proceedings before purchasing the lands herein and honestly believed that by the foregoing

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proceedings the United States Government had ceased to make any further claim, on behalf of the Indians similarly situated, to the effect that they were then powerless to alienate their said lands, or that the foregoing restrictions on the power of alienation of said lands had not expired and because of the attitude of the United States Government in dismissing each and all of said petitions, and by further reason of laches on the part of these plaintiffs and the original administrator appointed herein, these defendants and their predecessors in interest were induced and did honestly believe that no further contention would be made that said lands were at in fact then subject to alienation by said Indians and their heirs at law, and so believing and relying upon the foregoing facts, these defendants and their predecessors in interest have acquired the lands herein described as purchasers in good faith and for value and that these defendants and their predecessors in interest have cultivated said premises and have expended large sums of money for improvements placed thereon, with the consent, knowledge and acquiescence on the part of the United States Government and the heirs of the original patentee.

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WHEREFORE, defendants pray that the plaintiffs' complaint herein be dismissed at plaintiffs' costs.

Stephens, Brayton & Lowe

Attorneys for Defendants.

(Duly Verified.)

(Filed and served at opening of trial,
September 14, 1939.)

mscript

2 (Title of Court and Cause Omitted)

MEMORANDUM DECISION

Brigham, Utah.

IN OPEN COURT OCTOBER 23rd, 1939.

COURT: In the case of Laura Morris, Special Administrator, vs. Clark and Robinson, the Court directs that findings and decree be prepared in favor of the defendants and against the plaintiff, for the reason that the court is not convinced from the record here but that the full amount of the escrow had been paid by Sail-or Diteman, or some of the other parties in interest, and for the further reason that it affirmatively appears that during the minority of these Indians and administrator was acting, or supposed to be acting, in this jurisdiction, a fact which these Indians knew about for the reason that they went to the superintendent at Fort Hall and requested certain things to be done; and it is understood that the statute of limitations will run against a minor during the time that the personal representative is acting.

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0312

So far as the question of notice is concerned, the mere fact that Mr. Service made an affidavit showing the terms of the escrow cannot be held to mean anything in view of the fact that the very deed referred to in the escrow appears to have been subsequently recorded showing a consideration of \$3200.00. Nor does the affidavit of Grover, as shown in the abstract, give notice of any irregularity. So the findings may show that the defendants were, in effect, innocent purchasers for value.

Now, in view of the fact that I did not fix a date for rendering a decision in this matter, I will ask the reporter to make a transcription of this decision, and counsel for the defendants is requested to prepare and present to this court not later than November 27th, 1939, after notice on counsel for plaintiff, proposed findings, conclusions and decree.

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(Title of Court and Cause Omitted)

N O T I C E

TO THE PLAINTIFFS AND TO THEIR ATTORNEY, P. C. O'MALLEY:

YOU, AND EACH OF YOU, will please take NOTICE that the defendants Amasa L. Clark and Joseph E. Robinson on Monday, the 27th day of November, 1939, at 11:00 o'clock A.M., or as soon thereafter as the parties may be heard, at the Court Room of said Court, Brigham City, Utah, will present to the Court Findings of Fact, Conclusions of Law and Judgment in the above entitled cause for signing. Copy of the proposed Findings, Conclusions and Judgment are herewith served upon you.

Dated this 22nd day of November, 1939.

STEPHENS, BRAYTON & LOWE

Attorneys for Defendants, Amasa
L. Clark and Joseph E. Robinson

Filed November 22nd, 1939.

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0328

(Title of Court and Cause Omitted)

N O T I C E

TO THE PLAINTIFFS AND TO THEIR ATTORNEYS, P. C. O'MALLEY
AND GEORGE M. MASON:

YOU, AND EACH OF YOU, will please take notice
that Findings of Fact, Conclusions of Law and Decree in
favor of the defendants Amasa L. Clark and Joseph E. Rob-
inson, and against the plaintiffs, as heretofore served
upon you, have this day been signed by Honorable Lewis
Jones, Judge of the above entitled Court. Said Findings,
Conclusions and Decree have been filed and are now of
record in said cause.

Dated this 27th day of November, 1939.

STEPHENS, BRAYTON & LOWE

Attorneys for defendants, Amasa
L. Clark and Joseph E. Robinson.

Filed: November 27th, 1939.

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031x

(Title of Court & Cause Omitted)

PLAINTIFFS' EXCEPTIONS

To the Findings of Fact, Conclusions of Law, and Decree, made and prepared in favor of defendants and against plaintiffs.

TO THE HONORABLE LEWIS JONES, JUDGE, THE ABOVE ENTITLED COURT:

Comes now the plaintiffs and each of them, by and through counsel, and excepts to, and files this their exception to all of the Findings of Fact, Conclusions of Law and Decree made in favor of the defendants and against the plaintiffs, in the above entitled action, as prepared by Counsel for defendants under order of the court, on the following grounds:

That not any one of the Findings, Conclusions and the Decree made in favor of the defendants and against the plaintiffs are not supported by the evidence, facts and law of the case.

That all of the Findings, Conclusions, and Decree, made in favor of the defendants and against the Plaintiffs, are contrary to the evidence and facts of the

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0314 case, and contrary to and not supported by the law governing any of the questions of law involved in the case.

Dated this 26th day of November, 1939.

Received Copy this 27th
day of November, 1939.

William J. Lowe
Attorneys for Defendants
Residence Salt Lake City,
Utah.

P. C. O'MALLEY
Attorney for Plaintiffs,
Residence Pocatello, Idaho.

GEORGE M. MASON
Residence Brigham City, Utah

Filed November 27th, 1939.

Manuscript (Title of Court & Cause Omitted)

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FINDINGS OF FACT & CONCLUSIONS OF LAW

This cause having come on regularly for trial on the 14th day of September, 1939, at 10 o'clock A.M., before Honorable Lewis Jones, Judge of said Court, without a jury, P. C. O'Malley and George Mason appearing for the plaintiffs and William J. Lowe, of Stephens, Layton & Lowe, appearing for the defendants Amasa L. Clark and Joseph E. Robinson, said action having been dismissed as to Box Elder County, and the parties having offered their testimony and the Court having continued said hearing to the 9th day of October, 1939, at 2 o'clock P.M., and the parties hereto having offered further evidence and having argued and submitted the cause, and the Court having taken the matter under advisement, and the Court having thereafter on the 23rd day of October, 1939, rendered its oral decision in open Court in favor of the defendants and against the plaintiffs and having directed that Findings of Fact, Conclusions of Law and Decree be prepared in keeping with said oral decision, the Court now makes and files the following:

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FINDINGS OF FACT

1. That Laura Morris was on or about the 14th day of February, 1939, appointed Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased; that said Laura Morris qualified for said office and at all times since said date has been the duly acting and qualified Special Administratrix of said estates.

2. That the plaintiffs Lucy Pocatello Johnson, Maude Pocatello Racehorse, Josephine Pocatello and Ray Pocatello are the sole surviving heirs of Washington Pocatello and Minnie Pocatello, deceased; that at all times mentioned herein they were and now are full blooded Indians, members of the Western Shoshone Tribe of Indians and at all times herein mentioned were, and now are, wards of the United States Government, residing on the Fort Hall Indian Reservation Idaho; that all of said plaintiffs are over the age of twenty-one years and all of said plaintiffs joined in said action with full knowledge and permission of the Superintendent of the Fort Hall Indian Agency of the United States

Department of Interior, Office of Indian Affairs, of Fort

ranscript

2315 Hall Indian Reservation, Fort Hall, Idaho
2316

3. That Washington Pocatello died on or about the 27th day of April, 1917, at Fort Hall, Idaho; that during his lifetime and at the time of his death, he was the only heir by blood, of an Indian woman of the name of Yaotes Owa, and also of a daughter of Yaotes Owa, commonly known and called Jane; that Minnie Pocatello, his wife, died at Fort Hall, Idaho, on or about the 28th day of May, 1928.

4. That Yaotes Owa, died in Box Elder County, Utah, sometime in the late 80's; that at the time of her death she was the owner of a certain eighty acres of land located in Box Elder County, Utah, described as follows, to-wit:

The $E\frac{1}{2}$ of the $SE\frac{1}{4}$ of Section 12, Township 11, North of Range 3 West, Salt Lake Meridian.

That besides the said Washington Pocatello, Yaotes Owa left surviving her as heirs, one daughter known as Jane, who died sometime in the late 90's, without issue, but leaving surviving her as heirs, a husband named James Brown, and Washington Pocatello, a descendant by half-blood.

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5. That no probate proceedings were commenced on the estate of Yaotes Owa, or on the estate of her daughter Jane until in the year of 1917; that during the years 1917, 1918 and 1919, full probate proceedings were had on both the estates, and decrees by this Court determining heirship, and of distribution in both estates were made and entered on the 7th day of November, 1919, and both estates were fully and finally closed and the administrator discharged during the month of November, 1919.

6. That on the 7th day of November, 1919, Justin D. Call, Judge of this Court, made and entered two decrees determining heirship, and of distribution, one in the estate of Yaotes Owa, and one in the estate of Jane Brown and James Brown, in each decree of Distribution there was decreed an undivided two-thirds interest to James S. Brown, the son of James Brown, the husband of the Indian woman Jane, the daughter of Yaotes Owa, and an undivided one-third interest to the estate of Washington Pocatello, deceased, each decree describing the same eighty acres of land located in Box Elder County, Utah, described as follows, to-wit:

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The E¹ of the SE¹ of Section 12, Township 11, North, of Range 3 West, Salt Lake Meridian.

That a copy of the Decree in the Estate of Yaotes Owa was filed for record by the Administrator on the 8th day of November, 1919, as recorded in Book H. of Misc. Records, at page 319, of the records of Box Elder County, Utah, that a true and exact copy of said Decree is attached to and made a part of plaintiff's complaint marked Exhibit "C"; that a copy of the Decree of Distribution made and entered in the estate of Jane Brown and James Brown was by the administrator filed for record on the 8th day of November, 1919, and recorded in Book H. Misc. Records at page 320 of the Records of Box Elder County, Utah, that a true and exact copy of this Decree is attached to plaintiff's complaint marked Plaintiff's Exhibit "D", and made a part thereof.

7. That at the time said decrees were made and entered, the said eighty acres of land were in fair state of cultivation, but had no water right therefor, and the land was uneven and had an appraised value of \$4900.00;

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0316 that by said decrees of distribution James S. Brown claimed an undivided two-thirds interest in said land and the estate of Washington Pocatello, deceased, claimed to be the owner of an undivided one-third interest in said lands; that the said James S. Brown subsequently sold his undivided two-thirds interest in said premises to the predecessors in interest of one Albert I. Grover and Washington Pocatello and Minnie Pocatello, in their lifetimes made, executed and delivered in escrow a Warranty Deed for their undivided one-third interest in said premises and that the said Albert I. Grover in November, 1919, by mesne conveyances, became the owner of said premises and at said time entered into the possession of said property and thereafter until March, 1925, when the defendants herein became the purchasers of said property, farmed said premises and collected all of the rents and profits from said premises and paid no part of said rents or profits to the administrator of the Estate of Washington Pocatello, deceased, or to any of the heirs of said estate.

8. That on or about February 2nd, 1917, Washington Pocatello and Minnie Pocatello, his wife, entered into a

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317 contract to sell said eighty acres of land to
U. F. Diteman for a consideration of \$3200.00, pay-
able \$300.00 cash, the balance of the purchase price to
be paid in annual installments of \$300.00 payable on the
20th day of December of each year until the full sum of
\$3200.00 was paid, the last installment falling due on
the 20th day of December, 1926; that said Washington
Pocatello and Minnie Pocatello, his wife, as sole heirs
of Yates Cwa, made, executed and delivered a Warranty
Deed for said eighty acres of land to U. F. Diteman,
which said Deed recited a consideration of \$3200.00 and
was deposited with the First National Bank of Pocatello,
Idaho, as Escrow Depository, the said Bank to hold said
Warranty Deed until the consideration of \$3200.00 was
fully paid, at which time said Deed so left in escrow was
to be delivered by said Bank to said U. F. Diteman; that
the terms of said escrow agreement were written on the
envelope containing the escrow papers; that an Affidavit
made at the time by the Cashier of said Bank was filed
of record in the County Recorder's Office of Box Elder
County, Utah, which said affidavit was in words and

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0317 figures following:

"Kind of Instrument - Affidavit - Date of Inst.,
April 18, 1917. Recorded April 19, 1917, at 2:50
P.M., in F. of Misc., page 613.

STATE OF IDAHO)
) ss.
COUNTY OF BANNOCK)

W. D. Service, who being first duly sworn on oath
says: That on the 1st day of January, 1917, he was
and ever since has been and now is the Cashier of
the First National Bank of Pocatello, Idaho; that on
the 2nd day of February, 1917, Washington Pocatello,
and Minnie Pocatello, his wife, executed and placed
in escrow with the First National Bank of Pocatello,
Idaho, their deed conveying to U. F. Diteman of
Seattle, Washington, the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Sec. 12,
T. 11, N. R. 3 W. SIM in Box Elder County, Utah; that
the said deed is now in the possession of the First
National Bank of Pocatello, Idaho, and to be delivered
to the said U. F. Diteman when all the following
payments shall have been made at the said Bank for
in behalf of the said Washington Pocatello, to-wit:
\$300.00 on December 20, 1917, and \$300.00 on Decem-
ber 20, of each and every year thereafter up to and
including December 20, 1926.

W. D. Service.

Subscribed and sworn to before me this 18th day of
April, 1917. Paul M. Bryan, Notary Public, Resident
Pocatello, Idaho. (Seal).

That said Escrow Agreement was entered into before
Washington Pocatello had acquired any title to the premises
through Probate proceedings and that said Washington Poca-
tello had never occupied said land.

unscript

7 9. That the plaintiffs offered no evidence at trial of said cause to the effect that U. F. Diteman, antee in said Warranty Deed on escrow with the First tional Bank of Pocatello, Idaho, himself, or with one I. Grover, wrongfully, unlawfully, corruptly and intentionally, with the intent to defraud the Estate of Washington Pocatello and the heirs of the Estate of Washington catello, paid to said Escrow Holder only \$1000.00 on the rchase price of \$3200.00 named in said Deed and Escrow greement and wrongfully and unlawfully procured from id depositary the said Warranty Deed; that said plaintiffs offered no testimony to the effect that said depositary bank did unlawfully, wrongfully and contrary to the press terms and obligations of said Escrow Agreement, cept \$1000.00 and deliver to said U. F. Diteman and A. Grover the said Deed; that the plaintiffs offered no testimony that at the time of the delivery of said Deed, e said U. F. Diteman and A. I. Grover and said depositary Bank, all had knowledge that Washington Pocatello s dead for more than a year previous to the delivery of

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0318 said Deed and that no administrator had been appointed for said estate and that by reason of the failure to offer evidence on said points heretofore set out in the paragraph, the Court finds against the same; the Court further finds that said Warranty Deed was by the First National Bank of Pocatello, Idaho, delivered to U. F. Diteman, or some person acting for him, and that the said Deed which its face recited a consideration of \$3200.00, was regularly filed for record in the office of the County Recorder of Box Elder County, Utah, on November 10th, 1919, at 4:00 P. M. in Book 15 of Deeds at page 440; that the said U. F. Diteman and A. I. Grover, or either of them, did not unlawfully, illegally or for the purpose of cheating or defrauding the Estate of Washington Pocatello and his heirs out of said property, file the said Deed for record in said Box Elder County, Utah, but that said Deed was regularly filed for record and recorded; that the said A. I. Grover, by the recording of said Deed, did not attempt to take from the estate a valuable property right; that the said A. I. Grover did from November, 1919, claim ownership of said lands;

cript

3.4 to the undivided one-third interest of said property to U. F. Diteman; that the depositary bank had right to deliver the Deed to said property without a full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the Deed was regular on its face, recited the consideration of \$3200.00 and from the evidence in the case the Court finds that said \$3200.00 recited in the Deed was paid to said Escrow holder and that the transaction with said Bank was not fraudulent; the Court further finds that although Washington Pocatello had title before the property was deeded to his estate, that it was unnecessary to specifically enforce the Escrow Agreement under the provisions of Section 7741, Revised Statutes of Utah, but the Bank, upon payment of the consideration aforesaid, was justified in delivering said Deed to the grantee therein.

10. That A. I. Grover on or about the 3rd day of November, 1919, secured from U. F. Diteman and Josie Diteman, his wife, Quitclaim Deed for said eighty acres of land to himself, which said Deed was recorded on or about

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0318 page 442, in the Recorder's Office of Box Elder County, Utah; that said A. I. Grover did not have knowledge that his grantors in said Quitclaim Deed had no legal title to the undivided one-third interest in said property; that said A. I. Grover did not connive and conspire with U. F. Diteman to secure the Warranty Deed so left in escrow without paying the just consideration for the same; that A. I. Grover did not unlawfully and wrongfully file said Deed for Record and did not admit that it was obtained without full compliance with the obligations of the escrow agreement; that said A. I. Grover did cause his Affidavit to be filed on or about February 10th, 1920, and that a true and correct copy of said Affidavit is marked "Exhibit E" and attached plaintiff's complaint and that as to said Affidavit the same was regularly made in connection with the making of a loan by said A. I. Grover from the State Land Board of Utah for \$7500.00.

11. That the said A. I. Grover did not fraudulently obtain the said Washington Pocatello Deed and file it for record; that after procuring the deeds for said premises in November, 1919, the said A. I. Grover took over said premises

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0318 farmed the same and thereafter collected all the rents and profits of said property; that said A. I. Grover did not account to the Estate of Washington Pocatello, or to the plaintiffs herein, for rentals or otherwise, as the said A. I. Grover claimed said premises in fee simple and no demand was ever made upon him or his successors in interest for any accounting from the plaintiffs herein or any other person; that upon assuming control of said premises, the said A. I. Grover did not know that the Estate of Washington Pocatello, deceased, and the heirs of the estate claimed or owned an undivided one-third interest in the premises and that he was fraudulently cheating or attempting to cheat the heirs of said estate out of said interest; that from November, 1919, to March, 1925, during which period the Court finds A. I. Grover had control of the property, he was not an owner in common with the heirs of the estate of Washington Pocatello and did not collect the rents as a co-tenant with the heirs of the estate of Washington Pocatello and did not hold the same under a constructive trust for

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0319 said heirs, but held and owned said premises in fee simple.

12. That on the 12th day of March, 1925, the said I. Grover, also known as Albert I. Grover, and Hortense Grover, his wife, conveyed by Warranty Deed all of their right, title and interest in and to the said eighty acres of land to the defendants, Amasa L. Clark and Joseph E. Robinson, and the said named defendants have since March 12th, 1925, exercised control and possession of all of said premises and ever since said date have claimed and now claim ownership to the said undivided one-third interest in said property against the heirs of the Estate of Washington Pocatello, deceased, and the administrator of said estate; that said defendants have, since the 12th day of March, 1925, collected all the rents and profits of said land and have made no accounting for the same by reason of the fact that said defendants claim and own said premises that the said defendants and their immediate predecessor in interest, A. I. Grover, have at all times since November 1919, been in the actual possession of said premises and that the plaintiffs, or any of them, have not been seized

ranscript

03/9 or possessed of said property at any time since said last named date.

13. That the defendants, Amasa L. Clark and Joseph M. Robinson, were innocent purchasers for value, by Deed, from Albert I. Grover and Hortense Grover, his wife, dated on or about March 12th, 1925; that at the time said defendants purchased said premises they believed A. I. Grover was the owner in fee of said premises and knew of no claim that A. I. Grover had fraudulently and wrongfully obtained the said Deed from said Bank as now claimed by the plaintiffs herein and without the payment of the consideration recited in said Deed; that defendants did not know the Quitclaim Deed from U. F. Diteman and wife to A. I. Grover conveyed no title to said undivided one-third interest; that said defendants had no knowledge or notice of any fraudulent acts of A. I. Grover and/or U. F. Diteman; that they did not connive and conspire in obtaining the said Deed and filing the same of record without paying any just consideration for the same; that they did not know that said undivided one-third interest

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8 3 1 9 from the estate of Washington Pocatello; that defendants did not know that their grantor, A. I. Grove was at all times an owner only of an undivided two-third interest in said property and did not know that said Gr held the same in common with the heirs of the Estate of Washington Pocatello as to an undivided one-third interest that these defendants did pay a consideration for said premises upon purchasing the same from A. I. Grover and wife to wit: the sum of \$12,500.00 for the premises in their then improved condition with water right therefor; that the defendants by said mesne conveyances obtained fee simple title to said premises and that the plaintiffs herein do not own an undivided one-third interest in said premises or any interest whatsoever; that the defendants since March, 1925, have collected the rents and profits from said premises but do not hold the same as co-tenants with the heirs of Washington Pocatello, under a constructive trust or otherwise, except as owners thereof.

14. The Court finds that the defendants Amasa L. Clark and Joseph E. Robinson, immediately upon purchasing said premises in March, 1925, filed their Deed of record in the office of the County Recorder of Box Elder County

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19 Utah, and by themselves and through their tenants immediately entered into the possession of said premises, claiming to be the owners in fee simple of said premises; that since said date, until the filing of the complaint herein, these plaintiffs, or any other person, never claimed any right to or in said premises and that defendants have at all times held said premises adversely against the rights of the heirs of the estate, of Washington Pocatello, deceased, the plaintiffs herein.

15. That on December 3rd, 1919, Charles E. Foxley filed in the probate division of this Court a Petition for letters of Administration on the estate of Washington Pocatello, deceased, which said Petition was supported by the Petition and Request of the heirs of said Washington Pocatello, deceased, and after due and legal proceedings had the said Charles E. Foxley was regularly appointed Administrator of said Estate and Letters of Administration were, on the 12th day of January, 1920, issued out of this Court to the said Charles E. Foxley on said estate; that the said Charles E. Foxley as Administrator and as the legally appointed representative of the heirs

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0319 of said estate failed to take any legal steps to recover the alleged undivided one-third interest in said eighty acres of land from A. I. Grover, although the Court finds that the said Charles E. Foxley was appointed at the request of said heirs of Washington Pocatello and said he at all times knew that the said Charles E. Foxley, as such administrator, represented them and the estate of Washington Pocatello; the Court finds that there is no proof that Charles E. Foxley, as administrator of said estate or otherwise connived and conspired with A. I. Grover, and the Court therefore finds that the said A. I. Grover did not fraudulently connive and conspire with the said Charles E. Foxley, administrator of said estate, or otherwise, and that said Charles E. Foxley did not improperly accept from the First National Bank of Pocatello, Idaho, any money with intent to cheat and defraud the heirs of Washington Pocatello, deceased; that said Charles E. Foxley did not connive and conspire with A. I. Grover to file a copy of Letters of Administration with the First National Bank of Pocatello, Idaho for the purpose of obtaining the said Deed of Washington

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320 property; that there was no evidence offered to the Court as to the whereabouts of Charles E. Foxley and the Court finds that the proceedings in the Estate of Washington Pocatello were regular insofar as administered and that from January 12th, 1920, the date of the appointment of the said Charles E. Foxley, to the date of the filing of complaint herein, the said Charles E. Foxley was the duly appointed, qualified and acting administrator of said Washington Pocatello, deceased, and represented the said estate and the heirs of said estate.

16. That the defendants Amasa L. Clark and Joseph E. Robinson at the time they purchased said eighty acres of land from A. I. Grover, had no knowledge or notice that Charles E. Foxley had been appointed administrator of the estate of Washington Pocatello, deceased, and had no knowledge or notice of any unlawful or fraudulent acts on the part of A. I. Grover and/or of the said Charles E. Foxley, as administrator of the Estate of Washington Pocatello, deceased; that said

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03 20 defendants had no knowledge or notice of any alleged connivance between A. I. Grover and Charles E. Foxley. The Court finds that there is no evidence of any conspiracy or conspiring on the part of the said A. I. Grover and Charles E. Foxley to cheat and defraud the Estate of Washington Pocatello and/or the heirs of said estate; and the Court finds that the grantor of these defendants, A. I. Grover, owned and had legal title to the said undivided one-third interest of the land formerly owned by Washington Pocatello; that at all times since March 12th, 1925, the defendants herein have exercised supervision and control of said undivided one-third interest and that said claim and ownership was not wrongful but was under claim of right as against the estate of Washington Pocatello and the heirs of said estate; that during all of said years the ownership of said defendants was not confined to an undivided two-third interest in said land and that said defendants were not tenants in common with the heirs of Washington Pocatello, ceased, but said defendants owned all of said land in fee simple.

17. The Court finds that on December 3rd, 1919, when

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20 Petition for Letters of Administration was filed in the Estate of Washington Pocatello, deceased, that Pocatello was then of the age of seven years and all the heirs of Washington Pocatello were older than Ray at the time of the filing of the Petition herein Ray Pocatello was of the age of twenty-six years; that the plaintiffs all knew of the fact that Charles E. Foxley was appointed administrator of said estate during all times from January 12th, 1920, to the date of the filing of their complaint herein, and during all of said time these plaintiffs and Charles E. Foxley as administrator of said estate knew that A. I. Grover and these defendants claimed said eighty acres of land and at all times had constructive knowledge that the said Deed of Washington Pocatello and Minnie Pocatello, his wife, placed in escrow with the First National Bank of Pocatello, Idaho, has been delivered and had been regularly recorded and that all of the plaintiffs herein knew all of the facts complained of in their complaint herein at all times after on or about November 1st, 1919, when Minnie Pocatello and her child-

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0321 ren appeared in Open Court as set out in paragraph 18 of plaintiffs' complaint, as will more fully hereinafter appear.

18. That Minnie Pocatello and four of her children appeared in Court on or about November 1st, 1919, at the time of the hearing on Petition for Settlement of the Account and Distribution in the Estate of Yates Cwa, deceased; that at said time Hon. Justin D. Call, then Judge of said Court, fully advised them of the nature of the probate proceedings then pending and the said Court then requested said Charles E. Foxley to consult with said Minnie Pocatello and the plaintiffs herein; that a conference was thereafter had between said parties and the plaintiffs herein, and their mother then signed a request in the matter of the Estate of said Washington, Pocatello, deceased, requesting the Court to appoint Charles E. Foxley as administrator of said estate, the said request is attached to and made a part of the Petition for Letters of Administration in the Estate of said Washington Pocatello, deceased; that pursuant to said request and after due and

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21 found, duly and regularly appointed as Administrator of said estate and thereafter qualified and Letters Administration were issued to him and that said letters never been revoked; that in the summer of 1921 Superintendent Donnor called Minnie Pocatello and her two old-daughters, plaintiffs herein, in his office and advised them that Charles E. Foxley reported he had about 5.00 belonging to the Estate of Washington Pocatello that after deducting attorney's fee and costs there left about \$490.00 for the heirs, the exact manner acquiring said money being not explained to said parties; that said Superintendent Donnor then advised said parties that he did not approve of the settlement of said estate without knowing more about it and spoke something about having the matter investigated; that several months later said heirs were informed from the Superintendent's office that nothing further could be done in the matter; that at different times thereafter said heirs appealed to said Superintendent's office to make an investigation of said settlement, but they were always told that nothing

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0321 said matter until the death of Minnie Pocstello when the heirs herein sought an investigation but received no encouragement from the Indian Agency and were told nothing could be done and said heirs took no further action until the filing of the complaint herein.

19. That the estate of Washington Pocstello, deceased and/or the heirs of said estate, have paid no taxes and legal assessments levied or assessed against said property or any part thereof and that the defendants Amasa L. Clark and Joseph E. Robinson and A. I. Grover, their immediate predecessors in interest, have each and every year since 1919 to date paid all taxes and assessments each year levied against all of said land.

20. That the physical conditions and improvements of the said eighty acres of land have remained practically unchanged since the Court decreed the property to the heirs of Yaotes Owa, deceased, except that the present owners and their predecessors in interest expended considerable time and money each year in leveling said land for intensive farming purposes and said A. I. Grover purchased from the Utah-Idaho Sugar Company a water right for said

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21 premises for which he paid the sum of \$3000.00;
22
that said land was appraised in the probate proceedings
in this Court as having a value of \$4900.00 which amount
the Court finds was the reasonable cash market value of
said premises at said time; that the defendants Amasa L.
Clark and Joseph E. Robinson at the time they purchased
said property in March, 1925, paid the sum of \$12,500,
which the Court finds was the then fair cash market value
of said property and that the said A. I. Grover and the
defendants Amasa L. Clark and Joseph E. Robinson have
for a year leased said premises for a cash rental.

21. That the plaintiff Laura Morris as Administra-
trix of the Estate of Washington Pocatello and Minnie
Pocatello, both deceased, and the other plaintiffs as
heirs at law of Washington Pocatello and Minnie Poca-
tello have filed the complaint herein jointly against
the defendants seeking to quiet title to said premises.

22. That Box Elder County claims no interest in
said premises except for right of way purposes and this
action has not been prosecuted as to it.

23. That a description of the real property in-

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0322 involved in this action is as follows, to-wit:

The E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Sec. 12, Township 11 N., Range 3 West, Salt Lake Meridian.

24. That the plaintiffs, or any of them, have no right herein and that the sole owners of said real estate are the defendants Amasa L. Clark and Joseph E. Robinson.

25. The Court further finds that Pooc Owa, an Indian, renounced his tribal relations and as a citizen of the United States on or about 187-made application under the then laws of the United States to homestead the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 12, Township 11 North, Range 3 West, Salt Lake Meridian, in Box Elder County, Utah; that the said Pooc Owa and his wife, Yaotes Owa, under said homestead application proceeded to homestead said premises and that prior to issuance of patent the said Pooc Owa died; that after the required period of residence Yaotes Owa, as the widow of Pooc Owa, made final proof on said homestead again renouncing all tribal relationship and making application for patent as a citizen of the United States; that under date of May 31st, 1884, the United States of America issued its Patent to Yaotes Owa (widow) of Pooc Owa for said E $\frac{1}{2}$

script
2 of the SE $\frac{1}{4}$ of Section 12, Township 11 South,
T³ West, Salt Lake Meridian, situated in Box Elder
County, Utah, and containing eighty acres; said Patent
issued upon the express condition that the title there-
conveyed should not be subject to alienation or en-
franchisement either by voluntary conveyance or judgment or
decree or order of any Court or subject to taxation of
any character but should remain inalienable and not sub-
ject to taxation for a period of twenty years from the
date thereof, as provided by Act of Congress approved
January 18th, 1881; that the restrictive period was err-
oneously stated therein as twenty years whereas in truth
and in fact said property passed to said Yaotes Owa free
and clear of governmental restrictions, five years after
the date thereof; that the United States Government at no
time after the expiration of said restrictive period cla-
imed any jurisdiction over said lands; that the Fort Hall
Indian Reservation and Agency have at no time claimed any
jurisdiction over said premises; that the Interior Depart-
ment has at no time since the expiration of said period
restriction claimed any interest in said premises;

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0322 that none of said Governmental and Indian Agencies have at any time attempted to collect rentals on said property for and in behalf of the plaintiffs or for any of said agencies; that the Indian Agent from Fort Hall Indian Reservation at the trial of this cause testified that the Government claimed no interest whatsoever in said lands or premises and directly or indirectly claimed no right to the rents and profits or the right to supervise the same, and the Court finds that all rights of the Government and the Governmental Agencies ceased and terminated five years from May 31st, 1884, the date of said Patent; that Yates was Patentee, and her successors in interest, including these plaintiffs, have subjected themselves to the Laws of the State of Utah and in the bringing of this suit the plaintiffs are subject to the same laws relating to the prosecution of suits which govern any other citizen of this State.

26. The Court further finds that the defendants, Amos L. Clark and Joseph E. Robinson, claim said premises as owners in fee simple; that the defendants purchased said premises in good faith and without notice or knowledge of any claims or matters set out by plaintiffs in their complaint.

script

323 herein, except as is hereinbefore expressly
and; that the defendants, at the time they purchased
premises, were furnished with an abstract of title
covering said property which said abstract of title had
been approved by the State of Utah in the making of a
first loan on said premises for \$7500.00; that A. I.
Grover, defendants' immediate predecessor, entered into
possession of said premises under claim of ownership
on or about November 3rd, 1919, and on or about said
date began to farm said premises as the owner thereof;
that at all times since on or about the 3rd day of Nov-
ember, 1919, until the 12th day of March, 1925, when
said A. I. Grover conveyed said premises to defendants,
said Grover occupied and cultivated and improved
said premises, protected the same by a substantial enclo-
sure, paid all taxes each year levied and assessed upon
said lands and claimed to own the same continuous, openly
and peaceably, peaceably and under claim of right each and
every year as his property, in fee simple, as against
persons whomsoever; that since the said conveyance to
defendants under date of March 12th, 1925, these

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0323 deferdants have claimed, occupied and farmed said premises each and every year as their property and defend-
ants during all of said years have claimed said premises, in
fee simple, have each year and at all times cultivated and
improved said property and protected said premises by a sub-
stantial enclosure, and each and every year defendants have
paid all taxes levied and assessed against said land and
have continuously, openly, notoriously, peaceably and under
claim of right claimed to be the owners of said premises in
fee simple as against the plaintiffs, the administrator of
said estate, and all the World; that at no time until the
filing of the complaint herein was any claim ever made by
the plaintiffs or any other person as to the ownership of
said premises hostile to these defendants; that when said
A. I. Grover entered upon said premises the property was
uneven and had insufficient water right and could not be
farmed to best advantage; that the said A. I. Grover and
these defendants spent much time, labor and money in the
improvement and leveling of said premises and in the pur-
chasing of additional water right for said premises, all of
which said amounts were paid by said A. I. Grover and the

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0323 defendants; that the defendants are innocent purchasers of said property for value and are now the owners, in possession, seized in fee simple of said property.

27. That A. I. Grover is now dead, that Albert Sawyer is long since dead, that U. F. Dittman is no longer resident of this State and is now aged and infirm and is unable to remember or testify as to the facts in this case; that the First National Bank of Pocatello, Idaho, is insolvent and has been liquidated and that all instruments in connection with the Escrow Agreement, except as offered in evidence, have been destroyed; that by reason of the long lapse of time, nearly twenty years, the parties hereto are unable to procure testimony in support of their claims or to refute the same; that the claims of plaintiffs herein are now stale claims; that if the said First National Bank of Pocatello, Idaho, escrow holder, made any unauthorized delivery of said Deed, then the administrator of said Washington Pocatello Estate and the heirs of said estate, by their subsequent acts, waive

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0323 delivery, and by said subsequent acts raised a
0324 presumption of ratification of said delivery and are now es-
topped to deny the validity of said delivery; that the plain-
tiffs are now estopped by reason of laches, silence and
other conduct on their part and on the part of the adminis-
trator herein, as heretofore found, from at this time prose-
cuting this action.

28. That the plaintiffs' first cause of action is barr-
ed by the statutes of Limitation of the State of Utah and par-
ticularly by the provisions of Sections 104-2-5, 104-2-6,
104-2-7, 104-2-19, and by Subdivision 3 of Section 104-2-24
of the Revised Statutes of Utah 1933.

29. That the Court finds against all of the allega-
tions of the plaintiffs' complaint and in favor of all of
the affirmative allegations of the defendants not herein-
before expressly found upon.

30. That the plaintiffs offered no testimony in
support of the allegations of their second cause of action
and the Court therefore makes no findings on any of the al-
legations of said second cause of action.

From the foregoing Findings of Fact, the Court makes
and files the following:

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CONCLUSIONS OF LAW

1. That a Decree should be entered in the above entitled cause dismissing plaintiffs' first cause of action the complaint with prejudice, as against the defendants herein.

2. That a Decree should be entered in the above entitled cause dismissing plaintiffs' second cause of action the complaint as against the defendants herein.

3. That a Decree should be entered in said cause to the effect that the defendants, Amasa L. Clark and Joseph Robinson, are the owners in fee simple title of the premises described in paragraph 23 of the Findings of fact herein, and that Decree be entered quieting title in said defendants thereto.

4. That said defendants are entitled to their costs of action.

Let judgment be prepared accordingly.

Dated this 27th day of November, 1939.

LEWIS JONES

District Judge.

Filed: November 27th, 1939.

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0325-

(Title of Court & Cause Omitted)

D E C R E E

This cause having come on regularly for trial on the 14th day of September, 1939, at 10 o'clock A. M., before Honorable Lewis Jones, Judge of said Court, without a jury P. C. O'Malley and George Mason appearing for the plaintiffs and William J. Lowe of Stephens, Brayton & Lowe, appearing for the defendants Amasa L. Clark and Joseph E. Robinson, said action having been dismissed as to Box Elder County, and the parties having offered their testimony and the Court having continued said hearing to the 9th day of October, 1939, at 2 o'clock P.M., and the parties having offered further evidence at said adjourned hearing and having argued and submitted the cause and the Court having taken the matter under advisement, and the Court having thereafter on the 23rd day of October, 1939, rendered its oral decision in Open Court in favor of the defendants and against the plaintiffs, and having directed that Findings of Fact and Conclusions of Law be prepared in keeping with said oral decision, and said Findings of Fact and Conclusions of Law having been entered and filed herein in keeping with said

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25- Order of the Court;

NOW, THEREFORE, in conference with the said
ings of Fact and Conclusions of Law, it is by the
t hereby ADJUDGED:

1. That the plaintiffs, or either of them, have
state, right, title, interest, claim or demand of any
re or description, or right of possession, in or to
real property, hereafter described, or any part there-
and that the plaintiffs' complaint as to the first
e of action be, and the same is, hereby dismissed
prejudice as against the defendants Amasa L. Clark
Joseph E. Robinson.

2. That the defendants Amasa L. Clark and Joseph
Robinson are the owners in fee simple absolute and in
possession and entitled to the possession of the
owing described real property situate in Box Elder
ty, State of Utah, to-wit:

The E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 12, Township 11 North,
Range 3 West, Salt Lake Meridian.

3. That the plaintiffs herein, and each of them,

all persons claiming under them, or any of them, be

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0324 perpetually restrained and enjoined from settling up or making any claim to or upon the real property herein above described, or any part thereof, and the title of the defendants herein, Amasa L. Clark and Joseph E. Robinson, to said property is hereby quieted against all claims, demands or pretensions of the plaintiffs herein, or any of them, and of all persons claiming under them, or either of them.

4. That the plaintiffs' second cause of action be, and the same is, hereby dismissed.

5. That defendants recover their costs herein taxed the sum of \$4.30.

And Judgment is hereby entered accordingly.

Dated this 27th day of November, 1939.

LEWIS JONES

District Judge.

Filed November 27th, 1939.

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(Title of Court & Cause Omitted)

AFFIDAVIT OF SERVICE OF PAPERS BY MAIL.

M. S. Higgins, being first duly sworn, deposes and says: that she served the attached Notice of Hearing, proposed Findings of Fact, Conclusions of Law and Judgment upon the plaintiffs by depositing a true copy thereof in the United States Post Office, at Salt Lake City, Utah, postage prepaid, on the 22nd day of November, 1939, enclosed in an envelope addressed to P. C. O'Malley, Attorney, Hub Building, Pocatello, Idaho, that being the Post Office Address of said P. C. O'Malley, the said P. C. O'Malley being the attorney of record for the plaintiffs, and that upon said 22nd day of November, 1939, there was regular communication by mail between said Salt Lake City, Utah, and said Pocatello, Idaho.

M. S. HIGGINS

Subscribed and sworn to before me this 22nd, day of November, 1939.

H. CRISTENSEN

Notary Public, Residing
at Salt Lake City, Utah.

MY COMMISSION EXPIRES:

10-10-42.

Transcript

03 28 (Title of Court & Cause Omitted)

N O T I C E

TO THE PLAINTIFFS AND TO THEIR ATTORNEYS P. C. O'MALLEY
AND GEORGE M. MASON:

YOU, AND EACH OF YOU, will please take notice
that Findings of Fact, Conclusions of Law and Decree in
favor of the defendants Amasa L. Clark and Joseph E. Rob-
inson, and against the plaintiffs, as heretofore served
upon you, have this day been signed by Honorable Lewis
Jones, Judge of the above entitled Court. Said Findings
of Fact, Conclusions and Decree have been filed and are
now of record in said cause.

Dated this 27th day of November, 1939.

STEPHENS, BRAYTON & LOVE

Attorneys for defendants, Amasa
L. Clark and Joseph E. Robinson

nscrip

130

(Court & Cause Omitted)

O R D E R .

Good cause appearing therefor, it is hereby
ordered that the plaintiff be given to and including
the 15th day of February, A. D. 1940, within which to
appear, serve and file her proposed bill of exceptions
in the above named cause.

Dated, Brigham, Utah, December 11th, 1939.

LEWIS JONES

District Judge.

Transcript

033/

(TITLE OF COURT & CAUSE OMITTED)

M O T I O N.

Comes now the plaintiffs, by and through their counsel, P. C. O'Malley and George M. Mason, and moves this Honorable Court to set and fix Tuesday, the 13th day of February, 1940, as the time and date, and the Court Room in the Court House of Box Elder County, as the time and place to hear and settle the Bill of Exceptions, in the above entitled case, and after such hearing for the Court to make the proper order settling the said Bill of Exceptions.

Dated this 30th day of January, 1940.

P. C. O'MALLEY

Residence, Pocatello,
Idaho.

GEORGE M. MASON

Residence: Brigham City,
Utah; Attorneys for
Plaintiffs.

Filed: January 31st, 1940.

mscript

332

(Title of Court & Cause Omitted)

N O T I C E

Of Time and Place of Calling Up for Hearing
And Settlement By The Court of Bill of Exceptions.

To Amasa L. Clark, and Joseph E. Robinson, defend-
ants, and to Messers. Stephens, Brayton and Lowe, attor-
neys of record for the above named defendants, Amasa L.
Clark and Joseph E. Robinson;

You and each of you will please take Notice, that
counsel for plaintiffs will on Tuesday, February 13th,
1910, at 10 o'clock in the forenoon of said day, or as
soon thereafter as the Court can hear the matter, at
the Court-Room, in the Court House of Box Elder County,
Brigham City, Utah, call for hearing and settle-
ment of the Bill of Exceptions, consisting of the complete
Reporters' Transcript, of all the proceedings and evi-
dence submitted at the trial of said cause and will move
the Court to make a few typographical corrections in said
mscript, and after said corrections are made, for the
Court to make an order settling said Bill of Exceptions.
The typographical errors sought to be corrected are as

follows:

Transcript

333/

- a- Substitute the letter "b" for the letter "t" in the word "because", in line 18, page 4.
- b- Substitute the word "then" for the word "there" in last line, on page 24.
- c- Strike out the word "no" that appears between words "paid" and "more", in line 5, page 34.

Dated this 30th day of January, 1940.

P. C. O'MALLEY

Residence: Pocatello, Idaho.

GEORGE M. MASON

Residence: Brigham City, Utah,
Attorneys for plaintiffs.

Filed: January 31st, 1940.

ranscript

1333

(Title of Court & Cause Omitted)

AFFIDAVIT OF SERVICES OF PAPERS BY MAIL.

STATE OF IDAHO)
) ss.
COUNTY OF BLAINE)

P. C. O'MALLEY, being first duly sworn, deposes and says: that he is one of the attorneys for all of the plaintiffs in the above entitled action; that he served the following motion and notice in the above entitled cause, to-wit: Plaintiffs motion for the Court to set Tuesday, February 13th, 1940, and the Court Room at the Court House, in Brigham City, Utah, as the time and place for to hear and settle the bill of exceptions, in the above entitled cause, and also, the plaintiffs notice that counsel for plaintiffs would call the said matter up for hearing, and move the Court to settle the said bill of exceptions, on the said Tuesday, the 13th day of February, 1940, by depositing a true copy of the said motion, and a true copy of the said notice in the United States Post Office, at Pocatello, Idaho, postage prepaid, on the 30th day of January, 1940, enclosed in

Transcript

0334 and LOWE, attorneys and Counsellors at Law, Walker Bank Building, Salt Lake City, Utah, that being the Post Office address of said Stephens, Brayton and Lowe, the said Stephens, Brayton and Lowe being the attorneys of record for the defendants, Amasa L. Clark and Joseph E. Robinsen, and that upon the said 30th day of January, 1940, there was regular communication by United States Mail between said Pocatello, Idaho, and in Salt Lake City, Utah.

P. C. C'MALLEY

Subscribed and sworn to before me this 30th day of January, 1940.

CARL A. CHRISTENSEN

Notary Public, Residing
at Pocatello, Idaho.

MY COMMISSION EXPIRES:

February 14th, 1943.

FILED: January 31st, 1940.

mscript

34

(Title of Court & Cause Omitted)

STIPULATION

The plaintiffs, through their attorneys P. C. Valley and George Mason, have filed herein their Motion with Notice that they expect to ask the Court to grant the Bill of Exceptions in said cause at the Courtroom of said Court on Tuesday, February 13th, 1940, at 10 o'clock A. M., and that counsel for defendants being desirous of being present at such hearing and it appearing; that counsel for defendants will be absent from the State of Utah at the time said matter is noticed for hearing; it is therefore

STIPULATED AND AGREED by and between counsel for plaintiffs and counsel for defendants that the hearing of said Motion may be continued to be heard on Monday, February 19th, 1940, at 10 o'clock A. M., or as soon thereafter as the Court can hear the same. In the event the Court cannot hear said matter on said date, it is agreed that the earliest possible date thereafter shall be designated for the hearing of said Motion, each party to be notified by the Clerk of said Court of such date of

Transcript
CJ34 hearing.

Dated this 1st day of February, 1940.

P. C. O'MALLEY

and

GEORGE MASON

Attorneys for Plaintiffs.

STEPHENS, BRAYTON & LOVE

Attorneys for Defendants, Amasa
L. Clark and Joseph E. Robinson

Filed: February 5th, 1940.

Manuscript

315

(Title of Court & Cause Omitted)

NOTICE OF APPEAL TO THE SUPREME COURT.

THE DEFENDANTS, AMASA L. CLARK AND JOSEPH E. ROBINSON, DEFENDANTS, AND TO MESSRS. STEPHENS, BRAYTON AND ONE, ATTORNEYS AND COUNSELLORS OF RECORD FOR THE DEFENDANTS, AMASA L. CLARK AND JOSEPH E. ROBINSON, AND TO THE ELDER COUNTY, DEFENDANT, AND TO WALTER G. MANN, COUNTY ATTORNEY OF BOX ELDER COUNTY, UTAH.

YOU, AND EACH OF YOU, PLEASE TAKE NOTICE:

That the above named plaintiffs, Laura Morris, Special Administratrix of the estate of Washington Pocatello, and Minnie Pocatello, both deceased, and Lucy Pocatello Johnson and Maude Pocatello Racehorse, and Josephine Pocatello and Ray Pocatello, heirs of the estate of Washington Pocatello and Minnie Pocatello, deceased, the above named plaintiffs, hereby appeal, and by this notice does appeal to the Supreme Court of the State of Utah, from all and every part of the judgment made and entered herein, and filed on the 27th day of November, 1939, in the above entitled cause, insofar as the said judgment is in favor of the defendants Amasa L. Clark and Joseph E. Robinson.

This appeal is taken on questions of both law and

of.

Residence Pocatello, Idaho.

Residence Brigham City,
Utah; Attorneys for the
Plaintiffs.

County Clerk.

County Attorney, Box Elder
County, Utah.

Filed: February 23rd, 1940.

ranscript

336

(Title of Court & Cause Omitted)

AFFIDAVIT OF IMPECUNIORITY.

COUNTY OF IDAHO)

) ss.

COUNTY OF BINGHAM)

I, Lucy Pocatello Johnson, do solemnly swear that owing to my poverty, I am unable to bear the expense of the action or legal proceedings of the appeal which I am about to take, and that I verily believe I am justly entitled to the relief sought by such action, legal proceedings or appeal.

LUCY POCATELLO JOHNSON

Subscribed to and sworn to before me this 30th day of January, 1940.

BRUCE C. GUNN

Notary Public; Residence
Fort Hall, Idaho.

My commission expires November 22, 1942.

Filed: February 23, 1940.

Transcript
0337

(Title of Court and Cause Committed)

AFFIDAVIT OF IMPECUNIOSITY

STATE OF IDAHO)
) ss.
COUNTY OF BINGHAM)

I, Maude Pocatello Racehorse, do solemnly swear that owing to my poverty I am unable to bear the expense of t action or legal proceedings of the appeal which I am abo to take, and that I verily believe I am justly entitled t the relief sought by such action, legal proceedings or appeal.

MAUDE POCA TELLO RACEHORSE

Subscribed to and sworn to before me this 29th day of January, 1940.

BRUCE C. GUNN

Notary Public; Residence, Fort Hall, Idaho.

My Commission Expires November 22, 1942.

Filed: February 23rd, 1940.

Transcript

0338

(Title of Court & Cause Omitted)

AFFIDAVIT OF IMPECUNIORITY.

STATE OF IDAHO)
) ss.
COUNTY OF BINGHAM)

I, Josephine Pocatello, do solemnly swear that
owing to my poverty, I am unable to bear the expense
of the action or legal proceedings of the appeal which
I am about to take, and that I verily believe I am
justly entitled to the relief sought by such action,
legal proceedings or appeal.

JOSEPHINE POCATELLO

Subscribed and sworn to before me this 27th day
of January, 1940.

BRUCE C. GUNN

Notary Public; Residence
Fort Hall, Idaho.

My Commission expires November 22nd, 1942.

Filed: February 23, 1940.

Transcript

0339 (Title of Court & Cause Omitted)

AFFIDAVIT OF IMPECUNIOSITY.

STATE OF IDAHO)
) ss.
COUNTY OF BINGHAM)

I, Ray Pocatello, do solemnly swear that I, owing to my poverty, am unable to bear the expense of the action or legal proceedings of the appeal which I am about to take, and that I verily believe I am justly entitled to the relief sought by such action, legal proceedings or appeal.

RAY POCATELLO

Subscribed to and sworn to before me this 1st day of February, 1940.

BRUCE C. GUNN

Notary Public; Residence
Fort Hall, Idaho.

My Commission Expires: November 22nd, 1942.

Filed: February 23rd, 1940.

ranscript

339

(Title of Court & Cause Omitted)

AFFIDAVIT OF IMPECUNIOSITY.

STATE OF UTAH)
) ss.
COUNTY OF BOX ELDER)

I, Laura Morris, as Special Administratrix of the
estate of Washington Pocatello and Minnie Pocatello, both
deceased, do solemnly swear, that no money whatsoever
came into my hands as Administratrix of the estate of
Washington Pocatello and Minnie Pocatello, both deceased,
and that there is no money in the estate to bear the
expense of the action or legal proceedings of the appeal
which I am about to take, and that I verily believe that
the heirs and the estate is justly entitled to the relief
sought by such action, legal proceedings or appeal.

LAURA MORRIS

Subscribed and sworn to before me this 23rd day
of February, 1940.

GEORGE M. MASON

Filed: February 23rd,
1940.

Notary Public; Residence
Brigham City, Utah

Transcript

0340 (Title of Court & Cause Omitted)

AFFIDAVIT (F MAILING COPY OF NOTICE OF APPEAL.

STATE OF IDAHO)
) ss.
COUNTY OF BANNOCK)

P. C. O'Malley, being first duly sworn, deposes and says: That he is one of the attorneys of record for all the plaintiffs in the above entitled action; that he served the following notice in the above entitled action or cause to-wit: Plaintiffs' Notice of Appeal to the Supreme Court of the State of Utah, from judgment entered and filed on the 27th day of November, 1939, in the above entitled cause upon the defendants Amasa L. Clark and Joseph E. Robinson and upon Messrs Stephens, Brayton and Lowe, attorneys of record for the defendants Amasa L. Clark and Joseph E. Robinson, on the 23rd day of February, 1940, by placing a true copy of said notice of appeal, in a sealed envelope, plainly addressed to Amasa L. Clark, in care of the Davis County Bank at Farmington, Utah, and by placing a true copy of the said notice of appeal, in another sealed envelope, plainly addressed to Messrs Stephens, Brayton and Lowe,

Transcript

0340 Attorneys at Law, Walker Bank Building, Salt Lake City, Utah, that both sealed envelopes so plainly addressed was placed by affiant on the 23rd day of February, 1940, in the United States Post Office, in the City of Pocatello, Idaho, and that full postage prepaid was placed on each envelope, and that on the said 23rd day of February, 1940, there was regular communication by United States Mail between said Pocatello, Idaho, and Farmington, Utah, and between the said Pocatello, Idaho, and Salt Lake City, Utah.

P. C. O'MALLEY

Subscribed and sworn to before me this 23rd day of February, 1940.

H. J. SWANSON

Notary Public; Residence,
Pocatello, Idaho.

My Commission Expires:

November 16th, 1942.

Filed: February 24th, 1940.

Transcript

0341 (Title of Court & Cause Omitted)

OBJECTIONS TO SETTLEMENT OF BILL OF EXCEPTIONS

Come now Amasa L. Clark and Joseph E. Robinson, two the defendants in the above entitled cause, and object to the settlement of any Bill of Exceptions in the above entitled cause for the reasons following:

1. That the plaintiffs herein or their counsel, or either of them, have never prepared a draft of a Bill of Exceptions and have never served the same or a copy thereof upon the defendants within the time and in the manner prescribed by Subdivision 1 of Section 104-39-4 Revised Statutes of Utah, 1933.

2. That no draft of proposed Bill of Exceptions has been prepared as is provided by Subdivision 3 of Section 104-39-4 Revised Statutes of Utah, 1933, and that no such draft of proposed Bill of Exceptions has been served on adverse party that amendments might be proposed thereto that none of the provisions of the Statutes of the State of Utah have been complied with in the preparation, service and settlement of a proposed Bill of Exceptions in said cause.

3. That none of the provisions of Subdivision 4 of

unscript

7/ Section 104-39-4 Revised Statutes of Utah 1933

re been complied with in the preparation, service, and
ling of a proposed Bill of Exceptions in said cause.

4. That the Court has no jurisdiction to settle any
ll of Exception in said cause by reason of the failure of
e plaintiffs and their counsel to comply with the Stat-
es of the State of Utah and in particular with the pro-
sions of Section 104-39-4 and each of the six Subdivis-
ns thereof and the rules and decisions of the Court
vering the preparation, service, filing and settlement
Bill of Exceptions on Appeal to the Supreme Court of
e State of Utah.

Dated this 26th day of February, 1940.

STEPHENS, BRAYTON & LOWE

Attorneys for Amasa L. Clark and
Joseph E. Robinson.

led: February 26th, 1940.

Transcript

0342 (Title of Court & Cause Omitted)

AFFIDAVIT IN SUPPORT OF MOTION.

STATE OF UTAH)
)
COUNTY OF SALT LAKE) ss.

M. S. Higgins, being first duly sworn, deposes and says: that she is a stenographer in the office of Stephens Brayton & Lowe, that on or about the 19th day of January, 1940, George M. Mason, one of the attorneys for plaintiffs called at the office of said firm and advised that he had copy of the transcript in the above entitled case and desired to serve the same upon said firm; that affiant at Mr. Mason's suggestion wrote receipt of copy of said transcript and thereupon said attorney desired to take said transcript with him; that affiant stated that she would not accede of copy without retaining said copy; that affiant then called Mr. Lowe on the telephone, he then being absent from the office, and asked instructions; that the said Attorney Mason then stated that this was not a Bill of Exceptions but was only a copy of the Reporter's notes and that he did not understand that plaintiffs were required to furnish attor

transcript

42 for the defendants with a copy of the transcript; that said attorney Mason then agreed to leave said transcript for a short time after which he would call and get the transcript or we should return it to him; that on about January 22nd, 1940, said transcript was returned and left with the Clerk of the District Court of Brigham City for the order of Mr. Mason.

Further affiant saith not.

M. S. HIGGINS

Subscribed and sworn to before me this 21st day of February, 1940.

H. CHRISTENSEN

Notary Public; Residing at
Salt Lake City, Utah.

My commission expires:
10/10/42

Dated: February 26, 1940.

Transcript

(Title of Court & Cause Omitted)

JANUARY TERM, 1940, MONDAY, THE TWENTY SIXTH DAY OF
FEBRUARY, 1940, MINUTEBOOK 19, PAGE 274.

#5691.

The motion of plaintiff, as filed in this Court on the 31st day of January, 1940, came on regularly for hearing, P. C. O'Malley, Esq., and George M. Mason, Esq., appearing as counsel for plaintiffs and William J. Lowe, of counsel, appearing for Defendants. Said motion is argued by counsel for the respective parties. Whereupon, the Court directs the reporter to make certain amendments to the transcript and on motion of Plaintiff the further hearing on said motion is continued to Monday, March 11, 1940, at 11 o'clock A. M.

Entered: February 26th, 1940.

manuscript

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(Title of Court & Cause Omitted)

PETITION FOR ORDER GRANTING
RELIEF

Comes now the above named plaintiffs by their counsel, P. C. O'Malley and George M. Mason, and petition this honorable Court under Section 104-14-4 Revised Code of the State of Utah, 1933, to make an order granting relief to the above named plaintiffs by permitting counsel for plaintiffs to file and serve a Proper Bill of Exceptions in the above entitled case, a copy of said Bill of Exceptions being hereto attached and made part of this petition, made upon the following showing and grounds, to-wit; that the chief counsel for the plaintiffs in the above entitled action is P. C. O'Malley of Pocatello, Idaho; and that this case is the first case that said counselor ever conducted in the State of Utah; that the failure to file a proper Bill of Exceptions was not caused through negligence, inattention, or excusable neglect, but was caused through his honest mistake, and inadvertence; that the said counsel honestly and sincerely believed that the Reporter's transcript in

Transcript

0343 the above entitled case constituted a proper Bill of Exceptions in its self, and there being no material objections or exception taken during the trial of the case, and the only desire was to have the reporter's transcript cert up to the Supreme Court, that it was not necessary to draft full Bill of Exceptions; that counsel honestly and sincerely believed that the procedure taken by him was sufficient and that all that was necessary to do was to have the Court settle the reporter's transcript as a Bill of Exceptions; which should bring the entire record in the case before the Supreme Court; that said counsel spent considerable time studying the Statutes of the State of Utah and the decisions of its Supreme Court pertaining to appeals and honestly believed this being an equity case, that under the Constitution of Utah and the long line of well defined decisions of the Supreme Court, that on appeal in equity cases, the Supreme Court must pass upon both the facts and the law in the case therein; that the Supreme Court must have all the testimony and records before it to rightly decide the case; that on such appeal the Supreme Court may try the case de novo, as held in the case of Doe vs. Doe, 48 U. 200, also

script
24 being held by the Supreme Court in the case of
er vs. Ting Warehouse Co. 71 U. 303, that "Relief in
ty being sought, we are required to weigh the evidence
ting to or bearing upon the facts challenged by the
gments of error and determine from such considera-
n whether the findings of the court are contrary to the
ght of evidence, "and in the case of Jensen vs. Birch-
ek Ranch Co. 76 U. 356, the court held, "a proceeding
quiet title to the right to use of water is a suit in
ity and not an action at law. In reviewing that part
the decree which fixes the rights of the parties to the
ers in dispute, we are required to pass upon questions
law and of fact -- Article 8, Sec. 9, Constitution of
h". That it was with those cases in view that counsel
ored under the impression that in all equity cases the
er Court would have to settle the reporter's transcript
certify it up to the Supreme Court so as all the facts
the case would be before the Court; and that whether
proceedings were termed settlement of Bill of Excep-
ns or settlement of reporter's transcript was immater-
and said counsel was reliably informed time and again

Transcript

0344 that in Utah, the reporter's transcript was taken as a Bill of Exceptions; that counsel was greatly surprised when at the hearing in plaintiffs motion to settle the reporter's transcript as a Bill of Exceptions, objections were filed that no proper Bill of Exceptions under the Utah law was filed in this case; that counsel had acted promptly and the judgment was entered, and recognized that the time for preparing, filing and serving the Bill of Exceptions would expire on the 15th of February, 1940; that counsel for plaintiffs had caused the reporter's transcript made up by the reporter to be served on counsel for defendants on or about the 19th day of January, 1940; and counsel for plaintiff did on or about the 30th day of January make a motion that the court fix the 13th day of February, 1940, in the Court house at Box Elder County, Utah, as the time and place to settle the Bill of Exceptions in this case, and counsel for plaintiff honestly believed that the reporter's transcript so served, constituted a Bill of Exceptions in this case; and filed notice of time and place, calling upon said Bill of Exceptions for settlement more than 10 days before the date set and did serve a true copy of said

Manuscript

4 Motion and Notice upon counsel for defendants;
That counsel for defendants did on February 1, 1940, acknowledge receipt of said Notice, and write a letter to counsel for plaintiff stating that attorney conducting defendants' case, William J. Lowe, could not be conveniently present on February 13, 1940, that said letter is hereto attached and marked "Exhibit A" and made a part of this petition for all intents and purposes as if written out in full herein; that on the said 1st day of February, 1940, counsel for defendant prepared a stipulation stating that plaintiffs through their attorneys, P. C. Valley and George Mason, had filed therein their Motion and Notice that they expect to ask the Court to settle a Bill of Exceptions in said Cause in said Court on Tuesday, February 13, 1940, at 10:00 a.m., and that counsel for defendants being desirous of being present at said hearing and it appearing that counsel for defendants will be absent from the State of Utah the time said matter is noticed for hearing, it is therefore stipulated and agreed that the hearing of said Motion may be continued to be heard on February 19, 1940, at 10:00 a.m., or as

Transcript

0345 soon thereafter as the court can hear the case, that counsel for defendant filed no objections at that time or at any time before the 15th day of February, 1940 but asked counsel for plaintiffs to stipulate that the time for taking up said Motion be continued to a date after

the time for preparing, serving and filing such Bill of Exceptions would expire; that if the matter was heard on the 13th day of February, 1940, and not continued on request of counsel for defendant, and counsel had filed objection on or before the 13th day of February, 1940, there was still ample time left for plaintiffs to file a proper Bill of Exceptions and still be within the time set by the Court at the period of expiration, or the Court could have Ex Parte granted an extension of a few more days time to file and serve a Bill of Exceptions; that counsel for the defendant by his letter and stipulation requesting extension of time for said hearing past the date of expiration on said motion and not having objected in any manner to the procedure taken by counsel for plaintiffs, I believed that the proceedings I had taken were regular and that the reporter's

manuscript
AS— transcript would be settled as a Bill of Ex-
ceptions, and then the filing, by counsel for the defen-
ds after the time had expired an objection to the
jurisdiction of the Court came as a complete and great
surprise to counsel for plaintiffs, as it was then too
late to file a proper Bill of Exceptions without an order
of the Court; that this Court has the authority within
its jurisdiction to grant the relief asked for in this
petition, and grant permission to counsel for plaintiffs
to file and serve the attached Bill of Exceptions; that
the granting of said relief is in the furtherance of
justice so plaintiffs may properly submit the matter to
the Supreme Court for final decree; that this petition
is supported by the affidavit of counsel for plaintiff and
made upon the records and files, and the justice of
the case.

WHEREFORE, Plaintiffs pray that this Honorable Court
grant this petition on March 11th, 1940, at the time set
for further action on the settlement of the Bill of Excep-
tions, and after due hearing thereon and in consideration
of the same that this Court make an order that plaintiff may

Transcript

0346

file and serve the said Bill of Exceptions.

Dated this 2nd day of March, 1940.

Respectfully submitted:

P. C. O'MALLEY

Attorney for Plaintiffs,
Residence: Pocatello, Idaho

GEORGE M. MASON

Attorney for Plaintiffs;
Residence, Brigham City, Utah

Manuscript

946

Copy of Letter.

Law Offices
Stephens, Brayton and Lowe
Walker Bank Building
Salt Lake City, Utah

February 1st, 1940.

J. P. C. O'Malley
Attorney at Law
Bank Building
Coeur d'Alene, Idaho

Dear Mr. O'Malley:

Re: Morris vs. Clark et al

We are just in receipt of Motion with Notice calling for the settlement of Bill of Exceptions in the above captioned case at Brigham City on Tuesday morning, February 13th, 1940, at 10:00 o'clock A.M. The writer had previously accepted an invitation from former Governor Morley Griswold of Nevada to be the guest speaker at the Lincoln Day Banquet in Las Vegas, Nevada, on the evening of February 12th. I am just in receipt of the following telegram:

(Copy of Telegram Omitted)

This morning I am in receipt of a letter from the Governor which reads as follows:

(Copy of Letter Omitted)

Since I had accepted the Governor's invitation and since I am just in receipt of letter from the Director of the Young Republican Club at Las Vegas, advising that all arrangements have been made for me at Las Vegas for the Banquet on February 12th at 8 o'clock, I see no out in this matter. It was my hope to accept Governor Morley's

Transcript

0346 invitation for a few days fishing on Lake Me
in addition to being present at the banquet.

This makes it impossible for me to be present in Court at Brigham City at the time you have noticed these matters for hearing. We are certain Judge Jones, under circumstances, would grant a continuance of this matter.

It occurs to us that we can probably arrange by Stipulation for the hearing of the Motion, particularly since you indicate you desire additional time within which to prepare your abstracts. We are, therefore, preparing Stipulation, continuing the hearing of this matter to the following Monday, February 19th, 1940, or as soon thereafter as the Court can hear the same. We assume that Judge Jones would be glad to take the matter up at Chambers if he is regularly holding Court.

Copy of this letter and Stipulation goes forward to Judge Jones for his information, and we await your early reply.

Yours very truly,

STEPHENS, BRAYTON & LOWE

By William J. Lowe.

WJL:mh

Enc.

REPLY.

Stephens, Brayton & Lowe
Law Offices, Walker Bank Bldg.
Salt Lake City, Utah

Dear Mr. Lowe:

Re: Morris vs. Clark, et al

Replying to your letter of February 1st, I am very willing to sign the Stipulation that the Court may post

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Machine-generated OCR, may contain errors.

Transcript

2342 the settling of the Bill of Exceptions in the above entitled matter to the 19th of February, 1940, as we are still well within the 90 day limit for Notice of appeal, and I may even file such Notice before that date.

(Part of Letter Omitted-not essential).

Will sign and send out the Stipulation today.

Very truly yours,

P. C. O'MALLEY

Transcript
0347 (Title of Court & Cause Omitted)

AFFIDAVIT IN SUPPORT OF PETITION

STATE OF IDAHO)
) ss
COUNTY OF BANNOCK)

P. C. O'Malley, being first duly sworn, deposes and says: That he is an attorney at law, admitted to practice before the State Courts of Oregon and Idaho, and before the Federal Court of the State of Idaho, that he is a resident of the city of Pocatello and that he has practiced law in the city of Pocatello and the State of Idaho for thirty years; that he is chief counsel of record for the plaintiffs in the above entitled action; that four of the plaintiffs mentioned are the only heirs of the estate of Washington Pocatello and Minnie Pocatello, both deceased, that all of said four heirs are Indians, residing on the Fort Hall Indian Reservation of Idaho; that the plaintiff, Laura Morris, was appointed by the above entitled court as special administratrix of the estate of Washington Pocatello and Minnie Pocatello, deceased; that on the 27th day of November, 1939, that this Court made its findings

Transcript

347 action in favor of the defendants, Amasa L.

Clark and Joseph E. Robinson, and against all of the plaintiffs in said cause, and said findings of fact and rulings of law and decree were filed of record by the clerk of the above entitled Court and became a final judgment in said Court; that on said date November 27, 1939, that plaintiffs filed exception to the said findings of facts, rulings of law, and decree, and served a copy of same upon counsel for the defendants, Amasa L. Clark and Joseph E. Robinson, that the affiant as chief counsel for the plaintiffs, at an early date after entering of said judgment, commenced steps to prosecute an appeal from said judgment to the Supreme Court of the State of Utah and paid the court reporter of said Court the estimate cost of preparing a reporter's transcript of the proceedings taken at the trial of said cause, including all testimony presented by both parties, rulings of the Court, etc., that shortly thereafter the said reporter secured from Judge Lewis Jones an order extending the time to prepare, file and serve plaintiffs' Bill of Exceptions to and including the 15th day of

Transcript

0344

February, 1940, that on or about January 2nd,

1940, the court reporter completed the transcript and sent the original to this affiant and the same was received on or about January 4th, 1940; that on this affiant read the burden of perfecting the appeal by taking all the proper steps therein including filing of the Bill of Exceptions; that this affiant did not look to or expect his Utah associate counsel to be in any way responsible for any part of the procedure; that plaintiffs clients were and are persons of very little means and so far have been able to advance very little money for any of the costs in this entire proceedings and this affiant not having had previous experience in appealing a case to the Supreme Court of the State of Utah, and this case being the first case that affiant ever prosecuted in the courts of Utah, this affiant made an honest and earnest effort to prosecute this case through the District Court and has made an honest and earnest effort to take every precaution and proper step in the prosecution in this appeal and has made an honest attempt, although a mistaken one, to follow the statutes of

transcript

448 this affiant misconstrued the law and made an
nest mistake as to the procedure of filing a proper Bill
Exceptions when this affiant had every intention to
le what he deemed necessary as a proper Bill of Exceptions;
at this affiant was casually informed by different attor-
ys from Utah that in this case the reporter's trans-
ript constituted a Bill of "xceptions, that it was nec-
sary to first secure the reporter's transcript and serve
on counsel for defendants; that affiant made his mistake
not incorporating a copy of the reporter's transcript
a properly formed Bill of Exceptions; that affiant avers
at he had frequently before him the revised statutes of
e State of Utah and did carefully consider Section 104-
-4, Bill of Exceptions-Preparation and Service; and all
her sections of the Code pertaining to Exceptions and
rtaining to Appeal and considered them all together, and
ad a number of the decisions of the Supreme Court of the
ate of Utah relating to Bills of Exception; that this
se being an action to quiet title, therefore an equity
se, affiant construed the Constitution of Utah to say
at in all Appeals of equity cases that the Supreme

Transcript

0348 Court passes upon all the facts of the case as well as the law; that this affiant read and studied a number of the long line of decisions of the State of Utah holding that on appeals in equity cases, the Supreme Court pass upon the facts as well as the law; that this affiant asserts that in a case of equity, the proper thing to do on appeal was to have the entire record in the case lodged with the Supreme Court, and having filed an Exception to the Decision and served a copy on counsel for defendants; that this affiant came to the erroneous conclusion that in the action to quiet title, which is an equity case, that the reporter's transcript, together with the exhibits, would be settled by the Court and certified to the Supreme Court and that the reporter's transcript in such cases was a proper Bill of Exceptions; that nothing having occurred during the trial that could reasonably be excepted to and the exceptions running only to the findings of fact, conclusions of law, and decree, and counsel for plaintiffs having filed an exception to such and served the same on defendants' counsel, this affiant did not deem it necessary to serve further exceptions; undoubtedly this was a mistaken and erroneous

mscript

8-9 conclusion and procedure, but it was done with best intent; that the affiant, when he received the reporter's transcript and carefully considered it, mailed it to the clerk of the Court to be filed, then later wrote to his Associate Counsel at Brigham, Utah, to withdraw the said reporter's transcript from the Clerk's office and serve the same by mail on Counsel for defendants; that said Associate Counsel notified said affiant that he was going to Salt Lake City in person in a few days, that he would then make the service at that time; that said Associate Counsel had no knowledge that this affiant had not prepared and served a proper Bill of Exceptions; that the said Associate Counsel did make the service of the reporter's transcript upon Counsel for defendants on the 19th day of January, 1940; that this affiant felt certain that all that remained to be done was to motion the Court to set a date for a hearing and settlement of the reporter's transcript, that this affiant also feeling certain that the reporter's transcript was termed in the State of Utah a Bill of Exceptions,

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0349 his Motion, order and notice; that this affiant took precaution to write to the Clerk of the Court to learn what dates would be Law and Motion days on the calendar and was informed that February 13, 1940, would be a Law and Motion day and on the 30th day of January, 1940, this affiant prepared and mailed for filing a notice of time and place, calling up for hearing and settlement by the Court of the Bill of Exceptions; that this notice was received by Counsel for defendants on the 1st day of February, 1940, this notice was accompanied by copy of the motion prepared and filed; same day moving the Court to fix Tuesday the 13th day of February, 1940, as the time and date, and the Courtroom in the Court house of Box Elder County, Utah, as the place to hear and settle the Bill of Exceptions; that this affiant was confident and honest in his own mind at that time that all that was necessary to do in an equity case was to settle the reporter's transcript as a Bill of Exceptions; that the method of appeal in Utah is vastly different than the method of appeal in Idaho which procedure this affiant was familiar with; that this affiant never had occasion to perfect an appeal to the Federal Circuit Court of Appeals,

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149 which procedure is followed in the State of

h; that Counsel for the defendants received the above

tioned notice and motion on the first day of Febru-

r, 1940, and did not make any objection and did not,

within 10 days or any other time, until the matter was

finally presented to the Court, file any objection; that

Counsel for defendants did on the first day of February,

1940, acknowledge receipt of a copy of said Motion and

copy of said Notice, and did on the 1st day of February,

1940, write a letter to this affiant, stating that it

would be impossible for Counsel for defendants to be

present on the 13th day of February, 1940; that said

letter is attached to the petition and marked "Exhibit A";

that with said letter Counsel for defendants enclosed

a prepared stipulation requesting this affiant to sign

and file the same extending the time for hearing to the

9th day of February, 1940, or as soon thereafter as the

Court could hear the same, for the accomodation of the

Counsel for the Defendants; that the time for filing and

servicing a proper Bill of Exceptions did not expire

until February 15, 1940; that if the hearing was held as

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0349 stated in the Motion and Notice and counsel for defendants filed his objections as he did on the 26th day of February, 1940, there would still have remained time for Counsel for plaintiffs to file and serve a new or proper Bill of Exceptions or if necessary, the Court could have Parte extended the time for a few days to permit such Bill of Exceptions to be filed before the date mentioned in the order expired; that affiant makes this affidavit in support of plaintiffs' petition for permission to be granted leave to file a proper bill of Exceptions, and in making this petition and this affidavit, affiant does not try to avoid a criticism or censure for misconstruing and misinterpreting the law of the State of Utah, as relating to Bills of Exception, but does aver that affiant's clients are poor, untutored and humble Indians, that for twenty years or more the estate of their parents has been lying in the probate division of the District Court of Box Elder County, Utah; that during all those years the Court never took any action on the estate of Washington Pocatello, deceased; never had a hearing during all those years on the final account and petition of the administrator filed in said probate

Transcript

350 proceedings but permitted the same to lie dormant during all those years; that those untutored plaintiffs at different times have tried to have some one take up their cause and try to determine what became of their interest in their father's estate; that now, when they have progressed so far towards submitting their claims, whether wrong or right, to the Supreme Court of the State of Utah, it is not right nor just to penalize them because their counsel made a mistake in not preparing a proper Bill of Exceptions; that in equity, justice and good conscience the Court should, under authority of Section 104-14-4 Revised Statutes of Utah, 1933, grant the relief sought in this case; that if there are any terms to be imposed, to impose same against this affiant; further this affiant saith not.

P. C. O'MALLEY

Subscribed and sworn to before me this 2nd day of March, 1940.

H. J. SWANSON

My Commission Expires - 11/16/42.

Notary Public; Residing at
Pocatello, Idaho.

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0351

(Title of Court & Cause Omitted)

MOTION

TO THE HONORABLE LEWIS JONES, JUDGE OF THE ARCV
ENTITLED COURT:

Comes now the plaintiffs, by and through their
sels, P. C. O'Malley and George M. Mason, and move
Court to hear plaintiffs' Petition for Relief, for t
granted permission to file and serve a proper Bill o
ceptions, on Monday, the 11th day of March, 1940, at
o'clock A.M., the said date and hour being the time
by this Court to further hear matters pertaining to
Bill of Exceptions. And that at such hearing, and af
due presentation of said Petition, and after hearing,
considering the same; that the Court make an Order p
mitting plaintiffs to file and serve a Bill of Excep
tions, in the above entitled case, within such time
the Court in its discretion shall allow.

Dated this 5th day of March, 1940.

GEORGE M. MASON

Attorney for Plain-
tiffs; Brigham City,
Utah.

P. C. O'MALLEY

Attorney for Plaintiffs;
Residing at Pocatello, Id

Transcript

(Title of Court and Cause Omitted)

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NOTICE.

TO AMASA L. CLARK AND JOSEPH E. ROBINSON, ABOVE NAMED DEFENDANTS, AND TO MESSERS STEPHENS, BRAYTON & LOWE, ATTORNEYS FOR THE DEFENDANTS AMASA L. CLARK AND JOSEPH E. ROBINSON:

You, and each of you, please take notice that counsel for plaintiff will on Monday, the 11th day of March, 1940, at 10 o'clock A.M. of said day, at the court room in the courthouse of Box Elder County, in Brigham City, Utah, move the Court to hear and pass upon the Petition of plaintiffs, requesting the Court to grant to plaintiffs the relief asked for in said Petition, by making an Order permitting plaintiffs to file and serve a proposed Bill of Exceptions, at or within such time as the Court may determine; that being the time that the Court continued the hearing to, pertaining to settling a Bill of Exceptions. You are further notified, that if the Court should grant the relief prayed for, plaintiff will ask the Court to sign an Order permitting plaintiffs to file and serve the proposed Bill of Exceptions.

Dated this 4th day of March, 1940.

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03 5-3

P. C. O'MALLEY

Attorney for Plaintiffs;
Residence Pocatello, Idaho

GEORGE M. WILSON

Attorney for Plaintiffs;
Residence Brigham City,
Utah.

(Title of Court and Cause Omitted)

AFFIDAVIT OF MAILING.

STATE OF IDAHO)
) ss.
COUNTY OF BANNOCK)

P. C. O'Malley, being first duly sworn, deposes and says: That he is chief counsel for all of the plaintiffs in the above entitled action, and avers that he did on 5th day of March, 1940, make service by mail upon Messrs Stephens, Brayton and Lowe, attorneys of record for the defendants Amasa L. Clark and Joseph E. Robinson, of the following enumerated instruments; a copy of plaintiffs petition for relief to have the Court make an Order permitting plaintiffs to file and serve a proposed Bill of

Exceptions, together with a copy of the Affidavit of F

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1353 O'Malley, a copy of letter, and copy of proposed
1 of Exceptions, all attached together, and a copy of
motion, moveing the Court to act upon said petition
Monday, the 11th day of March, 1940, and a copy of the
ice of the motion and that the plaintiff would ask the
rt to act on said motion on the 11th day of March,
0, at the hour of 11 o'clock A.M. by placing said copies
in a sealed container, plainly addressed to STEPHENS,
AYTON AND LOHE, Attorneys at Law, addressed to the Walker
nk Building in Salt Lake City, Utah, with postage fully
id attached thereto, and that there wason the 5th day
March, 1940, regular United States Mail communication
etween Pocatello, Idaho and Salt Lake City, Utah, and
is affiant placed the said container, containing said
pies, in the United States Post Office in Pocatello, Idaho.

Signed P. C. O'MALLEY

Subscribed to and sworn to before me, this 5th day
March, 1940.

H. J. SWANSON

Notary Public; Residence
Pocatello, Idaho.

Commision Expires
vember 16, 1942.

Transcript

0354 (Title of Court and Cause Omitted)

AMENDED MOTION.

TO THE HONORABLE LEWIS JONES, JUDGE OF THE ABOVE ENTITLED COURT:

Comes now the plaintiffs, by and through their Counsel P. C. O'Malley and George M. Mason, and moves the Court hear plaintiffs' petition for relief, to grant plaintiff permission to file and serve a proper Bill of Exceptions Monday, the 11th day of March, 1940, at 11 o'clock A.M. the said date and hour, being the time set by this Court further hear matters pertaining to settlement of Bill of Exceptions. And that at such hearing, after due presentation of said petition, and after hearing and considering the same; that the Court will make an Order permitting plaintiffs to file and serve a Bill of Exceptions in the above entitled case, within such time as the Court in its judgment and discretion shall allow.

This motion will be made upon the facts stated in said petition, and the affidavit supporting the same, upon all the records and files in the case, and such other and further evidence, both oral and documentary, which may be

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~~0355~~ produced at the hearing.

Dated this 8th day of March, 1940.

P. C. O'MALLEY

Attorney for Plaintiffs;
Residence Pocatello, Idaho.

GEORGE M. MASON

Attorney for Plaintiffs;
Residence Brigham City, Utah

(Title of Court & Cause Omitted)

AFFIDAVIT OF MAILING.

STATE OF IDAHO)
) ss.
COUNTY OF BANNOCK)

P. C. O'MALLEY, being first duly sworn, deposes and
says: That he is chief counsel for all of the plaintiffs
in the above entitled action, and avers that he did on
the 8th day of March, 1940, make service by mail upon
Messers Stephens, Brayton and Lowe, attorneys of record
for the defendants Amasa L. Clark and Joseph E. Robinson
of a true copy of plaintiffs' Amended Motion to hear
plaintiffs' Petition for Relief, by placing in the United

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States Post Office, at Pocatello, Idaho, a sealed envelope with postage fully prepaid attached thereto, plainly addressed to Messers Stephens, Brayton and Lowe, Attorneys at Law, Address Room 1001, Walker Bank Building, Salt Lake City, Utah, which envelope contained a true copy of said Amended Motion, and that on the 8th day of March, 1940, there was a regular United States Postal connection between the said Pocatello, Idaho and the said Salt Lake City, Utah.

Dated this 8th day of March, 1940.

Signed P. C. O'MALLEY

Subscribed and sworn to before me this 8th day of March, 1940.

H. J. SWANSON

Notary Public, Residence
Pocatello, Idaho.

My Commission Expires:

November 16, 1942.

ranscript

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(Title of Court and Cause Omitted)

OBJECTIONS TO PETITION FOR ORDER GRANTING RELIEF

Come now Amasa L. Clark and Joseph E. Robinson,
two of the defendants in the above entitled cause, and
object to the petition of the plaintiffs for an Order
granting relief and permitting plaintiffs to now pre-
pare, serve and file a Bill of Exceptions in the above
entitled cause for the reasons following:

1. That the plaintiffs herein or their counsel, or
either of them, have never prepared a draft of a Bill of
Exceptions and have never served the same or a copy there-
of upon the defendants within the time and in the manner
prescribed by Subdivision 1 of Section 104-39-4 Revised
Statutes of Utah, 1933.

2. That no draft of proposed Bill of Exceptions
has been prepared as is provided by Subdivision 3 of Sec-
tion 104-39-4 Revised Statutes of Utah 1933 and that no
such draft of proposed Bill of Exceptions has been served
on the adverse party that amendments might be proposed
thereto and that none of the provisions of the Statutes
of the State of Utah have been complied with in the pre-

Transcript

0356 paration, service or settlement of a proposed Bill of Exceptions in said cause.

3. That none of the provisions of Subdivision 4 of Section 104-39-4 Revised Statutes of Utah 1933 have been complied with in the preparation, service and filing of a proposed Bill of Exceptions in said cause.

4. That the Court has no jurisdiction to settle any Bill of Exceptions in said cause by reason of the failure of the plaintiffs and their counsel to comply with the Statutes of the State of Utah and in particular with the provisions of Section 104-39-4 and each of the six Subdivision thereof and the rules and decisions of the Court covering the preparation, service, filing and settlement of Bill of Exceptions on Appeal to the Supreme Court of the State of Utah.

5. That the Affidavit in support of Petition of P. C. O'Malley filed herein does not state facts sufficient to warrant the Court in granting the relief sought under the provisions of Section 104-14-4 Revised Statutes of Utah 1933 as amended by Chapter 121 of the Session Laws of Utah

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57 6. That your Honorable Court has no jurisdic-

on to grant the relief sought in said petition for the

asons following:

(A) That prior to the filing of this Petition, the
aintiffs had perfected their appeal in said cause to the
reme Court of the State of Utah and that this Court has
no further jurisdiction in the premises.

(B) That more than ninety days have elapsed from the
entry of the judgment in this action, from which these plain-
tiffs have appealed, and that under the provisions of Chap-
ter 121, Session Laws of Utah 1939, this Court has no jur-
isdiction to entertain or grant said petition for an Order
granting the plaintiffs the relief sought for herein.

(C) That from the plaintiffs' Petition and Affidavit
support thereof and from the records and files in said
case, it affirmatively appears that any mistake on the
part of plaintiffs' counsel was a mistake of law for which
this Court can now grant no relief.

(D) That the Plaintiffs' Petition and Affidavit in
support thereof do not state facts sufficient to warrant

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Dated this 11th day of March, 1940.

STEPHENS, BRAYTON & LOWE

Attorneys for defendants, Anna
L. Clark and Joseph E. Robin-
son.

Received 11th day of March, 1940.

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58 (Title of Court and Cause Omitted)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for hearing on 11th day of March, 1940, at 11 o'clock A.M., the said hearing being continued from February 26, 1940, plaintiffs appearing by and through their counsel, P.C. Malley and George M. Mason, and the defendants appearing by and through their counsel, William J. Lowe, upon the petition of plaintiffs requesting relief from their default in the matter of filing a proposed bill of exceptions and upon the objection to the granting of said relief filed by counsel for defendants, the court now finds as follows: That Findings of Fact, Conclusions of Law and Decree were made and entered in this cause on the 27th day of November, A. D. 1939, in favor of the defendants, Amasa L. Clark and Joseph E. Robinson, and against the plaintiffs, and that a copy of said Findings of Fact, Conclusions of Law and Decree was served upon the counsel for plaintiffs on the 27th day of November A. D. 1939, that counsel for plaintiffs shortly

after said judgment was made and entered, requested

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the reporter of this court to make a transcript of the proceedings and testimony in the case and paid to the Reporter the necessary fee for preparing the same; that on the 11th day of December, A. D. 1939, this court, for good cause appearing, made an order that plaintiff be given to and including the 15th day of February, A. D. 1940, within which to prepare, serve and file plaintiffs' proposed Bill of Exceptions in the above named case, which order was filed on the 11th day of December, A. D. 1939; That the reporter completed said transcript and delivered the original to counsel for plaintiffs about January 4, 1940, and said transcript was left with the Clerk of this court on or about the 11th day of January, A. D. 1940; That on or about the 19th day of January, A. D. 1940, counsel for plaintiffs withdrew said reporter's transcript and delivered the same at the office of counsel for defendants in Salt Lake City, Utah, which said transcript was subsequently returned to the Clerk of the Court by counsel for defendants; That on the 31st day of January, A. D. 1940, counsel for plaintiffs filed in this court and served upon counsel for defendants

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a notice of time and place of calling up for hearing and settlement by the court of bill of exceptions; That at the same time counsel for plaintiffs filed motion moving the court to set and fix Tuesday, the 13th day of February, 1940, as the time and date, in the court rooms of said court in the Court House in Box Elder County, Utah, as the place to hear and settle said bill of exceptions; That when said notice was served, counsel for the defendants not finding it convenient to be present at the hearing February 13, 1940, prepared a stipulation, mailed the same to counsel for plaintiffs, stipulating that said hearing be postponed until February 19, 1940, for such time thereafter as the court could be heard, and this court fixed Monday, the 26th day of February, 1940, at 10 o'clock A.M. as the time and place for the hearing on said matter; The matter coming on regularly for hearing on February 26, 1940, under the title of settling a bill of exceptions, counsel for defendants filed written objection to the hearing on different grounds, but especially on the ground that no proper draft of bill of

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0359-60 exceptions had ever been served or filed in the matter, and that the time within which a proper bill of exceptions could be served had expired on February 15, 1940, and thereby the court had no jurisdiction in the matter of a bill of exceptions and that there was nothing properly before the court to decide:

And it appearing that the procedure followed by counsel for plaintiffs did not constitute a proper bill of exceptions, plaintiffs having only served a reporter's transcript on counsel for defendants, and the counsel for plaintiffs having requested the court for a continuance of the matter, this court continued the same until March 11, 1940, at 11 o'clock A.M., and this matter having come on regularly for hearing before the court at the appointed time, counsel for plaintiffs having filed a petition supported by affidavit seeking relief from their default in the matter of the filing of a proper bill of exceptions, which petition was opposed by counsel for defendants, written objections having been filed and arguments made by counsel for both parties;

The court further finds that the facts set

forth in the petition of the plaintiffs for relief are true and correct; That P. C. O'Malley, Chief Counsel for plaintiffs, was mistaken as to the proper procedure of preparing and serving a proper proposed form of bill of exceptions and was under the impression that all that was necessary to do was to have the reporter's transcript settled as a bill of exceptions, for the same to be presented to the Supreme Court.

From the foregoing Findings of Fact, the court takes and files the following:

CONCLUSIONS OF LAW

1. That plaintiffs are entitled to relief from their default in not serving a proper bill of exceptions within the time fixed by law.

Dated this 11th day of March, A. D. 1940.

LEWIS JONES, District Judge.

Transcript

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(Title of Court and Cause Omitted)

ORDER AND DEGREE

From the foregoing Findings of Fact and
Conclusions of Law, signed by the court, the court
hereby

ORDERS AND DECREES that plaintiffs be and
are hereby relieved from their default in not filing
and serving a proper bill of exceptions before the time
for such filing had expired, and that permission is
hereby granted to counsel for plaintiffs to forthwith
serve proposed bill of exceptions upon counsel for
defendants and have same settled by the court.

Dated this 11th day of March, A. D. 1940.

LEWIS JONES

District Judge.

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2 (Title of Court and Cause Omitted)

ACKNOWLEDGEMENT OF SERVICE

This is to certify that I have this day received
copy of the Findings of Fact, Conclusions of Law and
signed by the Judge of the above entitled court,
giving permission to plaintiffs to file an amended
bill of exceptions, and also that I have this day received
copy of the said proposed bill of exceptions filed
by plaintiffs containing in all forty-seven pages.

Dated this 11th day of March, A. D. 1940.

STEPHENS, BRAYTON AND LOWE

BY William J. Lowe

Counsel for Defendants.

Transcript

0363 (Title of Court and Cause Omitted)

No. 5691

Brigham City, Utah, March 18th, 1940.

TO THE CLERK OF THE ABOVE NAMED COURT:

You will please prepare and transmit to the Supreme Court of the State of Utah the Transcript in the above entitled cause, namely, the complete Judgment Roll, containing all documents and instruments necessary to make a complete Judgment Roll, and certified copy of the non-resident bond filed by the plaintiffs at the commencement of this action. The Findings of Fact, Conclusions of Law, and Judgment, the Notice of Appeal, Certificate of Mailing a Copy to Defendants and their counsel, the Affidavits of Plaintiffs, as filed, declaring their impecuniosity to obtain an Appeal Bond; all instruments filed to date pertaining to Bill of Exceptions, including Plaintiffs' Petition for Relief, and Affidavit in Support of same, the Findings of Fact, Conclusions of Law and Order made by the Court granting plaintiffs permission to serve a Bill of Exceptions together with all objections made by defendants to granting said relief. This transcript to be sent up to the Supreme

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Court not later than Friday, the 22nd
ay of March, 1940. The Bill of Exceptions to
be sent up later, after the same is settled by the
Court.

P. C. O'MALLEY

GEORGE M. MASON

Attorneys for Plaintiffs;
Residence: Pocatello, Idaho,
and Brigham City, Utah.

Filed: March 13, 1940.

IN THE
SUPREME COURT
OF THE STATE OF UTAH

LAURA MORRIS, Special Admin-
istratrix of the estate of Washington
Pocatello and Minnie Pocatello, his
wife, both deceased, and LUCY
POCATELLO JOHNSON,
MAUDE POCATELLO RACE-
HORSE, JOSEPHINE POCA-
TELLO and RAY POCATELLO,
Heirs of Washington Pocatello and
Minnie Pocatello, deceased,

No. 6248

Plaintiffs and Appellants,

vs.

AMASA L. CLARK, JOSEPH E.
ROBINSON, and BOX ELDER
COUNTY,

Defendants and Respondents.

ABSTRACT OF RECORD
VOLUME II.

P. C. O'MALLEY and GEORGE M. MASON
Attorneys for Appellants and Plaintiffs

STEPHENS, BRAYTON & LOWE
*Attorneys for Respondents and Defendants, Amasa L. Clark and
Joseph E. Robinson*

FILED

Transcript

(Title of Court and Cause Omitted)

BILL OF EXCEPTIONS

Comes now the plaintiffs and file this, their Bill of Exceptions to the rulings, findings of facts, conclusions of law and decree made and entered in the above entitled action, and alleges that the findings of fact signed by the Court and filed are so voluminous and subject to so many exceptions that if each exception that could be taken was set out in a separate exception, the Bill of Exceptions would be too voluminous, therefore, Counsel for plaintiffs will endeavor to condense his exceptions and make them as brief as possible. The fact being admitted by defendants and found by the Court that the deed of Washington Pocatello and Minnie Pocatello executed and placed in escrow before his death and long before any interest in the real property was decreed to the estate of Washington Pocatello, deceased, and that affidavit having been filed in the county court records of Box Elder County, Utah, disclosing that the deed was placed in escrow, and it being admitted by the defendants and found by the Court that subsequent to the

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death of Washington Pocatello that an undivided one-third interest in the real property described in the deed that was placed in escrow was decreed to the estate of Washington Pocatello, deceased, and it being pleaded and admitted by the defendants and so found by the Court that an administrator was legally and duly appointed by the District Court of Box Elder County, Utah, to administer the estate of Washington Pocatello, deceased;

And it being pleaded and admitted by the defendants and so found by the Court that the administration of the estate of Washington Pocatello, deceased, has never been settled or closed and is still open, existing and pending in the above entitled court today, Counsel for plaintiffs briefly points out the following exceptions to the rulings, findings of fact, and conclusions of law made by the Court:

1st: Except to each and all and every finding in Paragraph No. 7 of the findings of facts, and more particularly to the finding that the land was uneven, had an appraised

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value of \$4900.00 and that Washington Poca-

tello and Minnie Pocatello in their lifetime made, executed and delivered in escrow a warranty deed, for their undivided one-third interest in said premises, that said Albert I. Grover, in November, 1919, by mesne conveyances, became the owner of said premises, that the same is not supported by the evidence.

2nd: Excepts to each and every finding made in Paragraph No. 9 of said findings of fact and particularly excepts to the finding that plaintiffs offered no evidence at the trial of the cause to the effect that U. F. Dite-man, grantee in said Warranty deed in escrow with the First National Bank of Pocatello or A. I. Grover, and the depository did wrongfully, unlawfully, corruptly, intentionally, with the intent to defraud the estate of Washington Pocatello and the heirs, deliver said deed when only \$1,000.00 was paid on the escrow agreement which recited that the full sum of \$3200.00 must be paid before delivery of said deed: further excepts to the said finding in said Paragraph No. 9 that the said U. F. Dite-

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2 fully, illegally, and for the purpose of cheating and defrauding the estate, file the deed for record in Box Elder County, Utah; excepts to the further finding in said Paragraph that said deed was not void but was a valid deed and passed title to the undivided one-third interest of said property to U. F. Diteman; further excepts to the Courts finding in said Paragraph that the deed was regular on its face recited the consideration of \$3200.00 and from the evidence in the case the Court finds that said \$3200.00 recited in the deed was paid to said escrow holder and the transaction with said bank was not fraudulent, that it was unnecessary to specifically enforce the escrow agreement under the provisions Section 7741, Revised Statutes of Utah, but the bank was justified in delivering said deed to the grantee therein. On the grounds that such finding is not supported by the evidence for the reason that the Probate proceedings offered evidence (plaintiffs' Exhibit "M") shows that only \$1,000.00 was paid on the escrow agreement, and on the further ground that such finding is against law, as the burden was placed upon defendants to prove that all obligations of the escrow were fully complied with in every respect to prove their title.

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2 good.

3rd: Excepts to each and every finding made in Paragraph No. 10 of the findings of fact and specifically excepts to the finding that said A.I. Grover did not have knowledge that his grantors in said quit claim deed had legal title to the undivided one-third interest in said property; that A. I. Grover did not connive and conspire with U. F. Diteman to secure the warranty deed so placed in escrow without paying the just consideration for the same; that A. I. Grover did not unlawfully and wrongfully file the deed for record. In support of this exception, plaintiffs point out that A. I. Grover had secured power of attorney from the said U. F. Diteman and filed the same with the depository of the escrow agreement (plaintiffs Exhibit "H" page 6 Reporter's Transcript) and the record and evidence shows, that A. I. Grover was the one who for more than one year previous to recording said deed had acquired deeds to the other two-thirds interest in said premises and had purchased a water right for said property and made an application for a loan from the State of Utah for \$7,000.00 on the premises 30 days previous

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2 to the decree of the Probate Court all of which appears in the Phillips Abstract offered in evidence by defendants as proof of their chains of title, (defendants' Exhibit "5" page 35 Reporters' Transcript) and the certified copy of Grover's application for a State loan (plaintiffs' Exhibit "J" page 8 Reporter's Transcript).

4th: Excepts to each and every finding in Paragraph 3 of said findings of facts and especially excepts to the finding that the said A. I. Grover did not fraudulently obtain the said Washington Pocatello deed and file it of record and excepts to the further findings of said Paragraph that Grover was not an owner in common with the heirs of the estate of Washington Pocatello and did not collect the rents as a tenant and did not hold the same under constructive trust for said heirs but held and owned said premises in fee simple. On grounds that said finding is contrary to the evidence and the law in the case, the power of attorney of U. F. Ditteman to A. I. Grover, (p. Exhibit "H") proves that Grover performed all acts in connection with securing said deed and filing it of record. The probate records in the estate of Washington Pocatello, deceased, (p. Exhibit "M") shows that Grover

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3 paid \$1,000.00 for that deed, therefore Grover had no title to the undivided one-third interest and under Section 78-1-5 Revised Statutes of Utah, 1933, he became tenant in common with the heirs.

5th: Excepts to the last finding of Paragraph 12 of the said findings of fact that the plaintiffs or any of them have not been seized or possessed of said property at any time since November, 1919; that such finding is not supported by any evidence, and is contrary to the evidence and law in the case as the probate records in the estate of Washington Pocatello, deceased, shows that the property was in the jurisdiction of the Court during all said time.

6th: Excepts to each and every finding contained in Paragraph 13 of said findings of fact, and particularly excepts to the finding that the defendants Amasa L. Clark and Joseph E. Robinson were innocent purchasers for value, that at the time they purchased said property that they believed said A. I. Grover was the owner in fee simple of said premises and knew of no claim that A.

I. Grover had fraudulently and wrongfully obtained said

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3 deed and did not know the quit claim deed from U. F. Diteman to A. I. Grover conveyed no title to said undivided one-third interest, did not know that A. I. Grover was at all times an owner only of an undivided one-third interest in said property, and did not know that said Grover held the property in common with the heirs of the estate of Washington Pocatello as to an undivided one-third interest. This exception is predicated upon the fact that the testimony and record in the case discloses such facts as are common notice and knowledge to all purchasers of real property to determine that their grantor has good title to the property he conveys to them and is predicated upon the law; and from the facts and records produced at this trial; that even if Amasa L. Clark and Joseph E. Robinson did not have knowledge or means of knowledge and were in fact innocent purchasers of value, they could not prevail as against the plaintiffs in this case, as a deed wrongfully delivered is not good even in the hands of an innocent purchaser for value.

7th: Excepts to each and every finding in Paragraph 1 for the reason that the said Amasa L. Clark and Joseph E. Robinson had notice and knowledge that an undivided one-third

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3 interest of the property they were purchasing was under probate court proceedings in the District Court of Box Elder County, Utah, that the estate had not been closed or settled or any determination made as to who were the heirs of the estate of Washington Pocatello, deceased, or any decree of distribution had been made in said estate.

8th: Excepts to each and every finding made in Paragraph 15 of said findings of fact save and except the first pertaining to the appointment of Charles E. Foxley as administrator and the findings that letters of administration were on the 12th day of January, 1920, issued out of this Court to the said Charles E. Foxley on said estate, but excepts to all of the balance of said findings that the said Foxley was the legally appointed representative of the heirs; that he failed to take any legal steps to recover the alleged undivided one-third interest; that the heirs of Washington Pocatello, deceased, at all times knew that such administrator represented them and the estate; excepts to the Court's finding that there is no proof that the admin-

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~~the~~ administrator of the estate did anything wrong; and specially excepts to the findings of the Court that the proceedings in the estate of Washington Pocatello, deceased were regular in so far as administered; that from January 1920, to the filing of this complaint that Charles E. Foxley was the representative of the said estate and the heirs of said estate. This exception is based upon the Court's record in the estate of Washington Pocatello, deceased, the administrator since the date of his appointment was legally acting representative of the Court and not the representative of the heirs, and the Probate Court record offered and accepted in evidence by the Court marked plaintiffs' Exhibit "M", and it was the legal duty of the District Court of Box Elder County, Utah, at all times since the day of January, 1920 to see the estate of Washington Pocatello was properly and legally administered.

9th: Excepts to each and every finding contained in Paragraph 16 of said finding, and particularly excepts to findings that Amasa L. Clark and Joseph E. Robinson at the time that they purchased that 80 acres of land had no knowledge or notice that Charles E. Foxley had been appointed

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4 administrator of the estate of Washington Pocatello and had no knowledge or notice of any fraudulent or unlawful acts on the part of A. I. Grover and Charles E. Foxley; and excepts to the findings that there is no evidence of any conniving or conspiring of A. I. Grover and Charles E. Foxley and objects to the findings that A. I. Grover owned and had legal title to the undivided one-third interest of the land formerly owned by Washington Pocatello, deceased, and objects to the findings that at all times since March 12th, 1925, that the defendants were not tenants in common with the heirs of Washington Pocatello, deceased, but said defendants owned all of said land in fee simple. This exception is based upon the fact that the Court in making said finding ignored the Court's own record and the Court's duty in administering the estate of Washington Pocatello, deceased, and ignored the record of the probate proceedings in the estate of Washington Pocatello, deceased, that was admitted in evidence by the Court (p. Exhibit "M").

10th: Excepts to each and every finding contained in Paragraph 17 of said findings of facts, particularly ex-

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5 cepts to the finding that on December 3rd, 1919, that Ray Pocatello was of the age of seven years, and at time of filing the petition herein Ray Pocatello was of age of 26 years; that said finding is positively contrary the testimony of Fred A. Gross, Superintendent of Fort Hall Indian Reservation, who testified from the records of the Hall Indian Reservation that such records show that Ray Pocatello was born in 1917 (see page 12 Reporter's Transcript exceptions to all the balance of said Paragraph 17 is based upon the fact that the same Court that made the findings assumed jurisdiction over the estate of Washington Pocatello deceased, on the 12th day of January, 1920, when it appointed Charles E. Foxley as administrator of said estate; that the said Charles E. Foxley did file with said Court on March 1, 1921, an instrument designated his final account and petition for settlement where he disclosed to the Court that only \$1,000.00 had been paid to the First National Bank of Pocatello for the deed of Washington Pocatello, deceased, and the Court during all the years since March 3rd, 1921, failed, refused and neglected to perform its duty and hold a hearing upon said final account or take any action in the

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5 estate of Washington Pocatello, deceased, all which facts was introduced in evidence and before the rt (p. Exhibit "1").

11th: Excepts to the findings contained in Paragraph that the estate of Washington Pocatello, deceased, or heirs of said estate had paid no taxes or legal assessments, levied or assessed against said property or any part thereof that the defendants and their immediate predecessors in interest have each and every year since 1919 paid all taxes and assessment levies each year against the same; this exception is based on the fact that the evidence, records, and the law in this case established beyond prevariance of doubt that A. I. Grover never obtained either legal or equitable title in the said undivided one-third interest of said promises that the defendants Amasa L. Clark and Joseph E. Robinson, Grover's grantees could obtain no greater or better title than their grantor could convey, consequently, the defendants having notice of the perfection of their grantor's title never obtained either legal or equitable title in an undivided one-third interest in said promises and the record and evidence shows, and

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5 it is admitted by defendants and found by the court that the property was rented each year for a substantial rental and collected by the defendants.

12th: Excepts to certain findings of fact contained Paragraph 20, in particular as follows; that A. I. Grover paid the sum of \$3,000.00 for a water-right; this except is based on the fact that the defendants introduced the record in evidence showing that Grover contracted for this water right in March, 1918, (d. Exhibit "4") nine months before property was decreed and that he paid only \$100.00 down subsequent to his wrongful obtaining and filing of record deed of Washington Pocatello and Minnie Pocatello, the said A. I. Grover, on January 2nd, 1920, mortgaged said premises to the state of Utah and obtained a loan of \$7,000.00 secured by a first mortgage on said premises and paid the balance of the purchase price of said water-right from the proceeds of said loan, all of which facts appear in the Philips abstract (d. Exhibit "5"); excepts further to the finding in said Paragraph that sum of \$4900.00 the Court finds was a reasonable cash market value for the premises at the time that said property was decreed and when A. I. Grover upon

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5 fully obtained and filed the said deed of record; this exception is based on the fact that the testimony and records in the case shows (p. Exhibit "O") that A. I. Grover had in October, 1919, applied for a loan from the State of Utah in the amount of \$7,000.00 on the said premises, and did under sworn affidavit (p. Exhibit "O") set the value of the land at \$300.00 per acre, and the fact that Grover obtained a loan from the state on January 2nd, 1920, of \$7,000.00 proves the land had a value of about \$15,000.00 at the time it was decreed.

13th: Excepts to Paragraph 24 of the findings of fact wherein the Court found that the plaintiffs or any one of them have no rights therein and the sole owners of said real estate are the defendants Amasa L. Clark and Joseph E. Robinson, on the ground that said findings is not supported in any way by any testimony presented by the defendants in this case and is contrary to all of the evidence and records produced in the case.

14th: Excepts to every ruling and finding contained in Paragraph 25 of the findings of fact on the ground-

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6 that the said findings of fact are immaterial, entirely outside of the record and the facts found in all said Paragraph 25 does not tend to prove or disprove any of the issues before the Court to be decided in this case; plaintiffs particularly except to the last clause of said finding Paragraph 25, wherein the Court found these plaintiffs have subjected themselves to the laws of the State of Utah in the bringing of this suit; that the plaintiffs are subject to the same laws relating to the prosecution of suits which govern any other citizen of this state; this exception is based upon the fact disclosed by the testimony and records of the case which shows that neither plaintiffs or their ancestor Washington Pocatello, deceased, ever of their own volition sought any relief from this Court; that their father Washington Pocatello, deceased, was brought into the Court Box Elder County, Utah, by the artful and designing white man in order that the white man might obtain legal title to his property for a paltry consideration; that the District Court of Box Elder County, Utah, assumed and took over jurisdiction of the estate of Yaotes Owa, and of all the heirs and descendants of Yaotes Owa and after the settlement of

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6 the estate of Yaotes Owa the same court assumed and took over jurisdiction of the estate of Washington Matello, deceased, and the matter of the settlement of said estate is still in the hands of this District Court unsettled and undisposed of, and all the plaintiffs are coming in this action is demanding of the Court a determination of their rights, which for over 20 years the court has failed, refused, and neglected to settle.

15th: Excepts to Paragraph 26 of said findings of fact on the ground that the said finding and each and every part thereof is largely a repetition of the voluminous previous findings made by the Court, but plaintiffs again specially except to the findings in said Paragraph 6 wherein the Court found that the defendants Amasa L. Clark and Joseph E. Robinson are owners in fee simple of an undivided one-third interest in said premises that they purchased the same without notice or knowledge of any of the matters set out by plaintiffs in their complaint and excepts to the finding that defendants were furnished an abstract of title approved by the State of Utah, as such a finding is immaterial, and in no way established

Transcript

6 good title or any title in the defendant; except to the finding that Grover paid all taxes each year on lands and owned the same continuously and openly and lawfully in fee simple as against all persons whosoever; excepts to the finding that the defendants have claimed, occupied and farmed said premises in fee simple, and have paid all taxes levied and assessed against said land, and have continuously, openly, notoriously, and peaceably owned and held the said premises in fee simple as against the plaintiff, the administrator of said estate and all the world; this exception is based upon the fact that during all the years mentioned by the Court in said finding that an undivided one-third interest in said premises belonging to the estate of Washington Pocatello, deceased, was in the Court's own hands and in process of probate and never settled and distributed and in making said finding 26, the Court again ignored the record in the estate of Washington Pocatello, deceased, which was introduced in evidence (p. Exhibit "M").

18th: Excepts to Paragraph 27 in said findings where the Court found A. I. Grover is now dead, that Albert B. is long since dead, that U. F. Ditman is not a resident

Transcript

6 Utah, is aged and inform, that the First National Bank of Pocatello has been liquidated, that all the instruments of the escrow except what is offered in evidence have been destroyed. This exception is based on the ground that all said findings are immaterial and do not tend to prove or disprove any of the issues in this case; that if the parties mentioned were alive they could not change the record by any testimony; plaintiffs especially except to the further finding in said Paragraph that by reason of long lapse of time, nearly 20 years, the parties hereto are unable to procure testimony in support of their claim or to refute the same; that the claims of plaintiffs herein are now stale claims; that if the said First National Bank of Pocatello, Idaho, escrow holder, made any unauthorized delivery of said deed, then the administrator of said Washington Pocatello estate and the heirs of said estate, by their subsequent acts, waived the performance of the conditions, and ratified the said delivery by said subsequent acts and raised the presumption of ratification of said delivery and are now estopped by reason of laches, silence, and other conduct

Transcript

7 on their part and on the part of the administrator herein as heretofore found from at this time prosecuting this action. That such findings are error on part of the Court and is not supported by any evidence by reason of the fact that the record shows that this Court did, on the 12th day of January, 1920, appoint the administrator of the estate of Washington Pocatello, deceased, that the by the Court assumed complete jurisdiction over the estate of Washington Pocatello, deceased, the administrator being an officer of the Court, all acts of administrator was subject to this Court's supervision and direction and that said administrator did, on the 3rd day of March, 1921, present to this Court a general account setting forth quite specifically what had been done in the estate of Washington Pocatello, deceased, and petitioned this Court to set a date for hearing and pass upon the acts of the administrator but that during all the years from the 3rd of March, 1921, to the date this suit was filed, this Court failed, refused, and neglected to perform its duty and take any action in the matter; that during all those years the plaintiffs, as heirs of the estate of Washington Pocatello, ha

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7 no control or right of control over said premises except through the administrator and this Court; the only laches, silence or other conduct that could be charged as an estoppel in this case has to be charged against the Court by reason of the neglect of the Court to perform its duty in a case pending on its calendar and the Court cannot now charge laches against the heirs of the estate. If the Court had performed its duty in 1921 or at any time since the filing of the account of the administrator, the facts in this case could have been discovered long ago, all of such facts defendants had full knowledge of.

17th: Excepts to Paragraph 28 of the findings of fact wherein the Court found that plaintiffs first cause of action was barred by the statute of limitations of the State of Utah and particularly by the provisions of Sections 104-2-5, 104-2-6, 104-2-7, 104-2-19, and by Subdivision 3 of Section 104-2-24 of the Revised Statutes of Utah 1933; on the ground first, the Statutes of Limitations of the State of Utah cannot run against

Transcript

7 ment, and second, for the reason that during all the years from January 12th, 1920, to and including this date, that the estate of Washington Pocatello, deceased, including the determination of the heirship of Washington Pocatello, deceased, and the rights of inheritance the legally determined heirs by this Court has been during all these years and is today still in process of settlement and has stood on the docket and in the hands of this Court unsettled; that probate proceedings are indivisible, they continue as one pending proceeding from the date of the appointment of the administrator until his accounts are settled and he is discharged and the Statute of Limitations does not commence to run until there is a final settlement of the estate or final settlement of the question involved that such finding is against public policy.

18th: Excepts to Paragraph 29 of said findings which in the Court finds against all of the allegations of the plaintiffs' complaint and in favor of all the affirmative allegations of the defendants. On the ground that such findings are not supported by any evidence in this case

is contrary to all of the evidence and records of this

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g and contrary to and in opposition to the law
f the case.

That in support of all and each and every one of
he foregoing exceptions plaintiffs herein incorporate
nd makes a part of this Bill of Exceptions, as proof
f all and each and everyone of said exceptions the com-
lete record and testimony taken at and during the
rial by the Court reporter of said Court as herein-
fter follows to-wit:

REPORTER'S TRANSCRIPT

I N D E X

	<u>Direct</u>	<u>Cross</u>	<u>Rodirect</u>	<u>Recross</u>
Fred A Gross	10	14	16	17
uey Pocatello Johnson	23	29		
osephine Pocatello	30			
masa L. Clark	37	42		
oseph E. Robinson	47	51		

(Title of Court and Cause Omitted)

BE IT REMEMBERED, that on Thursday, September
4th, 1939, at ten A.M., the trial of the above entitled
ause was had before Hon. Lewis Jones, District Judge.

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§ without a jury, in the court room of the above named court, at Brigham City, Box Elder County, State of Utah; P. C. O'Malley, esq. and George Mason, esq. appearing as counsel for the plaintiff; and Wm. J. Lowe, esq. appearing as counsel for the defendants, whereupon the following proceedings were had:

THE COURT: Laura Morris, special administratrix, v Clark and Robinson, are you ready, gentlemen:

MR. O'MALLEY: We are ready.

MR. LOWE: Yes, Before proceeding, I have here a supplemental answer that I now ask leave to file. It raises no new questions of fact, as is presented by documentary evidence. The supplemental answer reads:

(Reading).

MR. O'MALLEY: We object to it on the ground it is immaterial, irrelevant and incompetent, and not a proper defense, and is in no way binding upon these parties, and it is not a proper record in this case; and upon the further ground that this same question was raised in a recent case in Utah, and the Federal Court decided that it is an estoppel and could not operate as an estoppel as against

transcript

9 my clients in this case; and that it would not even operate as an estoppel as against the United States Government, and if the court sees fit to admit it, we want permission to enter a general denial.

THE COURT: You make no objection on the ground of surprise, or the fact that it is just served this morning.

MR. O'MALLEY: No, I waive that.

THE COURT: The answer may be filed.

MR. O'MALLEY: The record may show that plaintiffs deny each and every allegation in the supplemental answer.

MR. LOWE: I assume so; the statute does that anyway.

THE COURT: Do we have a reply here at all?

MR. LOWE: Yes.

MR. O'MALLEY: Yes, we have a reply.

THE COURT: The record may show you have a general denial of this supplemental answer.

MR. O'MALLEY: We submit plaintiffs' exhibit "A" for identification, the same being a United States Patent issued to Yaotes Owa, the same being a certified copy of the original patent on file in the Recorder's office of

Box Elder County. We offer it in evidence.

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9

MR. LOWE: No objection.

THE COURT: Exhibit "A" is received.

MR. O'MALLEY: I want to have this marked for identification as plaintiffs' exhibit "B".

MR. LOWE: We are going to offer the abstract which covers this. You are making the record.

MR. O'MALLEY: Plaintiff now offers in evidence Plaintiffs' Exhibit "B", being the escrow agreement with the bank or the affidavit.

THE COURT: Received.

MR. O'MALLEY: I now offer in evidence Plaintiffs' Exhibit "C", petition for letters of administration in the estate of Yaotes Owa.

MR. LOWE: May I ask, in offering this petition, are you following it up with some decree?

MR. O'MALLEY: Following it up with the findings of fact and conclusions of law and decree.

MR. LOWE: No objection.

THE COURT: It will be received.

MR. O'MALLEY: Plaintiff now offers in evidence exhibit "

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/D petition for probate of will of James Brown,
deceased.

R. LOWE: We object to it on the ground it is immaterial, irrelevant and incompetent.

R. O'MALLEY: The decrees decrees both estates, and that the only reason why I have offered this, because the decree in the first instance mentions both estates.

THE COURT: It may be received.

R. O'MALLEY: I suppose, Mr. Lowe, you will now stipulate that Mr. W. E. Getz was appointed and qualified and acted as legal administrator of the estate of Yaotes wa and James Brown, deceased.

R. LOWE: Yes, we so stipulate.

R. O'MALLEY: Now, plaintiff offers in evidence plaintiffs' Exhibit "E", the findings of fact and conclusions of law made by Justin D. Call in the estate of Yaotes wa, deceased. I believe the same findings cover the Brown estate.

R. LOWE: No objection.

THE COURT: Received.

R. O'MALLEY: Mr. Lowe, I assume you are willing to

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10 stipulate that the final discharge of W. E. G. as administrator in the estate of Yaotes Owa was executed entered on December 14th, on February 14th, 1937, 1927, the estate closed. If necessary, we will have a certified copy.

MR. LOWE: The final decree was signed November 7th, 191

THE COURT: No.

MR. O'MALLEY: Cut that offer out.

THE COURT: This is a decree, the 7th of November, 1919.

MR. O'MALLEY: Yes, I am entering the two decrees. Plaintiffs now offer in evidence Plaintiffs' Exhibit "F", a decree of distribution in the matter of the estate of Yaotes Owa, deceased, being a certified copy, taken from the County Recorder's office of Box Elder County.

MR. LOWE: Dated, the 7th of November, 1919.

MR. O'MALLEY: Yes dated the 7th of November, 1919.

MR. LOWE: No objections.

THE COURT: Received.

MR. O'MALLEY: We likewise offer in evidence plaintiffs' Exhibit "G", being a certified copy of the decree of distribution of the estates of James Brown and Jane Brown, deceased.

both of them, dated November 7th and filed November 7th, 1919.

R. LOWE: No objections.

THE COURT: Received.

R. O'MALLEY: Now, Mr. Lowe, are you willing to stipulate that the estate of Yates Owa was finally closed, and final discharge filed of record as of the 14th day of February, 1927.

R. LOWE: I don't see the materiality of it.

R. O'MALLEY: Just to show that the estate was closed, that is all.

R. LOWE: The record now discloses that the final decree of distribution was entered. I don't see that it is material when the administrator was discharged.

MR. O'MALLEY: If the court thinks it is not material, I am not going to press it.

THE COURT: I think it is going to encumber the record unnecessarily to have that in there.

MR. O'MALLEY: All right.

THE COURT: I will sustain the objection.

MR. O'MALLEY: Plaintiffs now offer in evidence Plaintiffs'

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// Exhibit "H", photostatic copies of escrow agreement as appearing upon the front of the envelope containing the escrow agreement between Washington Pocatello and U. F. Diteman on deposit with the First National Bank of Pocatello, Idaho; a letter dated December 14th, 1917, written by Albert Saylor agent for U. F. Diteman, to the First National Bank of Idaho; and a photostatic copy of a letter, photographed, it should be--of a letter dated December 24th, 1917, written by Albert Saylor to the First National Bank of Pocatello with the written receipt upon said letter for the return of three hundred dollars, and another receipt dated December 24th, 1917, for receipt of the return of \$300.00, and a photographic copy of letter dated February 23rd, 1918, written to W. D. Saylor, Cashier of the First National Bank of Pocatello, Idaho, by Albert Saylor, and a photographic copy of a special power of attorney signed by U. F. Diteman, witnessed by W. B. Saylor and Hazel Christensen, appointing one A. I. Grover as legal attorney for the said U. F. Diteman in all matters pertaining to said escrow. We offer this all in one exhibit.

MR. LOWE: I understand that there is in the files of this case a stipulation, in an effort to economize, or an effort

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// to arrive at the facts--I might state for the record that Mr. O'Malley and I, on or about the 21st of August, met at the First Security Bank in Pocatello. With Mr. Service, W. D. Service, who was the former cashier of the old First National Bank of Pocatello, which is now defunct, and after spending sometime in going over the matter with Mr. Service, we entered into this stipulation: (reading the stipulation). Now, that escrow was excluded, that is, I assume was excluded by counsel for the plaintiff, and if the court is now informed of his offer, we have no objection to the offering of these exhibits under that stipulation.

THE COURT: They may be received, then.

MR. LOWE: May it now be stipulated, Mr. O'Malley, that this constitutes all of the records that are now with the First National Bank.

THE COURT: That can be found.

MR. LOWE: That can be found with the First National Bank.

MR. O'MALLEY: We have made a search.

THE COURT: And these are all that are to be located.

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12 MR. O'MALLEY: I did not make any search. I as
Mr. Service and he said he could not find any. I now off
in evidence plaintiffs' Exhibit "I", being a certified co
of an affidavit of A. I. Grover as taken from the records
the County Recorder's office of Box Elder County, Utah.

MR. LOWE: No objections.

THE COURT: Received.

MR. O'MALLEY: We are now offering in evidence plaintiffs
Exhibit "J", being a certified copy of an application for
loan made by Albert I Grover, on or about the 11th day of
October, 1919, to the State Land Board of the State of Ut
for a loan of seven thousand dollars on the premises descri
ed in this case, said copy bearing the certificate and sa
of the State Land Board of the State of Utah.

MR. LOWE: We desire, for the purpose of the record, to
object to the introduction of Exhibit "J" on the ground
tends to encumber the record, and as not being taken from
the public records of Box Elder County.

THE COURT: Pro forma, it may be received.

MR. O'MALLEY: We now offer in evidence plaintiffs' Exhibit
"K", a certified copy of a warranty deed deposited with t

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12 escrow agreement in the First National Bank of Pocatello, Idaho, and executed by Washington and Pocatello the second day of February, 1917, already in the pack of papers as already introduced in evidence.

R. LOVE: No objections.

THE COURT: Received.

R. O'MALLEY: We now offer in evidence plaintiffs' exhibit "L", being a certified copy of a farm lease made and executed on the 5th day of March, 1923, by and between A. I. Grover and G. K. Takagaki, for the lease of the premises involved in this action, for the years 1923, 1924, 1925, as filed of record in the County Recorder's office of Box Elder County, Utah.

R. LOVE: No objections.

THE COURT: It may be received.

R. O'MALLEY: We now offer in evidence Plaintiffs' exhibit "L", being a certified copy of the first petition for letters of administration made by Charles F. Foxley on the estate of Washington Pocatello, deceased, in Box Elder County, and amended petition for

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12 letters of administration made by Foxley on the same estate, and letters of administration of Charles E. Foxley, the final account and petition for settlement, all filed by Charles E. Foxley and petition for distribution of the estate and the order fixing the time for settlement, and the notices by the clerk of the court, continuing this by continuing the last notice dated the 13th day of February, 1922, at ten o'clock A.M.

MR. LOWE: Is this all the records?

MR. O'MALLEY: I don't know whether it is, or not. It is supposed to be all.

MR. LOWE: You haven't got the request of these Indians for the appointment of Mr. Foxley.

MR. O'MALLEY: I am willing to introduce the whole record.

MR. LOWE: If the Court please, Mr. O'Malley is offering the second petition without apparently offering here this request signed by Minnie Pocatello, Lucy Pocatello --

MR. O'MALLEY: That can be included. I will include the whole record.

MR. LOWE: We certainly would object to the introduction of these instruments without having included everything of the

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13 petition.

MR. O'MALLEY: What petition?

MR. LOE: For letters of administration.

MR. O'MALLEY: I will include that in the offer, the whole record.

MR. LOE: No objection to the introduction of the whole record.

THE COURT: Probate 355, the Estate of Washington Pocahonello, the files are all received in evidence.

MR. O'MALLEY: If the record requires the certificate, I will have the certificate complete.

THE COURT: All right.

MR. O'MALLEY: Call Mr. Gross.

FRED A. GROSS

witness produced in behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

MR. O'MALLEY: Q. You may state your name.

1. Fred A. Gross.

2. What is your official occupation with the Government.

3. Superintendent of the Fort Hall Indian Reservation.

Transcript

13 Q How long have you been superintendent of the Fort Hall Indian Reservation?

A I entered on duty on December 24th, 1929.

Q Have you continuously acted in that capacity ever since?

A Yes, Sir.

Q As superintendent of the Fort Hall Indian Reservation, have you a complete list of all Indians living on the Fort Hall Indian Reservation in your care and custody?

A I have kept a complete record at the Fort Hall Agency pertaining to the reservation.

Q You didn't know Washington Pocatello?

A No, Sir.

Q Or Minnie Pocatello? A No, Sir.

Q They were both dead before you arrived there?

A Yes, Sir.

Q Do the records of the Fort Hall Indian Reservation reveal or show who was Washington Pocatello and Minnie Pocatello?

A Yes, Sir.

Q Who were they?

MR. LOWE: We object to that as not the best evidence.

MR. O'MALLEY: It is preliminary by way of showing they were

anscript

14 Indians.

A. LOWE: The records are the best evidence.

Q. O'MALLEY: Q. Did you bring all these records with you?

I did bring some records with me, yes, sir.

Have you got any record of Washington Pocatello and Minnie Pocatello?

I believe I have.

Would you please get them? Do the records that you have in your custody show the relationship of Washington Pocatello and Minnie Pocatello to the government?

I would answer yes to that. We have a number of records here that indicate the relationship of the Indians to the reservation, to this case, I presume.

Are all of these Indians on the reservation enrolled?

Yes, Sir.

Is that enrollment in your care and custody?

Yes, sir.

Was Washington Pocatello and Minnie Pocatello each enrolled - in order to make them Indians - enrolled on the Fort Hall Reservation?

Transcript

14 A Yes, sir.

Q You may state whether or not any records show Washington Pocatello or Minnie Pocatello had ever received a registration of competency from the United States Government.

A There is no record there to show that they did.

Q No registration to show that they did. What tribe of Indians were they?

A Shoshones.

Q Does your record show when Washington Pocatello died?

A Yes, sir.

Q What time did he die according to your record?

A Washington Pocatello died on April 27th, 1917.

Q Have you any record of the death of Minnie Pocatello, his wife, or do you know about when that occurred?

A Minnie Pocatello died May 22nd, 1927.

Q 1927. Do you know the heirs of Washington and Minnie Pocatello?

A Yes, sir.

Q Who are the heirs of Washington Pocatello and Minnie Pocatello?

A. Lucy Pocatello Johnson, Josephine Pocatello, Maud

mscript

15 Pocatello Racehorse, and Ray Pocatello.

That is, the four persons mentioned in this action?

The four children.

Four children. Those were the only children so far
the records of the Fort Hall Indian Reservation reveal?

Yes, sir.

Have you got a record of the date of the birth of
Pocatello?

The records show that he was born in 1917. I do
have the date of the month.

You do not have the date of the month.

No, sir.

Now, you may state whether or not those four heirs
Washington Pocatello are still living on the Fort
Hall Indian Reservation.

Yes, sir.

They are wards of the government?

Yes, sir.

And subject to the tribal rights and rules and
regulations?

Yes, sir.

Transcript

15- Q. On the Fort Hall Indian Reservation?

A Yes, sir.

Q Now, you may state briefly what funds these Indians receive from the government or the reservation lands, how are they handled?

A All of the income of the property are listed through the Agency, from the office at Fort Hall, and paid out to them from the office there, over my signature. I have to sign the checks.

Q And that pertains to any income of their land, or sale of stock or anything in connection with the reservation, does it not?

A An Indian may have poultry or property of that kind, as he handles it entirely on his own initiative, his own record but any livestock, like cattle, probably, or any income from the lands, we handle that through the office, but if they have some of their work, or any labor outside, why, of course, they receive that.

Q Suppose they have income from land, that goes through the office, and that is only paid out on their application?

A Yes, sir.

Transcript

16 Q. And if sales of land are made for them,
you assume supervision over that?

A Yes, sir.

Q Now, you may state whether, if you know, during the
last ten years, whether any of the heirs of Washington
Pocatello have mentioned or spoken to you about having
some interest down here that should be taken care of?

A They have talked to me about it many times repeatedly
and wanted me to help them to bring some action to get
that money that they said they didn't get. Of course,
I didn't know much about it. I told them they would
have to have an abstract of title, and they would have
to employ an attorney to help them.

MR. O'MALLEY: I believe that is all.

CROSS EXAMINATION.

MR. LOWE: Q. They spoke to you about wanting your
assistance to get that money they didn't get?

MR. O'MALLEY: Q Did you hear him?

A I didn't understand what he said to me.

MR. LOWE: Q That conversation, or part of the con-

versation between you and the Indians was in reference
to the U. S. Indian Law Library, funded for its creation by the U. S. State of Montana and the U. S. State of
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Transcript

16 to the money they didn't get from the sale of their land?

A Yes, sir. They said they had some land down here that was sold without their getting any proceeds from it.

Q You spoke of money being received by you and paid out you, about lands owned by the Indians, and by that you that the land under reservation, or under restriction from the government, don't you? That is part of the reservation, is it, in Idaho?

A That is part of the reservation, an Indian having been allotted all the income from their lands, either going to Indian allottee, or the heirs of the deceased allottees.

Q You never did attempt to take jurisdiction of this particular area of ground, did you?

A No, sir.

MR. O'MALLEY: Just a moment. I move to strike out the answer, and I object to the question as incompetent, irrelevant and immaterial.

THE COURT: Overruled--the answer may remain.

MR. LOWE: Q You never did receive any returns from those lands for distribution, have you?

transcript

17 A. No, sir.

Q And these particular Indians complained to you that they didn't get any of the money for which their property was sold, and such complaints have been made to you particularly after you went into the office at Fort Hall as an official of the Indian reservation; is that correct?

A Yes, sir.

Q These particular Indians never claimed by statements to you that they owned any land down in Box Elder County, did they?

A Yes, it would amount to that. They claimed the land, and they never got the money for it. They claimed the land.

Q The particular complaint was that the land had been sold and they hadn't received the proceeds of the sale?

A I would not say just exactly which. They complained to me about this money, and that as I recall, the land was disposed of in some manner, and they didn't get the whole proceeds for it. I would not say exactly yes or no to your question, but that is the way they discussed it with me. That is the reason they are here today, be-

Transcript

17 cause they have insisted on that money which the didn't get.

MR. LOWE: I think that is all.

REDIRECT EXAMINATION.

MR. O'MALLEY: Q Any of this money that any of these Indians or any of the Indians on the Reservation received, you just testified, I think, that they could not take and spend any this money, themselves, for any purpose, without permission from you, until the time passed upon those things; is that right?

MR. LOWE: That is objected to as calling for the conclusion of the witness.

THE COURT: He may answer.

THE WITNESS: There are two questions there. I believe, aren't there?

MR. O'MALLEY: Strike that.

Q As to these Indians on the Reservation, all the money that passes to them from their business, they cannot dispose of this for any purpose they want to, till you pass upon

A It is necessary for me to sign the checks before any money can be used in their business. I believe I answered that

Transcript

18 question before.

Q Do the heirs of Washington Pocatello, do they have very much money coming to them from the rental of lands, very much rent coming to them, for their lands on the Reservation, or other lands?

MR. LONE: I object to that as immaterial.

THE COURT: The objection is sustained.

MR. O'MALLEY: Q In other words, you have control of all the money that any of these Indians receive for anything sold on the Reservation, outside of what is produced or paid to them?

A I have control of all money which comes into my office, and I receipt for it.

Q I don't know whether I asked you this or not; the heirs of Washington Pocatello, Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, Ray Pocatello, are they still wards of the government?

A Yes, sir.

Q Has any certificate of competency ever been issued to either one of them?

A No, sir.

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Transcript

18

MR. O'MALLEY: That is all.

RECROSS EXAMINATION.

MR. LOWE: Q Speaking of the heirs of Washington Pocatello I show you here an instrument in the files of the estate of Washington Pocatello, signed Minnie Pocatello; you understand that she was the wife of Washington Pocatello?

A Yes, sir.

Q And Lucy Pocatello Matso, that is one of the daughters?

A Yes, sir.

Q And Maud Pocatello? A. Yes, sir.

Q That is one of the daughters?

A Yes, sir.

Q And the name Racchorse, that is the husband's name, is it not?

A That is right; he has recently died.

Q That is, the husband died?

A Yes, sir.

Q And in addition to Minnie, who died in 1927, there are two other children of Washington Pocatello, besides Lucy and Maud, one of them is Ray and the other is Josephine.

A Yes, sir.

transcript

18 Q These Indians are highly educated, are they not?

A How is that?

A The heirs of Washington Pocatello were highly educated, were they not?

A They are educated, I would say.

R. LONE: That is all.

R. O'MALLEY: Q He asked you if they are highly educated.

A Yes.

Q Tell the court what education they have?

A Of course, it depends on what he means by highly educated. I don't consider them highly educated, none of them. They have a common school education. I don't know so much about Mrs. Lucy Pocatello Johnson. I don't know how much education she has. She speaks English. He understands it some, but I don't know about her education.

27, 28 Q Would you say she was highly educated?

29 A Josephine has more education than she has, than the other two. They are not highly educated, never went

Transcript

19 beyond high school, none of them.

Q Did they go to school at Fort Hall?

A Yes, sir. Josephine and Ray went to the Sherman River California Fort school, but that is not an accredited high school, or a school of higher education than just the eighth grade.

Q They are the two youngest children?

A Yes, sir.

Q Now, the heirs of Washington Pocatello, in fact, all the Indians, isn't it a fact that they come to you or to the headquarters there for information on pretty nearly everything concerning them?

A They come for almost everything under the sun that you think of. They consider the agency and the superintendent's office the place for information and advice. That is a very common thing.

Q They depend upon the Government and upon the agency for practically everything, do they not?

A In the way of information and advice, they do, yes, sir.

Q How long have you been in the service, or an Indian agent?

A I started in May ten years ago.

unscript

19 Q During all that time, during the ten years
at you have been an officer at Fort Hall Reservation,
it is a fact that from your observations, the Indians
do not pay any attention to State laws, or State education
anything pertaining to outside affairs?

I could not say that they did not pay any attention. I
think they pay some attention, but not a great deal of
attention. They pay more attention, a majority, or some
of them, after they reach the position in life or stage
of life, where they take the same place, you might say
as some of the white neighbors do.

Do they read the papers and discuss things?

In a general way.

But a majority of them do not?

I would say a majority of them do not.

They rely entirely and depend entirely upon your agency?

Practically.

And the Government? A Practically so, I would say.

O'MALLEY: That is all.

LOWE: Q Did you happen to know Rebecca Pocatello?

Transcript

20 Q Was she an interpreter here in court, or do
happen to know about that?

A I would not recall. I have seen her.

Q She was a Carlisle graduate?

A Yes--well, I would not say graduate, because the Indian
go to Carlisle and come back--all graduates are not graduates
but she was a very intelligent person.

Q I recall, when some of these Indian matters were in court
here, that there was an interpreter by the name of Rebecca
and she said she was from the Carlisle Indian School?

A That is right.

Q She is the one, is she?

A I think she is the one.

Q Rebecca, is she related in some way to Minnie?

A She was a sister-in-law, I believe. I think Minnie Poc
tello was her sister, half sister, or full sister.

Q But as to the relationship between Rebecca and Washing
Pocatello, what was that?

A She was married to a man by the name of Pocatello. Th
is how she gets the name of Pocatello, but not Washington

brother, I don't believe.

Transcript

20 Q She was rather outstanding and pretty well educated?

A She was pretty well educated, yes.

Q And she did act as interpreter?

A She understands the English language. She was able to speak the English language, etc.

MR. LOWE: That is all.

MR. O'MALLEY: Q. Rebecca Pocatello was not a member of Washington's family, Washington Pocatello?

A She was just his sister-in-law.

MR. O'MALLEY: That is all.

THE COURT: Q. Mr. Cross, what was the policy in your department back around 1920 with regard to these Indians who left the Reservation and became residents and citizens of the States that they moved into; was it your attitude that they could not become citizens of the United States when they left the Fort Hall Reservation, or was it your attitude and policy that where the Indian left the Reservation and went to another State, that he could become a citizen of that State?

Transcript

2/ settled in 1924 by congressional action. However, all Indians are citizens of the United States. I would say prior to 1924 there may have been a question about it, but it was settled then, about fifteen years ago.

THE COURT: Q Since that time the policy of your department is not to take any attitude particularly about the law of citizenship of an Indian to become a citizen of the State into which he moves?

A No, if he lost citizenship anywhere, he has his allotment the Indian at Fort Hall has an allotment. He would have lands, just the same as you would have, if he left the State.

THE COURT: Thank you. I merely wanted to get your answer.

MR. LOWE: Q Do those Indians vote, Mr. Gross?

A They do, many of them do vote. That is a question that is debatable, however. If some citizen takes a notion he wants to contest an Indian voting, he may be successful. We have Indians that have served on juries, and so on, so that the law would recognize them as citizens. Then the question of the severance of their tribal relations enters into the question too.

Q That is purely a legal question.

unscript

21 A Yes. I don't know how Utah is on that question. Your Attorney General is pretty well informed on these things, Mr. Chez.

Yes, Mr. Chez was attorney in some of those Indian state matters.

Yes.

Q. LOWE: That is all.

Q. O'MALLEY: Q Do your records reveal whether or not Washington Pocatello and Mimie Pocatello ever left the Fort Hall Reservation and resided in Utah?

A I could not say that off hand. I don't believe that they did. They had allotments, both of them, and I don't believe they ever left the Fort Hall Reservation permanently. They may have left for a short duration, but I don't believe they ever left there permanently. Their estates were probated by the department of interior, so that, at least, they were residents all that time.

Q The Government has a special system of probating the estates of Indians?

A They have attorneys appointed to handle the matters, but the state law governs. They follow the state law.

Transcript

21

So far as decent goes, they follow the State laws

In other words, in Idaho the state laws apply to the decedent
in Utah it applies to the decedent here, and in Wyoming it
applies to the decedent there.

Q They follow the law of decent and distribution of the State
of Idaho?

A That is right.

MR. O'MALLEY: That is all.

MR. LOWE: That is all.

LUCY POCATELLO JOHNSON:

a witness produced in behalf of the plaintiff, being first
duly sworn, testified as follows:

DIRECT EXAMINATION.

MR. O'MALLEY: Q You may state your name.

A Lucy.

Q Speak up loud. Lucy Pocatello Johnson.

Q You are a daughter of Washington Pocatello and Minnie
Pocatello?

A Yes, sir.

Q And Maud Pocatello Racehorse is your sister?

A Yes, sir.

Manuscript

Q And Josephine Pocatello is your sister?

A Yes, sir.

Q And Ray Pocatello is your brother?

A Yes, sir.

Q And that is all of the children living of Washington Pocatello and Minnie Pocatello, is it not?

A They are all living today.

Q Where do you reside, and where do you and your sisters and brother reside?

A Fort Hall Reservation.

Q How long have you been residing at the Fort Hall Indian Reservation?

A All my life.

Q Were you born there?

A Yes, sir.

Q And the rest of your family, your sisters and brother, were they all born there?

A Yes, sir.

Q Your father and mother, Washington Pocatello and

Minnie Pocatello, how long did they live on the Fort Hall Indian Reservation?

Transcript

22 A My father lived there sixteen years, and my mother lived there fifty years.

Q Did your father or your mother, either one, ever live down here in Box Elder County, Utah?

A No, they never lived here. They only visited here.

Q Your father's father, that was Chief Pocatello, was he not?

A That was my grandmother's grandfather. Grandfather.

Q Your grandfather was Chief Pocatello?

A Yes, sir.

Q Did he ever live around in this section of the country down here in Utah?

A He lived here when he was married to the daughter of Chief Tosogero.

Q How long did your grandfather live in the Fort Hall Indian Reservation?

A My Grandfather?

Q That is Chief Pocatello?

A He lived there and around here, both places. I could not tell you because I was not born there. I didn't know the Chief.

Q But your father and your mother lived on the Fort Hall

script

23 Indian Reservation for about sixteen years before your father died.

Yes, sir.

They never moved away from there?

No, sir.

They never moved from there and they lived at Fort

all that time?

Yes, sir.

Now, Lucy, did you ever come to Brigham City before?

I have been here lots of times and at Washakie when I was a little girl.

Do you recall coming to the courthouse here; in other words, do you recall being here one time on a hearing on the estate of Yaotes Owa?

Yes, we were here the last day of the probation.

Now, Lucy, just as briefly as you can, you tell what you recall happened here on that day?

LCME: I object to that as incompetent, irrelevant, and immaterial.

THE COURT: Pro forma, I am going to overrule the objec-

tion and let the matter go on the record and we will

Transcript

23

argue it at the conclusion.

MR. LOWE: May our objection extend to the testimony, all of it, without repeating it?

THE COURT: That ruling may stand as to what took place in the court room, the entire matters; we will try to protect your record.

MR. O'TALLEY: Q. You may go ahead and state it.

A. They send us a letter stating that there was a probation to be on three days at Brigham here, and we made a previous trip to come here. It took us two days to get here, and I was here only just a little while when that probation was. We were in the hall here, and we were excited; we didn't have no lawyer or anything, and we didn't know what to do, and well, the Judge asked if anybody was interested in this that they were probating. We said we didn't have no lawyer. Well, then, the Judge said if you want a lawyer, I will appoint one. He said all right, nothing else to do. He came over, and called a lawyer by the name of Foxloy, and so he was rushed in here, for about twenty minutes and we told him what our interests were, and so he came in. We listened

transcript

one-third of the land, of our grandfather's land, or great-grandfather's land, and that was all we understood, and the probation was over with then. That is all I can recall of that hearing that we met over here.

Q Then what did you do?

A And this Foxley said, well the probation is all over. We then could go home, he said. "What is going to happen to that one-third?" we said. He said, "I got to appoint an administrator for that one-third of the land, and then, whenever the land is sold, why, you are going to get what is coming to you. So, he said, well, I will be the administrator of Josephine and Ray, and then I will take care of the rest, he said to us, and signed on that. Of course, he was our lawyer.

Q Do you recall whether you ever went to Mr. Foxley's office?

A Yes, we went over. He took us over. I don't know how many blocks over. We went down the street, and he took us into his office and talked to us, and made us sign things.

Transcript

24

Q I show you a paper here in this abstract record; do you recognize that paper?

A Sure.

Q Was this the paper that Mr. Foxley prepared for you?

A It must be, because that is my hand writing.

Q That is your own hand writing?

A Yes, sir.

Q That is your sister's hand writing?

A Yes, sir. That is my hand writing.

Q That is your hand writing?

A I don't know who wrote mother's name for her. Maybe her sister. That is my hand writing.

Q Was that your mother's mark?

A Yes, sir.

Q. What did Mr. Foxley say, if anything, it was necessary for you to do?

A. Well, that is all he said. He said that if the land was sold, he would pay us out of it, and then for the money to be paid for Josephine and Ray, pay their guardian, and if there was any money for us, he would send it to Fort Hall for it to be paid through Fort Hall.

nscrip

25 Q. Did Mr. Foxley say anything to you about whether you could go home?

Yes, he told us to go home now, we were through.

Did he say anything to you about looking after your interests?

That is what he said. He said, I am your lawyer, I will attend to everything for you. He said, you just leave it in my hands, he said.

Do you recall about how long it was before you ever heard anything about the matter after that?

It was soon after father passed away. I think it was just about a year or so, when Donner was superintendent, then we heard something about money coming from Brigham, nine hundred dollars. Donner explained to us that four hundred dollars was to come to us heirs, and five hundred dollars to the lawyer, and so we took the money, ourselves, there in the office, and then my mother said, there is not enough for that land; we are not getting anything out of that land; that is our land; it looks as though that is not enough. What shall we do? Then we

Transcript

25 money sent back to him; we won't keep it home; will just send it back, unless they pay us more than that hundred dollars, or we will let the land go out of ourself we have a right to see how the deed is to that land. So, told Donner. He said all right, I will agree with you on He said, that is not enough, and so he said, we will send money back. That is the last I heard of that money. It sent over to us and it was sent back. It has been still standing that way, from that time on.

Q That is all you heard about it from that time on?

A Yes.

Q But you have at different times spoken to the superintendent?

A Well, I have talked with the superintendent about ten years, a time or two, and tried to get a foothold some way, that we could take it up, and then our superintendent said that we had to hire another lawyer before we ever could take that land or the money. We were helpless, because we were Government wards. We had to have an outside lawyer.

Q I take it, that neither you nor any of your brothers or sisters ever got any of that money?

Transcript

25 A. No, they never got any of it.

Q None of the money was ever paid to either one of you?

A No, none of us ever got a cent, even got a red penny, not a red penny. We never even got that.

MR. O'MALLEY: That is all.

CROSS EXAMINATION.

MR. LOVE: Q. You say you spent considerable time down at Washakie, Lucy?

A Yes, I have been to Washakie lots of times.

Q Your friends and relatives live there at Washakie?

A Yes, my aunt lives there.

Q You have lived there considerable time, yourself, haven't you?

A Well, not live there, but just visit, something like two weeks or for a day, or something like that. That is the longest I have ever stayed at Washakie.

Q When did you first talk this matter over with the Indian Superintendent, what you should have, and about your affairs?

A When Donner, when he came in, I took it up with him.

Q. How long ago was that, Lucy?

Transcript

26 A. Oh, that is about twenty, twenty-two years ago, or twenty-one years, something like that.

MR. LOVE: That is all.

MR. O'MALLEY: Q. You say that you spent some time at Washakie?

A Yes, sir.

Q That is some twenty years ago, wasn't it, that you used to visit there?

A Yes, sir.

Q Do you recall about the last time you visited at Washakie?

A We visited when we would go through on these trips here.

Q Yes. A. We visited when we went on through Washakie and when we went back home.

Q Have you visited in Washakie since that time?

A I visited Washakie when I visited my aunt there, when she passed away.

Q When your aunt passed away?

A Yes sir.

Q You just went to Washakie on visits?

A Yes.

MR. O'MALLEY: That is all. MR. LOVE: That is all.

Transcript

27

JOSEPHINE POCATELLO

a witness produced in behalf of the plaintiff, being first duly sworn, testified as follows.

DIRECT EXAMINATION.

MR. O'MALLEY: Q State your name please.

A Josephine Pocatello.

Q Where do you live -- reside? A At Fort Hall Reservation.

Q You are a daughter of Washington Pocatello and Minnie Pocatello? A Yes, sir.

Q Lucy Pocatello Johnson is your sister?

A Yes, sir.

Q And Ray Pocatello is your brother?

A Yes, sir.

Q Then you four are the only children of Washington Pocatello and Minnie Pocatello?

A Yes, sir.

Q You don't recall the time you came to Brigham City at the time of a probate of an estate; you don't even recall that, do you?

A I just can barely remember it.

Transcript

27 Q You don't remember anything that happened at that time?

A No, I don't.

MR. O'MALLEY: I think that is all.

MR. LONE: No cross examination.

MR. O'MALLEY: The plaintiff rests.

MR. LONE: Now, if the Court please, before we proceed, there is one matter that I wish to correct our pleadings on. In our answer, the original answer filed herein, we allege that this action is barred by the State statutes of limitations, of the State of Utah, and particularly by the provisions of Section 104-2-5 and 104-2-6; and we desire to add to another section, 104-2-7. I ask permission to amend our answer, as to the first cause of action, by interlineation by adding the additional section 104-2-7.

MR. O'MALLEY: No objection.

THE COURT: The amendment may be made.

MR. LONE: If I may do that by interlineation?

THE COURT: Yes.

MR. LONE: If the Court please, we have a stipulation which

anscript

28 paragraph ten. "It will be further stipulated the trial of said cause that certified copies of Homestead Proof on file in the General Land Office covering Homestead Entry #2400.00 may be offered at the trial of said cause subject only to the objection regarding the materiality of the same." I might state that we have received from the Land Office, United States Land Office. Photostatic copies of Homestead Proof, testimony of witnesses, Homestead Proof, testimony of claimant, to support the Homestead Proof, testimony of witnesses, Homestead Proof, testimony of claimant. I sent my letter to the General Land Office, to the commissioner of the General Land Office at Washington, to send us photostatic copies of all of the instruments, including the patent, and telling him that it was required by the 14th of this month, and we would appreciate their early attention to these matters. I now desire to offer--first, have marked these instruments as defendants Exhibit "1" and offer them in evidence as being part of the records in the General Land Office relating to this patent.

B. O'MALLEY: We have no object particularly, only on-

Transcript

28 cumbering the record. I think they are incomplete, irrelevant and immaterial. That is the only objection to them.

THE COURT: All right, the exhibits are received.

MR. LONE: We offer them for the purpose of showing that had renounced their tribal relations and take up the civil life. I should also like the stipulation of counsel that the complete photostatic files from Washington are received that the additional entries may be offered in connection with this exhibit, which has already been offered in evidence, completing the entire transcript of the patent files with reference to this land, that they may be attached and made a part of this exhibit.

MR. O'MALLEY: I don't think that we have any objection.

THE COURT: Very well, that may be the understanding.

they come that may be deemed a part of the record.

MR. O'MALLEY: Yes.

MR. LONE: That is satisfactory. That is a complete file.

THE COURT: The application for the homestead, and who paid the fees, and statements as to whether the applicant claimed he was a citizen of the State, of the United States, and

ranscript

MR. LOVE: Yes.

R. CUMLEY: That is immaterial. That can be added.

R. LOVE: Yes. Now, if the Court please, for the purpose of saving time, we have a letter here from the County Treasurer in reference to the taxes. We can probably stipulate with counsel as to the payment of these taxes. I might state that we are in a position to prove that the letter of the County Treasurer of Box Elder County, Utah, states, that it appears from Box Elder County's records that the east half of the southeast quarter of section twelve, township eleven north, range west, was assessed for the first time in 1919 to Yactes m, an Indian. From 1920 to 1925, inclusive, it was assessed to A. I. Grover, and from 1926 to 1938, inclusive, was assessed to Joseph E. Robinson and Amasa L. Clark. The taxes have been paid each year before delinquency with the exception of 1921, 1922, 1924, and these were redeemed by A. I. Grover. When taxes are paid before delinquency, we keep no record of the person paying the tax. Moreover, it is generally assumed that the owner pays the

Transcript

29 to prove that; if you will stipulate to it, it will save us the necessity of calling here the County Treasurer.

MR. O'MALLEY: Yes, we will stipulate, we are ready to stipulate with you, provided you stipulate that they have rented these lands all the time.

MR. LOWE : Yes.

MR. O'MALLEY: We are willing to stipulate that these men contracted to pay the taxes, Mr. Lowe, but we don't admit that they paid our taxes; that the property rented all the time, that the rental paid more than the taxes from an undivided one-third interest. I am willing to stipulate that they paid the taxes--that is the record. I am not willing to stipulate that they paid it out of their own funds. I want to insist that they were paid of the rentals of the property.

MR. LOWE: That is the way I have understood Mr. O'Malley contention here, that the taxes, as he alleges, were paid from the proceeds of the farm. With that stipulation, we offer defendants' Exhibit "3".

MR. O'MALLEY: With the understanding that they were paid out of the rental value of the property.

MR. LOWE: I don't know what the exhibits show.

MR. O'MALLEY: Well-

MR. LOWE: At least, we admit that we rented the property and got some returns.

Transcript

29 THE COURT: Exhibit "3" is received then.

MR. LOVE: Now, Mr. O'Malley, the pleadings show that Mr. Grover purchased a water right for this property. We likewise allege improvements. We now show to counsel defendants' proposed Exhibit "4", being a letter from the Utah-Idaho Sugar Company, in reference to a contract to purchase, by Mr. Grover, and his payments thereon. I ask if you will stipulate that that letter correctly states the facts as to that water application and the payments made thereon?

MR. O'MALLEY: We will so stipulate.

MR. LOVE: We therefore offer defendants' exhibit "4" in evidence.

THE COURT: It is received.

MR. LOVE: We now offer in evidence defendants' exhibit "5", being an abstract by John W. Phillips, extended by Norman Lee, as of the 28th day of March, A. D. 1925, at ten:thirty-five A.M., being the abstract of title now held by the defendants in this action.

MR. O'MALLEY: Just one second, now. We want to glance over this just a minute, your Honor. There are no objec-

Transcript
29 tions.

THE COURT: All right, it may be received.

MR. LOWE: That comes up to and included the deed to these defendants. We now offer in evidence, in the Estate of Angichah, deceased, petition for intervention, signed by William Ray, United States District Attorney, and Isaac Blair Esq. Assistant United States Attorney, with the stipulation of counsel dated June 20th, 1919, order of the Court, Justin D. Caldwell dated June 21st, 1919, all of which were filed in the office of the Clerk of the District Court of Box Elder County, Utah June 21st, 1919, together with a motion to dismiss dated July 28th, 1921, signed by Charles M. Morris, United States Attorney, filed in the office of the Clerk of the Court under date of July 28th, 1921, an order of dismissal, signed by Albert A. Law, Judge, dated July 28th, 1921, filed with the clerk of the court on the same date.

MR. O'MALLEY: We object to the offer on the ground that it is incompetent, irrelevant and immaterial; it is not binding in any way in this case; it is an altogether different administrator. It has got nothing to do with this property. It does not have anything to do with the plaintiff's in this case.

Transcript
30 (argument)

THE COURT: Pro forma, the objection may be overruled, Counsel may argue the matter at the conclusion of the case.

MR. O'HALLEY: I want the record to show that we object on the ground, also, that it is incompetent, irrelevant and immaterial, and it is not an element of estoppel in any way as against the plaintiffs in this case.

THE COURT: Very well.

MR. LOVE: We likewise offer in evidence, in the Estate of Mad-ga-gee, petition of intervention of William H. Ray and Isaac Blair Evans, Dated December 18th, 1918, the stipulation of counsel, dated December 16th, 1918, and the order of the Court, Justin D. Call, Judge, dated December 18th, 1918, all filed in the office of the clerk of the court under date of December 18th, 1918, the motion to dismiss dated July 28th, 1921 by Charles M. Morris, United States Attorney, the order of dismissal signed by Judge Albert A. Law, under date of July 28th, 1921.

THE COURT: That is the same situation as the previous

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Transcript

30 one.

MR. LOWE: Yes. We likewise offer in evidence the petition for intervention and the stipulation of counsel, and the order permitting intervention with the motion for dismissal at the order of dismissal in the Estate of Geeump, and in the estate of Ar-ri-neap. That is the same as the other.

MR. O'MALLEY: The same objection to each and every one of them on the same grounds, without repeating them.

THE COURT: The same may be received in evidence, pro forma. I think we will take our noon recess at this time.

- - - - -

Thursday, September 14th, 1939.
1:30 P.M.

THE COURT: You may proceed.

AMASA L. CLARK

one of the defendants, produced in behalf of the defendant being first duly sworn, testified as follows:

DIRECT EXAMINATION.

MR. LOWE: Q. State your name, please.

A Amasa L. Clark.

Q Where do you reside? A Farmington, Utah.

Q How old are you? A Seventy-four.

Manuscript

Q. How long have you resided at Farmington?

All my life.

What is your business? A Cashier of the Davis County Bank, Vice-President and Cashier.

How long have you been affiliated with the Davis County Bank? A Since 1892.

You have some ecclesiastical positions in the home town?

R. O'MALLEY: Just a moment.

R. LOVE: I want to qualify him as to the standing in the community.

MR. O'MALLEY: We object to it as incompetent, irrelevant and immaterial.

MR. LOVE: Q Have you held some positions other than the positions with the Davis County Bank?

A I served a couple of terms as mayor. I served on the county school board, as treasurer.

Q Any other positions?

A I was bishop of the Farmington ward for six years, fifteen years. Since that time I have been in the scout work. I am scout executive of the Salt Lake council.

Transcript

31 Q You are one of the defendants in this action

A Yes, sir.

Q You recall one A. I. Grover in his lifetime?

A Yes, sir.

Q Is he still living?

A No, sir.

Q When did he die, if you know?

A It seems to me a couple of years ago. I cannot recall.

Q You procured a deed from Mr. Grover for the ground in question on the 12th of March, 1925, did you?

A Yes, sir.

Q At that time of the transaction there was delivered to this abstract of title which is designated as defendant's exhibit "5"? A. Yes, sir.

Q What was the consideration for this deed?

A \$12,500.00.

Q I notice the deed is a joint deed to you and Joseph E. Robinson.

A Yes, sir.

Q In that consideration of \$12,500.00, did you assume an indebtedness against the property?

Manuscript

32 A. No, sir, we got a clear title.

At that time was there a mortgage?

Oh, yes, there was a mortgage to the State of Utah for seven thousand dollars. Of course, that was paid, and the taxes were paid, and other expenses.

The balance was paid to Mr. Grover in cash?

Yes, sir.

At the time you procured this deed, did you have any knowledge of any claim on the part of the plaintiffs in this action to this land?

R. O'MALLEY: That is objected to as incompetent, irrelevant and immaterial, calling for the conclusion of the witness and self-serving.

THE COURT: Overruled.

R. O'MALLEY: Exception.

No, sir, I didn't.

R. LOWE: Q After you received this deed, state whether or not you went into possession of the property?

Yes, sir, we did.

And have you and Mr. Robinson had possession of this property at all times since the date of this deed?

Transcript

32 A Yes, sir.

Q And during that time since March - A. 12th.

Q Since March 12th, 1925, state whether or not you have farmed it ?

A Yes, sir, we have.

Q Each and every year ?

A Yes, sir.

Q What was the condition of the ground when you first cured it as to being level or otherwise?

A Well, the parties to whom we rented it claimed that needed a lot of work done to level it, and they asked buy a fresno, they wanted us to buy a fresno, and that needed to do a lot of work in leveling the ground, especially on the east portion.

Q Did you make an allowance for that?

A Yes, sir.

Q For those services in the rental of the property?

A Oh, yes.

Q What is the conditions of the land as to being level in good condition for farming now as compared with when first got the land?

Transcript

33 A It is in very much better condition.

Q Just explain in detail, if you will, bishop, what you mean by that?

A We have allowed several hundred dollars for the leveling that they have done for the work in grading and scraping and leveling the ground. It is in much better condition now.

Q During this time since you procured the title to the property, you have paid the taxes each and every year?

A Yes, sir.

Q You have claimed the land, yourselves?

A Yes, sir.

Q Openly, and farmed it?

A Yes, sir.

Q Claimed it as against all persons?

A Yes, sir.

Q I ask you whether or not during that period of time any person has disputed your right to the ownership of this property prior to the time of the filing of this complaint?

A No, they haven't.

Transcript

33 Q Were you during any of that time visited by
of these plaintiffs?

A No, sir.

Q In reference to your not being the owner?

A No, sir.

Q During that time the property has been enclosed with
substantial enclosure, has it?

A Yes, sir.

Q You have kept that up during all the time, the fence
around the property?

A Yes, sir.

Q In purchasing this property you relied upon the title
shown in the abstract of title, did you?

A Yes, sir.

MR. O'MALLEY: That is objected to as calling for the com-
sion of the witness.

MR. LOWE: It merely goes to the good faith.

THE COURT: He may answer.

A Yes, sir.

MR. O'MALLEY: Exception.

A Yes, we relied on that title as shown.

inscript

34 MR. LOWE: Q. Did you know Albert Saylor?

I never saw him.

. LOWE: And as to Albert Saylor, are you willing to stipulate that he has been dead for better than twenty years, Mr. O'Malley?

. O'MALLEY: Yes, we will stipulate the record can show that Albert Saylor died around 1917, 1918 or 1919.

. LOWE: Q. Did you know U. F. Diteman?

I never saw him to know him, no.

. LOWE: We allege here that Mr. Diteman is a non-resident of the State, and now resides near Portland, Oregon, is a man past eighty-five years of age. We could not bring Mr. Diteman down, if his testimony was material, because of the fact that he cannot remember anything about it, as being old and infirm, and he don't like to testify, but I do want counsel to admit that he is incompetent. Do you happen to know about that, Mr. Malley?

. O'MALLEY: No, I don't know anything about him. I don't think it is material. What is your point?

. LOWE: I have a letter from Mr. Diteman that he

Transcript

31 cannot remember anything about the transaction

MR. O'MALLEY: I think it is immaterial, irrelevant and competent, anyway.

MR. LOWE: I had better come back to that.

MR. O'MALLEY: All right.

MR. LOWE: Do you have any knowledge as to the First al Bank of Pocatello, Idaho?

A No, sir.

MR. LOWE: It is stipulated in this case that the First ional Bank of Pocatello, Idaho, is defunct and has been a good many years, Mr. O'Malley.

MR. O'MALLEY: Oh, I guess about eight or nine years.

MR. LOWE: Q. Did you know Charles E. Foxley?

A No, sir.

MR. LOWE: That is all.

CROSS EXAMINATION.

MR. O'MALLEY: Q. Now, Mr. Clark, you reside, you say, Farmington?

A Yes, sir.

Q Of course you never lived on this property?

A No, sir.

Transcript

35 Q. When you and Mr. Robinson purchased the property, it was under a lease, wasn't it, under a written lease, with a Jap?

It seems to me it was, yes.

Q I show you plaintiffs' Exhibit "L", which has been admitted in evidence; do you recall whether, when you purchased the property, that lease existed on the property?

A Yes, sir, this was dated in 1923.

Q For three years? A I think that was right, for 1925, yes.

Q That lease calls for the delivery of two hundred and thirty-two tons of beets annually. The last year, 1925, this lessee delivered these beets as rental of the farm that year?

A He didn't deliver it to us.

Q I mean to the sugar company?

A I don't know.

Q Who collected the rent during all the years, Mr.

Clark, since you and Mr. Robinson bought the property;

did you or did Mr. Robinson?

Transcript

35 A It came to me.

Q It has been rented every year, hasn't it, since?

A Yes.

Q Haven't you got any recollection that this Jap lessee delivered these beets in 1925, to the Sugar Company, 232 tons of beets, as rental, out of the first beets?

A I don't think I recall any transaction, other than that we took it probably after that. I don't remember about this delivery. I didn't handle any transaction concerning these beets.

Q But do you recall who paid you the rental in 1925?

A 1925, no. I can't say just how that was, the amount of that rent for 1925. We took it in March.

Q You don't recall whether you collected the rental in 1925 or not?

A I don't think we did.

Q You took the property over in March?

A Yes, we did.

Q Haven't you got any recollection of how you collected the rental in 1925?

A I could not state. That is so long back. I probably ha

Transcript

36 got a record of it, but I don't think it came to us.

Q You don't think it came to you?

A I don't think for that year.

Q Now, you say it is enclosed by a fence, that is the whole property is enclosed by a fence; is that true; the whole eighty acres? About sixty-five acres of it is enclosed by a fence; is that right?

I think it is practically enclosed. I think probably around on the east side there--

Q You think the whole eighty acres is enclosed?

A I think it may be open on the east side. I Can't remember.

Q Now, then, you collected the rent every year since 1925, did you not?

A Well, we attempted to collect it. It was due us, but some years we lost out because of failure of the lessee.

Q You rented the whole eighty?

A Yes, sir.

Q Now, you collected the rent for the whole eighty

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Transcript

36 whenever you did collect the rent?

A Yes, sir, that was the understanding.

Q Now, you spoke about it being uneven; do you know what parts are uneven?

A Yes, sir.

Q What parts? / The east part, specially the northeast part.

Q That has never been divided into two-thirds, or one-third by a fence, or anything, has it?

A Heavens, no.

Q You knew, when you purchased the property, Mr. Clark, it had been decreed by the probate court, an undivided two-thirds to one person, and an undivided one third to another person, did you not?

A No, sir, I didn't know it.

Q You didn't consult the record at all, yourself?

A No, sir, I just bought it from the--I assumed that the State of Utah had passed title. I bought it with the idea that the abstract shows it.

Q You assumed because the State of Utah had appraised the loan, and had a seven thousand dollar mortgage upon the

Transcript

37 erty, that that was a good title?

A Yes, sir.

BY MR. MASON: Q When you got this property, at the time you purchased it from Mr. Grover, you didn't go on the property at all?

A No.

Q Of your own knowledge you didn't know whether this property was gravelly or rough?

A Yes, sir, I did, because I was on it just after we purchased it, yes.

Q You just went on it after you purchased it. Did you ever have any conversations with A. I. Grover relative to this piece of property, when you purchased it?

A No, I can't say that I did.

Q You didn't have any conversation with him relative to the income he had received from it?

A I think he said that it was leased under good conditions.

Q That it was a bargain, good land, under good conditions?

A Yes, sir.

Transcript

37 Q Did you ask him what those conditions were?

A No, sir.

Q Didn't he ever tell you that he had leased it to these Japs for so much rental, or thirty dollars per acre per year?

A He may have said that, too. He may have said that at that time, yes.

Q Now, in your opinion, Mr. Clark, a piece of land, renting for thirty dollars per acre, cash rental, per year, required a good piece of property?

A At that time, and what it was after that, in succeeding years, is totally different.

Q You said, Mr. Clark, that there was a couple of years that you never realized any income from this property. Is that correct?

A Yes, sir. It was meager. I know that the rent was not collected. We lost most of the rent for the first few years.

Q How did you lease it; share lease or cash?

A I think it was on a cash basis. I think it was on a cash basis later.

Q Let us see; you said that you purchased it for \$12,500.00.

A Yes, sir.

Transcript

38 Q At the time that Mr. Grover sold this property he was in straightened financial circumstances, wasn't he?

A I think he was.

Q So that he was just coming out from under the deal with the State Land Board.

A Yes, sir. He needed it.

Q How much did you receive from this property last year?

A \$930.00, I think.

Q \$930.00? By the way, Mr. Clark, in 1925, was it, when you purchased this property?

A Yes, sir.

Q What was ground selling for in this vicinity of this property, other ground, that you happen to know, of your own knowledge?

A At that time land, I guess, good land, was worth from two hundred to three hundred dollars an acre.

Q Do you know of any parcels near by selling for that price?

A No, I don't. I know of some selling for \$200.00.

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Transcript

38 somewhere, about \$200.00, \$175.00. I know that land dropped to \$175.00 later.

MR. MASON: That is all.

MR. LOWE: That is all.

JOSEPH E. ROBINSON

one of the defendants, produced as a witness in behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

MR. LOWE: State your name.

A Joseph E. Robinson.

Q What is your age? A Sixty-nine.

Q Where do you reside? A Salt Lake City.

Q You are associated with Mr. Clark, who just left the witness stand?

A Yes, sir.

Q You are one of the defendants and a half owner of the real estate in question?

A Yes, sir.

Q You have resided in Box Elder County for some years, you? A Yes, sir.

Q You raised your family in Box Elder County?

Transcript

39 Q We did.

Q And you ranched in this county? A Yes, sir.

Q Do you have a farm at Fielding? A Yes, sir.

Q Oversee it? A Yes, sir.

Q Some of your children still on the farm?

A None of them.

Q But you were a resident of this County for a long time, till you moved to Salt Lake City?

A Yes, sir.

Q Did you know A. I. Grover?

A I did.

Q Did you know this ground about the fall of 1919 when Mr. Grover is alleged to have purchased it?

A I could not say. I knew the territory. I had been over in that neighborhood.

Q But you hadn't paid attention to it? A. No.

Q I ask you whether you know whether Mr. Grover farmed that property after 1919?

A Yes, I know he farmed it.

Q State whether or not he farmed it each and every year until you purchased that tract in 1925 in March?

Transcript

39

A He had farmed it right along, yes. He had himself worked on it, and they had lived on the farm every year to get it in shape to water it.

Q You saw the general operations, in a general way, on the farm?

A Each and every year, we lived in that neighborhood, close to me.

Q There was some leveling done?

A Yes. Of course, I wasn't there every year while he had it. Then I was by there a good deal. I didn't pay so much attention to it while he owned it. After we bought the place I was on the place. I was watching it.

Q You know it was farmed each and every year?

A Yes, sir.

Q By him or by his supervision?

A By him, yes, sir.

Q Since you procured the deed in March of 1925, you and Bishop Clark have farmed it at all times?

A Yes, sir.

Q The Bishop said that you paid \$12,500.00; that is correct?

A Yes, sir.

Transcript

40 Q. You paid the consideration, in addition,

as set forth in the mortgage?

A Yes, sir.

Q You paid some taxes, and then the balance went to Grover.

A I paid cash for my share right down.

Q And left it to Bishop Clark, let him finish?

A Yes, sir.

Q To care for the straightening up of the title?

A Yes, sir.

Q At the time you purchased it, did you have any knowledge of any claim on the part of these Indians?

A None whatever.

Q Of ownership to the land? A No, sir.

Q It has never been called to your attention that they claimed any interest in it? A None whatever.

Q At no time?

A At no time.

Q Each and every year you have been on it, or your tenants?

A I have been on the place there and while I go around

Transcript

40 by there. I was overseeing it.

Q And you have claimed it adversely?

A Yes, sir.

Q Under a claim of right? A Yes, sir.

Q You have fenced it, or kept up the fence?

A Yes, sir.

Q Is it entirely enclosed with a fence?

A Yes, there is two or three wires, about three wires, around the place. I don't know whether there is any more than that, or not. The fence is right around it. Of course part is in waste land, down on the river.

Q Are there irrigation ditches on the property?

A Yes, sir, there are irrigating ditches.

Q And were during each and every year? A Yes sir.

Q What crops have you raised on it?

A Raised tomatoes, beets, hay and grain.

Q Are they similar to the crops Mr. Grover raised in 1919 until you got it?

A Grover, I think he raised beets pretty well.

Q Most every year?

A Yes, sir, right along.

Transcript

41 Q What about you and Mr. Clark, have you made any improvements by way of leveling the ground?

A Yes, sir.

Q Tell the court what you did?

A On this one side we used a fresno, pushing down the high places, so you could get water on it, and then fix the ditches so you could water it.

Q What would you say the cost of such work amounted to?

A I would not know just what that would be. Those that did the work would know more themselves what that work would be.

Q The tenants took it out of the rent?

A Well, yes.

Q Did you know any of these parties, other than A. I. Grover--Albert Saylor, U. F. Diteman or Charles Foxley?

A Neither one of them.

Q Did you know any--did you know the First National Bank of Pocatello, or any of its officers or directors?

A No, sir.

Q Did you know anything about an alleged escrow agreement?

A No, sir.

MR. LOVE: That is all.

Transcript

41

CROSS EXAMINATION

MR. MASON: Q You stated that you took the cost of leveling this ground out of the rent; just how did you figure it?

A By doing this work, we furnished several sacks of lucern seed. The farm was run down.

Q You furnished several sacks of lucern seed? A Yes, s

Q Did you furnish anything else? A No, sir.

Q To pay for the leveling? A No, sir.

Q That is the only consideration you gave for leveling the farm?

A We let him have it a little cheaper. He had done some extra work.

Q About howmuch less, do you recall? A No.

Q Now, you were on this farm you say before you purchased it? A I have been on there.

Q Before purchasing it? A In that neighborhood, I say, a good many years.

Q Well, now, this piece of property lies--if I might dig a little. The road **that** goes straight from Tremonton beyond the Brown Corner. Do you know where the George Howard property is? A. Yes, sir.

Transcript

42 Q Then you go east along that main highway for approximately one mile, up to the river, and then you have to go down about a half a mile; it is off the main highway?

A Yes.

Q Had you ever been along there, paying any particular attention to that property before 1925?

A Not particular. I may have been down there. There was another road, of course, around into Tremonton.

Q Not many times, had you?

A No.

Q This lies down off the main highway?

A Yes.

Q You didn't have any particular reason to go down that way?

A Not particular.

Q How much of this ground was unlevel, how many acres?

A If you were on there we could tell.

Q Approximately, that will be near enough.

A Well, I think a third of it.

Q Now, if I show you here, here is Mr. Grover's

Transcript

43 application for a loan. It says that he has sixty five acres under cultivation, and then the balance is uncultivated. Now, some of this leveling has been done on the fifteen acres?

A What do you call the fifteen acres?

Q I don't know, myself. I haven't been on the property.

A The northeast portion there, there was a cross-irrigating ditch there, and very uneven. That was the worst part of it. The other, where the buildings were, that was more level but there was an acre, or such a matter, there was just a swale in there, we had to fill that up and to grade over the

Q That was over in the northeast portion?

A That was on the southwest corner.

Q How many acres do you think you have under cultivation at the present time? A Sixty acres.

Q You haven't any more than that?

A No, sir.

Q The reason I ask, Mr. Grover's application said there was sixty-five acres under cultivation at that time. I don't know ~~where~~ he would get his sixty-five in there. As I understand it, there are two ditches that run diagonal?

transcript

43 A Yes, sir.

Q They have been there ever since you can remember?

A Yes, sir.

Q And this has been under irrigation probably for the last twenty years?

A Yes, sir.

Q Or twenty-five years? A Yes, sir.

Q Were you ever down to this property when Bishop Moroni Ward was managing it for the Indians?

A Yes, sir, I went to see Moroni Ward about these other parties claimed that they had bought this right of way through there for that ditch, but Ward told me then he was looking after it for the Indians. They claimed they bought it, but they didn't.

Q What work have you done in repairing the fences, putting in posts and keeping up the fences?

A Sellman has been doing all that work.

Q He has just repaired the fence that was already there?

A He has kept it up. It is in good shape.

MR. O'MALLEY: Q Do you know if this particular eighty acres of land was irrigated and crops raised on it for a

Transcript

44 number of years before Grover obtained possession of it.

A I don't think there was any--I understood there was water on it till he got it.

Q You don't know of your own knowledge?

A No, sir.

Q I see.

MR. O'MALLEY: That is all.

MR. LOWE: That is all. One other matter. I am in a embarrassing situation here, your Honor. We allege in answer that Grover is dead; that Albert Saylor is deceased. Albert Saylor was the attorney representing Mr. Ditema has been for twenty years deceased. U. F. Diteman is ever a resident of the State. He is now past the age of five and unable to appear and testify as to the facts in this case. I have had correspondence with him up near Port Oregon, and he advises me that he is infirm. I hesitate to testify in this case as to things I know of my own knowledge having been associated with these Indians in certain of the Indian cases; that Mr. Grover was present and had knowledge of the fact that these patents or petitions were on file.

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44 Mr. Grover was very often present in court. He
is dead and cannot be had. I do not want to testify and
argue the facts in the case. I think it is admitted that
the First National Bank is defunct and has been for many
years. I think that is all the testimony we have. We
rest.

R. O'MALLEY: We are willing to accomodate you in any
way. If you want to stipulate that Grover, if he were
here, would so testify, that he was familiar with these
petitions being filed --

R. LOWE: Yes, that is what it would show.

R. O'MALLEY: I will stipulate, but I want to enter an
objection that it is incompetent, irrelevant and immater-
ial and does not tend to prove or disprove any of the
issues in this case.

THE COURT: The objection may be overruled, the stipula-
tion deemed in evidence.

R. O'MALLEY: We are willing to show that, but we object
to it as incompetent, irrelevant and immaterial.

R. LOWE: With that stipulation we rest.

R. O'MALLEY: We have a little relation to the Counsel for
Spokane County, the St. Quinlan, now have funding for distribution provided by the Institute of Cultural Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Transcript

44 defendants entered a letter from the Utah Idaho Company, giving the amounts paid for the water right by ver, and it was agreed that if the Utah Idaho Sugar Company were present, that they would testify that the price of the paid by the Utah Idaho Sugar Company at Garland, Utah, for years 1920, 1921, 1922, and 1924, are as stated in the Utah Idaho Company letter to Attorney P. C. O'Malley, dated August 30th, 1939. We ask to have this letter introduced in evidence or else to have that statement in the record.

MR. LOWE: No objection to offering the letter.

THE COURT: Have it identified, Mr. O'Malley.

MR. O'MALLEY: That is exhibit "N".

THE COURT: It is received.

MR. O'MALLEY: Plaintiff offers in evidence, plaintiffs exhibit "O", for identification, the account and petition of settlement of W. E. Getz, administrator, for the rental of the premises involved in this action, for the year 1917, showing that it rented for a cash rent of \$650.00, and asks permission to file a certified copy.

MR. LOWE: I will stipulate with you that the account does so show.

Transcript

45 MR. O'MALLEY: All right. Will you stipulate that during the years 1917, 1918, and 1919, that the administrator, William E. Getz, rented the property for a cash rental of \$650.00 a year?

MR. LOWE: I don't know that the files so show.

MR. O'MALLEY: I don't know. I was looking here. I don't find it in here. So we will let it rest for that one year. Strike out that last part.

MR. LOWE: Let me suggest this. The transaction of the First National Bank of Pocatello, Idaho, that stipulation between counsel as to the records in the First National Bank of Pocatello, was that filed?

MR. O'MALLEY: The original was filed in the files of the court. Do you wish to introduce that in evidence?

MR. LOWE: It should appear in evidence as an exhibit.

MR. O'MALLEY: It is part of the court records, if you want to introduce it, we would have no objections. I am certain you will find the original in the files.

THE COURT: Here is the recitation about the testimony of W. D. Service.

MR. LOWE: That is it.

Transcript

45 THE COURT: You offer that as part of the record?

MR. LOVE: That may be deemed in evidence.

MR. O'MALLEY: No objection.

THE COURT: That portion of the stipulation relating to the testimony of W. J. Service, if present, may be received in evidence.

MR. O'MALLEY: No objection.

MR. LOVE: Defendants' exhibit "6" is now offered in evidence being the stipulation between counsel as to the matters relating to the escrow agreement in the First National Bank of Pocatello.

THE COURT: There being no objection the same is received.

MR. LOVE: I think that is all.

MR. O'MALLEY: As I understand, your Honor, at this time this hearing is entirely on the first cause of action, I take that for granted, that the Court would want to pass upon the first cause of action before any action is taken on the second cause of action.

THE COURT: Yes, that was my understanding. The record may show that you are proceeding under the requirement of the Court as to the first cause of action, and you reserve what

anscript

46 you may have as to the second cause of action.

. O'MALLEY: Yes.

THE COURT: But you do rest as to the first cause of action.

O'MALLEY: Yes, I presume the Court would want to take it under advisement. Do you want to have briefs?

THE COURT: You have a stipulation here that certain records, if received, are going to be made a part of the record here. If Yaotes Owa made certain representations to the Department of the Interior at one time, they may be material and binding here. I don't know till we see them. If you want to discuss it informally now, that is all right; if there is going to be additional evidence, I want to see what that is.

LOVE: We will send an air mail letter and ask them to get the exhibits back here as soon as they can.

(Remarks).

THE COURT: Well, the case is continued till the 9th of October, counsel to file written briefs in the meantime.

OCTOBER 9TH, 1939, AT TWO P.M.

Transcript

46 THE COURT: In the case of Laura Morris, Special Administratrix, vs. Clark and Robinson, if you are ready, may proceed. We fixed this day and hour in order to take further testimony or to review certain evidence that the defendants were going to secure, and then, I assume, also, we were going to discuss the law of the case further. Is that about the situation, gentlemen?

MR. O'MALLEY: That is as I understand it, Your Honor.

MR. LOWE: We have some further evidence to offer, the exhibits which hadn't been received from Washington at the time of the trial, from the United States Land Office, which subsequently arrived, and we forwarded them to the clerk, so that the photostatic record in that respect is now complete.

THE COURT: Was there an understanding that these matters would be admitted in evidence? MR. LOWE: Yes.

THE COURT: Have you examined them, Mr. O'Malley?

MR. O'MALLEY: No, I have not.

THE COURT: Let Mr. O'Malley see them. These exhibits refer to the homestead proceedings.

MR. LOWE: Yes, otherwise we have nothing further.

MR. O'MALLEY: We have no objection to the introduction of

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47 exhibits submitted.

THE COURT: They may be received, then, in evidence.

(Thereupon the cause is further argued to the Court, and by the Court taken under advisement).

OCTOBER 23RD, 1939.

THE COURT: In the case of Laura Morris, Special Administrator vs. Clark and Robinson, the Court directs that findings and decree be prepared in favor of the defendants and against the plaintiff, for the reason that the Court is not convinced from the record here but what the full amount of the escrow had been paid by Saylor or Diteman, or some of the other parties in interest, and for the further reason that it affirmatively appears that during the minority of these Indians an administrator was acting, or supposed to be acting, in this jurisdiction, a fact which those Indians knew about for the reason that they went to the Superintendent at Fort Hall and requested certain things to be done; and it is my understanding that the Statute of Limitations will run against a minor during the time that the personal representative is acting.

Transcript

47 As far as the question of notice is concerned, the mere fact that Mr. Service made an affidavit showing the terms of the escrow can't be held to mean anything in view of the fact that the very deed referred to in the escrow appears to have been subsequently recorded showing a consideration of \$300.00, nor does the affidavit of Grover, as shown in the abstract, give notice of any peculiarity. So findings may show that the defendants were in effect innocent purchasers for value.

Now, in view of the fact that I did not fix a date for rendering a decision in this matter, I will ask the reporter to make a transcription of this decision, and counsel for the defendants is requested to prepare and present to this Court not later than November 13th, 1939, after notice on counsel for plaintiff, proposed findings, conclusions and decree.

STATE OF UTAH)
COUNTY OF CACHE) ss

As the official reporter of the within named Court, I hereby certify that the foregoing 59 pages contain a full, true and correct transcript of all my shorthand notes taken of the trial of the cause named herein; that the 59 pages contain the testimony and other evidence adduced at said trial, together with the objections made by counsel, the rulings of the Court thereon--except that said record does not contain

script
7 copies of the various exhibits offered and re-
red in evidence at said trial, for the reason that
exhibits can be attached to and made a part of the
of exceptions herein.

Dated, Logan, Utah, December 30th, 1939.

FARREL JOHNSON

(Title of Court and Cause Omitted)

ACKNOWLEDGMENT OF SERVICE.

This is to certify that I have this day received
copy of the Findings of Fact, Conclusions of Law, and
er, signed by the Judge of the above entitled court, gran-
g permission to plaintiffs to file an amended bill of ex-
tions, and also that I have this day received a copy of
e said proposed bill of exceptions filed by plaintiffs,
ntaining in all 47 pages.

Dated this 11th day of March A.D 1940.

STEPHENS, BRAYTON & LOWE

By William Lowe

Counsel for Defendants.

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(Title of Court & Cause Omitted)

OBJECTIONS AND PROPOSED AMENDMENTS.

Come now the defendants, Amasa L. Clark and Joseph E. Robinson, and object to the settlement of any bill of exceptions herein for the reason following:

1. That the plaintiffs herein or their counsel or either of them, have never prepared a draft of a bill of exceptions and have never served the same or a copy thereof upon the defendants within the time and in the manner prescribed by Subdivision 1 of Section 104-39-4 Revised Statutes of Utah 1933.

2. That no draft of proposed bill of exceptions has been prepared as is provided by Subdivision 3 of Section 104-39-4 Revised Statutes of Utah 1933 and that no such draft of proposed bill of exceptions has been served on the adverse party that amendments might be proposed thereto and that none of the provisions of the Statutes of the State of Utah have been complied with in the preparation, service or settlement of a proposed bill of Exceptions in said cause.

Transcript

53 3. That none of the provisions of Subdivision 4 of Section 104-39-4 Revised Statutes of Utah 1933 have been complied with in the preparation, service and filing of a proposed bill of exceptions in said cause.

4. That the Court has no jurisdiction to settle any bill of exceptions in said cause by reason of the failure of the plaintiffs and their counsel to comply with the Statutes of the State of Utah and in particular with the provisions of Section 104-39-4 and each of the six subdivisions thereof, and the rules and decisions of the Court covering the preparation, service, filing and settlement of the bill of exceptions on appeal to the Supreme Court of the State of Utah.

5. That the Affidavit in support of Petition P. C. O'Malley filed herein did not state facts sufficient to warrant the Court in granting the relief sought under the provisions of Section 104-14-4 Revised Statutes of Utah 1933 as amended by Chapter 121 of the Session Laws of Utah 1939.

6. That your Honorable Court had no jurisdiction to grant the relief sought in said petition for the

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reasons following:

(A) That prior to the filing of this Petition the plaintiffs had perfected their appeal in said cause to the Supreme Court of the State of Utah and that this Court had no further jurisdiction in the premises.

(B) That more than ninety days had elapsed from the entry of the judgment in this action, from which these plaintiffs have appealed, and that under the provisions of Chapter 1212, Session Laws of Utah 1939 this Court had no jurisdiction to entertain or grant said petition for an Order granting the plaintiffs the relief sought for therein.

(C) That from the plaintiffs' Petition and Affidavit in support thereof and from the records and files in said cause, it affirmatively appears that any mistake on the part of plaintiffs' counsel was a mistake of law for which the Court could grant no relief.

(D) That the plaintiffs' petition and Affidavit in support thereof did not state facts sufficient to warrant the Court in granting the relief sought therein.

Transcript

54 (E) That the Findings of Fact entered herein on the 11th day of March, 1940, do not state facts sufficient to warrant the Court in relieving the plaintiffs from their default and in permitting plaintiffs to serve a proposed bill of exceptions on the 11th day of March, 1940, in this cause.

(F) That the findings of this Court, to-wit:

"That P. C. O'Malley, chief counsel for plaintiffs, was mistaken as to the proper procedure of preparing and serving a proper proposed form of bill of exceptions and was under the impression that all that was necessary to do was to have the Reporter's Transcript settled as a Bill of Exceptions, for the same to be presented to the Supreme Court",

do not state facts sufficient to warrant this Court in setting aside said default for the reasons that said Findings relate only to a mistake of law and misconception or absence of knowledge of the Law of this State on the part of P. C. O'Malley, chief counsel for plaintiffs which situation is no legal ground for procuring relief from default therein and for the further reason that such misconception or absence of knowledge is not imputed to George M. Mason, the local attorney and associate of said chief counsel.

Transcript

54 (G) That the Conclusions of Law under said Findings of Fact, dated March 11th, 1940, to the effect that plaintiffs are entitled to relief from their default in not serving a bill of exceptions by the time fixed by law is contrary to law.

(H) That the Order and Decree of this Court dated March 11th, 1940, relieving plaintiffs from default and permitting them to forthwith serve a proposed Bill of Exceptions is contrary to law and is not supported by sufficient facts to warrant such relief.

Subject to the objections hereinbefore set out to the settlement of any bill of exceptions in this case, said defendants without waiving any rights herein and expressly reserving all rights, in order to preserve their record in this case, propose as amendments to said proposed bill of exceptions, solely to protect their record covering objections here, the following:

Transcript of Farrell Johnson, Court Reporter, covering proceedings had in said cause under

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Transcript

54 date of February 26th, 1940, which said transcript properly certified by said Court Reporter is herewith served with these proposed amendments.

Transcript of Farrell Johnson, Court Reporter, covering proceedings had in said cause under date of March 11th, 1940, which said transcript properly certified by said Court Reporter is herewith served with these proposed amendments.

Dated this 19th day of March, 1940.

Stephens, Brayton & Lowe

Attorneys for defendants,
Amasa L. Clark and Joseph E.
Robinson.

Copy of foregoing Objections and Proposed Amendments received and service acknowledged this 21st day of March, 1940.

George M. Mason

Attorney for Plaintiffs.

Transcript

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(Title of Court & Cause Omitted)

Defendants' Amendment to Bill of Exceptions

BRIGHAM, UTAH, Feb. 26th, 1940.

APPEARANCES:

For the plaintiffs, P. C. O'Malley, Esq.

For the defendants, Wm. J. Lowe, Esq.

THE COURT: Lucy Pocatello Johnson, et al, vs.

Clark and Robinson, the record may show that this is the time and place fixed for the settlement of the bill of exceptions in this case; this matter having been continued from a previous date by stipulation, and the court having jurisdiction to hear and to proceed to settle the proposed bill of exceptions.

MR. LOWE: As to that, I would not want to stipulate that the court had jurisdiction to settle the bill of exceptions, by reason of the fact that since checking the record, I doubt very much the jurisdiction of the court. And at this time, I want to file my objections to the court settling the bill of exceptions in this case.

THE COURT: Do you have your objections pre-

Transcript

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pared?

MR. LOWE: Yes, Your Honor.

THE COURT: I haven't checked the record here; I recall signing one order extending the time.

MR. LOWE: Yes. I am not raising the question on that. My objections to the settlement of the bill of exceptions are set forth in the written objections which I will ask leave to file at this time.

(The written objections read by Mr. Lowe.)

I ask leave to file with the court these objections.

THE COURT: I take it, there are no objections to filing the objections.

MR. O'MALLEY: I think not, no objections.

THE COURT: They may be filed.

MR. LOWE: Now, in support of our objections, I call Your Honor's attention to the fact that the record in this case fails to disclose that there are any proposed bill of exceptions. So far as they have been served, there is nothing been served upon us purporting to be a bill of exceptions, and as a result we have had no

anscript

57 opportunity to examine the proposed bill of exceptions, and make any amendments thereto within the time as prescribed by the statute, and as a result, it is our position that the Court has nothing before it to settle; that is, as a proposed bill of exceptions. The most that might be contended as a bill of exceptions, represents a motion filed in this court dated the 30th day of January, 1940, which motion is as follows: (reading the motion)

I make the point there is no bill of exceptions to settle. That is the point I make.

MR. O'MALLEY: The only purpose of this is to have the court settle the reporter's transcript. We have no objection--no bill of exceptions, if there was a case for a bill of exceptions. There is nothing in the record that is adduced, that we objected to, that the court overruled us. So the only purpose is to have the transcript incorporated in the record. Now, if you have not no exceptions, you can't raise any exceptions. Of course, I looked it over very carefully. There are two or three little errors, and they are only just typogra-

Transcript

✓ 8 phical errors. Now, when there are no exceptions, is it necessary in order to get the court to settle this transcript, is it necessary to make a draft and enumerate the reporter's transcript? That is the only purpose or procedure. The reporter's transcript would not go up unless the Court settled it; and that the only thing that this bill of exceptions is, just the reporter's transcript.

THE COURT: Well, of course, there are two views that we may take of this situation. If this transcript were settled as the bill of exceptions, there are several reasons, perhaps, why it might not be considered as such when you got your record up to the Supreme Court. Now, as far as the typographical errors are concerned, I don't see any objection to correcting them. The question is, have you complied with the statute and served the bill of exceptions on the opposite party.

MR. O'MALLEY: In this case, there is not really any exceptions filed. You call the reporter's transcript such. I spent a little time on this. I have had some conferences and correspondence with attorneys in

Transcript

59 Salt Lake; and the only bill of exceptions is the reporter's transcript.

THE COURT: Let me ask you this; you take this transcript up to the Supreme Court, like this; has the reporter copied every exhibit in this record? How are you going to argue the case when the exhibits are not up there? How are you going to get the exhibits up there?

MR. O'MALLEY: I wrote to the attorney--we would stipulate these exhibits. I could very well stipulate our exhibits. There is nothing to stipulating these exhibits. We want to stipulate that all the exhibits go up, and we can do it today, as I understood.

THE COURT: This Court is going to help you get your record up to the Supreme Court, Mr. O'Malley, but I have serious misgivings that you come under the procedure that is outlined under our practice. Let us see your formal order; have you got any to present to the Court at this time?

MR. O'MALLEY: No, I didn't draw an order. I was going to draw the order.

THE COURT: As I understand it, Mr. Lowe,

Transcript

59 you object to any consideration of any matter, except the motion, or that part of the motion, which might be proper for the purpose of curing the typographical errors in the record.

MR. LCWE: Yes; I have no objections to correcting those errors.

THE COURT: But you do object to any settlement of any bill of exceptions.

MR. LOWE: Decidedly so, Your Honor. We submit that counsel's statement of the purpose of the bill of exceptions is not in keeping with the provisions of our statute. We have here a method of making the record for the Supreme Court to review, the testimony and the exhibits in this case.

THE COURT: The record may show that the Court directs the clerk to forward to the Supreme Court whatever matter the court may settle as the bill of exceptions, but I have serious doubts that the court would be justified in making a conventional form of order. I want to see that you get your record down to the Supreme Court, Mr. O'Malley, but I don't see how you can settle any bill

transcript

60 of exceptions today.

MR. O'MALLEY: Of course, I studied the record and I could find not any real exceptions, under the term "exceptions", to make. There is only one purpose, and that is to have the reporter's transcript included in the bill of exceptions.

THE COURT: Do you object to the correcting of the typographical errors set forth in the motion to the reporter's transcript, Mr. Lowe?

MR. LOWE: No, I have no objections to the typographical errors corrected.

THE COURT: The court will grant your motion, and these errors may be corrected, and the reporter is directed to make the corrections. What else do you ask for here?

MR. O'MALLEY: I want to get it in shape so the whole thing will go up to the Supreme Court; and if this way of incorporating the reporter's transcript is wrong - I understand that the reporter's transcript goes up as a bill of exceptions; and if I have got to make proof and

60 set them forth, in order for the court to have jurisdiction, I respectfully ask the court to continue it.

THE COURT: I do not want to influence you in your position by anything that I might say as to what should do in the premises. I hesitate to make any pronouncements. If you have an order here for the court to sign, I will consider the order.

MR. LOWE: At this time, I think, I am going to ask that an affidavit--in other words, I am going to ask leave to file an affidavit in support of our motion that this be not settled as a bill of exceptions, the affidavit of the girl at the time this transcript was served upon us. That is it, is it, Mr. Mason?

MR. MASON. Yes.

MR. LOWE: I ask leave to file it in support of our objections.

THE COURT: Let us see what you ask for in your motion, Mr. O'Malley.

MR. LOWE: To appear and settle bill of exceptions.

MR. O'MALLEY: In this case there is no real

6/
of exceptions.

MR. LOWE: You cannot settle a bill of exceptions unless you comply with the statute.

MR. O'MALLEY: If it is necessary, under the statute, to include the transcript and bill of exceptions, but we have got no exceptions.

THE COURT: How are you going to get the exhibits up to the Supreme Court, if I settle this reporter's record as the exceptions?

MR. O'MALLEY: All we have to do is to stipulate to send them up.

THE COURT: They won't stipulate. That question goes to the meat of the thing. The bill of exceptions, as I understand it, takes up everything except the judgment roll, if it is properly presented. The reporter's transcript is only one part of the bill of exceptions, as I have always understood. Anything you want sent up, I will send up.

MR. O'MALLEY: I ask the Court to continue it for two weeks until I look into this matter.

MR. LOWE: I object to any continuance on

62 the ground that the court has no jurisdiction.

They have taken their appeal in this case.

THE COURT: If you want a continuance, I will give you one, but I want to point out to you that if you haven't made a proper service of the bill of exceptions, the time has expired to make such a service. If you want a continuance for two weeks, I will give you a continuance of this matter, that is without rights to -- without prejudice to your rights, Mr. Lowe.

MR. LOWE: Yes, Your Honor.

THE COURT: I certainly want to expedite their appeal, and not in any way seem to head off or shut off any appeal up to the Supreme Court.

MR. LOWE: On the other hand, we feel that counsel for the plaintiff is not proceeding properly, in failing to prepare and serve upon us his bill of exceptions as the statute contemplates, and we feel it is a duty that we owe to our clients to now appear and make these objections.

THE COURT: The Court cannot conscientiously certify that this reporter's transcript includes all the evi-

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62 dence received in the trial of the case. The bill of exceptions where one goes up on the facts, should include all the evidence. You have only got part of it in here, unless the reporter has copied every exhibit verbatim.

MR. O'MALLEY: Your statute provides as to the exhibits; I don't think the statute says the exhibits have got to be included in the bill of exceptions.

THE COURT: Well, whatever your pleasure is: I will take the matter under advisement and examine the proposed order, or continue it--whatever your pleasure is.

MR. O'MALLEY: We will take a continuance, Your Honor.

THE COURT: March 11th is our next probate day. I have an estate matter here on March 5th.

MR. LOWE: I prefer the 11th, if it makes no difference to the Court.

THE COURT: Which do you prefer, the 5th or the 11th?

MR. O'MALLEY: It is immaterial to me.

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63 THE COURT: I think it would be more convenient to take the 11th.

MR. LCWE: I think I desire to be present; I want to make my objections to keep my record clear.

THE COURT: This matter will be continued til the 11th at eleven o'clock. A.M.

STATE OF UTAH)
) ss
COUNTY OF BOX ELDER)

64 As the official reporter of the within named court, I heroby certify that the foregoing eight pages contain a full, true and correct transcript of all my short hand notes taken on February 26th, 1940, in the within named cause, on the motion to settle proposed bill of exceptions.

Dated, Brigham, Utah, March 11th, 1940.

Farrell Johnson

Transcript

65 (Title of Court & Cause Omitted)

Brigham, Utah, March 11th, 1940.

APPEARANCES:

For the plaintiffs: P. C. O'Malley, Esq.
George Mason, Esq..

For the defendants: Wm. J. Lowe, Esq.

THE COURT: Laura Morris, Special Administratrix
et al, vs. Clark & Robinson, for settlement of bill of
exceptions. You may proceed.

MR. O'MALLEY: On the 6th of March, we filed
a petition with the Court and setting forth the facts
and asking the Court to grant permission, under Sec-
tion 104-14-4, Revised Statutes of the State of Utah,
to grant plaintiffs permission to file a bill of ex-
ceptions. This petition is supported by my own affi-
davit, and a letter which I received from Mr. Lowe at
that time. I don't know whether that has got much im-
portance in the matter. There is one thing I would like
to ask in filing the petition --

MR. LOWE: That statute has been amended, Mr.

66 O'Malley.

THE COURT: That is why I was going to look at it

MR. LOWE: The last legislature amended it.

THE COURT: It affects the discretion of the court after a certain time.

MR. O'MALLEY: Of course, I don't have the session laws of Utah. I didn't know that it was amended.

THE COURT: I don't know as it affects this particular matter.

MR. LOWE: I think it does.

THE COURT: It affects the jurisdiction of the court after a certain length of time.

MR. LOWE: Ninety days.

THE COURT: They wanted to shorten time to clear title.

MR. LOWE: I think that is right. It is just the latter part of the section that has been amended.

THE COURT: That must have been the last legislature.

MR. LOWE: Yes, 1939.

THE COURT: Go ahead.

MR. O'MALLEY: I filed this petition accompan-

transcript

66 ied by my own affidavit. I see that I didn't verify it. Is it necessary, I wonder, to verify a petition like that? I judged from the statute that it was not necessary to verify it. If it is necessary to verify it, I would like permission to verify it. I didn't put the usual verification upon it that goes on an answer, or a pleading. As to the merits of the petition. pretty near everything that I could say is contained in my affidavit. I have practiced law for thirty years. I don't think there ever was any lawyer that didn't make some errors or mistakes in figuring out our procedure. It is quite evident that a proper bill of exceptions has not been filed in this case, but certainly, it was an honest mistake on my part, because I attempted to follow the steps and proceedings in this appeal as closely as possible. I wrote to the Supreme Court and got a copy of the rules and regulations. I aimed to get a copy of an abstract record, and I did secure an abstract of record of a very important case that went to the Supreme Court. It is headed a bill

Transcript

67 of exceptions and is the complete record of trial. It starts out just the same as our reporter's transcript. "Be it remembered" that on such and such a day the cause came on regularly to be heard, and it contains all the evidence. I took a great deal of time in studying the statute and decisions of the court, and I admit that there was much about exceptions, and there were two things that struck me as being true; the first one was that the statutes say that the exceptions occurring at the trial. There was no exception occurring at the trial that I took if there was any. I just excepted to the admission of supplemental answer, and to the exhibits pertaining to these other Indian estates, and I took no exceptions. I came to the conclusion that the only exceptions in this case was the record, and that I took proper steps. The record shows that I acted promptly. I served notice on counsel for the other side that we were going to call the matter up for settlement on a certain date, long before the ten days would expire. Mr. Lowe wrote me sending me a stipulation, and asking to postpone it till the 19th.

transcript

68 whatever day the court could hear it. I readily signed that stipulation, feeling that there was nothing to be done except settling the reporter's transcript as the bill of exceptions. I was quite surprised when I found the objections, and the Court telling me this was not a proper bill of exceptions, and continued the time for settling. And now I come back under this section of the statute. I don't know what that amendment is, Your Honor.

THE COURT: I don't know what Mr. Lowe's theory is. The decree was signed on the 27th of November. Now, you have three months. November 27th was the date of signing. December 27th is one month; January 27th, two months; February 27th, three months. Under one construction, if Mr. Lowe makes some point on the time, I am wondering if we are not laboring under a mistake here; that the time would not run from thirty days after the decree was signed, and on that time or on that date the time expired to settle the bill of exceptions. You did get an order extending the time, didn't you?

MR. O'MALLEY: We got an order extending the

Transcript

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time to the 15th of February.

THE COURT: Well, under one construction, between the 15th of February to the present time, you failed to have your bill of exceptions settled; that is about the situation, isn't it?

MR. O'MALLEY: I guess that is about the situation. I didn't know there was an amendment to the statute. I don't have your session laws up there in Idaho. I have your statute, but I don't have your session laws. Of course, I didn't prepare to make the argument here anyway, because pretty nearly everything I could say has been put forth in the affidavit. Outside of this amendment, I feel that we come clearly under that statute. I might say this, too, I don't know whether Your Honor has before you a copy of our bill of exceptions. I was going to attach a copy of the bill of exceptions to the affidavit--

THE COURT: I prefer not to look at it, Mr. O'Malley. It is ready to be served.

MR. O'MALLEY: Yes.

THE COURT: Let us see if I got your theory, Mr.

Transcript

• 7 O'Malley, you are asking here now that you be relieved for the reason--to be frank about it--unfamiliarity with the practice and statute of our state with reference to perfecting a bill of exceptions.

MR. O'MALLEY: That is the true situation.

My mistaken construction and conclusions as to the proper bill of exceptions; that is the whole thing, as set forth in the affidavit. I followed the matter very diligently. As I say, I wrote immediately to Mr. Mason here, and then before he could get me a copy, I had secured a copy of the abstract of record in a very important case, entitled certain parties against the Silverton Western Mining Company. I read everything. It says in this case that the bill of exceptions is your reporter's transcript. I came down here and looked in to the case of Koller vs. Chournos, where the question of the bill of exceptions was before the court. I came down here, but it wasn't in the files. That is 76 Pac. 626. I came down here to consult the files, but I could not find the bill of exceptions in the files. I honestly believ-

Transcript

69 od that I had taken the right steps to perfect the bill of exceptions and serve it. It is my theory that under this statute, we are entitled to the relief that we ask for.

70 THE COURT: Let us hear from Mr. Lowe.

MR. LOWE: At this time for the purpose of the record and for the purpose of protecting the record, I want to file defendants' objections to the order, or entering the order granting the relief. I desire to serve opposing counsel--having already done so--and ask leave to file it. And I should further like the opportunity of making my record. At this time, before arguing the matter, I offer certain evidence, if the Court please. On the former hearing, I offered the affidavit of M. S. Higgins in support of our objections. This is a continued hearing from February 26th, 1940. But since that time Mr. O'Malley has served us with separate motions supported by his affidavit. I now desire to offer the affidavit, in support of the motion, of M. S. Higgins, which was previously offered and accepted in evidence, in support of our objections at this time, to the new application which Mr. O'Malley has filed.

Transcript

70

THE COURT: Any objections?

MR. O'MALLEY: I don't think there are any

objections.

THE COURT: It may be received.

MR. LOWE: And may be considered as read into the record.

THE COURT: Very well.

MR. LOWE: And at this time, I desire to offer in evidence, a transcript of the hearing on February 26, 1940, before this court; that the record may be clear, that it may be offered in support of our objections on the application made by Mr. O'Malley since that time. It is the statement of Mr. O'Malley as to the reasons for asking the court to sign the bill of exceptions at that time, which is, in substance, what he has stated this morning. I now ask that it be marked. It is certified to by the reporter. I have had it marked as defendant's exhibit "1". It is a certified copy of the proceedings had on the former hearing, certified to by Mr. Johnson under date of March 11th, 1940.

MR. O'MALLEY: No objections. That is part

71

of the record.

MR. LOWE: We offer this in evidence in support of our position and objections.

THE COURT: Any objections.

MR. O'MALLEY: No objections.

THE COURT: It may be received.

THE COURT: Before we proceed with the argument of the matter, there is one or two things that we, perhaps, should agree on, as to the preliminary proceedings. I take it, the record may show that an order extending the time was made, and that order was made in due time, permitting the plaintiffs to and including February 15th, 1940, in which to file, serve and settle bill of exceptions.

MR. LOWE: Yes.

THE COURT: There is no dispute, in the record, that upon the request of counsel for the defendants, the hearing on the first proposed draft was continued, as an accomodation, until a later time.

MR. LOWE: That is right.

THE COURT: Here is one matter that has not

Transcript

71 been discussed with counsel; after the draft was filed with the clerk, I made a notation on my calendar that the matter would be heard on February 19th, on my personal pocket calendar, but through some misunderstanding between the clerk's office and the Judge of this Court, she received the impression that instead of the 19th, the matter would be heard the next probate day, so the matter appeared on the calendar on February 23rd, would it be?

MR. O'MALLEY: The 26th.

THE COURT: February 26th, instead of the 19th.

MR. O'MALLEY: Yes, that is right.

THE COURT: At which time the proceedings shown by the exhibit were had. Is there any dispute on that statement, gentlemen?

MR. LOVE: No, no dispute.

MR. O'MALLEY: I think that is right.

MR. LOVE: Our position is, there was nothing before the court to settle. Such a proceeding could accomplish nothing, because no bill of exceptions had been served.

72 THE COURT: All right, proceed, then, Mr. Lowe

MR. LOWE: Frankly, our positions are set out in the objections which we have filed, which are covered the six paragraphs and subdivisions thereof.

(Reading the objections)

- - - - -

(Argument by counsel)

THE COURT: One of my first official acts when I went on the bench was to relieve a party in a default similar to this. My predecessor was not involved in any way, but was in a matter over which he presided.

I am perfectly willing to face a reversal, gentlemen, rather than have it be said or inferred that in a hearing, the trial Judge, having decided in favor of one party, would turn down, in effect, and deny the other party the right to appeal. My conscience, gentlemen, will be more clear to have a reversal ensue, rather than to make some technical ruling here that might be more correct, technically, according to the greater weight of authority.

So, findings of fact and conclusions of law, Mr.

73 be prepared and presented to this court, setting forth all the facts, including the finding of the original order extending the time, and the obtaining of the record, and the service of the same, the various hearings, the occasion for the delays, and authorizing the service, forthwith, of a draft of bill of exceptions upon counsel for the defendants. In making this order, I want to say this much, if there are any defects in the draft that you serve this time, I am not going to relieve you. It is the further order that you serve those findings immediately on opposing counsel. The court has considerable doubt whether in view of the statute and the proof here, you have legal grounds for relief, but on account of the situation, I am going to deliberately go in the face of the decisions of our Supreme Court.

MR. LOWE: I am going to raise those same questions, if it ever gets to the Supreme Court.

THE COURT: You can do it on appeal.

MR. LOWE: Yes, I appreciate that, Your Honor.

THE COURT: The record may show your exception

73 to the order and ruling of the Court, Mr. Lo

MR. LOWE: Yes, we would like to have an execution to the order of the court.

- - - - -

STATE OF UTAH)
) ss.
COUNTY OF BOX ELDER)

74 As the official reporter of the within named court, I hereby certify that the foregoing nine pages a full, true and correct transcript of all my shorthand notes taken on the hearing for settling of bill of executions heard in the within named cause on the 11th day of March, 1940, in the court named herein.

Dated, this 11th day of March, A. D. 1940.

FARRELL JOHNSON

(Title of Court & Cause Omitted)

75 AFFIDAVIT IN SUPPORT OF MOTION

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

M. S. Higgins, being first duly sworn, depose

Transcript

75 and says: That she is a stenographer in the office of Stephens, Brayton & Lowe, that on or about the 19th day of January, 1940, George M. Mason, one of the attorneys for plaintiffs, called at the office of said firm and advised that he had a copy of the transcript in the above entitled case and desired to serve the same upon said firm; that affiant at Mr. Mason's suggestion wrote receipt of copy of said transcript and thereupon said attorney desired to take said transcript with him; that affiant stated that she could not accept of copy without retaining said copy; that affiant then called Mr. Lowe on the telephone, he then being absent from the office, and asked instructions; that the said Attorney Mason then stated that this was not a Bill of Exceptions but was only a copy of the Reporter's notes and that he did not understand that plaintiffs were required to furnish attorneys for the defendants with a copy of the transcript; that said attorney Mason then agreed to leave said transcript for a short time after which he would call and get the transcript or we could return it to him; that on or about January 22nd, 1940.

Transcript

75 said transcript was returned and left with the Clerk of the District Court of Brigham City for the order of Mr. Mason.

Further affiant saioth not.

M. S. HIGGINS

Subscribed and sworn to before me this 21st day of February, 1940.

H. CHRISTENSEN

Notary Public, Residing
at Salt Lake City, Utah.

My commission expires:
10/10/42.

Manuscript

76

(Title of Court and Cause Omitted)

Brigham, Utah, April 15, 1940.

APPEARANCES:

For the plaintiffs, Messrs O'Malley & Mason;
For the defendants, Wm. J. Lowe, Esq.

THE COURT: Morris vs. Clark, the record may show this
the time and place, so far as this court is concern-
to pass upon the sufficiency of settling the bill of
exceptions; and on this day all the files have gone up
the Supreme Court.

O'MALLEY: Yes.

THE COURT: The only thing we have here is the trans-
cript.

R. O'MALLEY: Transcript, settling the bill of ex-
ceptions.

R. LOWE: There has been no transcript settling the
bill of exceptions. This is not a proper bill of excep-
tions, this transcript--not served upon us as such.

MR. O'MALLEY: The original bill of exceptions and the
amendments are here, are they not?

THE COURT: They are all down to the Supreme Court.

THE CLERK: I sent them all down.

Transcript

76 THE COURT: Have you a copy of the praecipe, O'Malley? If necessary, we will have to have the clerk remit those papers back to us. This is the first time ever had a situation like this, and the clerk may have got confused.

MR. LOWE: We came here objecting to the settlement of the bill of exceptions served upon us sometime last month, the clerk tells us it is not here. Subject to our objections, we made certain amendments.

MR. O'MALLEY: That is true.

THE COURT: If the clerk has inadvertently sent them down then we have got to make our substituted record here, in order not to ask you gentlemen to come back here another or fix another time, but on the other hand, if you have sent the clerk a praecipe to send them down there, as far as the court is concerned, there is not much we can do for

MR. LOWE: This is a most peculiar case. I have never had an experience like it, on the settlement of the bill of exceptions. We have the reporter's transcript which was left with us, not served as a bill of exceptions. Subsequent

Mr. O'Malley served us with a typewritten copy which pur

Transcript

77 to be a copy of the transcript, which is not certified by the reporter. He does not include the substance of any of the exhibits. So, we have a situation before us, where the reporter's notes are not proposed as a bill of exceptions, nor are the exhibits proposed as a bill of exceptions, but we have only an uncertified typewritten copy of the reporter's notes proposed as a bill of exceptions. We are here objecting to any such arrangements as a bill of exceptions. It is novel to me. Probably the court has had such an experience, but I must confess, I never heard of it. Had Mr. O'Malley at the time the court relieved him of his default, served us with the reporter's transcript, and likewise incorporated into it the exhibits. or proposed they may be attached and made a part of the transcript, we would not be here objecting. None of that was done.

THE COURT: Apparently, you are all right on that, Mr. O'Malley. The praecipe recites that the bill of exceptions is to be sent up later. The last sentence

Transcript

77 THE COURT: I appreciate the court is not in a position to make any suggestions to counsel, but if counsel would agree that Mr. O'Malley's office copy of the bill of exceptions or of the transcript is a duplicate of the one that was served on Mr. Lowe, and if we can attach the amendments that Mr. Lowe makes, what I had in mind doing was to certify that the above is a copy of the testimony, not including the exhibits given at the trial.

MR. LOWE: I have no objection to so proceeding. We are here objecting to the order of the court settling the bill of exceptions, insofar as the last paragraph is concerned, which goes to the original exhibits. We are asking that that paragraph be eliminated.

MR. O'MALLEY: Do you have to make copies of the exhibits? The exhibits are all mentioned in the reporter's transcript, and identified as to just what they are.

THE COURT: If they are, that may be sufficient. The court will make a certificate setting forth exactly what has been done here. I don't see how I can go any further than that.

MR. O'MALLEY: Certainly not.

THE COURT: We will take an informal recess while counsel

transcript

78 are getting the papers together.

(Recess)

THE COURT: Have you agreed on the certificate?

MR. LOVE: Yes, the proposed certificate is satisfactory to us.

MR. O'MALLEY: Yes.

THE COURT: We had better state now what those papers are--

MR. MASON: We found the original.

MR. LOVE: Mr. Mason had them in his office.

THE COURT: The bill of exceptions, as served, purports to be a typewritten copy of the reporter's transcript?

MR. LOVE: Yes.

THE COURT: Here is an acknowledgment of service. Mr. Love's objections and proposed amendments. I take it, the record may show the objections just the same as though you stated them in the record at this time.

MR. LOVE: Yes.

THE COURT: What do you say to the amendments, gentlemen?

MR. O'MALLEY: We accept the amendments.

THE COURT: May the record show that you agree that the

Transcript

79 reporter's notes dated February 26th, 1940,
March 11th, 1940, are the amendments that you request?

MR. LOWE: Yes.

THE COURT: The proceedings today may also be included
the bill of exceptions?

MR. LOWE: I think so.

MR. O'MALLEY: Yes.

MR. LOWE: And before Your Honor rules on the settlement
of the bill of exceptions, we would like a ruling on our
objections to the settlement at this time. We submit our
objections at this time, and ask the court to rule upon
the objections.

THE COURT: I think I will overrule the objections. The
fact that the original reporter's notes were not served,
you accept the copy of the reporter's notes?

MR. LOWE: Yes, but the court has no jurisdiction to
settle the bill of exceptions at this time.

THE COURT: By reason of the lapse of time?

MR. LOWE: Yes.

THE COURT: I think the court will overrule the objection
and announce that the court proposes to certify that the

Transcript

79 bill of exceptions, as amended, together with the proposed amendments, merely shows the proceedings at the trial, and includes all the testimonial evidence; and you may have your exceptions, Mr. Lowe, to the settlement. I think, in fairness to the plaintiffs here, that the record should show--or in fairness to the defendants, the record should show you served this on the 11th day of March.

MR. O'MALLEY: Yes.

MR. LOWE: And we served our amendments within ten days.

THE COURT: I am wondering if there is any dispute between us that today is the first day the court has been in session in this county for three weeks.

MR. LOWE: We make no objection on that.

MR. O'MALLEY: No objection.

THE COURT: When the reporter makes up this record today, then the court will sign this certificate.

STATE OF UTAH)
) ss.
COUNTY OF BOX ELDER)

As the official reporter of the within named court,

Transcript

79 I hereby certify that the foregoing four pages contain a full and complete and true transcript of all my shorthand notes taken on the proceedings with respect to the settlement of the bill of exceptions in the above named cause.

Dated, Brigham, Utah, April 15th, 1940.

Farrell Johnson

(Title of Court and Cause Omitted)

80 The foregoing bill of exceptions contains all the testimonial evidence adduced on the trial of this cause, and correctly contains the various proceedings during the trial as well as subsequent thereto, the same being true and correct, it is accordingly settled and allowed as a bill of exceptions in this cause.

Dated, Brigham City, Utah, April 15th, A. D.
1940.

Lewis Jones

District Judge.

Transcript

81 (Title of Court and Cause Omitted)

C E R T I F I C A T E.

I, C. Henry Nielsen, Clerk of the District Court of the First Judicial District in and for the County of Box Elder, State of Utah, do hereby certify that the foregoing Bill of Exceptions is the Bill of Exceptions in the above entitled cause and said Bill of Exceptions is hereby transmitted to the Supreme Court of the State of Utah, pursuant to Precept filed herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 18th day of April, 1940.

C. HENRY NIELSEN

(SEAL)

Clerk of the District Court
In and For the County of Box
Elder, State of Utah.

Filed: April 20, 1940.

Transcript

(Title of Court and Cause Omitted)

ASSIGNMENTS OF ERROR

APPELLANTS' ASSIGNMENTS OF ERROR.

Now comes the Appellants' by their counsel, P. C. O'Malley, and George M. Mason, and represents to this Honorable Court that in the proceedings in the Court below, there were substantial errors committed by the Court to the prejudice and denial of the substantial rights of the Appellants and the Appellants hereby assign these errors as grounds upon which they seek the reversal of the judgment and decree in this cause, and decision of this Court directing a judgment and decree in favor of these Appellants and against the defendants and respondents, Amasa L. Clark and Joseph E. Robinson.

ASSIGNMENT OF ERROR NO. 1

That the court erred in receiving and permitting defendants to file their supplemental answer (Abstract 100) on the ground it was irrelevant, incompetent, and not a proper defense; that the matters contained in said supplemental answer did not in any way pertain to the real property involved in this suit, and such matters were in no way

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binding upon the plaintiffs', does not in any way operate as an element of estoppel, does not prove or tend to prove or disprove any of the facts pertaining to this case.

ASSIGNMENT OF ERROR NO. 2

That the court erred in admitting in evidence over plaintiffs' objection the petition for intervention signed by William Ray, United States District Attorney, and his assistant, together with the stipulation signed by Counsel in that estate, the Order of the Court, which was filed with the Clerk on June 21st, 1919, together with the motion to dismiss dated June 28th, 1921, signed by Charles M. Morris, United States District Attorney, an Order of Dismissal signed by Albert A. Law, Judge, dated July 28th, 1921, all filed in the estate of a deceased Indian, "Angichah", (page 35 of the Reporter's Transcript; defendants' exhibit ; also the Court erred in admitting in evidence similar papers and records, in the estate of a deceased Indian named "Wad-ga-gee", and in the estate of a deceased Indian named "Geeump", and in the estate of a deceased Indian of the name of "Ar-ri-nee",

Transcript

(Abstract, defendants' exhibits Nos.

on the ground that none of the said records in any one of the said estates, were relevant, or competent in any way to tend to prove or disprove any title to the property involved in this case, and on the further reason that the record in each case discloses that the dismissal relied was not made or filed until near two years subsequent to A. I. Grover having secured and filed of record the deed Washington Pocatello, and Minnie Pocatello.

The Court erred in **its** findings of fact, and in each and every one of the same beginning with Finding No. 7, continuing through all of said findings, as hereinafter more particularly set out.

ASSIGNMENTS OF ERROR NO. 3

The Court erred in Finding No. 7 (Abstract 115) where in the Court found:

"That at the time the said decree was made and entered, the said eighty acres of land were in a fair state of cultivation but had not a water right therefore, and the land was uneven and had an appraised value of \$4900.00."

That such finding is not supported by the evidence and record in the case. The evidence shows the land was in a good

Transcript

state of cultivation, that during the three years it was in the course of probation that the Administrator W. E. Getz rented it for \$650.00 a year cash rental, it was stipulated by counsel for defendants, that it was rented for that sum for the year, 1917, the first year of the probation, (Abstract 314) (page 55 Reporter's Transcript), that it was irrigated, and could not be uneven to demand such rental, that defendants own exhibit No. 4 proves that Grover contracted for a water right in March, 1919, some eight months before it was decreed; there is no evidence whatever in the record that at the time the land was decreed that it had an appraised value of \$4900.00; the Decrees of the Court decreeing an undivided two-thirds to James Brown, the son of the surviving spouse of the daughter Jane, and an undivided one-third interest to the estate of Pocatello (Exhibits F and G) proves that the court at that time must have found that the property had a value of at least \$15,000.00; if the property only had an appraised value of \$1900.00, the court would have to decree it all to James S. Brown; that said finding is

Transcript

error for the reason that the court had before it, application of A. I. Grover to the State of Utah for a loan of \$7,000.00, made in October, 1919, (exhibit "J" wherein he swore the land at that time had a value of \$30 per acre, and the abstract (defendants' exhibit 5, the Phillips Abstract) shows that the loan was granted and the mortgage executed on January 2nd, 1920; there was no evidence produced that there was an appraisement made of the land the time it was decreed, and no evidence was produced that it was uneven and only in a fair state of cultivation at that time.

ASSIGNMENT OF ERROR NO. 4

The Court further erred in finding No. 7 (Abstract 116)

"that by said decree that James S. Brown claimed an undivided two-thirds interest in said land and the estate of Washington Pocatello claimed an undivided one-third interest".

Such a finding is error, the Court on November 7th, 1919, made an absolute decree in both the Yaotes Owa estate, and the estate of Jane Brown and James Brown, (exhibits "F" and "G") decreeing the property undivided, and from then on James S. Brown and the Estate of Washington Pocatello, each owned the respective undivided interests in fee simple as

ranscript

tenants in common.

ASSIGNMENT OF ERROR NO. 5

The court further erred in Finding No. 7 (Abstract 116),

"and Washington Pocatello and Minnie Pocatello, in their lifetime made, executed and delivered in escrow a warranty deed for their undivided one-third interest in said premises and Albert I Grover in November, 1919, by ~~mesne~~ conveyances became owner of said property."

That such findings are not supported by any evidence, produced by defendants or otherwise, but are contrary to the evidence and record in the case. The deed executed by Washington and Minnie Pocatello was before the court, Plaintiff (exhibit "K"), a certified copy of the recorded deed, and was also before the court in the Philips Abstract, defendants' exhibit "5"), and the recitals in the deed show that it was made by Washington Pocatello, grantor, as the only surviving heir of Jane, the daughter of Yaotes Owa," and it was not for any undivided one-third interest, it was for the whole of said 80 acres of land; the record showed and the court found that deed was placed in escrow (abstract 118) and the probate court proceedings, in the estate of Washington Pocatello, (Exhibit "M") shows that Grover obtained

Transcript

that deed for \$1,000.00, which left the deed same as a forged or stolen deed, plaintiffs do not know what the court means when it says "that Albert I. Grover in November, 1919, by mesne conveyances became the owner of said property". If there is such a thing as a mesne conveyance, it is not an absolute conveyance, and could not pass title to the property; it would only be a "mid" or "intervening", or "intermediate", title and would be subject to the rights of the Lord of the Manor, or the person holding the superior title. That said finding No. 4 is contradicted by the court's finding No. 8 (Abstract

ASSIGNMENT OF ERROR NO. 6

The court erred in findings No. 9 (Abstract 119) where the Court found:

"That plaintiffs offered no evidence at the trial said cause to the effect that U. F. Diteman, Grant in said warranty deed on escrow with the First Nat. Bank of Pocatello, Idaho, himself or with one A. I. Grover, wrongfully, unlawfully, corruptedly, and intentionally, with intent to defraud the Estate of Washington Pocatello, paid to the escrow holder on \$1,000.00, on the purchase price of the \$3,200.00, named in said deed and "Escrow Agreement and wrongfully and unlawfully procured from said depository the said deed".

Such findings are directly contrary to the evidence and

Transcript

record in the case. The power of attorney made by U. F. Diteman to A. I. Grover, was before the court, (exhibit "H"). The court's own record in the Probate proceedings in the estate of Washington Pocatello, deceased, (exhibit "M"), shows that only \$1,000.00 was paid for the deed of Washington Pocatello, deceased, and the Power of Attorney shows that was paid by A. I. Grover, who secured the deed and filed it for record the day after the decrees were filed of record, is sufficient proof in the absence of any proof on the part of the defendants that the full amount was paid, that only \$1,000.00 was paid by A. I. Grover for the Washington Pocatello deed, and that the deed was wrongfully and unlawfully procured from the depository and filed of record. That said finding is directly contrary to the law of the case. The plaintiffs proved the escrow agreement, and that the deed was placed on escrow, and it is so found by the Court in its findings of facts Finding Nos, 3 and 6, (Abstract 113-114), and it is a settled rule of law that when it is proven that an instrument was placed in escrow, then the burden is on the party

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claiming under the instrument to prove that a obligations of the escrow agreement was fully performed fore the instrument was delivered. Further, the plaintiffs being Indians, the burden of proof shifted to the defendants they being white persons, under the laws of the United States of America. By the Act of June 30th, 1844, which provides as follows:

"In all trials about the right of property in which Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership". (R. S. Sec. 2126; Act June 30th, 1834, C. 161, Sec. 22, 4 Stat. 753).

In this case the Court found that title of the land was Washington Pocotello, and his heirs, Findings Nos. 6 and (Abstract 114-118), consequently the burden of proof was upon the defendants to prove the deed was not wrongfully delivered.

ASSIGNMENT OF ERROR NO. 7.

That the court further erred in Finding No. 9, Abstract

"that said plaintiffs offered no evidence to the effect that the depository bank did unlawfully, wrongfully contrary to the express terms and obligations of said escrow agreement accept \$1,000.00 and deliver to said U. F. Diteman and A. I. Grover said deed; that the plaintiffs offered no testimony that at the time of the

Transcript

delivery of said deed, the said U. F. Diteman and A. I. Grover and said depositary bank, all had knowledge that Washington Pocatello was dead, and that Washington Pocatello was dead for more than one year previous to the delivery of said Deed, and that no administrator had been appointed for said estate and that by reason of the failure to offer evidence on said points set out in this paragraph, the court finds against the same."

That such findings are contrary to the evidence produced by both plaintiffs and defendants. In making such findings the court ignores the Court's own record, and decrees of distribution in the estate of Yaotes Owa and Jane Brown (plaintiffs' exhibits "F" and "G"), and the Philips Abstract, (defendants' exhibit "5"), which contained the record of the decrees, gave notice to the world that Washington Pocatello, was dead long before the decrees were entered and the deed delivered. The affidavit of A. I. Grover (exhibit "I"), also, a part of the Philips Abstract, (defendants' exhibit "5") proves the knowledge of A. I. Grover and the wrongful and corrupt intention of A. I. Grover to secure the interest of Washington Pocatello, for \$1,000.00, and (exhibit "M", Abstract 244-246, the court's own record proves that A. I.

Transcript

Grover paid the depositary \$1,000.00 for said deed. It is immaterial whether the depositary had knowledge that Washington Pocatello was dead or not, it had no right to deliver the deed without full performance of escrow obligations, whether Washington Pocatello was dead or alive. Such findings are contrary to the law of the state; this is an action to quiet title, and defendants prayed for and were granted affirmative relief; the burden was upon defendants to prove that their grantor A. I. Grover had acquired good and lawful title to the undivided one-third interest.

ASSIGNMENT OF ERROR NO. 8

The court further erred in Finding No. 9 (Abstract 12) wherein it found:

"The Court further finds that said Warranty Deed given by the First National Bank of Pocatello, Idaho, delivered to U. F. Diteman, or some person acting for him, and that said deed which on its face recited a consideration of \$3200.00, was regularly filed for record in the office of the County Recorder of Box Elder County, Utah, on November 10th, 1919, at 4 P.M., in Book 15 of Deeds at Page 440; that said U. F. Diteman, A. I. Grover, or either of them did not unlawfully, legally or for the purpose of cheating or defrauding the estate of Washington Pocatello and his heirs out of said property, file the said deed for record in said Box Elder County, Utah, but that said deed was regularly filed for record and recorded; that the said A.

transcript

Grover by the recording of said Deed did not attempt to take from the estate of Washington Pocattello and from the heirs of said estate a valuable property right; that the said A. I. Grover did from November, 1919, claim ownership to said lands; that said deed was not void but was a valid deed and passed title to the undivided one-third interest of said property to U. F. Diteman."

That such findings are in error, that the Court should have found from the evidence and record in the case that the deed was delivered to A. I. Grover, the power of attorney to A. I. Grover from U. F. Diteman, (exhibit "H") shows that A. I. Grover assumed the place of U. F. Diteman, and prima facie proves that the deed was delivered to him; that (exhibit "I") the court's own record proves that Grover only paid \$1,000.00 for the deed, which proves that the deed was wrongfully delivered by the depository, and that Grover secured the same and filed it for record for the purpose of claiming the undivided one-third interest, by only paying \$1,000.00 for the same, which proves the act of cheating and defrauding the estate, and the heirs out of valuable property right, and by recording the said deed and taking possession of the property the said A. I. Grover did take from the estate and from the heirs a valuable

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property right for not more than one-fifth its real value, and the court's own record (exhibit "M") show that the deed was void, and was not a valid deed, and did not pass title to the undivided one-third interest of said property to U. F. Ditoman; that the fact that the deed on face recited a consideration of \$3200.00 for the entire 8 acres of land, does not prove that the full sum of \$3200. was paid to the depositary before the deed was delivered; such finding by a court so unsupported by any evidence, but contrary to the evidence and record in the case, that such finding is aiding and assisting the artful and designing impose upon the ignorant and incompetent, and is in contravention of and against public policy, and is in contravention of and against the laws of the State of Utah, made as provided for the protection of the estates and the rights of the heirs of deceased persons.

ASSIGNMENT OF ERROR NO. 9

The Court further erred in finding No. 9, (Abstract 121) wherein the Court found:

"But the court finds that the said deed was regular on its face, recited the consideration of \$3200.00, and from the evidence in the case the Court finds that said

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\$3200.00 recited in the Deed was paid to said escrow holder and that the transaction was not fraudulent."

Such finding is not supported by any testimony and law of the case, but is directly contrary to the facts in the case. First: the deed is not regular on its face (see Plaintiffs' exhibit "K"), the deed describes Washington Pocatello, the grantor, as the only surviving heir of Jane, the daughter of Yaotes Owa, and conveys the whole of said premises, not an undivided one-third interest; the deed shows on its face that it was executed long before the property was decreed, and there is absolutely no testimony in the record that the said \$3200.00 recited in the Deed was paid to the Escrow Holder; there is no evidence in the case that the transaction was not fraudulent, but on the contrary, the Probate Court Record in the Estate of Washington Pocatello, deceased, which still stands on the Court's docket unacted upon, (plaintiffs' exhibit "M"), proves that Grover only paid \$1,000.00 to the escrow depository and obtained the Deed, and proves the transaction with the Bank fraudulent; there was absolutely no evidence before the Court that the said \$3200.00, recited in the

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Deed was paid in full to the Bank.

ASSIGNMENT OF ERROR NO. 10.

The Court further erred in its concluding finding No. 9, (Abstract 12/), wherein the Court found:

"the Court further finds that although Washington Pocatello had title before the property was decreed to his estate, that it was unnecessary to specifically enforce the Escrow agreement under the provisions of Section 7741, Revised Statutes of Utah, but the Bank upon the payment of the consideration aforesaid, was justified in delivering the Deed to the grantee therein."

That such finding is in error; the evidence before the court and the Court's own probate record in this case (exhibit we hold proves conclusively that Grover only paid \$1,000. on the escrow agreement; therefore, the bank was not justified in delivering the deed and there was no more validity to the deed than if it had been forged or stolen by Grover furthermore, Washington Pocatello being dead and the interests of the heirs having intervened, and the fact that the amount of \$3200.00 being an inadequate price for even an undivided and the Deed being not an undivided one-third interest, even if Grover was willing to pay the amount, which he did not do, the only way a good title could be obtained would be under Section 7741, Revised Statutes

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Utah, Titled Specific Performance, wherein the Court could legally decide the matter not the administrator and Grover.

ASSIGNMENT OF ERROR NO. 11

The Court erred in its finding No. 10 (Abstract 122) wherein it found:

"That said A. I. Grover did not have knowledge that his grantors in said Quit Claim Deed had no legal title to the undivided one-third interest in said property; that said A. I. Grover did not connive and conspire with U. F. Diteman to secure the warranty deed so left in escrow without paying the just consideration for the same; that said A. I. Grover did not unlawfully and wrongfully file said Deed for record and did not admit that it was obtained without full compliance with the obligations of the escrow agreement".

That such findings are decidedly contrary to the testimony, record and law in the case; the power of attorney that Grover had secured from U. F. Diteman was before the Court in the escrow papers (exhibit "H"), proving that A. I. Grover was the one that secured the Deed and filed it of record; the securing of the power of attorney and the granting of the same proves the connivance and conspiracy between the two; the Philips Abstract of title relied upon by defendants (exhibit 5)

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discloses the determination of Grover to secure this 80 acres for much less than its real value and in his affidavit filed for the purpose of obtaining the \$7,000. loan for the state (exhibit "I"), Grover set forth the fact that he had full knowledge of everything pertaining to the agreement and deposit, and knew all about Washington Pocatello, which, coupled with the undisputed evidence before the court, contained in its own record, the Probate Proceedings in the Washington Pocatello Estate (exhibit "M") proves Grover only paid the Bank \$1,000.00, is so clear the case that such finding is error.

ASSIGNMENT OF ERROR NO. 12

The Court erred in its findings No. 11 (Abstract 122) wherein it found:

"That the said A. I. Grover did not fraudulently obtain the said Washington Pocatello Deed and file it for record."

Again the plaintiffs humbly ask the question in the face of the record and testimony furnished in this case, how could the Court make such a finding? If that finding is supported by the evidence and record in this case, then no person can either forge or steal a deed to another's

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property and file it of record, and it could be said he would not have fraudulently obtained the same.

ASSIGNMENT OF ERROR NO. 13

The Court further erred in its finding No. 13 (Abstract 122) wherein found:

"that upon assuming control of said premises the said A. I. Grover did not know that the Estate of Washington Pocatello, deceased, and the heirs of the estate, claimed or owned an undivided one-third interest in the premises and that he was fraudulently cheating or attempting to cheat the heirs of said estate out of such interest."

Again, plaintiffs ask the question, in the face of the evidence and record in this case, how could a court make such a finding? The Philips Abstract of title (defendant's Exhibit "5"), reveals the determination of Grover to secure this 80 acres of land; his securing the power of attorney from Diteman; his entering into a contract with the Sugar Company for 60 shares of water-right 9 months before the decrees were entered (defendants' exhibit 4), his application to the State of Utah for a loan of \$7,000.00, 30 days before the decree was entered (plaintiffs' exhibit "J"); Grover's own affidavit (plaintiffs'

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exhibit "I") which among other things contains the following language:

"that I was acquainted with Washington Pocatello in his lifetime and knew his family; that he was an In residing at Fort Hall, Idaho; that during his life he and his wife made, executed and left in escrow a warranty deed in favor of U. F. Diteman which said deed was to be delivered to the said U. F. Diteman the payment of the consideration mentioned in the escrow agreement; that subsequently the said Washington Pocatello died and his heirs appeared as contestants in the probate proceedings referred to in entry #12 of the abstract; that in said hearing the estate of the said Washington Pocatello was given a one-third interest in said premises and thereafter the said U. F. Diteman paid the Bank sufficient to procure the said Warranty Deed so held in escrow and procured the said deed and subsequently conveyed his interest to deponent as shown by entry #16 of the abstract, and that thereafter an administrator was appointed for estate of Washington Pocatello and the said administrator received and accepted the money paid by the said U. F. Diteman for the Warranty Deed in his favor from the said Washington Pocatello."

Therefore, plaintiffs allege that the said finding is positively contrary to the affidavit of defendants' grantor and the evidence and the record in the case.

ASSIGNMENT OF ERROR NO. 14

That the Court further erred in finding No. 11 (Abstract 123), wherein it found:

"That from November, 1919, to March, 1925, during"

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period the Court finds that A. I. Grover had control of the property, he was not an owner in common with the heirs of the estate of Washington Pocatello, and did not collect the rents as co-tenant with the heirs of the estate of Washington Pocatello and did not hold the same under a constructive trust for said heirs, but held and owned said premises in fee simple. "

Such finding, in the face of the record and evidence produced to the Court in this case, is error, and is so contrary to the facts and the law of the case that plaintiffs again, with due sincerity and humility, allege that such finding is an attempt to aid and assist an artful and designing person to wrongfully acquire the property of another that was in the custody of the Court under Probate Proceedings, without paying more than about one-fifth its reasonable value.

ASSIGNMENT OF ERROR NO. 15.

The Court further erred in the last sentence in finding No. 12 (Abstract 124), wherein it found:

"that the said defendants and their immediate predecessor in interest, A. I. Grover, have at all times since 1919 been in the actual possession of said premises and that plaintiffs, or any of them, have not been seized and possessed of said property at any time since said last named date."

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and law in the case; that furthermore the Court by making such finding, is ignoring its own duty as a Court and ignoring the fact that the estate of Washington Pocatello, deceased, is and has been on the Court's docket all the years mentioned in the said finding and during all such time the property was in the custody of the Court in proper probate proceedings, and the Court has failed, refused and neglected to perform its duty, and to have a hearing on the Final Account of the administrator it appointed; that the said finding is an attempt to validate the unlawful wrongful acts of A. I. Grover, (see exhibit "M").

ASSIGNMENT OF ERROR NO. 16

That the Court erred in finding No. 13 (Abstract 125), in it found:

"That the defendants, Amasa L. Clark and Joseph E. Hinson, were innocent purchasers for value, by Deed from Albert I. Grover and Hortense Grover, his wife, dated on or about March 25th, 1925; that at the time said defendants purchased said premises, they believed that Grover was the owner in fee of said premises and knew of no claim that A. I. Grover had fraudulently and wrongfully obtained the said Deed from said Bank, as now claimed by plaintiffs herein and without the payment of the consideration recited in said Deed; that the defendants did not know that the Quit Claim Deed from Diteman and wife to A. I. Grover conveyed no title to said undivided one-third interest; that said defendants

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had no knowledge or notice of any fraudulent acts of A. I. Grover and/or U. F. Diteman."

That said finding is contrary to the evidence, record and law in the case, and is not supported by, or justified by, the evidence and the record in the case; for the following reasons: First, said finding is contrary to law even if defendants did not have such knowledge or notice, that would not entitle them to be classed as innocent purchasers for value, unless the defendants pleaded and proved some act or acts on the part of plaintiffs which misled the defendants, that would estop the plaintiffs from claiming the property; Second, defendants are not entitled to such finding as they did have knowledge that Grover had wrongfully acquired the Deed, the Abstract of title (defendants' exhibit "5") reveals that fact and defendant, Amasa L. Clark, who made the purchase, testified that he never even examined the abstract himself, let alone have it legally examined. Quoting from his testimony on cross-examination (page 45, Reporter's Transcript, Abstract 297):

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Q. You didn't consult the record at all yourse

A. I just bought it from them--I assumed that State of Utah had passed title. I bought it with the idea that the abstract showed it.

Q. You assumed because the State of Utah had appraised the loan and had a seven thousand dollar mortgage upon the property, that that was good title?

A. Yes, sir.

There is no evidence that either one of the defendants made any examination or inquiry about the title; Third, said findings are contrary to the evidence and record in the case the defendants had notice, that the Deed was in escrow, the Deed purported to convey the entire premises, that it executed long before the property was decreed; that Washington Pocatello was dead; that the property was decreed undivided; that A. I. Grover only paid \$1,000.00 for the Deed that his deed was not valid; that the estate of Washington Pocatello was in the course of probate in the District Court of Box Elder County, Utah, and had never been settled; all of these facts plaintiffs allege was and are shown by the Philips Abstract, offered in evidence, (defendants' exhibit "5"); such findings is an attempt to excuse the defendants of their gross negligence when they purchased the property, and is against public policy and contrary to the

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laws of Utah therein made and provided.

ASSIGNMENT OF ERROR NO. 17

The Court further erred in finding No. 13. (Abstract 25), wherein it found:

"that they did not know that the undivided one-third interest had not been properly probated or legally transferred from the estate of Washington Pocatello; that defendants did not know that their grantor A. L. Grover was at all times an owner of only an undivided two-thirds interest in said property and did not know that said Grover held the same in common with the heirs of the estate of Washington Pocatello as to an undivided one-third interest."

The Court erred in making such findings, for the reason that defendants admitted that they never looked at the abstract, or examined the title, or attempted to find out anything about the title; as heretofore stated Amasa L. Clark testified that he took the property believing the title was good because the State had a \$7,000.00 loan on it; the record of the title of the property, and the record of the probate proceedings in the estate of Washington Pocatello (exhibit "M"), was notice to them, as if they had searched the record it would disclose the fact that Grover had no title to the undivided one-third interest; such finding is against the law of the case, and also,

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against public policy as it is an attempt to excuse and shield the negligence, and carelessness of the buyer, and to throw the burden of the loss sustained through the fraud upon the ignorant and helpless, and is in violation of the laws of Utah, Sec-78-1-6 and 78-3-2, 1933, Revised Statutes of Utah, which provides that public records are notice to all.

ASSIGNMENT OF ERROR NO. 18

The Court further erred in finding No. 13, (Abstract 12) wherein it found:

"That said defendants by said mesne conveyances obtained fee simple title to said premises and the plaintiff herein do not own an undivided one-third interest in said premises or any interest whatsoever; that the defendants, since March, 1925, have collected the rents and profits from said premises but do not hold the same as co-tenants with the heirs of Washington Pootello under a constructive trust or otherwise, except as owners thereof."

That such finding is contrary to the law and the evidence in the case, the defendants have only the title they obtained from their grantor, A. I. Grover, and the records, the evidence, and the law of the cases, establishes that Grover had no title to the said undivided one-third interest, and Grover could not convey any better interest.

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then he had; Grover's title to the undivided one-third interest being no better than if he had forged or stolen the deed, and the property being still in the custody of the Court, such a finding is an effort by the court to make a title for the defendants.

ASSIGNMENT OF ERROR NO. 19

That the Court erred in that part of finding No. 14 (abstract 127), wherein the Court found:

"that since said date until the filing of the complaint herein, these plaintiffs, or any other person, never claimed any right to or in said premises and the defendants have at all times held the said premises adversely against the rights of the heirs of the estate of Washington Pocatello, deceased, the plaintiffs herein."

That said finding is not supported either by the evidence or the law in the case; the property during all the years was in the custody of the court that made the findings; furthermore defendants did not either plead or prove any of the elements of adverse possession; that the possession and control of the premises pleaded and testified to by the defendants is more consistent with a possession of tenants in common, than of adverse possession, and the possession of one tenant in common is the possession of all.

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of all.

ASSIGNMENT OF ERROR NO. 20

That the Court erred in that part of finding No. 15 (Abstract /28), wherein the Court found:

"The Court finds that there is no proof that Charles E. Foxley as administrator of said estate, or otherwise, connived and conspired with A. I. Grover, and the Court therefore finds that said A. I. Grover did not fraudulently connive and conspire with the said Charles E. Foxley, as administrator of said estate, or otherwise, and that the said Charles E. Foxley did not improperly accept from the First National Bank, Pocatello, Idaho, any money with intent to cheat and defraud the heirs of Washington Pocatello, deceased.

That said finding is not supported by the law and the evidence in the case; that the Court, by such finding, ignoring its own record, the files and record in the Probate proceedings in the matter of the Estate of Washington Pocatello, deceased, plaintiffs' exhibit "M", together with the power of attorney that A. I. Grover secured from U. F. Diteman, and the paying only of \$1,000.00 by the said Grover to the Bank, and the securing of the Deed by Grover and filing it for record, and the failure of Charles E. Foxley, to file an inventory in the estate, or to take any steps to secure for the estate and the heirs th

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rights in the estate, and the act of Foxley in sending a copy of the letters of administration to the Bank, and demanding that the \$1,000.00 paid by Grover be sent to him, is sufficient proof of the connivance and conspiracy of Grover and Foxley; and furthermore, the fact that the Court or the Clerk of the Court of the First Judicial District, in and for Box Elder County, Utah, failed, refused and neglected to ever take any action on the Final Account rendered by the said Charles E. Foxley, the administrator, is sufficient to charge that the Clerk of the Court, and the Court was either conniving with the said A.I. Grover, or else, the Clerk of the Court and the Court, shamefully neglected the duty imposed upon them by the Constitution and the laws of the State of Utah, to protect the estate, and the right of the heirs of a deceased person, and there was no evidence whatsoever that A. I. Grover did not connive and conspire with the said Charles E. Foxley, and it is absolute error to hold that Charles E. Foxley did not improperly accept the money from the bank.

ASSIGNMENT OF ERROR NO. 21.

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That the Court further erred in its finding in No. 15, (Abstract ¹²⁸/₂₉), wherein the Court found:

"that said Charles E. Foxley did not connive and conspire with A.I. Grover to file a copy of Letters of Administration with the First National Bank of Pocatello, Idaho, for the purpose of obtaining the said Decd of Washington Pocatello and Minnie Pocatello, his wife covering said property; that there was no evidence offered to the Court as to the whereabouts of Charles E. Foxley and the Court finds the Proceedings in the Estate of Washington Pocatello were regular insofar as administered, and that from January 12th, 1920, to the date of the filing of the complaint herein, the said Charles E. Foxley, was the duly appointed, qualified and acting administrator of said Washington Pocatello, deceased, and represented the said estate and the heirs of said estate."

By such finding the Court is again ignoring its own duty to act on the final account and petition of distribution filed by the administrator in the estate of Washington Pocatello, deceased, and ignoring the Court's duty to see that the estates of deceased persons, and the rights of the heirs are fully protected, and by such finding the Court is attempting to establish a title for the defendants and against the plaintiffs, and approving the cheating and defrauding of heirs out of their just property rights; from the record in this case before the Court,

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Plaintiffs are justified in alleging that the
Court and the Clerk of Court, at the time that Charles E.
Foxley filed his so-called final account in the Estate
of Washington Pocatello, deceased, failed, refused and neg-
lected to hear said matter, and to properly administer said
estate and to dispose of the matter at that time, and during
all the years since the Court has failed, refused and neg-
lected to perform its duties. In the above findings, the
Court finds "that the Proceedings in estate of Washington
Pocatello were regular insofar as administered", that finding
true, the Proceedings in the estate of Washington Poca-
tello was regular in the appointment of administrator, and
it is true that from the 12th day of January, 1920, until
the complaint was filed that Charles E. Foxley was the
duly appointed and qualified administrator of the estate,
and the reports of Charles E. Foxley, was during all these
years lying on the docket of the Court with a petition for
hearing on same but ignored during all the time by the
Court; by said finding the court stresses, that Charles E.
Foxley was the duly appointed and qualified administrator
of the Washington Pocatello estate but ignored the duty
at appointment of said administrator imposed

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upon the Court. A Court must take judicial notice of its own record that in any way pertains to the case. Section 104-46-1, Revised Statutes of Utah, 1933; Warren vs. Robinson, 21 Utah, 429; State vs. Bates 22 Utah, 65. Plaintiffs were not obliged to offer any evidence to the Court as to the whereabouts of Charles E. Foxley.

ASSIGNMENT OF ERROR NO. 22

The Court erred in its finding No. 16 (Abstract 129) wherein it found:

"That defendants Amasa L. Clark and Joseph E. Robinson at the time they purchased said eighty acres of land from A. I. Grover had no knowledge or notice that Charles E. Foxley had been appointed administrator of the estate of Washington Pocatello, deceased, and had no knowledge and notice of any unlawful or fraudulent acts on the part of A. I. Grover and/or Charles E. Foxley as administrator of the estate of Washington Pocatello, deceased."

Said finding is contrary to the evidence, record and law of the case; the abstract of title that defendants rely upon, and introduced in evidence their proof of title, Exhibit "5"), showed the deed was placed in escrow, it showed that the 80 acres of land was decreed undivided, two-thirds and one-third; it showed the Deed of Washington Pocatello and Minnie Pocatello purported to convey the entire property

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and that he executed it as the only surviving heir of Jane, the daughter of Yaotes Owa, that it was executed on February 2nd, 1917, long before the property was decreed; that it was filed of record just one day after the decrees of distribution of the estate of Yaotes Owa, and of Jane her daughter, had been filed of record; the abstract contained the affidavit of the defendants' grantor, A. I. Grover, wherein he told all about the whole transaction, and that an administrator had been appointed in the estate of Washington Pocatello, deceased, and that the administrator had accepted and received the money paid on the escrow agreement, all of which was sufficient to give the defendants notice of the fraud and the cheating throughout the whole proceeding; and that Grover, their grantor, had title to the undivided one-third interest; for a Court to find that the defendants "had no knowledge or notice that Charles E. Foxley had been appointed administrator of the estate of Washington Pocatello, deceased, is preposterous. Probate Proceedings are Court records, and notice to everyone. Ruling Case Law lays down the following rule:

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"The records of the Courts are notice to everyone, and all persons are bound to know the facts disclose. So if those records show that the personal estate of a decedent is not sufficient to pay debt or if they show that such estate is still unsettled, notice is thereby imputed to all who may deal with real estate that the latter is or may be mortgaged, and no one purchasing from an heir or devisee, under such circumstances, could pretend to be a bona fide purchaser without notice."

ASSIGNMENT OF ERROR NO. 23

That the Court further erred in finding No. 16 (Abstract 129/33), wherein the court found:

"that the said defendants had no knowledge or notice of any unlawful or fraudulent acts on the part of I. Grover and/or of the said Charles E. Foxley, as administrator of the estate of Washington Pocatello deceased; that said defendants had no knowledge of any alleged conniving or conspiracy on the part of the said I. I. Grover and Charles E. Foxley to cheat and defraud the Estate of Washington Pocatello, and the heirs of said estate; and the Court finds that the grantor of these defendants A. I. Grover, owned and had legal title to the said undivided one-third interest of the land formerly owned by Washington Pocatello;"

That such findings is not supported by any evidence, but is contrary to the evidence and law in the case, for the same reason as heretofore set out, defendants' (Exhibit No. "5") disclosed the escrow, and that Grover had obtained the Washington Pocatello Deed; and filed it of record.

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that he only paid \$1,000.00 was proved by the Court's own record (exhibit "M"), together with the "affidavit of defendants' grantor (Exhibit "I"), all constituted knowledge and notice to defendants of the connivance and conspiracy of Foxley and Grover to cheat and defraud the heirs of the estate; and then for the Court to find that "A. I. Grover owned and had a legal title to the said undivided one-third interest of the land formerly owned by Washington Pocatello", in the face of the evidence and record before the Court, is contrary to the great weight of authority laid down by courts for over four hundred years, that a deed, wrongfully delivered or forged or stolen, passes no title.

ASSIGNMENT OF ERROR NO. 24

That the Court erred further in finding No. 16 (Abstract '30), wherein it found:

"that at all times since March 12th, 1925, the defendants herein have exercised supervision and control over said undivided one-third interest and that said claim and ownership was not wrongful but was under claim of right as against the estate of Washington Pocatello and the heirs of said estate; that during all of said years

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the ownership of said defendants was not confined to an undivided two-thirds interest in said land and that said defendants were not tenants in common with the heirs of Washington Pocatello, deceased, but said defendants owned all of said land in fee simple."

That such finding is not supported by the evidence, record and law of the case, but is contrary to the evidence, record and law in the case, the defendants could not take a better title than their grantor, A. I. Grover, had, and it shocks the conscience of justice and equity to hold that Grover took good title to the undivided one-third interest, and again the Court in making such finding is ignoring its own record, and ignoring the fact that the Court has, during all the years, failed, refused and neglected to perform its duty in the matter of the Estate of Washington Pocatello, deceased; and ignoring the fact that the property, during all the time mentioned, was in the custody of the Court.

ASSIGNMENT OF ERROR NO. 25

The Court erred in finding No. 17 (Abstract ¹³⁰/₃₁), where in the Court found:

"The Court finds that on December 3rd, 1919, when petition for letters of administration was filed in

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the Estate of Washington Pocatello, deceased, that Ray Pocatello was then of the age of seven years, and all the heirs were older than Ray, and at the time of the filing of the petition herein, Ray Pocatello was of the age of twenty-six years."

That such finding is so untrue that plaintiffs cannot understand what either the counsel that prepared the findings or the Court who signed the same ever expect to gain by it; the purpose of such findings is plain. It was an attempt to show that Ray Pocatello had become of age more than two years previously to this suit being filed, but in making such findings the Court ignores the sworn testimony of Superintendent Gross, that the Records of the Fort Hall Indian Reservation shows that Ray Pocatello was born in 1917, (page 12 of Reporter's Transcript).

Question: Have you got a record of the date of the birth of Ray Pocatello?

Answer: The records show that he was born in 1917. I do not have the date of the month.

(Abstract 250)

In order to try to make out a perfect case for the defendants by attempting to show that Ray Pocatello is barred by statute, the Court takes the age that Charles E. Foxley inserted in his first petition for appointment as adminis-

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trater, and ignores the direct testimony taken from the records of the year Ray was born, and at the same time ignored the record of the administration of Washington Pocatello, deceased, for any other purpose in this case.

ASSIGNMENT OF ERROR NO. 26

The Court further erred in said finding No. 17 (Abstract 131), wherein it found:

"That the plaintiffs all knew of the fact that Charles E. Foxley was appointed administrator of said estate during all the time from January 12th, 1920, to the date of filing their complaint herein, and during all of the time these plaintiffs and Charles E. Foxley, as administrator of said Estate, knew that A. I. Groer and these defendants claimed said eighty acres of land and at all times had constructive knowledge that the said deed of Washington Pocatello and Minnie Pocatello, his wife, placed in escrow with the First National Bank of Pocatello, Idaho, had been delivered and had been regularly recorded, and that all of the plaintiffs herein knew all of the facts complained of in their complaint herein at all times after on or about November 1st, 1919, when Minnie Pocatello and her children appeared in open court as set out in paragraph 18 of plaintiffs' complaint, as will more fully hereinafter appear."

In the face of the evidence, record and law of this case, plaintiffs humbly allege that such a finding is astounding; the Court absolutely ignores its own duty, record and proceedings of which it had actual knowledge, yet charges

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those ignorant, untutored persons, not in any way familiar with legal proceedings with constructive knowledge; and charges its administrator with constructive knowledge while during all of the years the Court had actual knowledge of its own docket, and failed, refused and neglected to do its duty and hold a hearing on the final account that the administrator had the honesty to file with the Court and petition to act upon. If the Court will not take actual notice and knowledge of its own docket and perform its duty during all the years, can a Court then, in justice's sake, bar the heirs from relief, by charging them and the administrator with constructive knowledge? The record shows, and it was found by the Court that Charles E. Foxloy was recommended to those ignorant untutored persons by Justin D. Call, the Judge who was hearing the matter after he advised with them, and they told him they knew no one, or what the matter was about, so (see next finding 18, Abstract 132), who else could Minnie Pocatello and her children turn to in Box Elder County to appear for them before the District Court of said County, if it was not the

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person that the Court recommended to them. The Clerk of the Court appointed him administrator and the Court takes jurisdiction over the estate and the distribution of the same, the administrator files his account, from that time on every Judge and Every Clerk, including the Judge that made those findings, fails, refuses and neglects to do and perform the duties that are imposed upon them by the Constitution and the Laws of the State of Utah and now when Plaintiffs come before the same Court to seek their rights, they are told by the Court, you and your administrator had constructive knowledge all those years that you were robbed of your estate, and now you have no standing in this Court.

ASSIGNMENT OF ERROR NO. 27

The Court erred in its finding No. 19 (Abstract 134), wherein it found:

"That the estate of Washington Pocatello, deceased, or the heirs of said estate, have paid no taxes and legal assessments levied against said property or of any part thereof, and that the defendants Amasa L. Clark and Joseph W. Robinson and A. I. Grover, their immediate predecessor in interest, have each and every year since 1919 to date, paid all of the taxes and assessments each year levied against all of said land."

Transcript

That such findings are contrary to the evidence, record and law of this case, and is in violation of all principles of law, justice and equity. The record in this case is clear that A. I. Grover wrongfully obtained the deed, just as wrongfully obtained it as if he had forged or stolen it, he obtained no legal title thereto, and during all the years the undivided one-third interest in that 80 acres of land was in the jurisdiction of the Court there is sufficient evidence in the record to show that the property demanded and received a high rental value each year, and the defendants and their predecessor was at all times tenants in common with the heirs, and subject during all the years to an accounting with the administrator for the rents, and that the undivided one-third of the rents far exceeded the one-third of the taxes, and all other legal charges and defendants were paying the taxes each year for their co-tenants.

ASSIGNMENT OF ERROR NO. 28

The Court's first finding in No. 20 (Abstract 134) wherein the Court found:

Transcript

the said eighty acres of land have remained
tically unchanged since the Court decreed the
property to the heirs of Yaotes Owa."

Such finding is correct, but further on the Court erro
finding No. 20 (Abstract 134), wherein it found:

"except the present owners and their predecessors
in interest expended considerable time and money
each year in leveling said lands for intensive
farming."

There is not any competent evidence in the record that

A. I. Grover, defendants' predecessor, ever expended
any time or money on the improvement of the premises.

Amasa L. Clark who purchased from Grover testified as
follows. (Page 45 Reporter's Transcript. Abstract
248).

Q. You just went on it after you purchased it? I
you ever have any conversation with A. I. Grov
relative to this piece of property, when you
purchased it?

A. No, I can't say that I did.

Q. You didn't have any conversation with him rela-
tive to the income he had received from it?

A. I think he said it was leased under good condi-
tions.

Q. That it was a bargain, good land, under good co-
ditions? A. Yes, sir.

Transcript

Q. Did you ask what those conditions were?

A. No, Sir.

Defendant Joseph W. Robinson on direct examination testified as follows: (Page 43 Reporter's Transcript, Abstract 303).

Q. There was some leveling done?

A. Yes, of course I wasn't there every year while he had it. Then I was by there a good deal. I didn't pay much attention to it while he owned it, after we bought the place I was on the place, I was watching it.

However, on cross-examination (page 52 Reporter's Transcript), defendant Robinson testified: (Abstract 308).

Q. Had you ever been along there, paying any particular attention to the property before 1925?

A. Not particular. I may have been down there. There was another road, of course, around to Tremonton.

Q. Not many times, had you? A. No.

Q. That lies down off the highway? A. Yes

Q. You didn't have any particular reason to go down that way.

A. Not particularly. (Abstract 308).

Likewise, there is no competent evidence in the record that the defendants ever spent any time or money in improving the property. On direct examination Amasa L.

Transcript

Clark testified as follows: (Pages 39-40 Reporter's Transcript - Abstract 289).

Q. What was the condition of the land as to being level and in good condition for farming now as compared with when you first got the land?

A. It is in very much better condition.

Q. Just explain in detail, if you will, Bishop, what you meant by that?

A. We have allowed several hundred dollars for the leveling that they have done for the work in grading and scraping and leveling the ground. It is in much better condition now.

Such is the answer to the request of his counsel to explain in detail what time and money they spent on the property; he did not testify as to spending considerable time and money each year; in fact, on cross examination, his answers as to how much rent was collected were very evasive. Defendant Joseph E. Robinson who claimed he was watching the place, testifying under direct examination, testified as follows: (Pages 43-44 Reporter's Transcript, Abstract 306).

Q. What about you and Mr. Clark have you made any improvements by way of leveling the ground?

A. Yes, sir.

mscript

Q. Tell the Court what you did?

A. On this one side we used a fresno, pushing down the high places, so we could get water on it, and then fixed the ditches so as you could water it.

Q. What would you say the cost of such work amounted to?

A. I would not know just what that would be. Those that did the work would know more themselves what that work would be. (Abstract 306).

Q. Tenants took it out of the work?

A. Well, yes. (Abstract 306).

However, on cross examination (page 51 Reporter's Transcript) he testified as follows: (Abstract 307).

Q. You stated you took the cost of leveling this ground out of the rent; just how did you figure it?

A. By doing this work, we furnished several sacks of lucern seed. The farm was run down.

Q. You furnished several sacks of lucern seed?

A. Yes, sir. (Abstract 307)

Q. Did you furnish anything else?

A. No, sir.

Q. That is the only consideration you gave for leveling the farm?

Transcript

A. We let him have it a little cheaper. He has done some extra work.

Q About how much less, do you recall? A No. (Abstract 307)
Then again (page 53 Reporter's Transcript), witness testified: (Abstract 310).

Q What work have you done in repairing the fences, putting in posts, and keeping up the fences?

A Sellma has been doing all that work.

Q He has just repaired the fence that was already there?

A He has kept it up. It is in good shape.

(Abstract 310). It is on that evidence that the Court made the finding that the defendants and their predecessors expended considerable time and money each year in leveling the land for intensive farming, which is not sufficient to sustain such findings, and further defendants having no title and as tenants in common, such was their duty, and they are entitled to credit in accounting for the rents.

ASSIGNMENT OF ERROR NO. 29

The Court further erred, in finding No. 20 (Abstract 131) wherein the court found:

"and said A. I. Grover purchased from the Utah-Idaho

Transcript

Sugar Company a water right for said premises which he paid the sum of \$3,000.00".

It was error for the Court to find that A. I. Grover paid for that water right. The record shows (defendants exhibit "4") that Grover contracted for that water right in March, 1919, 9 months before he unlawfully obtained the deed of Washington Pocatello, and Minnie Pocatello, paying down only \$100, and agreeing to pay the balance in yearly installments; the record also shows (plaintiffs exhibit "J") that in October 1919, 30 days before the property was decreed that A. I. Grover made application to the State of Utah for a loan on the premises for \$7,000 on this 80 acres of land, and the record shows he obtained from the State about the month of February, 1920, this \$7,000, loan, and that shortly afterwards he paid the Sugar Company in full for this water right receiving a discount. Grover not having title to the undivided one-third of the property, secured the loan and paid for the water right as a tenant in common with the heirs of the estate, and the water right attached to the premises, and was not in his own personal right. Also the record shows

Transcript

(exhibit "L") that A. I. Grover leased the land in 1923 for three years at an annual rental of 232 tons of beets delivered from the first beets dug each year to the Sugar factory, there is no evidence that Grover did not secure as good a rental in 1920, 1921, and 1922, and plaintiffs introduce in evidence (exhibit "N") a letter from the Sugar Company showing the beet prices for the five years that Grover claimed the property which proves the rental of the undivided one-third interest more than paid for its share of the water right and the taxes and assessments during the five years Grover claimed the premises.

ASSIGNMENT OF ERROR NO 30

The Court further erred in finding No. 20 (Abstract 135) wherein the Court found:

"that said land was appraised in the probate proceedings in this Court as having a value of \$4,900.00, which the Court finds was a reasonable cash market value of said premises at said time."

While it is true, that when the property was appraised for probation in the summer of 1917, it was appraised at only \$4,900.00, the evidence and the record in the case shows that it is not true that such a sum was the reasonable

Transcript

cash value of the premises at that time, or at the time it was decreed; by such finding the Court is again ignoring its own record. If such was the reasonable cash value, then Judge Call, could not have decreed the property as he did. Under the law of inheritance of the State of Utah at the time the property was decreed, and the same today, the surviving spouse was and is entitled to \$5,000 clear value of the estate of the deceased spouse, and in addition there to, entitled to 50 per cent of the additional value of the estate. Decreeing the property as he did Justice Call must have valued the property at a clear \$15,000 value, furthermore the record shows that it was rented for \$650 per year cash rental, by the administrator (plaintiffs' exhibit "O") and the application of A. I. Grover for the State loan (exhibit "J"), he swears that the land is worth \$300 per acre; the fact that he secured a loan of \$7,000 from the state proves that \$4,900 was not the reasonable cash value of the property at the time it was appraised, or but only about one-third its reasonable cash value.

Transcript

ASSIGNMENT OF ERROR NO. 31

That the Court erred in its finding No. 24 (Abstract 13 wherein it found:

"That plaintiffs, or any of them, have no right herein and that the sole owners of said real es are the defendants Amasa L. Clark and Joseph E. Robinson."

Such finding is not supported by the evidence, record and in the case, but is contrary to the evidence and law in t case for the reasons as heretofore set out in support of the foregoing assignments of error.

ASSIGNMENT OF ERROR NO. 32

That the Court erred in its finding No. 25 (Abstract 136-137 for the reason that all of such findings is irrevelant and immaterial in the case at Bar, as none of the facts found said finding No. 25, either tends to prove or disprove any the points and facts in this case, and its injection only encumbers the record, and confuses the issues; plaintiffs allege however, that the Court specially erred by the last sentence of finding No. 25 (Abstract 138) wherein it found:

"That Yaotes Owa as Patentee, and her successors

Transcript

in interest including the plaintiffs', have subjected themselves to the laws of the State of Utah and in the bringing of this suit the plaintiffs are subject to the same laws relating to the prosecution of suits governing any other citizen of this State."

The finding that Yaotes Owa and the plaintiffs have subjected themselves to the Laws of Utah, is not born out by the evidence and record in the case, the record shows that Yaotes Owa died about 1888, that her daughter Jane died sometime in the early ninties, that neither the daughter while she lived, or Washington Pocatello, or James Brown, her husband after her death ever paid any attention to the property, or came into the Court asking any action or relief until the artful and designing white man, sought them out, and dragged them into the Court in an effort to rob them of valuable property rights; of which they had no judgment as to its value. The finding by the Court, that by the bringing of this suit the plaintiffs have subjected themselves to the laws of Utah, is not borne out by the record and evidence in this case. Washington Pocatello was sought out and brought in to the Court by Saylor. The estate of Washington Pocatello, deceased, is now, and was

Transcript

at the time of the filing of this suit and has ever since February 20, 1940 on the docket and in the hands of the Court, and the Court that made the above finding and its predecessors, has failed, refused and neglected to do its duty during 11 of the years, and the plaintiffs came to the Court in this action to claim their property. It may be true that as far as probate proceedings, or suits quiet title are concerned that plaintiffs and their predecessors were and are subject to the laws of the State of Utah, and it is likewise true that they are also entitled to the protection of the laws of Utah in their rights of property, and entitled to the protection of the Courts of the state, which the evidence and record shows they have not received from the Court of the First Judicial District in and for Box Elder County, Utah.

ASSIGNMENT OF ERROR NO. 33

That the Court erred in each and every finding in No. 26 (Abstract 138-141). That such findings are largely repetition of many such findings of a similar nature previously made; that not one of the findings made in said finding No

Transcript

(Abstract 138-140), is supported by any evidence,

or by the record and the law of the case, the said defendants did not purchase the property without knowledge or notice of any of the claims set forth in plaintiffs' complaint; defendants did not even examine the abstract; the fact that the State had made a loan of \$7,000 on the property did not make good title; Amasa L. Clark was a banker, and Joseph E. Robinson was a man that had dealt in real estate for years, the duty and the burden was upon them to examine the title, and if they had they would have found out that A. I. Grover did not have any title, and that the Estate of Washington Pocatello, deceased, was still in Probate proceedings, without having been settled. That the Court specially erred in Finding No. 26 (Abstract 139) wherein it found:

"That A. I. Grover, defendants immediate predecessor, entered into the possession of said premises under claim of ownership on or about said date began to farm said premises as the owner thereof; that at all times since on or about November 3rd, 1919 until the 25th day of March, 1925, when the said A. I. Grover conveyed said premises, to defendants; that said Grover occupied and cultivated and improved said premise protected the same by a substantial enclosure,

Transcript

paid all taxes each year levied and assessed upon said lands and claimed to own the same continuously, notoriously, peaceable and under claim of right each and every year as his property, in simple, as against all persons whatsoever."

The record in this case is so clear that A. I. Grover only paid \$1,000 to the escrow depository, for the Washington Minnie Pocatello Deed, that it is error to find that he entered into the possession of the premises lawfully; the record shows that in the hands of Grover, that deed was of no more effect, than if it were forged or stolen; therefore any occupancy of Grover could not be other than that of a wrongful possession or of a tenant in common, or under a constructive trust, and such a finding as above by a court is an attempt to aid and assist, and approve of the wrongful acts of the artful and designing Grover to deprive those ignorant and untutored heirs out of their rightful property the custody of which was at all times mentioned in said finding in the hands and jurisdiction of the Court that in the finding, that during said time mentioned said A. I. Grover was a tenant in common with the administrator and with the heirs and could not hold adversely to them. That the Court again specially erred in the last part of finding No. 26

Transcript

(Abstract 140), wherein the Court found:

"that when said A. I. Grover entered upon said premises the property was uneven and had insufficient water right and could not be farmed to best advantage; that the said A. I. Grover and these defendants spent much time, labor and money in the improvement and leveling of said premises and in purchasing additional water rights for said premises

premises all of which said amounts were paid by said A. I. Grover and all these defendants; that defendants are innocent purchasers of said property for value and are now the owners in possession seized in fee simple of said property."

Said finding is purely a repetition, as the same findings has been made several times previously, and we have so plainly pointed out heretofore, that such findings are error, that every point in the last above assignment has been heretofore covered; However, we again point out that there is not a scintilla of competent evidence anywhere in the record that when Grover entered upon the premises that it was uneven and could not be farmed to advantage, and that the said Grover spent much time, labor, and money in its improvement; on the other hand the evidence in the record is over-

Transcript

whelming to the contrary; it was leased yearly to Getz, the Administrator, for \$650 cash rent during the administration of the Yaotes Owa, Estate. Grover's own application for the State Loan shows the land to be in high state of cultivation, and worth \$300 per acre, and had a 60 acre water right; the defendants could take no better title than their grantor had, and they can not be seized in fee simple, one can't become holder in fee simple under the same as a forged or stolen deed; defendants' possession, and the possession of their grantor's was that of tenants in common, and not possession in fee simple.

ASSIGNMENT OF ERROR NO. 34

That the Court erred in its finding No. 27 (Abstract 141) wherein it found:

"that U. F. Diteman is no longer a resident of the state, and is now aged and infirm and is unable to remember or testify as to the facts in this case; that the First National Bank of Pocatello, Idaho, is insolvent and has been liquidated and all instruments in connection with the escrow agreement, except as offered in evidence have been destroyed; that by reason of lapse of time, nearly twenty years, the parties are unable to procure testimony in support of their claims

Transcript

or to refute the same; the claims of plaintiffs are now stale claims."

Such finding is error, there is no evidence in the record to support such finding; such finding is contrary to the evidence in the record; U. F. Diteman, passed out of the case when he gave the power of attorney to A. I. Grover, if Diteman was present, and a young able bodied man, there is no oral testimony he could give that could change the record; there is ample undisputed evidence in the record that Grover wrongfully obtained that deed, by only paying \$1,000 for the same (exhibit "M"), and no oral testimony could change that; it is immaterial that the depository Bank is now insolvent, the escrow papers in evidence (exhibit "H") together with the Final account of Charles E. Foxley, in the estate of Washington Pocatello, (exhibit "M") tells the story. Said Final Account is still in the hands of the Court unacted upon, yet the same Court now finds "that the claims of plaintiffs herein are now stale claims", when during all the years the Court has failed, refused and neglected to perform its duty, and hear the matter of

Transcript

the final account of its administrator, but held the case on its docket unsettled, and undisposed of. That the Court again specially erred in its last finding in finding No. 26 (Abstract 142), wherein the Court found:

"that the plaintiffs are now estopped by reason of laches, silence and other conduct on their part and on the part of the administrator as heretofore found, from at this time prosecuting this action."

Plaintiffs contend that such finding by the Court is error; by such finding the Court is charging the administrator, who rendered his account to the Court, and these poor ignorant and untutored persons, who had no knowledge of probate procedure, with laches, silence and other conduct as an estoppel, when the reason for not acting upon, and settling the estate of Washington Pocatello, deceased, can solely and entirely be charged to the refusal and utter disregard of the Court to perform its duty, by not holding a hearing on the Final account of its duly appointed administrator, and its disregard of its plain duty to see that all estates of deceased persons that assumes jurisdiction over are properly administered; that no acts of turpitude was either pleaded or proven against the plaintiffs, and the rule of law is that to establish estoppel there must be some degree of turpitude.

Transcript

in the conduct of the party before a court of equity will estop him from asserting his title.

ASSIGNMENT OF ERROR NO. 35

The Court erred in its finding No. 28 (Abstract 142), wherein it found:

"That the plaintiffs' first cause of action is barred by the Statutes of Limitations of the State of Utah and particularly by the provisions of Section 104-2-5, 104-2-6, 104-2-7, 104-2-19, and by subdivision 3 of Section 104-2-24 of revised Statutes of Utah, 1933."

That such findings is in error for many reasons; First; that A. I. Grover never obtained legal title to said undivided one-third interest, and the title and right of ownership, remained in the heirs of Washington Pocatello, deceased, and the Court appointed an administrator in the Matter of the Estate of Washington Pocatello, deceased, who qualified and assumed the duties of such administrator, and filed with the Court his final account, and asked for a hearing on the same, and the Court failed, refused, and neglected to perform its duty (exhibit "M") and consider said Final Account,

Transcript

but has retained the matter on its docket all the years undisposed of, and the Court can not apply the statute of limitations to a matter that is on the Court's docket, and the Court has failed, refused and neglected to hear and dispose of. Second; Grover having no legal title to the undivided one-third interest, his possession of the entire premises was the possession of his co-tenants, and defendants have not pleaded or proved any circumstances that would be notice to the plaintiffs of an adverse holding; Third; at the trial plaintiffs have proved their title and right of ownership, and therefore plaintiffs are presumed, under Section 104-2-7 Revised Statutes of Utah, 1933, to have been in possession thereof within the time required. Fourth; that the plaintiffs are, and during all the years were "incompetents", as defined by Section 102-13-20, Revised Statutes of Utah, 1933; three hundred years history of our Country proves, that the Indian has ever been robbed by the crafty and designing white man, and when dragged into the Courts, they and their property are entitled to the Court's protection. Fifth; plaintiffs being Indians the Statute

Transcript

Limitations can not be invoked against them, when it is proven that they are still wards of the Government; Sixth, that the defendants had notice that their grantor, Grover, had no title to convey to, the undivided one third interest, and had notice that the said undivided one third interest was still in the hands of the Court unsettled at the time they purchased the premises. Seventh; that the said finding is in error particularly as to Ray Pocatello, for the reason that two years had not elapsed since he arrived at majority until the suit was filed, as provided for in Section 104-2-37, Revised Statutes of Utah, 1933.

ASSIGNMENT OF ERROR NO 36

That the Court erred in its finding No. 29 (Abstract 142) wherein it found;

"That the Court finds against all of the allegations of the plaintiffs' complaint and in favor of all the affirmative allegations of the defendants not hereinbefore expressly found upon".

That such finding is not supported by the evidence, record and law of the case, and is an unfair and unjustified find.

Transcript

ing made by the Court that has during all of the years failed, refused and neglected to perform its duty in administering the Estate of Washington Pocatello deceased, and has held on its docket undisposed of, the final account of the administrator of said estate, yet he retained jurisdiction of the matter, by keeping the case on its docket undisposed of.

ASSIGNMENT OF ERROR NO. 37

That the Court erred in Finding No. (Abstract 142)

wherein it found:

"That the plaintiffs' offered no testimony in support of the allegations of their second cause of action and that the Court makes no findings on any of the allegations of said cause of action."

That such finding was in error, for the reason that at the close of the taking of testimony on the first cause of action, it was agreed in open court that it was useless to offer any testimony on the second cause of action until the Court had disposed of the first cause of action, we quote from the record (page 57 Reporter's Transcript)

THE COURT: Yes, that was my understanding. The record may show that you are proceeding under the requirement of the Court as to the first cause of

Transcript

action, and you reserve what you may have as to the second cause of action."

ASSIGNMENT OF ERROR NO. 38

That the Court erred in all of its Conclusions of law (Abstract 143)

1. That a decree should be entered dismissing plaintiffs' first cause of action with prejudice;
2. That a decree should be entered dismissing plaintiffs' Second Cause of Action:
3. That a decree should be entered in said Cause to the effect that the defendants, Amasa L. Clark and Joseph E. Robinson, are the owners in fee simple title of the premises described in paragraph 23 of the Findings of Fact herein, and that Decree be entered quieting title in said Defendants thereto.
4. That said defendants are entitled to their costs of action. Let Judgment be prepared accordingly.

That such conclusions, are not supported by the evidence, the record before the Court, and the law of the case, as pointed out in plaintiffs' Assignments of Error, therefore the Court erred in such conclusions.

ASSIGNMENT OF ERROR NO. 39

That the Court erred in making and entering its judgment and decree, as made and entered on the 27th day of November, 1939, and erred in each and every particular and

Transcript

in every paragraph of said decree, namely; paragraphs 1, 2, 3, 4, and 5 on the grounds that the said decree or any part thereof, is not supported by the evidence the record and the law of the case, but is contrary to the evidence, record and law of the case as pointed out in plaintiffs' Assignments of Error; that the Court should have entered judgment and decree in favor of the plaintiffs' and against the defendants, quieting title in the plaintiffs to an undivided one-third interest in the premises described, and that plaintiffs are entitled to an accounting from the defendants of all the rents and profits derived from said undivided one-third interest, since March, 1925, to date of settlement, after deducting all just taxes, and assessments, or any other necessary and appropriate charges against the said undivided one-third interest, and on said grounds as heretofore set out, plaintiffs ask a reversal by this Court of said judgment and Decree."

Respectfully submitted.

Transcript

P. C. O'MALLEY

Residence Pocatello, Idaho

GEORGE M. MASON

Residence Brigham City, Utah
Counsel for Plaintiffs.

Transcript The following are essential minute entries:
 0379 (Title of Court and Cause Omitted) Trial:

This case came on regularly for trial on plaintiffs' cause of action, pursuant to setting heretofore made, before the Court sitting without a jury, P. C. O'Malley and George M. Mason, Esqs., appearing as counsel for plaintiffs, and Wm. J. Lowe, Esq. of counsel, appearing as counsel for defendants.

Counsel for defendants asks leave to file supplemental answer, which request is granted. Plaintiffs' exhibits A, B, C, D, E, F, G, H, I, J, K, L, N, O, were introduced and received in evidence. File No. 355, Estate of Washington Pocatello was introduced and received in evidence. The following were called as witnesses on behalf of plaintiff and were sworn and testified: Fred A. Gross, Lucy Pocatello Johnson and Josephine Pocatello. Plaintiff rests.

Counsel for defendant asks leave to amend the answer, which request is granted and the amendment is made in open court. Plaintiffs rest.

Amasa L. Clark and Joseph E. Robinson were called as witnesses on behalf of defendants and were sworn and testified. Defendants

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0379 ants' exhibits 1,2,3,4,5 and 6 were introduced and received as evidence. The following probate files were offered and received in evidence in behalf of defendants: Angichah, Geeump, Ar-ri-nip, Wadgagee. Defendants rest. Both parties rest.

It is ordered that the further hearing be continued to October 9, 1939.

0380 (Title of Court and Cause Omitted) Taken Under Advisement. #5691

The matters herein came on regularly for further argument, P. C. O'Malley and George M. Mason, Esqs., appearing as counsel for plaintiff and William J. Lowe, of counsel appearing for defendants. Arguments were made by counsel for the respective parties and being submitted was by the Court taken under advisement.

0381 (Title of Court and Cause Omitted) #5691

This case came on regularly for further hearing on the 9th day of October, 1939, P. C. O'Malley and George M. Mason, Esqs., appearing as counsel for plaintiff and Wm. J. Lowe, Esq., of counsel, appearing for defendants. Arguments were made by counsel for the respect-

Transcript

ive parties and the matters being submitted was by the Court taken under advisement, and the Court now being sufficiently advised, it is Ordered that judgment be prepared in favor of defendants and against the plaintiffs as will more fully appear from the Findings of Fact and Conclusions of Law and Decree to be signed and filed hereafter.

(Title of Court and Cause Omitted) #5691

The matters herein came on for hearing upon plaintiffs' objections to defendants proposed Findings of Fact and Conclusions of Law, George M. Mason, Esq., of counsel appeared as counsel for plaintiffs and William J. Lowe, Esq., of counsel for defendants, and said Findings and Decree are signed as presented.

0382 (Title of Court and Cause Omitted) Order Extending Time.

Good cause appearing therefor, it is hereby ordered that the plaintiff be given to and including the 15th day of February, A.D. 1940, within which to prepare, serve, file her proposed bill of exceptions in the above entitled cause.

Transcript

038- (Title of Court and Cause Omitted) #5691

The motion of plaintiff, as filed in this Court on the 31st day of January, 1940 came on regularly for hearing, P. C. O'Malley, Esq., and George M. Mason, Esq., appearing for counsel for plaintiffs and William J. Lowe, of counsel, appearing for defendants. Said motion is argued by counsel for the respective parties. Whereupon, the Court directs the reporter to make certain amendments to the transcript and on motion of plaintiff the further hearing on said motion is continued to Monday, March 11, 1940, at 11 o'clock A. M.

038- (Title of Court and Cause Omitted) #5691

Plaintiffs' motion for relief came on regularly for hearing, P. C. O'Malley, Esq., and George M. Mason, Esq., appearing as counsel for Plaintiffs, and William J. Lowe, Esq., of counsel, appearing for the defendants. Said motion is argued and submitted and by the Court granted. Thereafter Findings of Fact and Conclusions of Law and Order and Decree thereon were signed by the Court and filed with the Clerk. Plaintiffs proposed draft of Bill of

Transcript

0386 Exceptions was then served on counsel for defendants in open court.

(Title of Court and Cause Omitted) Affidavit.

I, C. Henry Nielsen, Clerk of the District Court of the First Judicial District of the State of Utah, in and for the County of Box Elder, do hereby certify that the foregoing Papers on appeal in the above entitled action is the Original Complaint, Summons on Return, Summons on Return, Copy of Complaint and summons, Summons on return, Dismissal as to some of the defendants, Demand for non resident plaintiffs to give security for costs, Affidavit of Joseph E. Robinson, Defendant's motion to strike, Demurrer of Defendants, Affidavit of service of papers by mail, Letter to Judge Jones, Motion, Affidavit of P. C. O'Malley, Stipulations, Letter to Judge Jones, Letter to P.C.O'Malley, Amended Complaint, Affidavit of M. Landon, Demurrer, Motion to Strike, Affidavit of Service of Papers by Mail, Affidavit of Fred Sorenson, Motion to substitute New Paragraph in lieu of paragraph ten stricken from amended complaint, Letter to Judge Jones, Plaintiffs' Brief, Defendants' authorities, Notice, Plaintiffs' Brief(Copy) Order extending Time,

Transcript

0380 Second Amended Complaint, Affidavit of Laura Morris, Second Amended Complaint (Copy), Affidavit of M. Landon, Demurrer, Motion to strike, Motion requiring plaintiffs to separately state different causes of action, Affidavit of M. S. Higgins, Third Amended Complaint, Affidavit of M. Landon, Demurrer, Motion to Strike, Affidavit in support of motion to dismiss, Motion to dismiss, Affidavit of service of papers by mail, Motion to strike motion to dismiss, Affidavit in resistance of motion to dismiss and in support of motion to strike the motion to dismiss, Affidavit of service of papers by mail, Letter to Judge Jones, Letter to Clerk of District Court, Order extending time, Order extending time, Order extending Time, Answer Affidavit of service of papers by mail, Reply to further answer and separate defense of Defendants, Affidavit of Service of papers by mail, Stipulation, Supplemental answer, Defendants' reply Brief, Plaintiffs' Brief on first cause of Action, Memorandum of Decision, Notice, Plaintiffs exception to the Findings of Fact, Conclusion of Law and Decree, made and prepared in favor of defendants

Transcript

0387 and against plaintiffs, Findings of Fact and Conclusion of Law, Decree, Affidavit of Service of Papers by Mail, Notice, Memorandum of Costs and Disbursements, Affidavit of Service of papers by mail, Order, Motion, Notice of Time and Place of Calling up for hearing and settlement by the Court, Bill of Exceptions, Affidavit of service of papers by mail, Stipulation, Notice of Appeal to Supreme Court, Affidavits of impecuniosity, Affidavit of mailing copy of notice of appeal, Objections to settlement of bill of exceptions, Affidavit in support of motion, Petition for Order Granting Relief, Letter Affidavit in support of petition, Motion, Notice, Affidavit of Mailing, Amended Motion, Affidavit of Mailing, Objections to petition for order granting relief, Findings of Fact and Conclusions of Law, Order and Decree, Acknowledgement of Service, Precipe, Certified copy of Bond for Costs Non-resident Plaintiff, Minute Entries.

That the foregoing papers are transmitted to the Supreme Court, State of Utah, pursuant to written precipe and I further certify that affidavits in lieu of an undertaking on appeal in the above entitled action was filed with the

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o 387 Clerk of the Court February 23, 1940

In Witness Whereof, I have hereunto set my hand and affixed
the official Seal of the Said Court this 22 day of March
1940.

(SEAL)

(Signed) C. Henry Nielson
Clerk of the District Court of
the First Judicial District of
the State of Utah, County of
Box Elder.

Transcript

(Title of Court and Cause omitted)

#6248

AFFIDAVIT OF MAILING COPY OF ASSIGNMENTS OF ERROR

State of Idaho. *
 * SS.
County of Bannock. *

P. C. O'Malley, being first duly sworn deposes and s
That he served the attached ASSIGNMENTS OF ERROR, up
the Defendants and Respondents, Amasa L. Clark and Joseph
E. Robinson, by depositing a true copy thereof in the
United States Post Office, at Pocatello, Idaho, postage
prepaid, on the 29th day of May, 1940 enclosed in an
envelope addressed to Stephen, Brayton and Lowe, Attorneys
at Law, Walker Bank Building, Salt Lake City, Utah that
being the Post Office Address of said Firm of Attorneys,
Stephen, Brayton and Lowe, the said Stephen, Brayton and
Lowe being the Attorneys of record for the defendants and
respondents, Amasa L. Clark, and Joseph E. Robinson, and
that upon the 29th day of May, 1940 there was regular
communication by mail between said Pocatello, Idaho and se
Salt Lake City, Utah.

Transcript

P. C. O'Malley

Subscribed and sworn to before me this 29th day of
May, 1940.

H. J. Swanson

Notary Public
Residing at Pocatello, Idaho.

MY COMMISSION EXPIRES.

November 6, 1942