

2004

Rose Gibbons and Austin K. Tiernan v. R.G. Frazier and Utah Copper Company : Unknown

Utah Supreme Court

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B. L. Liberman; R. A. McBroom; Geo. Y. Wallace; Attorneys for Appellant.

Unknown.

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UTAH SUPREME COURT
BRIEF

4378 Abst.

In the Supreme Court
of the
State of Utah

ROSE GIBBONS and AUSTIN K.
TIERNAN,

Appellants,

vs.

R. G. FRAZIER and UTAH COP-
PER COMPANY, a Corporation,
Respondents.

Abstract of Record on Appeal

B. L. LIBERMAN,

R. A. McBROOM,

GEO. Y. WALLACE,

Attorneys for Appellant.

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R. G. FRAZIER and UTAH COP-
PER COMPANY, a Corporation,
Respondents.

No. 4378

ABSTRACT OF RECORD

B. L. LIBERMAN,

R. A. McBROOM,

GEO. Y. WALLACE,

Attorneys for Appellant.

On the 1st day of May, 1925, appellants filed their complaint in the District Court of Salt Lake County, Utah, as follows:

COMPLAINT.

Plaintiffs complain and allege:

I.

That the defendant Utah Copper Company is a corporation organized and existing under the laws of the State of New Jersey, doing business in the State of Utah, with principal place of business within the State of Utah, in the City of Salt Lake.

II.

That the plaintiffs, together with one Michael Gibbons, and one Stephen Hays, as tenants in common, are and for a long time heretofore have been the owners of and entitled to the immediate possession of the following described land, situate in Bingham Canyon, Salt Lake County, State of Utah, and bounded and particularly described as follows, to-wit:

That portion of the McGuire & Company Placer, U. S. Lot 242, designated as Lot 10, Block 4, Plat "A", in the Wilkes Official Survey of Bingham Townsite.

III.

That the defendants have been and now are in possession of said premises, and have wrongfully withheld and do now wrongfully withhold possession of said premises and the whole thereof from the plaintiffs and have, upon demand, refused and continue to refuse to deliver possession thereof to the plaintiffs.

WHEREFORE, plaintiffs pray judgment against the defendants for the possession of the said premises and costs of this action.

B. L. LIBERMAN,
WM. H. BRAMEL,
R. A. McBROOM,
GEO. Y. WALLACE,
Attorneys for Plaintiffs.

(Duly verified.)

ANSWER.

Come now the defendants above named and for their answer to the complaint herein, admit, deny and allege:

1. Admit the allegations of fact in paragraph 1 of said complaint contained.

2. Deny that the plaintiffs, either together with or severally or apart from one Michael Gibbons and one Stephen Hays, or either thereof, or any other person or persons, as tenants in common or otherwise or at all, are now or were at the time of the commencement of this action or at any time thereafter have been the owners of or entitled to the possession immediately or otherwise of the lands or premises in said complaint described and in controversy in this action, or any part or parcel thereof, or had at the commencement of this action or since have had any right, title, interest, estate, claim or color of claim thereto, either in law or equity, from any source whatever.

3. Admit that these defendants have been from a time prior to the commencement of this action and at all times thereafter, and are now in possession of said premises and the whole thereof, and at all said times have withheld and do now

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withhold possession thereof from the plaintiffs, as these defendants have a right to do; and admit that these defendants have upon demand refused and do now continue to refuse to deliver possession thereof to the plaintiffs.

4. These defendants deny each and every allegation, matter and thing in said complaint contained not hereinbefore expressly admitted.

Further answering said complaint and as an affirmative defense thereto, these defendants allege:

1. At the time of the commencement of this action the defendant Utah Copper Company was and is now seized in fee simple and in the possession and entitled to the possession of said piece and parcel of land mentioned and described in the complaint and sought to be recovered in this action, without any right or title thereto or to any part or parcel thereof being vested in the plaintiffs; that the defendant R. G. Frazier is a tenant of said defendant Utah Copper Company and as such in the possession of said premises.

2. Defendants and their predecessors have been in continuous occupation and possession of said premises and the whole thereof, holding the same under claim of title in fee simple, exclusive of all other right, adversely to the pretended title of the plaintiffs, for more than twenty-five years

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last past before the commencement of this suit, and said defendants, their predecessors and grantors have paid all taxes which have been levied and assessed upon said land and the improvements thereupon according to law during said period and the whole thereof.

3. Said cause of action is barred by the provisions of Section 6449 of the Compiled Laws of Utah, 1917.

4. Said cause of action is barred by the provisions of Section 6450 of the Compiled Laws of Utah, 1917.

5. Prior to the year 1895 one S. S. Maxwell entered into the possession of the premises in the complaint mentioned and described and sought by this action to be recovered, erected a cabin thereupon and constructed a rock wall along the southerly boundary thereof and from a date prior to the year 1895 continued in the possession of said premises under the claim of title in fee simple, exclusive of all other right, adverse to the pretended title of the plaintiffs and their predecessors and grantors, to and until the 26th day of May, 1899, when said S. S. Maxwell, then unmarried, sold and conveyed the same to one F. E. Straup; and the said F. E. Straup continued in like exclusive and adverse possession to and until the 8th day of May, 1901, when he, his wife joining, con-

veyed said premises to one Charles McCann; and said Charles McCann thereafter continued in like exclusive, adverse possession to and until the 5th day of October, 1904, when he conveyed said premises to one A. L. Castleman; and the said A. L. Castleman thereupon entered into possession of said tract and thereafter continued in the exclusive, adverse possession thereof under claim of title in fee simple, to and until the 30th day of March, 1907, moved the cabin theretofore erected upon said premises by said predecessor, the said S. S. Maxwell, to the rear of said lot or tract of land, and erected thereupon an additional two-story frame building at or about the cost of \$4000.00, and devoted said building and premises to the purposes of residence and a hospital for the care and treatment of the sick and injured in the town of Bingham and in the vicinity thereof; that upon the 30th day of March, 1907, the said A. L. Castleman, his wife joining, conveyed said premises to one C. N. Ray, who thereupon entered into and possessed said lot or tract of land, and thereafter continued in the open, notorious and adverse possession of the same to the 30th day of June, 1913, adding to said two-story frame residence constructed upon said premises by said A. L. Castleman, as hereinbefore alleged, four rooms at a cost of about \$2000.00; and the said C. N. Ray thereafter devoted said premises and the improve-

ments thereon to the purposes of residence and hospital for the care of the sick and injured in the town of Bingham and in the vicinity thereof; that on the 30th day of June, 1913, said C. N. Ray, his wife joining, conveyed said premises to one Dr. Davison H. Ray and one Dr. Bernardo S. O'Brien, who entered into and continued in the open, notorious, exclusive and adverse possession thereof to and until the 19th day of April, 1917, when said Bernardo S. O'Brien, his wife joining, conveyed his interest therein to the said Davison H. Ray, the latter continuing thereafter in said open, exclusive and adverse possession thereof and devoted said premises to said residence and hospital use and purpose to and until his death, to-wit, the 26th day of June, 1920; that the estate of said Davison H. Ray, deceased, was thereupon probated and said premises were in due course regularly distributed to Elizabeth K. Ray, the widow of said decedent, who continued in the open, exclusive and adverse possession thereof to and until the 21st day of November, 1922, when she sold and conveyed the same, warranting title thereto, to the defendant, R. G. Frazier, who thereupon entered into the possession of said premises as the sole and exclusive owner thereof, and thereafter continued in the open, exclusive and adverse possession thereof to and until the 20th day of September, 1924, when said defendant sold and conveyed

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the same, and warranted title thereto, to the defendant Utah Copper Company; and said R. G. Frazier, during the said period of his occupancy until the destruction of said improvements by fire in the month of September, 1924, devoted said improvements and premises to said residence and hospital purposes; that the defendant Utah Copper Company, upon its acquisition of title to said premises as hereinbefore alleged, entered into the possession thereof, employed architects and let contracts for the erection thereupon of a hospital building of a magnitude equal to the needs of the said town of Bingham and vicinity, entered upon the construction thereof on the 23rd day of September, 1924, and thereafter completed the same on the 10th day of April, 1925, at a cost of \$23,000.00 or thereabouts; that said hospital building so constructed was and is a two-story, fire-proof, steam-heated building of 17 rooms in addition to the basement and the laundry and heating facilities therein; and said structure has been since the completion thereof devoted to the care and treatment of the sick and injured of Bingham and vicinity requiring its facilities.

The fact that said several conveyances were made and said several grantees entered into and continued in said open, notorious and exclusive possession in the belief and under claim of title against the plaintiffs and all the world, was upon

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said several occasions and at all times since has been within the knowledge of the plaintiffs, and said S. S. Maxwell and said several grantees improved said premises by the erection thereupon of said structures and said additions thereto hereinbefore alleged without notice or knowledge that the plaintiffs had or claimed any title or interest in or to said premises, and said plaintiffs and each thereof stood by, although possessed of said knowledge, and allowed said several occupants to purchase said premises, possess and improve the same, as hereinbefore alleged, without any manner of protest, notice, claim or assertion of title to said premises or against said occupants or grantees, or any thereof, until that certain notice by plaintiffs' counsel herein by letter addressed to the defendant R. G. Frazier and dated the 30th day of October, 1924, which notice was received by said defendant R. G. Frazier more than a month after architects had been employed, contracts let and the construction of said structure had been actually begun by the said defendant Utah Copper Company; that the plaintiffs by their said delay and conduct were guilty of gross laches and in view thereof ought not in equity be allowed to proceed against these defendants, and the plaintiffs are estopped from claiming title to said land and premises, or the improvements thereupon.

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WHEREFORE, these defendants having fully answered, pray to be hence dismissed with their costs of suit in their behalf incurred.

DICKSON, ELLIS, PARSONS &
ADAMSON,
Attorneys for Defendants.

(Duly verified.)

DECISION OF THE COURT.

On the 28th day of December, 1925, the court signed and filed its decision as follows:

Findings of Fact.

I.

The defendant Utah Copper Company is and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, at all said times had complied with the laws of the State of Utah with respect to foreign corporations, and is now and at all said times was authorized to carry on and conduct its business within the State of Utah, and was at all said times entitled to the benefits of the laws of said state relating to corporations.

II.

At the time of the commencement of this action and upon the occasion of the trial thereof, the defendant Utah Copper Company was seized in fee simple and in the possession and entitled to the possession of that piece and parcel of land mentioned and described in the complaint and sought to be recovered in this action, to-wit:

That portion of the McGuire & Company Placer, U. S. Lot No. 242, designated as Lot 10, Block 4, Plat "A", in the Wilkes Official Survey of Bingham Townsite;

without any right or title thereto, or to any part or parcel thereof being vested in the plaintiffs.

III.

The defendant R. G. Frazier was at the time of the commencement of said action and upon the occasion of the trial thereof a tenant of said defendant Utah Copper Company, and as such was at all said times rightly in the possession of said premises.

IV.

Defendants and their predecessors at the time of the commencement of said action and upon the trial thereof had been in continuous occupation and possession of said premises and the whole thereof, holding the same under claim of title in fee simple, exclusive of all other right, adversely to the pretended title of the plaintiffs, for more than forty-five years last past before the commencement of said suit, and said defendants, their predecessors and grantors, had paid all taxes which had been levied and assessed upon said land and the improvements thereupon according to law during the thirty years of said period then last past, and the whole thereof.

V.

In the year 1878 or 1880, one S. S. Maxwell entered into the possession of said premises in the complaint and hereinbefore mentioned and described and sought by said action to be recovered, erected a cabin thereupon and constructed a rock wall along the southerly boundary thereof, and from said date continued in the possession of said premises under claim of title in fee simple, exclusive of all other right adverse to the pretended title of the plaintiffs and their predecessors and grantors, to and until the 26th day of May, 1899, when said S. S. Maxwell, then unmarried, sold and conveyed the same to one F. E. Straup; and the said F. E. Straup continued in like exclusive and adverse possession to and until the 8th day of May, 1901, when he, his wife joining, conveyed said premises to one Charles McCann; and said Charles McCann thereafter continued in like exclusive, adverse possession to and until the 5th day of October, 1904, when he conveyed said premises to one A. L. Castleman; and the said A. L. Castleman thereupon entered into possession of said tract and thereafter continued in the exclusive, adverse possession thereof under claim of title in fee simple to and until the 30th day of March, 1907, moved the cabin theretofore erected upon said premises by said predecessor, the said S. S. Maxwell, to the rear of said lot or tract of land,

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and erected thereupon an additional two-story frame building at or about the cost of \$4000, and devoted said building and premises to the purposes of residence and a hospital for the care and treatment of the sick and injured in the town of Bingham and in the vicinity thereof; that upon the 30th day of March, 1907, the said A. L. Castleman, his wife joining, conveyed said premises to one C. N. Ray, who thereupon entered into and possessed said lot or tract of land and thereafter continued in the open, notorious and adverse possession of the same to the 30th day of June, 1913, adding to said two-story frame residence constructed upon said premises by said A. L. Castleman as hereinbefore found, four rooms at a cost of approximately \$2000.00; and the said C. N. Ray thereafter devoted said premises and the improvements thereon to the purposes of residence and hospital for the care of the sick and injured in the town of Bingham and in the vicinity thereof; that on the 30th day of June, 1913, said C. N. Ray, his wife joining, conveyed said premises to one Dr. Davison H. Ray and one Dr. Bernardo S. O'Brien, who entered into and continued in the open, notorious, exclusive and adverse possession thereof to and until the 19th day of April, 1917, when said Bernardo S. O'Brien, his wife joining, conveyed his interest therein to the said Davison H. Ray, the latter continuing thereafter in said open, ex-

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clusive and adverse possession thereof and devoted said premises to said residence and hospital use and purpose to and until his death, to-wit, the 26th day of June, 1920; that the estate of said Davison H. Ray, deceased, was thereupon probated and said premises were in due course regularly distributed to Elizabeth K. Ray, the widow of said decedent, who continued in the open, exclusive and adverse possession thereof to and until the 21st day of November, 1922, when she sold and conveyed the same, warranting title thereto, to the defendant R. G. Frazier, who thereupon entered into the possession of said premises as the sole and exclusive owner thereof, and thereafter continued in the open, exclusive and adverse possession thereof to and until the 20th day of September, 1924, when said defendant sold and conveyed the same and warranted title thereto to the defendant Utah Copper Company; and said R. G. Frazier, during the said period of his occupancy until the destruction of said improvements by fire in the month of September, 1924, devoted said improvements and premises to said residence and hospital purposes; that the defendant Utah Copper Company, upon its acquisition of title to said premises as hereinbefore found, entered into the possession thereof, employed architects and let contracts for the erection thereupon of a hospital building of a magnitude equal to the needs of the

said town of Bingham and vicinity, entered upon the construction thereof on the 23rd day of September, 1924, and thereafter completed the same on the 10th day of April, 1925, at a cost of \$23,000.00 or thereabout; and said structure has since the completion thereof been devoted to the care and treatment of the sick and injured of Bingham and vicinity requiring its facilities.

VI.

The fact that said several conveyances were made and said several grantees entered into and continued in said open, notorious and exclusive possession in the belief and under claim of title against the plaintiffs and all the world was upon said several occasions and at all times since has been within the knowledge of the plaintiffs, and said S. S. Maxwell and said several grantees improved said premises by the erection thereupon of said structures and said additions thereto hereinbefore found without notice or knowledge that the plaintiffs had or claimed any title or interest in or to said premises, and said plaintiffs and each thereof stood by, although possessed of said knowledge, and allowed said several occupants to purchase said premises, possess and improve the same as hereinbefore found, without any manner of protest, notice, claim or assertion of title to said premises or against said occupants or grantees,

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or any thereof, until that certain notice by plaintiffs' counsel herein by letter addressed to the defendant R. G. Frazier and dated the 30th day of October, 1924, which notice was received by said defendant R. G. Frazier more than a month after architects had been employed, contracts let and the construction of said structure had been actually begun by said defendant Utah Copper Company.

Conclusions of Law.

I.

Said cause of action is barred by the provisions of Section 6449 of the Compiled Laws of Utah, 1917.

II.

Said cause of action is barred by the provisions of Section 6450 of the Compiled Laws of Utah, 1917.

III.

Plaintiffs by their said delay and conduct were guilty of gross laches, and in view thereof ought not in equity be allowed to proceed against said defendants, and the plaintiffs are estopped from claiming title to said land and premises, or the improvements thereupon.

IV.

The defendant Utah Copper Company is the owner in fee simple absolute of said premises hereinbefore particularly described, and the plaintiffs have neither right, title nor interest therein of any kind or character.

V.

The plaintiffs have not proved a cause of action against the defendants, and defendants are entitled to a judgment of dismissal herein, and to their costs in this behalf incurred.

Let judgment be entered accordingly.

By the Court,

L. B. WIGHT, Judge.

JUDGMENT.

This cause having come on for trial on the 1st day of October, 1925, before the Honorable L. B. Wight, one of the judges of the above entitled court, and the issues therein arising upon the complaint of the plaintiffs and the answer of the defendants having been duly tried before the court sitting without a jury, a jury having been waived by the parties to said cause; the plaintiffs appearing by their counsel, Geo. Y. Wallace, Esq.; R. A. McBroom, Esq., and B. L. Liberman, Esq., and the defendants by their counsel A. C. Ellis, Jr., Esq., and C. C. Parsons, Esq.; and the court having made and filed its findings of fact and conclusions of law in writing in said cause, and having expressly found and determined that the defendant Utah Copper Company was the owner in fee simple absolute of the property for the possession whereof said action was brought, that the defendant R. G. Frazier was a tenant of the defendant Utah Copper Company, and as such rightly in the possession of said property, that plaintiffs had neither right, title nor interest therein, that plaintiffs had not proved a cause of action against the defendants, or either of them, and that defendants were entitled to a judgment of dismissal herein;

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IT IS ORDERED AND ADJUDGED; That
plaintiffs take nothing by their suit; that the same
be and is hereby dismissed, and that defendants
have and recover their costs herein incurred.

Done this 28th day of December, 1925.

L. B. WIGHT, Judge.

Entered December 30, 1925.

BILL OF EXCEPTIONS.**Plaintiffs' Case in Chief.**

- 6 Exhibit "A", received in evidence, is an Abstract of Title, showing the various instruments of record affecting title to the demanded premises.
- 10 Exhibit "B", received in evidence, is a map, showing (1) the exterior lines of $W\frac{1}{2}$ of $E\frac{1}{2}$ of $NW\frac{1}{4}$ of Section 26, T. 3 S, R. 3 W, Salt Lake Meridian, (2) the exterior lines of McGuire & Company Placer Mining Claim, U. S. Lot 242, (3) Block 4 of Plat "A" of Wilkes Official Survey of Main Bingham Canyon, and (4) the demanded premises, to-wit: Lot 10, Block 4, Plat "A" of Wilkes Survey.

It is thus made to appear, that so far as relevant in this case, the McGuire & Company Placer as patented is in part situate within the exterior lines of the agricultural patent covering the $W\frac{1}{2}$ of the $E\frac{1}{2}$ of the $NW\frac{1}{4}$ of Section 26 and that the demanded premises is situate on a portion of the McGuire Placer which is within the agricultural patent.

The Abstract of Title discloses that the McGuire & Company Placer Mining Claim was located, August 26, 1875. Notice of location was recorded in the Records of Lower Placer Mining District, Salt Lake County, Utah, on August 26, 1875, and in the office of the County Recorder of Salt Lake County, February 13, 1880. Claim was made to a placer mining claim 2600 feet in length and 200 feet wide.

U. S. Patent for said placer mining claim, designated as Lot 242, and containing 11.77 acres, issued to Thomas Gibbons, John McGuire, Robert Smith and to the heirs of William Gibbons, deceased, on July 20, 1881, which was duly recorded in the office of the County Recorder of said Salt Lake County on June 12, 1897.

By mesne conveyances from said patentees, at the time of the commencement of this action, the interest of Thomas Gibbons was lodged in the plaintiff, Rose Gibbons; the interest of John McGuire and the heirs of William Gibbons was lodged in Michael Gibbons and the plaintiff A. K. Tierman, and the interest of Robert Smith was lodged in Stephen Hays.

It appears that the estate of John McGuire was in course of probate on October 3, 1887, indicating that he was dead at that time.

It also appears that the estate of Patrick Mc-Avinney was in course of probate on November 16, 1898, indicating that he was dead at that time.

On September 20, 1900, the plaintiff Rose Gibbons gave to Michael Gibbons a power of attorney "to grant, bargain, sell and convey any and all my right, title and interest in and to McGuire & Company Placer Mining Claim patented as Lot 242 for any price and upon such terms as he may see proper." A revocation of said power of attorney was recorded October 29, 1909. Under date of September 4, 1901, the plaintiff Tiernan gave to said Michael Gibbons, power of attorney "to sell, and transfer, bond, lease or otherwise dispose of any and all interests I may have in the McGuire & Company Placer, U. S. Lot 242," which has never been revoked. And on May 1, 1907, Lucile Tiernan, wife of said A. K. Tiernan, gave to said Michael Gibbons a like power of attorney which has never been revoked.

On February 9, 1876, David H. Bentley, having acquired Valentine Scrip, applied the same on the $W\frac{1}{2}$ of the $E\frac{1}{2}$ of the $NW\frac{1}{4}$ of Sec. 26, by entry in the land office in Salt Lake City. On July 10, 1876, U. S. Patent issued to said David H. Bentley for said 40 acres. By mesne conveyances from Bentley and his grantees, their title became lodged in S. Hays or Stephen Hays July 31, 1902.

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His immediate grantor was T. R. Jones. By bargain and sale deed, dated May 26, 1899, S. S. Maxwell, unmarried, conveyed to F. E. Straup, "that lot or parcel of ground on the westerly side of Main Bingham Canyon, opposite Richard Prideaux residence and across the street from Bouregard's Butcher Shop, known as the Maxwell lot, and having a frontage on Main Street of 50 feet and running back 100 feet to the base of the hill."

By quit claim deed, dated May 8, 1901, Straup and wife to Charles McCann, conveyed the lot directly opposite the Prideaux residence and designated on the official county map of Bingham as Lot 10, Block 4, Plat "A", Bingham Survey.

From that time the following deeds all describe the premises as Lot 10, Block 4, Plat "A", Wilkes Official Survey of Main Bingham Canyon.

On October 5, 1900, Chas. S. Wilkes, County Surveyor, filed in the office of the County Recorder of Salt Lake County, a plat of Bingham Townsite, Plat "A", which was approved by the County Commissioners March 12, 1900.

October 3, 1904, S. Hays quit-claimed to McCann.

October 5, 1904, McCann quit-claimed to A. L. Castleman.

March 30, 1907, Castleman quit-claimed to C. N. Ray.

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June 30, 1913, C. N. Ray quit-claimed to Drs. D. H. Ray and B. S. O'Brien.

April 19, 1917, O'Brien quit-claimed to Dr. D. H. Ray.

December 1, 1920, property was sold to Salt Lake County for taxes for 1920 assessed against Dr. D. H. Ray. Redeemed by D. H. Ray, January 18, 1921.

December 29, 1922, in the matter of the estate of D. H. Ray, deceased, the premises were distributed to his widow, Elizabeth K. Ray.

November 21, 1922, Elizabeth K. Ray conveyed by warranty deed, to R. G. Frazier.

October 30, 1924, Frazier conveyed to Utah Copper Company.

Motion for Non-Suit.

8 MR. PARSONS: Now, if your Honor please, the defendants move this court that an order of non-suit be entered herein against the plaintiffs, and that this action be dismissed against the plaintiffs, and that this action be dismissed accordingly, and predicate their motion upon the ground that the evidence offered by the plaintiffs, and received, is not sufficient to sustain a judgment against the defendants, or either of them, and that the plaintiffs have failed to make out a case against the defendants, or either of them, in this:

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That it is conclusively proved by the evidence offered and adduced that neither the plaintiffs, nor any of them, have any right, title or interest whatsoever in the premises occupied by the defendants, the possession of which is sought by this action, and that on the contrary title to the fee thereof as well as to the right of possession there is vested in the defendant Utah Copper Company as to the fee, and in the defendants Utah Copper Company and R. G. Frazier as to the right of possession. That, your Honor, is our motion, and we will ask leave to argue it somewhat at length, because we think it is determinative of this case.

- 10 The motion for non-suit was denied per forma and an exception allowed defendants.

Defendants' Case.

- 11 MR. PARSONS: If your Honor please, there have been identified certain certified copies of deeds, certified by the County Recorder, and identified as Exhibits 1 to 14, inclusive. All of these deeds appear by abstractor's entry in the abstract offered and admitted by the plaintiffs.

Exhibit 1 is a deed dated May 26, 1899, between S. S. Maxwell of the first part, and F. E. Straup.

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Exhibit 2 is a mortgage by F. E. Straup to S. S. Maxwell, dated May 26, 1899.

Exhibit No. 3, a release of the mortgage of S. S. Maxwell to F. E. Straup, dated January 8, 1900.

Exhibit No. 4, an agreement of boundary lines between Samuel Robbins, F. E. Straup and Joseph Lerwill, dated October 23, 1899.

Exhibit No. 5 is a quit-claim deed from F. E. Straup and wife to Charles McCann, dated May 8, 1901.

Exhibit No. 6, a quit-claim deed from Stephen Hays and wife to Charles McCann, dated October 3, 1904.

Exhibit 6B is a quit-claim deed from Charles McCann to A. L. Castleman, dated October 5, 1904.

Defendants' Exhibit 7 is a quit-claim deed from A. L. Castleman and wife to C. N. Ray, dated March 30, 1907.

Defendants' Exhibit 8 is a quit-claim deed from C. N. Ray and wife to Dr. Davison H. Ray and Dr. Bernardo S. O'Brien, dated June 30, 1913.

Exhibit 9 is a quit-claim deed from Bernardo S. O'Brien and wife to Davison H. Ray, dated April 19, 1917.

Exhibit 10 is a mortgage from Davison H. Ray and Bernardo S. O'Brien to the Citizens State Bank of Bingham, and dated July 2, 1913.

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Exhibit 11 is the release of the mortgage just referred to, and is dated December 1, 1914.

Exhibit No. 12 is a warranty deed, Elizabeth K. Ray to R. G. Frazier, dated November 21, 1922.

Exhibit No. 13 is a warranty deed from R. G. Frazier and wife to Utah Copper Company, dated October 30, 1924.

Exhibit No. 14 is a warranty deed by R. G. Frazier and wife and W. N. Cain to Utah Copper Company, dated September 20, 1924.

Each of these deeds describe the premises in question. We offer them separately.

MR. WALLACE: No objection.

THE COURT: They may be received.

Exhibit 15 is a compilation of duly authenticated copies of the record in the General Land Office concerning the Valentine Scrip Entry, which on plaintiffs' objection was excluded.

Exhibit 16, received in evidence, is the Valentine Scrip Patent, dated July 10, 1876, which reads, in material part, as follows:

WHEREAS, in pursuance of the Act of Congress, approved April 5, 1872, entitled "An Act for the relief of Thomas B. Valentine," there has been deposited in the General Land Office Special Certificate of Location E, No. 227, for forty acres, in favor of Thomas B. Valentine, with evidence that the same has been duly located upon the west half of the east half of the northwest quarter of

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Section twenty-six, in Township three south, of range three west, in the District of Lands subject to sale at Salt Lake City, Utah Territory, containing forty acres, according to the Official Plat of the Survey of said lands, returned to the General Land Office by the Surveyor General: the said Special Certificate of Location having been assigned by the said Thomas B. Valentine to David H. Bentley, in whose favor said tract has been located.

NOW, KNOW YE, That there is, therefore granted by the United States unto the said David H. Bentley as assignee as aforesaid and to his heirs, the tract of land above described: TO HAVE AND TO HOLD the said tract of land, with the appurtenances thereof, unto the said David H. Bentley as assignee as aforesaid and to his heirs and assigns forever; * * *

15 Defendants' conceded that their exhibits 17 to 44, inclusive were not the original tax receipts issued at the time the taxes were paid, but were copies taken recently off the tax rolls. Plaintiffs conceded that the same were evidence that the property described therein was assessed to the persons named therein and that the taxes had been paid, but objected that they were no evidence of payment by any particular person.

They were received in evidence, the court remarking:

THE COURT: They are evidence, they may be insufficient to prove all that is claimed for them, but they are evidence, in view of your stipulation.

Exhibit 44 reads as follows: Property assessed to S. S. Maxwell. Description: One frame house, Bingham Canyon. Value of improvements, \$50.00. Amount of tax, \$1.00. Paid October 12, 1895.

Exhibit 43 reads as follows: Property assessed to S. S. Maxwell. Description: 50x100 feet, Bingham. Value: R. E. \$25.00. Imp., \$50.00. Amount of tax, \$1.17. Paid October 17, 1896.

Exhibit 42 reads as follows: Property assessed to S. S. Maxwell. Description: 50x100 feet, T. R. Jones Patent, Bingham. Value: R. E. \$25.00. Imp., \$50.00. Amount of tax, \$1.98. Paid November 17, 1897

Exhibit 41 reads as follows: Property assessed to S. S. Maxwell. Description: 50x100 feet, Jones Patent, Bingham. Value: R. E. \$20.00. Imp., \$60.00. Amount of tax, \$1.72. Paid December 21, 1898.

Exhibit 40 reads as follows: Property assessed to S. S. Maxwell. Description: 50x100 feet, Bingham. Value: R. E. \$25.00. Imp. \$60.00. Amount of tax, \$1.78. Paid September 1, 1899.

Exhibit 39 reads as follows: Property assessed to Dr. F. E. Straup. Description: Lot 10, Block 4, Bingham Plat "A". Value: R. E., \$50.00.

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Imp., \$75.00. Amount of Tax. \$2.68. Paid November 16, 1900.

Exhibit 38 reads as follows: Property assessed to Dr. F. E. Straup. Description: All of Lot 10, Block 4, Bingham Plat "A". Value, R. E. \$50.00. Amount of tax, \$1.01. Paid November 5, 1901.

Exhibit 37 reads as follows: Property assessed to Charles McCann. Description: Block 4, Bingham, Plat "A". Value: R. E. \$45.00. Imp. \$100.00. P. P., \$10.00. Amount of tax, \$3.04. Paid November 13, 1903.

Exhibit 36 reads as follows: Property assessed to Charles McCann. Description: Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$50.00. Imp., \$100.00. P. P., \$10.00. Amount of tax, \$3.15. Paid November 12, 1904.

Exhibit 35 reads as follows: Assessed to Dr. A. L. Castleman. Description: Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$50.00. Imp., \$100.00. P. P., \$200.00. Amount of tax, \$7.70. Paid November 14, 1905.

Exhibit 34 reads as follows: Assessed to A. L. Castleman. Description: Lots 9 and 10, Block 4, Bingham Plat "A". Value: R. E. \$100.00. Imp. \$700.00. P. P. \$135.00. Amount of tax, \$21.50. Paid November 14, 1906.

Exhibit 33 reads as follows: Assessed to A. L. Castleman. Description South 7.4 feet of Lot

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9 and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$200.00. Imp. \$700.00. P. P. \$200.00. Amount of tax, \$28.60 Paid November 14, 1907

Exhibit 32 reads as follows: Assessed to Charles N. Ray. Description: South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$200.00. Imp. \$800.00. P. P. \$400.00. Amount of tax \$33.60 Paid October 21, 1908.

Exhibit 31 reads as follows: Assessed to Charles N. Ray. Description: South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$200.00. Imp. \$800.00. P. P. \$235.00. Amount of tax \$33.34. Paid November 3, 1909.

Exhibit 30 reads as follows: Assessed to Charles N. Ray. Description South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value R. E. \$275.00. Imp. \$800.00. P. P. \$215.00. Amount of tax \$34.83. Paid October 22, 1910.

Exhibit 29 reads as follows: Assessed to Charles N. Ray. Description South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value R. E. \$300.00. Imp. \$800.00. P. P. \$175.00. Amount of tax \$33.35. Paid November 8, 1911.

Exhibit 28 reads as follows: Assessed to Charles N. Ray. Description South 7.4 feet of Lot 9, and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$340.00. Imp. \$800.00. P. P. \$250.00. Amount of tax, \$38.87. Paid October 17, 1912.

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Exhibit 27 reads as follows: Assessed to Charles N. Ray. Description: South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value R. E. \$340.00. Imp. \$800.00. P. P. \$250.00. Amount of tax \$41.97. Paid November 1, 1913.

Exhibit 26 reads as follows Assessed to Drs. D. H. Ray and Bernardo O'Brien. Description: South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$340.00. Imp. \$800.00. P. P. \$250.00. Amount of tax \$51.84. Paid November 5, 1914.

Exhibit 25 reads as follows: Assessed to Drs. D. H. Ray and Bernardo O'Brien. Description: South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$480.00. Imp. \$800.00. P. P. \$300.00. Amount of tax \$63.02. Paid October 19, 1915.

Exhibit 24 reads as follows: Assessed to Drs. D. H. Ray and Bernardo O'Brien. Description: South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$2000.00. Imp. \$2200.00. P. P. \$420.00. Amount of tax \$74.01. Paid November 17, 1916.

Exhibit 23 reads as follows Assessed to Drs. D. H. Ray and Bernardo O'Brien. Description: South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$2000.00. Imp. \$2000.00. P. P. \$420.00. Amount of tax \$71.16. Paid September 28, 1917.

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Exhibit 22 reads as follows: Assessed to Dr. D. H. Ray. Description: South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$2000.00. Imp. \$1800.00. P. P. \$350.00. Amount of tax \$65.98. Paid September 16, 1918.

Exhibit 21 reads as follows: Assessed to Dr. D. H. Ray. Description: South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$2000.00. Imp. \$1800.00. P. P. \$350.00. Amount of tax \$87.15. Paid October 10, 1919.

Exhibit 20 reads as follows: Assessed to Dr. D. H. Ray. Description: Part of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$2000.00. Imp. \$1800.00. P. P. \$300.00. Amount of tax \$119.72. Paid November 30, 1921.

Exhibit 19 reads as follows: Assessed to Dr. D. H. Ray. Description: South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$2200.00. Imp. \$1800.00 P. P. \$350.00. Amount of tax \$118.32. Paid November 29, 1922.

Exhibit 18 reads as follows: Assessed to Elizabeth K. Ray. Description: South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$2200.00. Imp. \$1800.00. Amount of tax \$110.00. Paid November 30, 1923.

Exhibit 17 reads as follows: Assessed to Elizabeth K. Ray. Description: South 7.4 feet of Lot 9 and Lot 10, Block 4, Bingham Plat "A". Value: R. E. \$2200.00. Imp. \$1500.00. Amount of tax

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\$101.38. Paid November 26, 1924.

18 MR. PARSONS: Defendants' Exhibit 45 is a similar duplicate tax receipt with reference to the West Half of the East Half of the Northwest Quarter of Section 26, on the Valentine Scrip, and Exhibits 45 to 77, both inclusive, relate to the Valentine Scrip by that, or substantially that description:

Exhibit No. 45 for taxes of 1924 assessed to Stephen Hays.

Exhibit No. 46 for the taxes of 1923, also assessed to Stephen Hays.

Exhibit No. 47 for the taxes of 1922, assessed to Stephen Hays.

Exhibit No. 48 for the taxes of 1921, assessed to Stephen Hays.

Exhibit No. 49 for the taxes of 1920, assessed to Stephen Hays.

Exhibit No. 50, for the taxes of 1919, assessed to Stephen Hays.

Exhibit No. 51, for the taxes of 1918, assessed to Stephen Hays.

Exhibit No. 52, for taxes of 1917, assessed to Stephen Hays.

Exhibit No. 53, taxes of 1916, assessed to Stephen Hays.

Exhibit No. 54, for the taxes for 1915, assessed to Stephen Hays.

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Exhibit No. 55 for the taxes of 1914, assessed to Stephen Hays.

Exhibit No. 56, for the taxes of 1913, assessed to Stephen Hays.

Exhibit No. 57, taxes for 1912, assessed to Stephen Hays.

Exhibit No. 58, for the taxes of 1911, assessed to Stephen Hays.

Exhibit No. 59, for the taxes of 1910, assessed to Stephen Hays.

Exhibit No. 60, for the taxes of 1909, assessed to Stephen Hays.

Exhibit No. 61, for the taxes of 1908, assessed to Stephen Hays.

Exhibit No. 62, for the taxes of 1907, assessed to Stephen Hays.

Exhibit No. 63, for the taxes of 1906, assessed to Stephen Hays.

Exhibit No. 64, for the taxes of 1905, assessed to Stephen Hays.

Exhibit No. 65, for the taxes of 1904, assessed to T. R. Jones.

Exhibit No. 66, for the taxes of 1904, assessed to Stephen Hays.

Exhibit No. 67, taxes of 1904, undivided one-fourth interest in David H. Bentley.

Exhibit No. 68, for the taxes of 1903, assessed to Stephen Hays.

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Exhibit No. 69, for the taxes of 1902, assessed to T. R. Jones, an undivided one-half interest.

Exhibit No. 70, for the taxes of 1902, assessed to Stephen Hays, an undivided one-fourth interest.

Exhibit No. 71, for the taxes of 1902, David H. Bentley, an undivided one-fourth interest.

Exhibit No. 72, taxes of 1901, assessed against T. R. Jones, an undivided one-half interest.

Exhibit No. 73, issued on the taxes of 1901, assessed against Stephen Hays, an undivided one-fourth interest.

Exhibit No. 74, for the taxes of 1901, assessed to David H. Bentley, an undivided quarter interest.

Exhibit No. 75, for the taxes of 1900, assessed to T. R. Jones.

Exhibit No. 76, for the taxes of 1898, assessed to T. R. Jones.

Exhibit No. 77, for the taxes of 1897, assessed to T. R. Jones.

We offer them separately.

MR. WALLACE: No objection.

THE COURT: They may be received.

Jerome Bouregard, a witness called on behalf of the defendants, testified as follows:

- 21 I commenced my residence in Bingham in
22 April, 1873. I lived on Lot 11 for twenty-five years.
23 I was engaged in business on Lot 6, directly across
the street from Lot 10, continually from 1880 until

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- two years ago. I knew a man named S. S. Maxwell who resided in Bingham. He built a cabin on Lot 10, I should say in the late '70's or early '80's. He lived there continually up until a short time before he died. I don't remember how long he has been dead. After Maxwell, Charley McCann lived there. Then the cabin was removed and another place was built on the ground by Dr. Castleman. He was succeeded by Dr. C. N. Ray, and he in turn by Drs. Ray and O'Brien and Frazier. Then the building was burned down and the hospital was built on the ground. I know Dr. Straup very well, but he did not live there. I cannot remember any evidence of a retaining wall around Lot 10 while Maxwell lived there. I never went into the records to determine the nature of the possession of these several parties, but I always considered them the owner. They occupied the premises as owners. In the days of Maxwell the lot now commonly referred to as Lot 10 was called the "Maxwell Lot."

Cross Examination.

- 26 I don't pretend to know anything about the nature of the title of these various people claiming to own this lot.
- 27 *J. Fewson Smith*, a witness produced by the defendants, testified as follows:

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I made a survey of the town of Bingham at one time. I have my field notes and blue prints of the map I made, showing Lot 10, Block 4, Plat "A", Wilkes Survey of Bingham Townsite. (Defendants' Exhibit 78.) The yellow patch indicates Lot 10, Block 4 of the Wilkes Survey. The name S. S. Maxwell across this yellow lot indicates the name of the man that claimed the property at the time I made my survey. That was in the fall of 1898. The double or hatched line on the southeast corner of this lot is the outline of a rock wall which I located at the date of the survey. My notes do not state whether Maxwell was living on the land on that date or not, but I saw him on that lot and the house at this time of making the survey. I was requested to make this survey and show all the property holders and properties and improvements of the Valentine Scrip Entry for T. R. Jones. I did not fix the dimensions of this Lot 10, but I made a note of the frontage Maxwell claimed.

Cross Examination.

My survey was prior to the Wilkes Survey. I received no instructions respecting the McGuire Placer. I was merely told to locate everything within the boundaries of the Valentine Scrip. As indicated on my map, the relative position of the McGuire Placer and the Valentine Scrip Entry is shown, that is so far as the limits of the map

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32 permit. Maxwell's statement to me was that he claimed up to a certain point, referring to a house of Mr. Bouregard's and that he had 50 feet frontage.

F. E. Straup, a witness produced by the defendants, testified as follows:

33 I have resided in Bingham since 1896. I lived on Lot 12 as indicated on the tracing. My neighbor on the north was S. S. Maxwell. I lived there on Lot 12, which is immediately behind Lot 10, until 1900. I bought Lot 10 from Maxwell in 1898
34 or 1899, I have forgotten which. The little house I was living in on Lot 12 was as large as the lot. It was quite necessary that I use part of the ground directly north of the house. Maxwell protested my using it and finally I decided to buy from him. Thereafter I owned it for three or four years when I sold to McCann. I paid taxes that were assessed upon it while I owned it, but I did not
35 improve it. I would not say positively that there was evidence of retaining walls around the lot. It seems that there was a little wall between Maxwell's house and the store building next to it. Defendants' Exhibit 1 is the deed I got from Maxwell and the defendants' Exhibit 5 is the deed I gave McCann. I don't know whether McCann is living or not. I think he lived on the Maxwell lot.
36 McCann was succeeded by Dr. Castleman and he

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in turn by Drs. C. N. Ray, D. H. Ray and Frazier, and finally by the Utah Copper Company and so far as I know each of the occupants continued in the possession of that property as owner of it.

Cross Examination

I never lived on the Maxwell lot and never went into the possession of it except by purchase under this deed. I didn't pay any taxes on the Maxwell lot until I took the deed from him and I didn't pay any taxes on it after I gave my deed to McCann. When I took the deed from Maxwell, 38 I did not cause the title to be examined. I talked with Maxwell and the old-timers in the camp and in those days we described and took our ground according to occupancy. I did not go through the formality or take the trouble of examining the record to see who did really own the record title. I knew that Maxwell had used the ground and I thought he was entitled to it. I believe the Wilkes Survey was made after I took this deed from Maxwell.

39 Q. When you received the tax notices for the property, they did not refer to Lot 10, Block 4, Plat "A", Wilkes Survey, prior to the time the Wilkes Survey was made?

A. Well, now, when you ask me about tax notices, I couldn't say what tax notices I received. I know that I paid them. I just know that I paid

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them. I wouldn't say positively, but that is as I remember it. I think if I paid any taxes during this period from the time I bought the Maxwell lot until I sold to McCann, that the taxes were on that ground.

40 Q. Doctor, during that period, have you any definite recollection of paying taxes at all?

A. No, I would not say positively that I did.

41 All I want to say is that if I paid any taxes it was on this ground.

Q. If you did?

A. Yes.

Re-Direct Examination.

I said, I think, I had paid some taxes, but as to saying it positively at a particular time, I don't know, but I think I said in the first place that I paid taxes. None of the McGuires or Gibbons or Tiernan ever made any claim or demand of me for that property.

Albert L. Castleman, a witness on behalf of the defendants, testified as follow:

42 At one time I resided in Bingham and purchased Lot 10, Block 4, Plat "A" of the Wilkes Survey from Charles McCann. Exhibit 6-B is the deed I received from him. I conveyed to C. N. Ray. Exhibit 7 is a copy of the deed I gave him. I was owner of the property between October 5,

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1904, and March 30, 1907. I first rented the two-room cottage on the property to one Carr, and in the spring I built a two-story building on the ground at a cost of \$2,000.00 and moved in as soon as it was completed. I lived there until I sold to C. N. Ray. I believe I paid taxes on the property while I was in possession. I am a physician and I used this property as a residence and office and an emergency hospital. Dr. D. H. Ray succeeded Dr. C. N. Ray in occupation of this lot and residence and Dr. Frazier is my representative in the Utah Copper Company's present hospital upon the premises. The occupation of myself and associates was that of owner. None of the McGuire's or Gibbons or Tiernan ever made demand for possession or claim of title. After I sold to Dr. Ray, a further improvement or addition was made to the building at a cost of \$2,000.00. The building burned down and the property was sold to the Utah Copper Company by Drs. Frazier and O'Brien. The Copper Company then built a hospital on the lot at a cost I believe, of \$23,000.00, and myself and associates are now in charge of it.

Cross Examination.

The hospital I have just mentioned was finished this last spring. The work commenced in the fall of 1924. When I purchased from McCann I got no abstract of title. I employed no attorney or searcher of titles to pass the title for me. I as-

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48 sumed that his title was all right without any in-
49 vestigation. I knew the history of previous occu-
50 pants from 1891. I left Bingham in 1894 and re-
 turned in 1904. I was gone 10 years. As to pay-
 ing taxes I have no distinct recollection such as
 writing a check or receiving a tax notice or remit-
 ting the money. I have no definite recollection of
 how the tax notices read. I have paid taxes on
 everything I owned. I never had anything sold
 for taxes.

Q. I know, but are you positive, Doctor, that
this property was ever assessed to you for pur-
poses of taxation?

A. Why, I could not say positively that it
was assessed, from my memory, that is.

C. N. Ray, a witness on behalf of the defend-
ants, testified as follows:

51 I am a physician and at one time I lived in
 Bingham, residing on Lot 10, Block 4, Wilkes Sur-
 vey. I bought the property from Dr. Castleman.
 Exhibit 7 is the deed I received. I subsequently
 sold it to Drs. D. H. Ray and B. S. O'Brien. Ex-
 hibit 8 is a copy of the deed I gave. I was owner
 between March 30, 1907, and June 30, 1913. I re-
 sided on this property during that time and paid
52 all taxes assessed upon it. I used it as a residence,
 doctor's office and emergency hospital. An addi-

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tion was built on the north side of two rooms, at a cost of about \$2,000.00. During that period no demand for the premises was made by the McGuires, Gibbons, or Tiernan.

Cross Examination.

52 I am sure I paid all taxes every year. I have no receipts with me. I mean that I paid all taxes that were sent to me by the county officials. As I received tax notices I paid the taxes listed thereon.

54 Q. And you don't know how the property was listed to you?

A. That is it. I don't know anything about it.

When I purchased from Dr. Castleman, I did not cause the title to be examined. I simply assumed that it was good.

55 Defendants' Exhibit 79 is redemption certificate showing redemption by D. H. Ray of the premises sold to Salt Lake County, December 21st, 1920, for general taxes delinquent November 30, 1920.

Rebuttal.

Michael Gibbons, a witness called by plaintiffs, testified as follows:

58 I first went to Bingham in April, 1874, and
have resided there ever since, except that I was
there very little between 1910 and 1920. Bingham
Canyon, as its name implies, is a canyon with a
stream of water running down it. I am familiar
with the lines of the McGuire & Company Placer.
I helped survey it. At the time it was located the
64 McGuire Placer was gravel and at that time those
gravels were being panned and sluiced for mine-
65 rals. They were working there and used to pan
gold on the rim rock where it went down into the
gulch. That was on the McGuire Placer, but at
the time it had not been located. At the time the
McGuire was located they drove a drainage ditch
out and panned down on the rim rock as far as
they could go down. I claim to be one of the own-
66 ers of the McGuire Placer at this time. I have
paid taxes on it every year with the exception of
67 one year that Mr. Tiernan paid them. I have paid
all taxes year after year from the time we ob-
tained the claims. I paid them on behalf of my-
self and my co-owners. I don't remember the
dates on which those taxes were paid.

Cross Examination.

- 69 I am 77 years of age. Between 1910 and 1920 I was in Salt Lake and made two or three trips east. I had business interests in Bingham during those years. I don't remember the dates, but at times I had a power of attorney from the other owners to represent them if any deal was made on the McGuire. They stopped operations on the McGuire after McAvinney's death. I don't remember the date. John McGuire died first and McAvinney bought his interest. He operated for a few years. The property hasn't been operated since his death. Since that time I have sold portions of the surface for building lots. I never resided on the McGuire Placer. My house was on part of the Valentine Scrip and on the section line which was the north boundary of the Valentine Scrip. I lived there 25 or 30 years. I sold it a couple of years after my wife died. She died in 1910. I believe I acquired my interest in the McGuire about 1898. I bought McAvinney's interest. I bought the interest of my brother William from father and mother and the other two-fifths I got from McGuire. My present interest is $3/10$. I sold $1/5$ to Mr. Tiernan. I am not a party to this suit.

Re-Direct Examination

- 74 At present I am working for the Utah Copper Company. Mrs. Rose Gibbons, one of the plaintiffs, is my sister-in-law. She was in Los Angeles the last I heard of her. She never lived in Bingham—used to visit there for a couple of weeks at a time after my brother died. That would be prior
- 75 to 1900. Mr. Tiernan resides in Hollywood, California. He never resided in Bingham outside of trips there. I never represented him in any way except under the power of attorney appearing in
- 76 the abstract. I knew S. S. Maxwell in Bingham.
- 77 During the time he was living on the property referred to as Lot 10, Block 4, Plat "A", Wilkes Survey, he spoke to me twice about wanting to get a title fixed up, to get a deed for it. He had got some money from the sale of the Jay Gould mine and he said he wanted to fix up the title. There was nothing done and he spoke to me again about
- 78 it. Steve Hays spoke to me about the conflict between the Valentine and the McGuire. The first
- 79 time was shortly after he had bought the Valentine. He wanted me to stand in with him and combine the two titles—give him half the placer and he would give me what title he had in the Valentine where the conflict was. I told him I did not
- 80 feel as though I could do it without my sister-in-law's consent.

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Cross Examination.

- 80 I cannot give the date of this conversation I had with Maxwell but I believe it was before I acquired my interest in the McGuire & Company Placer. I would not say positive. I don't know
- 81 when Maxwell's occupation commenced. The only way I can recollect about it is what McGuire told me that he gave him permission to go on there. I was living there all those years and saw Maxwell living on the lot after he built his house. Afterwards I saw McCann living there. I heard that Dr. Straup had purchased and also that Dr. C. N. Ray and Dr. Castleman had bought. I did not know Dr. D. H. Ray nor Dr. O'Brien. I knew that McCann was there. While Mr. Bullock was living they had a few hundred dollars and Bullock wanted to buy the title and give it to McCann to straighten out the title. Maxwell never claimed to me that he was the owner. Mr. McGuire was the one who let him go on there. I never interfered with him. I never made any demand on
- 83 them or asserted any title against them on behalf of myself or any of my associates. Going up and down I saw that the place was being enlarged when Dr. Castleman got it. Maxwell's holdings were very limited. They kept increasing and increasing until they built this last hospital, which took the full width of the patent on the west side.
- 83 All I did was to represent Mr. Tiernan if any sales

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84 were made. A number of sales were made and I represented Tiernan and Rose Gibbons by power of attorney.

Q. The fact of the matter is that the McGuire & Company Placer is very well built up, isn't it, with houses from one end to the other?

A. It is pretty well roofed over, yes.

85 Representing the plaintiffs I made no effort to sell surface lots only when some one would come and want to get a lot. I have no tenants on the placer claim. I paid taxes during all these years. I think the claim was valued at \$2.50 per acre as a placer mining claim. Those are the only taxes I have paid on that claim. The only taxes anyone ever paid on that placer claim were taxes predicated upon the valuation of \$2.50 per acre as provided by Statute.

Re-Direct Examination.

88 It was only lately that I heard that Stephen Hays had bought the interest of Robert K. Smith in the McGuire Placer. Mrs. Rose Gibbons has lived in Nevada and California since before my
89 wife's death in 1910. I never claimed to own more than an undivided fractional interest in the McGuire. I don't know what my co-tenants may have done about giving deeds to it or leasing it.

Re-Cross Examination.

90 In a way I have looked after this property for my co-tenants. They kind of looked to me. At the same time they seemed kind of indifferent to my ideas so after my sister-in-law withdrew her power of attorney, I thought if they wanted to let things go, why, let it go.

John W. Ensign, a witness called by plaintiffs, testified as follows:

91 I am a licensed abstractor in Salt Lake County. Have been engaged in that business since 1898. In the course of my business I have had frequent occasion to examine titles in Bingham Canyon. That has entailed an examination of the records in the Recorder's Office and other county offices, including the Assessor's and Treasurer's
92 offices. Ownership plats are filed by the Recorder with the Assessor.

95 MR. WALLACE: I will offer to prove by this witness and expect to prove that in the transfers of title during the last twenty-five years, of realty in Bingham, reference has been made in the description in various deeds to lots, blocks and plats in Bingham, according to the Wilkes Survey; that in many instances the descriptions in these deeds excluded the mineral rights, purporting to convey only the surface rights. In other instances,

96 and numerous instances, those deeds made no segregation or severance of surface from the minerals and in the ownership plats in the Recorder's office during that period of time, namely from 1900 to date, the ownership plats, which the Recorder from time to time has supplied the Assessor, no segregation was made or any indication given, or nothing to indicate that the owner under a deed conveying to him the surface rights owned, according to the plat, only the surface rights, but on the contrary, if a deed was recorded purporting to convey Lot 10, Block 4, Wilkes Survey, and contained a reservation of the minerals underneath, it appeared on the ownership plat just as if that deed did not contain that reservation. And on the other hand, if a deed did not contain any reservation, the grantee's ownership appeared on the plat as if he owned the entire fee.

MR. ELLIS: We object to it on the ground it is incompetent, irrelevant and immaterial, and does not prove nor tend to prove any of the issues covered by the pleadings in this action.

THE COURT: I think the objection may be sustained.

MR. WALLACE: Note an exception.

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9 It was stipulated that taxes were assessed and paid upon McGuire & Company Placer Mining Claim, U. S. Lot 242, 11.77 acres, as follows:

For 1900, assessed to M. Gibbons, agent, residence, Bingham. Value, \$30.00. Tax of 64 cents paid November 9, 1900.

For 1901, assessed the same. Value, the same. Tax of 60 cents paid November 1, 1901.

For 1902, assessed to Thos. Gibbons, agent, residence, Bingham. Value, \$30.00. Tax of 57 cents paid November 6, 1902.

For 1903, assessed to Thos. Gibbons, residence, Bingham. Value of \$30.00. Tax of 59 cents paid November 12, 1903.

For 1904, assessed to Thos. Gibbons, agent; residence, Bingham. Value, \$30.00. Tax of 59 cents paid November 4, 1904.

For 1905, assessed to A. K. Tiernan, Michael and Rose Gibbons; residence, Bingham. Value, \$30.00. Tax of 66 cents paid October 18, 1905.

For 1906, assessed the same. Tax of 69 cents paid October 23, 1906.

For 1907, assessed the same. Tax of 78 cents paid November 9, 1907.

For 1908, assessed to A. K. Tiernan, et al.; residence, University Club. Value, \$60.00. Tax of \$1.44 paid September 22, 1908.

For 1909, assessed the same. Value, \$30.00. Tax of 81 cents paid November 6, 1909.

For 1910, assessed to Michael and Rose Gibbons and A. K. Tiernan; residence, Bingham. Vaue, \$30.00. Tax of 81 cents paid November 8, 1910.

For 1911, assessed the same. Tax of 78 cents paid October 23, 1911.

For 1912, assessed to Michael Gibbons, et al.; residence, Bingham. Value, \$30.00. Tax of 83 cents paid November 1, 1912.

For 1913, assessed to Michael and Rose Gibbons and A. K. Tiernan; residence, Bingham. Tax of 90 cents paid November 10, 1913.

For 1914, assessed the same. Tax of 81 cents paid November 2, 1914.

For 1915, assessed the same. Tax of 89 cents paid October 14, 1915.

For 1916, assessed to Michael Gibbons, et al.; residence, Cullen Hotel. Value, \$55.00. Tax of 66 cents paid November 20, 1916.

For 1917, assessed to Michael and Rose Gibbons and A. K. Tiernan; residence, Bingham. Value, \$60.00. Tax of 72 cents paid November 6, 1917.

For 1918, assessed to Michael and Rose Gibbons and A. K. Tiernan. no residence given. Value, \$30.00. Tax of 35 cents paid October 29, 1918.

For 1919, assessed to Michael and Rose Gibbons and A. K. Tiernan; no address. Value, \$60.00. Tax of 78 cents paid September 24, 1919.

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For 1920, assessed to Rose and Michael Gibbons and A. K. Tiernan; residence, 445 East South Temple. Value, \$60.00. Tax of \$1.09 paid November 16, 1920.

For 1921, assessed to same parties; no address. Value, \$60.00. Tax of \$1.27 paid September 22, 1921.

For 1922, assessed to same parties; residence, Bingham. Value, \$60.00. Tax of \$1.15 paid October 23, 1922.

For 1923, assessed to same parties; no residence. Value, \$60.00. Tax of \$1.17 paid October 29, 1923.

For 1924, assessed to same parties; no residence. Value, \$60.00. A tax of \$1.16 paid September 17, 1924.

MR. PARSONS: We desire to object to counsel's offer on the ground that it is utterly immaterial, incompetent and irrelevant and could be in no way binding upon the successors in title to the Valentine Scrip or any portion of it, having no reference to any issue in the case and tending to prove no issue tendered in the case.

MR. ELLIS: We don't object to it on the ground it is not the best evidence or anything of that kind. The stipulation goes merely to its competency.

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THE COURT: The stipulation is that it would be evidence if it were received, but you don't stipulate that it should be received and object to it. Objection overruled.

MOTION FOR NEW TRIAL.

108 On the 28th day of December, 1925, the plaintiffs served and filed their motion for new trial as follows:

“Come now the plaintiffs and apply to the court to vacate its decision heretofore given herein and grant a new trial of the issues herein on the following grounds:

Insufficiency of the evidence to justify the decision and that the decision is against law.

Errors in law occurring at the trial and excepted to by these applicants.

B. L. LIBERMAN,
R. A. McBROOM,
GEO. Y. WALLACE,
Attorneys for Plaintiffs.

Copy received December 28, 1925.

DICKSON, ELLIS, PARSONS
and ADAMSON,
Attorneys for Defendants.”

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and the same having been submitted to the court by counsel for the respective parties, said motion for a new trial was by the court on the 28th day of December, 1925, denied and plaintiffs were allowed their exception to said ruling by the court.

On December 30, 1925, the parties stipulated that the exhibits offered and received in evidence by the respective parties might be incorporated in a bill of exceptions by reference to number as marked by the clerk of the trial court for purpose of identification.

On January 4, 1926, the proposed bill of exceptions was served by the appellants upon the respondents.

CERTIFICATE.

I, L. B. WIGHT, judge of said court who tried the above entitled action, hereby certify that the above and foregoing bill of exceptions contains all of the testimony and all of the evidence given and introduced or offered upon the trial of said cause and all of the objections and motions made with respect thereto and all of the rulings of the court

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during the trial of said cause and all of the exceptions taken to such rulings and all of the stipulations and admissions of counsel for the respective parties and particular reference sufficient to identify all of the documentary evidence given and introduced or offered upon said trial.

WHEREFORE, the above and foregoing bill of exceptions is allowed, settled, signed, sealed and filed as the bill of exceptions in the above entitled cause.

Dated this 6th day of January, 1926, at the County Court House in Salt Lake City, Salt Lake County, Utah.

L. B. WIGHT, Judge.

Bill of Exceptions filed January 6, 1926.

NOTICE OF APPEAL.

On January 7, 1926, the appellants served and filed a Notice of Appeal as follows:

To the Clerk of said Court and to the defendants, R. G. Frazier and Utah Copper Company, and to Messrs. Dickson, Ellis, Parsons & Adamson, their attorneys:

You are hereby notified that the plaintiffs Rose Gibbons and Austin K. Tiernan appeal to the Supreme Court of the State of Utah

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from that certain final judgment rendered, dated and filed December 28, 1925, and entered December 30, 1925, dismissing said action, and from the whole thereof.

On January 12, 1926, the appellants filed in the Supreme Court of the State of Utah the Record on Appeal from the District Court for Salt Lake County, Utah.

ASSIGNMENT OF ERRORS.

Come now the appellants, ROSE GIBBONS and AUSTIN K. TIERNAN, and assign the following errors upon which they will rely on this appeal:

I.

The trial court erred in making Finding of Fact No. II. Said finding is in effect a conclusion of law, but notwithstanding, the proof shows without contradiction that the McGuire & Company Placer Mining Claim was duly located prior to the entry of the west half of the east half of the northwest quarter of Section 26, and prior to the issuance of the agricultural patent to Bentley, and

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in consequence the mineral patent conveyed title by relation to the date of discovery and location, and the Bentley patent, in so far as a conflict results, could convey no title and the respondents by mesne conveyance from Bentley could not therefore acquire the fee simple title from paramount source. The proof shows that the appellants and their co-tenants are owners in fee simple of the demanded premises by mesne conveyances from the patentees of the mining claim, which is the prevailing title from paramount source.

Said finding is not justified on the theory that the respondents own fee simple title by adverse possession for the reasons stated in Assignment of Error No. III.

II.

The court erred in making Finding of Fact No. III because the possession of Frazier is predicated on the title of the Utah Copper Company and the latter cannot prevail under the undisputed facts.

III.

The court erred in making Finding of Fact No. IV to the effect that the respondents and their predecessors have been in adverse possession of the demanded premises for forty-five years, because the proof shows without contradiction that S. S.

Maxwell, whose claimed possession terminated in 1899 did not claim adversely, but on the contrary recognized a paramount title and that Dr. F. E. Straup, whose claimed possession was between 1899 and 1902 was never actually in possession of the demanded premises adversely or otherwise. Furthermore the proof shows without dispute that the respondents and their predecessors did not pay all taxes levied or assessed against the demanded premises, but on the contrary, that the appellants and the owners of the west half of the east half of the northwest quarter of Section 26 paid taxes thereon and that neither the respondents nor their predecessors for any seven consecutive years paid taxes thereon prior to the time the appellants also paid taxes thereon. And there is no proof from which the court could properly find that the respondents or any one of their predecessors had paid taxes on the demanded premises; the proof in that respect going no farther than to indicate that certain taxes were paid but failing to show who paid them.

IV.

The court erred in making Finding of Fact No. V in so far as it is found that the respondents and their predecessors held the demanded premises adversely, for the reasons stated in Assignment No. III.

V.

The court erred in making Finding of Fact No. VI, in finding as a fact that the respondents and their predecessors had no notice or knowledge of the claims of the appellants and their co-tenants because the proof shows without contradiction that the appellants' claim of title was at all times a matter of record in the office of the County Recorder of Salt Lake County.

VI.

The court erred in making Conclusion of Law No. I, because under the undisputed facts, no finding of fact could be made to justify such conclusion.

VII.

The court erred in making Conclusion of Law No. II, because under the undisputed facts, no finding of fact could be made to justify such conclusion.

VIII.

The court erred in making Conclusion of Law No. III, because under the undisputed facts, no finding of fact could be made to justify such conclusion.

IX.

The court erred in making Conclusion of Law No. IV, because under the undisputed facts, no finding of fact could be made to justify such conclusion.

X.

The court erred in making Conclusion of Law No. V, because under the undisputed facts, no finding of fact could be made to justify such conclusion.

XI.

The court erred in rendering judgment in favor of the respondents and against the plaintiffs because under the undisputed facts no finding of fact or conclusion of law could be made to justify such judgment.

XII.

The court erred in denying the appellants' motion for a new trial because of insufficiency of evidence to justify the decision of the court and because the court's decision is against law.

XIII.

The court erred in excluding the testimony of the witness Ensign, tendered by the plaintiffs in rebuttal. (Trans. 95, 96; Abs. 52, 53.)

B. L. LIBERMAN,
R. A. McBROOM,
GEO. Y. WALLACE,
Attorneys for Appellant.

Copy received January 12, 1926.

DICKSON, ELLIS, PARSONS
& ADAMSON,
Attorneys for Respondents.

Filed January 12, 1926.