

No. 2389

United States

Circuit Court of Appeals

For the Ninth Circuit.

STEWART MINING COMPANY, a Corporation,
Appellant,

vs.

BUNKER HILL AND SULLIVAN MINING
AND CONCENTRATING COMPANY, a
Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Idaho, Northern Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

CULLEN, LEE & MATTHEWS, Spokane, Wash-
ington,

GUNN, RASCH & HALL, Helena, Montana,
Solicitors for Appellant.

CURTIS H. LINDLEY, San Francisco, Cal.,

MYRON A. FOLSOM, Spokane, Washington,
Solicitors for Respondent.



*In the District Court of the United States, District
of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING &
CONCENTRATING COMPANY, a Corpora-
tion,

Defendant.

Bill of Complaint.

To the Honorable, the Judge of the District Court of
the United States, District of Idaho, Northern
Division:

The Stewart Mining Company, a corporation cre-
ated and existing under and by virtue of the laws of
the State of Washington, brings this, its bill of com-
plaint, against the defendant, the Bunker Hill and
Sullivan Mining & Concentrating Company, a resi-
dent and citizen of the State of Oregon, and there-
upon your orator complains and alleges:

I.

That your orator is now and at all times since the year 1902 has been a corporation duly organized and existing under and by virtue of the laws of the State of Idaho and a resident and citizen of such State and empowered to own, possess and enjoy the mining claim and property hereinafter described.

II.

That the defendant, the Bunker Hill and Sullivan Mining & Concentrating Company, is a corporation organized and [1*] existing under and by virtue of the laws of the State of Oregon and a resident and citizen of such State.

III.

That your orator is now, and for a long time hitherto has been, the owner in fee, in possession of, and entitled to the possession of, that certain quartz lode mining claim situated in Yreka Mining District, Shoshone County, Idaho, known and designated as the Senator Stewart Fraction lode mining claim, and of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface lines of said mining claim extended down and vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of the said claim, which said mining claim is particularly described in the United States patent issued therefor as follows:

BEGINNING at corner No. 1, from which
corner common to Sections one (1), two (2),

*Page number appearing at foot of page of original certified Record.

eleven (11), and twelve (12), of Township forty-eight (48) North, Range two (2) East, B. M., bears north eight-six (86) degrees, eleven (11) minutes thirty (30) seconds west, three hundred twenty and thirty-eight hundredths (320.38) feet; thence south twenty-four (24) degrees, thirty-eight (38) minutes west, six hundred (600) feet to corner No. 2; thence north sixty-three (63) degrees, fifty-five (55) minutes west, thirteen hundred eighty-five and four-tenths (1385.4) feet to corner No. 3; thence north twenty-four (24) degrees, thirty-eight (38) minutes east, five hundred (500) feet to corner No. 4; thence south sixty-eight (68) degrees three (3) minutes east, thirteen hundred eighty-six and forty-seven hundredths (1386.47) feet to place of beginning, containing an area of sixteen and one hundred and ninety-six thousandths (16.196) acres, more or less.

That within said Senator Stewart Fraction quartz lode mining claim is a certain vein or lode bearing silver, lead and other valuable minerals, the top or apex of which vein or lode crosses the easterly end line of said claim at approximately the center thereof between corners Nos. 1 and [2] 2 and extends within the boundaries of said claim in a westerly direction, following the general course of said claim, for a distance of seven hundred five (705) feet, more or less.

That said vein or lode has a downward course and descends into the earth southerly and beyond the south boundary and side line of said claim into and

beneath the surface of the Silver Casket, Survey No. 790, Saxon, Survey No. 2067, Sierra Nevada, Survey No. 554, Carbonate, Survey No. 764, Marion, Survey No. 583, and Ace, Survey No. 2583, mining claims and a southerly triangular portion of the Lazy Jean quartz lode mining claim, Survey No. 1858, owned by the defendant mining company, being patented mining claims.

IV.

Your orator further avers that for many years last past your orator has been and is now the owner in fee, in the possession of, and entitled to the possession of said vein or lode, the top or apex of which is within said Senator Stewart Fraction quartz lode mining claim, as aforesaid, between a vertical plane drawn downward through the east end line of said claim extended southerly in its own direction indefinitely, and a vertical plane drawn downward through a line seven hundred five (705) feet westerly from said east end line and parallel thereto extended as aforesaid.

V.

Your orator further avers that said defendant is the owner, or claims to be the owner, of the said Silver Casket, Survey No. 790, Saxon, Survey No. 2067, Sierra Nevada, Survey No. 554, Carbonate, Survey No. 764, Marion, Survey No. [3] 583, and Ace Survey No. 583 mining claims and a southerly triangular portion of the Lazy Jean quartz lode mining claim, Survey No. 1858, situated in the Yreka Mining District, Shoshone County, Idaho, and lying in a group about four hundred (400) feet southerly

from said Senator Stewart Fraction quartz lode mining claim, and claims an estate or interest adverse to complainant in and to that part of said vein or lode having its apex within the boundaries of the Senator Stewart Fraction quartz lode mining claim as aforesaid beneath the said Silver Casket, Saxon, Sierra Nevada, Carbonate, Marion and Ace, and the southerly triangular portion of the Lazy Jean mining claims, which part is between the planes extended as aforesaid.

VI.

Your orator further avers that the said defendant, Bunker Hill and Sullivan Mining & Concentrating Company, has driven a long tunnel from the surface from one of its said claims into and towards the said vein, which apexes within the said Senator Stewart Fraction quartz lode mining claim, for the purpose of intersecting the said vein, and threatens to and is about to enter in and upon the said vein for the purpose of extracting ore therefrom.

VII.

Your orator further avers that the claim of the said defendant is false and groundless, and without any right whatsoever, and constitutes a cloud upon your orator's title thereto, and that the said defendant has no right, title, estate or interest whatever in or to said vein or lode, or any part thereof. [4]

VIII.

Your orator further avers that that portion of said vein or lode to which said defendant wrongfully asserts title and claim, as herein alleged, exceeds in value the sum of one hundred thousand (\$100,000.00)

dollars, exclusive of interests and costs.

IX.

That your orator has no plain, speedy or adequate remedy in the ordinary course of law.

IN CONSIDERATION WHEREOF, and foreasmuch as your orator is entirely remediless in the premises at and according to the strict rules of the common law, and can secure relief only in a court of equity where matters of this nature are properly cognizable and reviewable, and to the end that the said defendant may appear and answer to all and singular the matters in this bill of complaint, but not under oath, an answer under oath being hereby expressly waived, your orator prays that said defendant may be made to set forth the nature of his claim, and that all adverse claims of said defendant may be determined by the decree of this Court, and that by said decree it be declared and adjudged that said defendant has not any estate or interest whatsoever in or to said vein or lode, or any portion thereof, between the planes above described, and that by said decree it be declared and adjudged that the title of your orator thereto is good and valid, and that said defendant be enjoined and forever restrained from asserting any claim whatsoever in or to said vein or lode between said planes.

May it please your Honor to grant unto your orator a writ of subpoena of the United States of America, directed [5] to said defendant, commanding it to appear on a date certain and answer unto this bill of complaint, and to abide by and perform the

order and decree of this Court.

STEWART MINING COMPANY.

By E. H. WILSON,

Vice-president.

GUNN, RASCH & HALL,

HAPPY, CULLEN, LEE & HINDMAN,

Solicitors for Complainant. [6]

State of Washington,

County of Spokane,—ss.

E. H. Wilson, being first duly sworn, deposes and says, that he is an officer of the complainant above named, to wit, its vice-president, and that he is entitled and authorized by the said company to make this affidavit in its behalf; that he has read the above and foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated upon information and belief, and as to those matters that he believes them to be true.

E. H. WILSON.

Subscribed and sworn to before me this 3d day of October, 1912.

[Notarial Seal]

W. E. CULLEN, Jr.,

Notary Public in and for the State of Washington,

Residing at Spokane, Washington.

[Endorsed]: Filed October 3, 1912. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. [7]

*In the District Court of the United States for the
Northern Division of the District of Idaho.*

IN EQUITY—No. 557.

STEWART MINING COMPANY, a Corporation,
Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING &
CONCENTRATING COMPANY, a Corpora-
tion,

Defendant.

Subpoena ad Respondendum.

The President of the United States of America, to
Bunker Hill and Sullivan Mining & Concentrat-
ing Company, a Corporation, Greeting:

You and each of you are hereby commanded that
you be and appear in said District Court of the
United States, at the courtroom thereof, in Coeur
d'Alene, in said District, on the first Monday of No-
vember next, which will be the 4th day of Novem-
ber, A. D. 1912, to answer the exigency of a Bill of
Complaint exhibited and filed against you in our
said court, wherein Stewart Mining Company, a
corporation, is complainant and you are defendant,
and further to do and receive what our said Circuit
Court shall consider in this behalf and this you are
in no wise to omit under the pains and penalties of
what may befall thereon.

And this is to COMMAND you the MARSHAL
of said District, or your DEPUTY, to make due ser-

vice of this our WRIT of SUBPOENA and to have then and there the same.

Hereof not fail.

Witness the Honorable FRANK S. DIETRICH, Judge of the District Court of the United States, and the Seal of our said Court affixed at Boise in said District, this 9th day of October, in the year of our Lord One Thousand Nine Hundred and Twelve and of the Independence of the United States the One Hundred and Thirty-seventh.

[Seal]

A. L. RICHARDSON,

Clerk.

MEMORANDUM PURSUANT TO EQUITY
RULE NO. 12 OF THE SUPREME COURT
OF THE UNITED STATES.

The defendant is to enter his appearance in the above-entitled suit in the office of the Clerk of said Court on or before the day at which the above Writ is returnable; otherwise the Complainant's Bill therein may be taken *pro confesso*.

This is to certify that I received the within *Subpoena ad Respondendum*, together with a certified copy of the complaint at Lewiston, Idaho, on the 12th day of October, 1912, and that I served the same on the Bunker Hill and Sullivan Mining & Concentrating Company, a corporation, at Kellogg, Shoshone County, Idaho, on the 15th day of October, 1912, by handing to and leaving with Stanley A. Easton, Statutory Agent of the Bunker Hill and Sullivan Mining & Concentrating Company, a corporation, a duplicate of the within *Subpoena Ad Re-*

spondendum, together with the certified copy of the complaint.

S. L. HODGIN,

U. S. Marshal.

By Wm. Schuldt,

Deputy.

Dated October 17th, 1912.

[Endorsed]: No. 557. In the District Court of the United States for the Northern Division of the District of Idaho. In Equity. Stewart Mining Co. vs. Bunker Hill & Sullivan M. & C. Co. *Subpoena Ad Respondendum*. Returned and filed Nov. 5, 1912. A. L. Richardson, Clerk.

H. Civ. 532 10/9/12. [8]

In the District Court of the United States for the District of Idaho, Northern Division.

Number 557.

STEWART MINING COMPANY, a Corporation,
Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING &
CONCENTRATING COMPANY, a Corpora-
tion,

Defendant.

Appearance [of Defendant].

To the Clerk of the District Court of Idaho:

Please enter the appearance of the Bunker Hill and Sullivan Mining and Concentrating Company, the defendant in the above cause, and of myself as solicitor and counsel, as of November 4th, 1912.

MYRON A. FOLSOM,

Solicitor and Counsel.

[Endorsed]: Filed Nov. 4, 1912. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk.
[9]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

Number 557.

STEWART MINING COMPANY, a Corporation,
Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING &
CONCENTRATING COMPANY, a Corpora-
tion,
Defendant.

Answer.

The defendant answers the bill of complaint as follows:

I.

Defendant admits the allegations in paragraph one and two of the bill of complaint.

II.

Defendant admits that plaintiff is the owner in possession and entitled to the possession of that certain lode claim known as the Senator Stewart Fraction quartz lode mining claim. Defendant denies that the said claim is described in the United States patent as set forth in the complaint. Defendant admits that the description set forth on page three of the said complaint correctly described the lines bounding said claim as the same are described in the patent. But defendant alleges that said patent in

addition to the description contained in paragraph three of the complaint contains the following language:

“Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described embraced in said Royal Knight Lode Mining Claim, Survey Number 1639 A. M., and that portion of said survey number 1314 A. M. in conflict with said Senator Stewart Fraction Lode Mining Claim; and also all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground.” [10]

Defendant denies that plaintiff is the owner of all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface lines of said Senator Stewart Fraction lode mining claim. Defendant admits that within said Senator Stewart Fraction lode mining claim there is a certain vein or lode bearing silver, lead and other valuable minerals; but defendant denies that the top or apex of said vein or lode crosses the easterly end line of said claim at approximately the center thereof between corners number one and two; or that the said top or apex crosses the said end line at any other place; and defendant denies that the said top or apex extends within the boundaries of said claim in a westerly direction following the general course of said claim for a distance of seven hundred and five feet; or for any distance. Defendant alleges that the course of said apex of said vein is substantially parallel with

the end lines of said claim, and lies within a distance of about four hundred and fifty feet of the westerly end line; and if not cut off by faults on the northerly and southerly ends, would cross the said side lines of said claim.

Defendant admits that the said vein or lode has a downward course, and descends into the earth in an easterly direction and passes underneath the easterly end line of said claim; but defendant denies that the said vein has a downward course or descends into the earth southerly; or that it passes beyond the south boundary or side line of said claim into or beneath the surface of the Silver Casket and other mining claims or ground described in paragraph three of the complaint. Defendant also denies that it is the owner or claims to be the owner of the Sierra Nevada, or Carbonate lode mining claims. [11]

III.

Defendant denies that *complaint* has been for many years or now is the owner in fee in possession of and entitled to the possession of any portion of said vein having its top or apex in the Senator Stewart Fraction lode mining claim lying between a vertical plane drawn downward through the east end line of the Senator Stewart Fraction lode mining claim extended southerly in its own direction indefinitely, and a vertical plane drawn downward through a line seven hundred and five feet westerly from said east end line and parallel thereto extended as aforesaid. Defendant denies that the plaintiff is the owner of any portion of said vein lying southerly of the south side line of said claim.

IV.

Defendant admits that it is the owner of the Silver Casket, Saxon, Marion and Ace lode mining claims, and is the owner of a portion of the Lazy Jean lode mining claim, Survey Number 1858, lying southerly from said Senator Stewart Fraction quartz lode mining claim; and admits that it claims to be and is the owner of all ores and minerals beneath the surface of, or which may be a part of said lode mining claims by virtue of its ownership of the said Silver Casket, Saxon, Marion and Ace lode mining claims, and by virtue of a conveyance from the complainant to the predecessor in interest of this defendant of the triangular portion of said Lazy Jean quartz lode mining claim, which lies within the exterior boundaries of said Saxon lode mining claim; said conveyance having transferred to the defendant all ores and minerals beneath the surface of that portion of the Lazy Jean lode mining claim above referred to.

Defendant denies that it is the owner or claims to be the owner of the Sierra Nevada or Carbonate lode mining claims, or of any veins, ores, or minerals beneath the surface of said [12] mining claims. Defendant alleges that for many years last past the said Sierra Nevada and Carbonate lode mining claims, together with all veins, lodes, ledges, and minerals contained therein, or a part thereof, have and now are owned and possessed by the Sierra Nevada Consolidated Mining Company, a corporation organized under the laws of Oregon.

V.

Defendant admits that it has driven a tunnel for

the purpose of intersecting ore bodies and veins beneath the said Silver Casket, Saxon, Marion and Ace lode mining claims, the property of said defendant, and if any ore or mineral of commercial value is encountered by said tunnel, the said defendant will extract and remove the same, as it has a right to do by virtue of its ownership of the said mining claims.

VI.

Defendant denies that its claim of ownership to the said claims is false or groundless, or without any right; or that it constitutes a cloud upon complainant's title. Defendant alleges that it is the owner in possession and entitled to the possession of the said Silver Casket, Saxon, Marion and Ace lode mining claims described in the complaint; and of the triangular portion of said Lazy Jean lode mining claim above referred to; and of all veins, lodes, ledges, and minerals beneath the surface of or which constitute a part of said lode mining claims.

VII.

Defendant admits that said ores and veins which constitute a part of said lode mining claim, and which lie beneath the surface thereof, is of the value of One Hundred Thousand (\$100,000) Dollars, exclusive of interest and costs; but defendant denies that it wrongfully asserts title or claim to said ore bodies.

[13]

WHEREFORE, defendant prays that complainant take nothing by its bill; that the same be dis-

missed; and that defendant be awarded its costs.

BUNKER HILL & SULLIVAN MINING
& CONCENTRATING COMPANY,

By MYRON A. FOLSOM.

CURTIS H. LINDLEY,

MYRON A. FOLSOM,

Solicitors and Counsel for Said Defendant.

[Endorsed]: Filed December 4, 1912. A. L. Richardson, Clerk. [14]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING
AND CONCENTRATING COMPANY, a
Corporation,

Defendant.

Replication.

The Replication of the Stewart Mining Company, complainant, to the Answer of the defendant, Bunker Hill and Sullivan Mining and Concentrating Company.

This replication saving and reserving unto itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain and prove its said bill of complaint to

be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this replicant. Without this that any other matter or things whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true. All which matters and things this replicant is and will be ready to aver, maintain [15] and prove as this Honorable Court shall direct, and humbly prays as in and by its bill it has already prayed.

GUNN, RASCH & HALL,
HAPPY, CULLEN, LEE & HINDMAN,
FEATHERSTONE & FOX,

Solicitors for Complainant.

[Endorsed]: Filed Dec. 30, 1912. A. L. Richardson, Clerk. [16]

*In the District Court of the United States, District
of Idaho, Northern Division.*

STEWART MINING COMPANY,

Complainant,

vs.

BUNKER HILL & SULLIVAN MINING AND
CONCENTRATING COMPANY,

Defendant.

STEWART MINING COMPANY,
Complainant,

vs.

JONATHAN BOURNE, Junior, and LILLIAN E.
BOURNE,

Defendants.

STEWART MINING COMPANY,
Complainant,

vs.

SIERRA NEVADA CONSOLIDATED MINING
COMPANY,

Defendant.

Stipulation Consolidating Causes.

STIPULATION CONSOLIDATING ABOVE
CAUSES AND PROVIDING FOR USE OF
TESTIMONY HERETOFORE TAKEN.

WHEREAS, the Stewart Mining Company, complainant in each of the above-entitled causes, is asserting title to certain portions of a mineral vein or lode lying outside of the exterior boundaries of the Stewart Fraction lode mining claim, and is basing its claim of title upon the allegation that the vein in question has its apex within said Stewart Fraction lode mining claim, and

WHEREAS, in each of the above-entitled causes the allegations of the complaint are identical so far as the foundation of [17] plaintiff's title is concerned, and

WHEREAS, the defendant in the several causes above mentioned are very similar, and

WHEREAS, in a cause which was commenced by the Stewart Mining Company against the Ontario Mining Company, Stanley A. Easton and Myron A. Folsom, in the District Court of the First Judicial District of the State of Idaho for Shoshone County, the issues are very similar to those involved in the above-entitled causes, and

WHEREAS, in said cause a large amount of testimony was taken and a large number of exhibits were introduced, all of which testimony and exhibits would be as pertinent to the issues in the above-entitled causes as in the case in which the same were offered.

NOW, THEREFORE, for the purpose of saving the time of the courts and of the parties herein, and for the purpose of saving expense, it is hereby stipulated as follows:

I.

The three causes above entitled are hereby consolidated for the purpose of trial, appeal and other proceedings in said cause.

II.

It is further stipulated that a copy of the testimony taken and the exhibits or copies and duplicates thereof, offered in the case which was commenced in the State District Court for the First Judicial District, Shoshone County, above referred to, may be filed in either one of the above-entitled causes with the same force and effect as if the witnesses had been sworn, examined and cross-examined, and the exhibits offered and received in the above-entitled court and causes, and when so filed shall constitute a part of the record in each of said causes.

III.

It is further stipulated that either party to the above-entitled [18] causes may offer additional testimony upon any subject not covered by the testimony to be filed as aforesaid, but no more than three witnesses shall be called by either side.

Dated this 12th day of May, 1913.

M. S. GUNN,

CULLEN, LEE & HINDMAN,

Attorneys for Stewart Mining Company, Plaintiff.

CURTIS H. LINDLEY,

MYRON A. FOLSOM,

Attorneys for Defendant, Bunker Hill Mining & Concentrating Company.

CURTIS H. LINDLEY,

MYRON A. FOLSOM,

Attorneys for Defendant, Sierra Nevada Consolidated Mining Company.

MYRON A. FOLSOM,

Attorney for Defendant, Jonathan Bourne, Junior.

The above stipulation is approved, and an order may be entered in each of the above-entitled causes accordingly.

District Court Judge.

[Endorsed]: Filed May 26, 1913. A. L. Richardson, Clerk. [19]

At a stated term of the United States District Court for the District of Idaho, Northern Division, held at Coeur d'Alene, Idaho, on Monday, the 26th day of May, 1913. Present: Hon. FRANK S. DIETRICH, Judge.

No. 557.

STEWART MINING COMPANY

vs.

BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY.

Order Consolidating Causes.

In accordance with stipulation on file in each cause, it is ordered that this cause and No. 558, Stewart Mining Company vs. Jonathan Bourne, Junior, and Lillien E. Bourne, and No. 563, Stewart Mining Company vs. Sierra Nevada Consolidated Mining Company, be consolidated for the purposes of trial, appeal and other proceedings in said cause. [20]

In the District Court of the United States, District of Idaho, Northern Division.

STEWART MINING COMPANY,

Complainant,

vs.

BUNKER HILL & SULLIVAN MINING AND
CONCENTRATING COMPANY,

Defendant.

STEWART MINING COMPANY,
Complainant,

vs.

JONATHAN BOURNE, Junior, and LILLIAN E.
BOURNE,
Defendants.

STEWART MINING COMPANY,
Complainant,

vs.

SIERRA NEVADA CONSOLIDATED MINING
COMPANY,
Defendant.

Stipulation of Facts.

WHEREAS, on the 12th day of May, 1913, the parties above named entered into a stipulation consolidating the three cases above named, and providing that the testimony, maps and exhibits, or copies and duplicates thereof, offered in a case commenced in the District Court of the First Judicial District of the State of Idaho, Shoshone County, wherein the Stewart [21] Mining Company was plaintiff and the Ontario Mining Company and others were defendants, might be filed in the above-entitled causes, and

WHEREAS, it was further provided in said stipulation that either party in the above-entitled causes might offer additional testimony upon any subject not covered by the testimony to be filed as aforesaid, but that no more than three witnesses might be called on either side, and,

WHEREAS, the parties to the causes above

named now desire to avoid taking the testimony last above referred to, and to agree upon such facts as are not covered by the testimony above referred to, and to close the testimony in said cases,

NOW, THEREFORE, all the parties named on the first page of this stipulation hereby agree that the following facts are true and may be treated as admitted facts in each of the above-named causes.

1. That the Stewart Mining Company is now, and was at the time of the commencement of the suits above named, the owner of the Stewart Fraction lode mining claim for which it holds patent from the United States: The Bunker Hill & Sullivan Mining and Concentrating Company is the owner of the Silver Casket mining claim, Survey No. 790, the Saxon lode mining claim, Survey No. 2067, the Marion lode mining claim, Survey No. 2583, and the Ace lode mining claim, Survey No. 2583, and the southerly triangular portion of the Lazy Jean quartz mining claim, Survey No. 1858, all of said claims being patented mineral claims; that the Silver Casket lode claim adjoins the Senator Stewart lode claim on the south, its side lines having a northwesterly and southeasterly course and its end line a northeasterly and southwesterly course; the Saxon lode claim has a length of 1445.3 feet and a width of 603.6 feet, and the northwest corner of said claim is upon the Senator Stewart lode claim, [22] the southwest corner is upon the Silver Casket lode claim, the southeast corner is southeasterly from the southeast corner of the Ontario lode claim, and its northeast corner is upon the Switchback claim; the free ground within

said claim consists of an irregularly shaped fraction west of the Ontario lode claim and south of the Senator Stewart lode claim and another irregularly shaped fraction south of the Ontario lode claim, and another irregularly shaped fraction east of the Ontario and Ontario Fraction lode claims; the Marion and Ace lode claims embrace fractions south of the southeast corner of the Silver Casket lode claim.

2. The Ontario lode mining claim is owned by Jonathan Bourne, Junior, is a patented lode mining claim, and is the same claim which was frequently referred to in the testimony which will be filed in the above-entitled causes in pursuance of the stipulation above referred to.

3. The Sierra Nevada and Carbonate lode mining claims lie a short distance south of the Ontario lode mining claim, but neither of said claims adjoins the Ontario. The Sierra Nevada and Carbonate claims are owned by the Sierra Nevada Consolidated Mining Company, and have been patented for more than twenty years.

4. On August 31st, 1904, the Stewart Mining Company conveyed to the Federal Mining and Smelting Company, and the latter company, in May, 1910, conveyed to the Bunker Hill & Sullivan Mining & Concentrating Company, a triangular portion of the Lazy Jean lode mining claim, which portion lies west of the Ontario lode mining claim and is described as follows:

“Beginning at Corner No. 5 Lazy Jean Lode Claim, Survey No. 1858, thence North $24^{\circ} 38'$ East 305 feet to the side line of the Saxon Lode Claim, thence south 64° East 122.5 feet to line

4-5 Lazy Jean Lode Survey No. 1858, thence south 50° 33' West 380.3 feet to place of beginning." [23]

5. That the deed from the Stewart Mining Company to the Federal Mining and Smelting Company conveying said triangular portion of the Lazy Jean lode as aforesaid, after describing the said ground as aforesaid, contained the following language:

“Together with all dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular, the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the said premises, and every part and parcel thereof, with the appurtenances.”

A copy of said deed is attached hereto, marked Exhibit “A” and made a part hereof.

6. That the deed from the Federal Mining and Smelting Company to the Bunker Hill & Sullivan Mining and Concentrating Company above referred to conveyed all of its rights and property in and to the said Lazy Jean lode.

7. It is further stipulated and agreed that the

vein which was the subject of controversy in the case of the Stewart Mining Company against the Ontario Mining Company passes beneath the triangular portion of the Lazy Jean lode claim, the Saxon, the Marion, Ace, Silver Casket, Ontario, Sierra Nevada and Carbonate lode mining claims, and the boundaries and position of said claims are correctly shown upon the maps filed herein.

8. The Silver Casket mining claim was located in the year 1885; the Ontario in 1885; the Sierra Nevada and Carbonate in 1886; the Stewart Fraction in 1889; the Saxon in 1899; the Marion and Ace in 1909.

9. It is further stipulated that the foregoing facts together with the testimony and exhibits to be filed herein in pursuance of the stipulation of the parties made on May 12th, 1913, shall constitute the entire evidence to be used in each [24] of the above-entitled causes; and each of the above cases shall be deemed closed and ready for argument upon the filing of the stipulation, and a copy of the testimony and such of the exhibits or copies or duplicates thereof as either party may deem material, and no witnesses shall be called by either side.

Dated this 24th day of November, 1913.

GUNN, RASCH & HALL,

CULLEN, LEE & MATTHEWS,

Counsel and Solicitors for Stewart Mining Company.

CURTIS H. LINDLEY and

MYRON A. FOLSOM,

Counsel and Solicitors for Bunker Hill and Sullivan Mining and Concentrating Company.

CURTIS H. LINDLEY and
MYRON A. FOLSOM,

Counsel and Solicitors for Sierra Nevada Consolidated Mining Company.

MYRON A. FOLSOM,

Counsel and Solicitor for Jonathan Bourne, Jr., and
Lillian E. Bourne. [25]

EXHIBIT "A."

DEED TO MINING CLAIM.

THIS INDENTURE, made this 31st day of August, A. D. 1904, between Stewart Mining Company, a corporation, party of the first part, and Federal Mining and Smelting Company, a corporation, party of the second part: .

WITNESSETH: That the said party of the first part, for and in consideration of the sum of One (\$1.00) Dollar lawful money of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quitclaimed and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto said party of the second part, and to its heirs and assigns all of the following described real estate situated in Yreka Mining District, Shoshone County, Idaho, to wit:

All that part of the Lazy Jean Lode Mining Claim, Survey No. 1858, in conflict with the Saxon Lode Mining Claim, the property of the party of the second part, the portion of the said Lazy Jean Lode by this instrument transferred,

being more particularly described as follows, to-wit: Beginning at Corner No. 5 Lazy Jane Lode Claim, Survey No. 1858; Thence N. $24^{\circ} 38'$ E. 355 feet to the N. side line of 'Saxon Lode: Thence S. 64° E. 122.5 feet to line 4-5 Lazy Jane Lode, Survey No. 1858; Thence S. $50^{\circ} 33'$ W. 280.3 feet to the place of beginning. Containing 358 acres, more or less.

Together with all dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular, the tenements, hereditaments and appurtenances thereto belonging or in any-wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party [26] *party* of the first part, of, in and to the said premises and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns forever.

IN WITNESS WHEREOF, the said corporation has its president to sign its name and affix his name as president and has caused the secretary to attest

the same and attach the corporate seal of the corporation hereto.

[Corporate Seal]

STEWART MINING COMPANY,

By H. F. SAMUELS, [Seal]

President.

W. N. MORPHY, [Seal]

Secretary.

Duly acknowledged by H. F. Samuels as president.

[Endorsed]: Filed Nov. 24, 1913. A. L. Richardson, Clerk. [27]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

CONSOLIDATED CASES.

STEWART MINING COMPANY,

Complainant,

vs.

BUNKER HILL & SULLIVAN MINING & CON-
CENTRATING COMPANY et al.,

Defendants.

**Stipulation [Relative to Defendants' Model Exhibit
"L" and Defendants' Map Exhibit "B," etc.].**

It is hereby stipulated that the model of the defendants designated as Defendants' Exhibit "L" is a duplicate of the model introduced in evidence in the case of the Stewart Mining Company vs. The Ontario Mining Company et al., referred to in the stipulations heretofore entered into, with the exception that the stopes were not shown on said model

introduced in evidence in the State court, and it is further stipulated that the stopes as shown upon said model in the present cases were placed on the said model for illustrative purposes, and the data therefor was taken from the stope map of complainant and there is no testimony in the record verifying the correctness of said stopes as shown upon said model.

It is further stipulated that the stopes shown upon defendants' map Exhibit "B" were not shown upon the map introduced in evidence in the State court, and that there is no testimony in the record verifying the correctness of said map with reference to said stopes; that said stopes were placed upon said map for illustrative purposes, and are to be so considered.

It is further stipulated that the development in the [28] Switch Back and Ontario claims to which no reference is made in the testimony, was not shown on the said map introduced in evidence in the State court.

Dated December 15, 1913.

CULLEN & LEE and
GUNN, RASCH & HALL,
Attorneys for Complainant.
CURTIS H. LINDLEY and
MYRON A. FOLSOM,
Attorneys for Defendants.

[Endorsed]: Filed December 15, 1913. A. L. Richardson, Clerk. [29]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

No. 557.

STEWART MINING COMPANY,

Plaintiff,

vs.

BUNKER HILL & SULLIVAN MINING & CON-
CENTRATING COMPANY,

Defendant.

Decision.

Jan. 16, 1914.

GUNN, RASCH & HALL, HAPPY, CULLEN,
LEE & HINDMAN, CULLEN, LEE & MAT-
THEWS, and FEATHERSTONE & FOX,
Counsel and Solicitors for Plaintiff.

CURTIS H. LINDLEY and MYRON A. FOLSOM,
Counsel and Solicitors for Defendant.

DIETRICH, District Judge:

For the reasons stated in the opinion this day filed
in No. 558, Stewart Mining Company vs. Jonathan
Bourne, Jr., et ux. the complaint herein will be dis-
missed.

[Endorsed]: Filed January 16, 1914. A. L.
Richardson, Clerk. [30]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

No. 557.

STEWART MINING COMPANY, a Corporation,
Complainant,

vs.

BUNKER HILL & SULLIVAN MINING & CON-
CENTRATING COMPANY, a Corporation,
Defendant.

Judgment.

This cause came on for final hearing before the Court, and the Court upon due consideration of the bill, the answer, the replication, the evidence and the arguments of counsel, doth now,

ORDER, ADJUDGE AND DECREE that this suit be, and the same is hereby dismissed, with costs to the defendant to be taxed.

Dated this 31st day of January, 1914.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed January 31, 1914. A. L.
Richardson, Clerk. [31]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

BUNKER HILL & SULLIVAN MINING & CON-
CENTRATING COMPANY, a Corporation,
Defendant.

Assignment of Error.

Now comes the Stewart Mining Company, plaintiff in the above-entitled cause, and says that the United States District Court for the District of Idaho, erred in its decision and decree in said cause, as appears from the record therein and that the errors committed are as follows, to wit:

1. The said Court erred in holding and deciding that the edge or termination of the vein along the Osborn fault beneath the surface of the Senator Stewart Fraction claim is not a top or apex within the meaning of those terms as used in section 2322 of the Revised Statutes of the United States.

2. The said Court erred in holding and deciding that the top or apex of said vein is not so situated with reference to the Senator Stewart Fraction claim as to entitle plaintiff to an extralateral right to those sections of the vein beneath the Silver Casket, Saxon, Marion and Ace lode mining claims, and the triangular portion of the Lazy Jean lode mining claim, [32] described in the complaint, between the vertical

planes of the end lines of the Senator Stewart Fraction claim extended.

3. The said Court erred in holding and deciding that the course pursued in following on the vein from the edge or termination thereof along said Osborn fault beneath the surface of the Senator Stewart Fraction claim along vertical planes parallel with the vertical plane of the end line of said claim extended to the parts of the vein beneath the Silver Casket, Saxon, Marion and Ace lode mining claims, and the triangular portion of the Lazy Jean lode mining claim, described in the complaint, is not a downward course within the meaning of the words "downward course" and "course downward" as the same appear in section 2322 of the Revised Statutes of the United States.

4. The Court erred in holding and deciding that the question whether the termination or edge of the vein along the Osborn fault is a top or apex thereof should be determined without reference to the situation of the Senator Stewart Fraction claim, or the boundary lines thereof.

5. The said Court erred in holding and deciding that the plaintiff has no extralateral right to those sections of the vein beneath the surface of the Silver Casket, Saxon, Marion and Ace lode mining claims, and the triangular portion of the Lazy Jean lode mining claim, described in the complaint, within the vertical planes of the end lines of the Senator Stewart Fraction claim extended.

6. The said Court erred in holding and deciding that the plaintiff is not the owner of those sections

of the vein beneath the Silver Casket, Saxon, Marion and Ace lode mining claims, and the triangular portion of the Lazy Jean lode mining claim, described in the complaint, between the vertical [33] planes of the end lines of the Senator Stewart Fraction claim extended.

7. The said Court erred in holding and deciding that the plaintiff conveyed that section of the vein beneath the said triangular portion of the Lazy Jean claim by the deed to the Federal Mining and Smelting Company.

8. The said Court erred in rendering a decree dismissing the bill of complaint in said cause.

WHEREFORE, the plaintiff, the Stewart Mining Company, prays that for the errors aforesaid and other errors appearing in the said cause to its prejudice that the said decree may be reversed.

GUNN, RASCH & HALL,

CULLEN, LEE & MATTHEWS,

Solicitors for Plaintiff Stewart Mining Company.

Due service acknowledged this 17th day of March, 1914.

C. H. LINDLEY,

M. A. FOLSOM,

Attys. for Defts.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [34]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

BUNKER HILL AND SULLIVAN MINING AND
CONCENTRATING COMPANY, a Corpora-
tion,
Defendant.

Petition for Order Allowing Appeal.

Comes now the above-named plaintiff, the Stewart Mining Company, and conceiving itself to be aggrieved by the decree made, rendered and entered in the above-entitled cause, on the 31st day of January, 1914, wherein and whereby it was ordered, adjudged and decreed that the bill of complaint therein be dismissed, hereby petitions for the allowance of an appeal from said decree to the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the said plaintiff should give and furnish upon said appeal.

And your petitioner will forever pray, etc.

GUNN, RASCH & HALL

CULLEN, LEE & MATTHEWS,

Solicitors for Plaintiff Stewart Mining Company.

Due service acknowledged this 17th day of March,
1914.

M. A. FOLSOM,

C. H. LINDLEY,

Attys. for Defts.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [35]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

BUNKER HILL AND SULLIVAN MINING AND
CONCENTRATING COMPANY, a Corpora-
tion,
Defendant.

Order Allowing Appeal, etc.

The petition of the Stewart Mining Company, plaintiff in the above-entitled cause, for an order allowing an appeal from the decree rendered and entered in said cause, on the 31st day of January, 1914, together with assignments of error, having been filed herein:

IT IS ORDERED that an appeal be and the same is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered in said cause; and that the amount of bond upon said appeal be and the same is hereby fixed at the sum of \$500.00; and that a certified transcript of the records and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

Dated this 19th day of March, 1914.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [36]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

BUNKER HILL AND SULLIVAN MINING AND
CONCENTRATING COMPANY, a Corpora-
tion,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Stewart Mining Company, as principal,
and United States Fidelity & Guaranty Co. as surety,
are held and firmly bound unto Bunker Hill and
Sullivan Mining and Concentrating Company in the
full and just sum of \$500.00, to be paid to the said
Bunker Hill and Sullivan Mining and Concentrating
Company, its successors and assigns, for which pay-
ment well and truly to be made we bind ourselves
and our successors and assigns, jointly and severally,
firmly by these presents.

Dated this 19th day of March, 1914.

WHEREAS, The Stewart Mining Company, plain-
tiff in the above-entitled cause, has taken an appeal
to the Circuit Court of Appeals for the Ninth Cir-
cuit to reverse the decree rendered and entered in
said cause by the above-entitled court, dismissing
the complaint therein and for costs.

NOW, THEREFORE, the condition of this obligation is such [37] that if the said Stewart Mining Company shall prosecute said appeal to effect, and answer all damage and costs, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

STEWART MINING COMPANY.

By W. E. CULLEN,

Its Attorney.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

[Seal]

By R. L. WEBSTER,

Its Attorney in Fact.

The foregoing bond is approved this 19th day of March, 1914.

FRANK S. DIETRICH,

United States District Judge.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [38]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

BUNKER HILL AND SULLIVAN MINING AND
CONCENTRATING COMPANY, a Corpora-
tion,

Defendant.

Praecipe [for Transcript of Record on Appeal].

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the entire record in said cause, omitting therefrom the testimony and evidence, and transmit the same with your certificate to the Clerk of the United States Circuit Court of Appeals at San Francisco. You will also please transmit with the record the original citation in said cause.

In your certificate please recite and certify that the testimony and exhibits in said cause are the same as in cause No. 558 in which the Stewart Mining Company, is plaintiff, and Jonathan Bourne, Jr., and Lillian E. Bourne, are defendants, said two causes and cause No. 563, in which the Stewart Mining Company, is plaintiff, and the Sierra Nevada Mining Company, is defendant, having been consolidated as per stipulation, constituting a part of the record in each of said causes and that the said testimony and exhibits have been certified and transmitted to the clerk of the Circuit Court of Appeals at San Francisco pursuant to the orders made and entered in said cause No. 558, [39] in which Jonathan Bourne, Jr., and Lillian E. Bourne, are defendants, as aforesaid.

Dated this 19th day of March, 1914.

GUNN, RASCH & HALL,

CULLEN, LEE & MATTHEWS,

Solicitors for Appellant.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [40]

Citation [on Appeal (Original)].

UNITED STATES OF AMERICA,—ss.

To the President of the United States to Bunker Hill and Sullivan Mining and Concentrating Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the clerk's office of the United States District Court for the District of Idaho, at Boise City, Idaho, in that certain suit numbered 557, in which Stewart Mining Company, a corporation, is plaintiff and appellant, and you are defendant and respondent, to show cause, if any there be, why the decree rendered against said Stewart Mining Company, plaintiff and appellant, as in the said order allowing the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRANK S. DIETRICH, United States District Judge for the District of Idaho, this 19th day of March, 1914.

FRANK S. DIETRICH,
United States District Judge for the District of Idaho.

[Seal] Attest: A. L. RICHARDSON,
Clerk of the United States District Court for the District of Idaho.

Service of the foregoing citation admitted and re-

ceipt of copy acknowledged this 21st day of March, 1914.

CURTIS H. LINDLEY,
MYRON A. FOLSOM,

A. W.

Solicitors for Defendant and Respondent. [41]

[Endorsed]: Original. No. 557. In the District Court of the United States for the District of Idaho, Northern Division. Stewart Mining Company, a Corporation, Plaintiff, vs. Bunker Hill and Sullivan Mining and Concentrating Company, a Corporation, Defendant. Citation. Filed March 23, 1914. A. L. Richardson, Clerk. [42]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

BUNKER HILL AND SULLIVAN MINING
AND CONCENTRATING COMPANY, a
Corporation,

Defendant.

I, A. L. Richardson, Clerk of the above-entitled court, do hereby certify that the foregoing from page 1 to page 43, inclusive, is a complete and true transcript of the records and proceedings in the above-entitled cause, with the exception of the testimony and exhibits as appears from the papers and records in said cause on file in my office.

11

United States
Circuit Court of Appeals
For the Ninth Circuit.

STEWART MINING COMPANY, a corporation,
Appellant,

vs.

SIERRA NEVADA MINING COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

This is a suit to quiet title. The plaintiff and appellant alleges ownership and possession of the Senator Stewart Fraction Quartz Lode mining claim; that within said claim is a vein, the top or apex of which extends from the easterly end line of the claim in a westerly direction through said

claim for a distance of approximately 705 feet to and across the southerly side line of the claim; and that such vein has a downward course from the apex and descends into the earth southerly beneath the Sierra Nevada and Carbonate Quartz Lode mining claims, the property of the defendant and appellee. The appellant asserts an extralateral right to the section of said vein beneath the Sierra Nevada and Carbonate claims within planes drawn downward through the end lines of the Senator Stewart Fraction claim extended. (Record p. 1.) The boundaries and situation of the claims referred to are shown on the maps in evidence in the case.

The answer (Record p. 19) denies that any vein having its apex within the Stewart Fraction claim extends beneath the Sierra Nevada and Carbonate claims. The answer also alleges an exception in the patent to the Stewart Fraction claim of that part of the claim in conflict with the Quaker Quartz Lode mining claim. The area excepted is shown by the maps in evidence and it is admitted that the exception is not material to any issue in this case.

It was stipulated that the appellant is the owner and in possession of the Stewart Fraction claim and the defendant is the owner and in possession of the Sierra Nevada and Carbonate claims. It was further stipulated that United States patents have issued for all of said claims and that the boundaries and situation of the claims are correctly shown upon

the maps introduced in evidence. It was also stipulated that the vein in controversy passes beneath the Sierra Nevada and Carbonate claims. (Record pp. 26-30.)

The case was pursuant to stipulation, (Record p. 22) heard and decided by the lower court on the evidence in the case of the Stewart Mining Company vs. the Ontario Mining Company, et al., 132 Pac. 787, supplemented by an agreement as to certain facts. (Record p. 26.)

The defendant and appellee is not asserting any apex right to the section of the vein in controversy. It makes no claim to the apex of the vein, but denies the extralateral right of the appellant and relies upon the prima facie presumption of ownership of the mineral beneath the surface of the Sierra Nevada and Carbonate claims.

In view of the pleadings, stipulation and admitted facts, the only question is whether the appellant has the right of lateral pursuit of the vein beneath the Sierra Nevada and Carbonate claims.

The case was consolidated with the case of the Stewart Mining Company vs. Jonathan Bourne, Jr. and Lillian E. Bourne, his wife, "for the purpose of trial, appeal and other proceedings in said cause." (Record p. 23.) The court decided the case against appellant for the reasons stated in the opinion filed in the case of the Stewart Mining Company vs. Jonathan Bourne, Jr., et ux. (Record p. 34.)

The lower court found and decided that the easterly and westerly termination of the vein in the Stewart Fraction claim is not an apex within the meaning of the term as used in Section 2322 of the Revised Statutes of the United States, and for this reason the appellant was denied an extralateral right to the section of the vein beneath the Sierra Nevada and Carbonate claims. Because of this finding and decision the complaint was dismissed and the appeal is from the decree which was entered accordingly.

SPECIFICATIONS OF ERROR.

1. The lower court erred in finding and deciding that the easterly and westerly termination of the vein in the Stewart Fraction claim is not an apex.

2. The court erred in deciding that the appellant has no extralateral right to, and is not the owner of, the section of the vein beneath the Sierra Nevada and Carbonate claims.

* * * * *

As the extralateral right asserted by appellant is dependent upon the same facts and conditions which are made the basis of the extralateral right claimed in the case of the Stewart Mining Com-

pany vs. Jonathan Bourne, Jr., et ux, which is now before this court on appeal, and in view of the fact that the lower court denied the claim of appellant to an extralateral right in this case for the reasons stated in the opinion in the case against Jonathan Bourne and wife, we refer to the brief for appellant in that case for a discussion of the facts and of the law applicable to same.

Respectfully submitted,

C. S. THOMAS,
CULLEN, LEE & MATTHEWS,
and GUNN, RASCH & HALL,
Solicitors for Appellant.