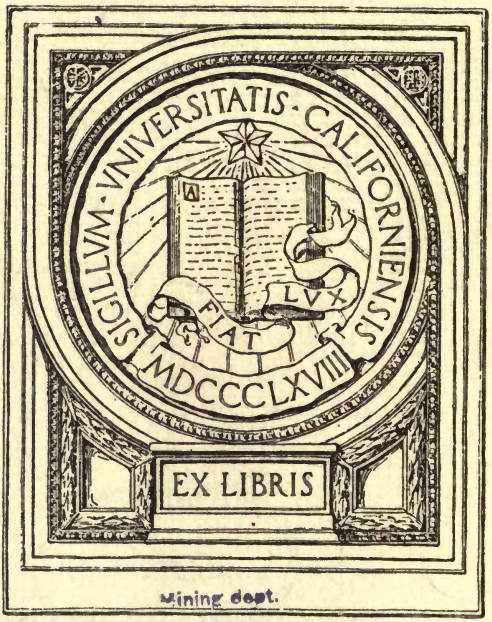

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HANDBOOK

ON

AMERICAN MINING LAW

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PREFACE.

THE author, who has lived in mining camps, has practiced law in the mining law states of Colorado and Utah, and has supplemented practical experience with several years of teaching mining law, hopes that this book will prove a help to practicing lawyers, as well as to law students. He acknowledges his indebtedness to the many meritorious works on the subject of American mining law, and in particular to the very serviceable "Morrison's Mining Rights" of Messrs. Morrison and De Soto, and the excellent two-volume treatise on Mines by Mr. Lindley. No book on American mining law yet written, however, meets the joint need of student and of practitioner which this Hornbook seeks to satisfy.

The title American Mining Law has been chosen because of its simplicity and because the law chiefly dealt with, while it affects only a comparatively small part of the United States and its possessions, is so national in its character as deservedly to be spoken of by all writers on the subject as American Mining Law.

In the notes the cases which for one reason or another are suggested as best for students to consult are printed in large type. As is true of other Hornbooks, an exhaustive citation of cases has not been attempted, but the endeavor has been to give a comprehensive, well proportioned, and up-to-date treatment of the subject.

Because, within a few months after a book on mining law is published, state or federal legislation or land department regulations may render obsolete various forms suggested in such a book, no attempt is made herein to offer forms for the practitioner. The last edition of Morrison's Mining Rights, a book which has rapidly succeeding revised editions, should be consulted for the latest and best forms. In the text of the present book only such forms are printed as elucidate particular points, while in one of the appendices, for the purpose of assisting students to understand the various steps in patent proceedings, certain of the forms for patent proceedings contained in the 13th edition of Morrison's Mining Rights are inserted by the generous permission of Messrs. Morrison and De Soto. Another of the appendices contains also forms of leases prescribed by the United States for the leasing of certain Indian lands.

In the appendices will be found the various federal statutes and departmental rules and regulations relating to mining. These include

the United States statutes and departmental regulations governing mineral lands in Alaska and in the Philippines, as well as those applicable to such lands in the mining law states. Except in the case of Texas, the statutes of which on mining are of general interest, because they constitute a system of laws independent of federal control or interference, state statutes on mining matters are not inserted in the appendices. Lack of space, if nothing else, would forbid such insertion; but, apart from that difficulty, it is believed that nothing of importance would be gained by the printing of such statutes. A basis for the comparison of the various important state statutory provisions on matters covered by the text is furnished at appropriate places in the text itself, and, for the rest, no mining law book can relieve the practicing lawyer from the necessity of consulting the mining law sections of the statute books of his own state.

The author wishes to express his thanks to one and all who have contributed information or suggestions for this book.

GEO. P. COSTIGAN, JR.

Lincoln, Neb., Sept. 1, 1908.

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HANDBOOK

ON

AMERICAN MINING LAW

CHAPTER I.

THE ORIGIN AND HISTORY OF AMERICAN MINING LAW.

DEFINITION OF AMERICAN MINING LAW.

1. American mining law consists of (1) federal legislation; (2) supplemental state legislation; and (3) local mining rules, regulations, and customs. All these, judicially expounded and applied, constitute the law applicable to that part of the public mineral domain of the United States which has been disposed of, and to that part which is to be disposed of, under the federal mining act of 1866 and the subsequent federal mining acts.

American mining law consists of mining customs and legislation interpreted by court decisions in the light of the history of mining in America. It is found primarily in congressional legislation and in United States Supreme Court decisions; but these are supplemented by the decisions of the lower federal courts and of the state courts, by such state enactments as are authorized by and are consistent with the acts of Congress, and by such district mining rules, regulations, and customs as are consistent both with the state laws and with the congressional legislation. American mining law is the law applicable to

what remains of the public mineral domain of the United States and to those parcels of mineral lands which have been disposed of under the federal mining acts to individuals, but to which for certain purposes, such as to govern extralateral rights, the mining laws still apply. American mining law relates, therefore, to those parts of what are now or have been the public mineral lands of the United States, to which the federal mining statutes have applied, and to which, even after patent and for some purposes, they still apply.

THE ORIGIN OF AMERICAN MINING LAW.

2. American mining law began with the discovery of gold in California, and its first phase was that of rules, regulations, and customs adopted and enforced by the miners in the various mining districts created by them. These rules, regulations, and customs governed the location and retention of mining claims. They originated in necessity, have received federal as well as state approval, and have been called the American common law of mining.

It was through the discovery of gold in California in 1848 that American mining law came into existence.[1] The discovery of gold on the public land of the United States in the then comparatively inaccessible region of California, and the consequent rapid influx there of thousands of miners and adventurers, created in an astonishingly short space of time unique conditions, which demanded and received a legal solution just as unusual. The inrushing treasure seekers found a land belonging to the United States and under military government, and they proceeded to enter in and possess it, although there was no precedent for such action, and although the English common-law theory of sovereign mining rights was distinctly against it. On February 12, 1848, the Mexican laws relating to mining were declared by Colonel Mason, the military governor of California, to be of no force and effect,[2] and the population of the gold fields thereupon proceeded to

[1] "Commodore Sloat raised the American flag at Monterey July 7, 1846. Marshall discovered gold at Coloma [Cal.] in January, 1848. The treaty of Guadalupe-Hidalgo was concluded February 2, exchanged May 30, and proclaimed July 4, 1848. This treaty added to the national domain an area of more than half a million square miles, embracing the states of California, Nevada, Utah, the territories of Arizona (except the Gadsden Purchase of 1853) and New Mexico west of the Rio Grande and north of the Gadsden Purchase, and the state of Colorado west of the Rocky Mountains, and the southwestern part of Wyoming." 1 Lindley on Mines (2d Ed.) § 40.

[2] His proclamation read: "From and after this date the Mexican laws and customs now prevailing in California relative to the denouncement of mines are hereby abolished." Yale on Mining Claims and Water Rights, 17. Compare Castillero v. U. S., 2 Black (U. S.) 18, 17 L. Ed. 360.

evolve mining laws of their own. The military governor did not interfere, for, as he said, while the entire gold fields, with the exception of a few Mexican land grants, belonged to the United States, and he was anxious to secure rentals and fees from those who took the gold therefrom, still, "upon considering the large extent of the country, the character of the people engaged, and the small, scattered force at my command, I am resolved not to interfere, but to permit all to work freely, unless broils and crimes should call for interference." [3]

Left by the military governor to "work freely" in a country where general law was undefined and largely unenforceable, the mining population, under the leadership, seemingly, of the Cornish miners, adopted a system of miners' regulations, enacted at meetings of the miners of self-created mining districts, and also evolved customs which the miners of the respective districts enforced, even though those customs were not embodied in the regulations adopted at the miners' meetings. The regulations voted at the early miners' meetings applied to many things beyond the legal jurisdiction of such assemblages. For instance, they imposed banishment for Asiatics, whipping and banishment for practicing lawyers, and death for horse or mule stealing and for murder. But so far as they prescribed rules about mining matters they were, in general, legally valid.[4] Trespassers upon the public domain,

[3] Report of August 17, 1848, contained in Donaldson's Public Domain, 312–317, at page 314.

[4] A good example of the early rules is found in those of Jacksonville mining camp, in Tuolumne county, Cal. They are found in Donaldson's Public Domain, 317, 318, and are as follows:

"Article I. The officers of this district shall consist of an alcalde and sheriff, to be elected in the usual manner by the people, and continue in office at the pleasure of the electors.

"Art. II. In case of the absence or disability of the sheriff, the alcalde shall have power to appoint a deputy.

"Art. III. Civil causes may be tried by the alcalde, if the parties desire it; otherwise, they shall be tried by jury.

"Art. IV. All criminal cases shall be tried by a jury of eight American citizens, unless the accused shall desire a jury of twelve persons, who shall be regularly summoned by the sheriff and sworn by the alcalde, and shall try the case according to the evidence.

"Art. V. In the administration of law, both civil and criminal, the rule of practice shall conform as near as possible to that of the United States; but the forms and customs of no particular state shall be required or adopted.

"Art. VI. Each individual locating a lot for the purpose of mining shall be entitled to twelve feet of ground in width, running back to the hill or mountain and forward to the center of the river or creek, or across a gulch or ravine (except in cases hereinafter provided for), lots commencing in all cases at low-water mark and running at right angles with the stream where they are located.

"Art. VII. In cases where lots are located according to Art. VI and the parties holding them are prevented by the water from working the same, they

and far from the seat of government in actual distance and in the means of communication, the swarming thousands, suddenly engaged in mining in California, had to create for themselves laws adapted to

may be represented by a pick, shovel, or bar until in a condition to be worked; but, should the tool or tools aforesaid be stolen or removed, it shall not dispossess those who located it, provided he or they can prove that they were left as required; and said location shall not remain unworked longer than one week, if in condition to be worked; otherwise, it shall be considered as abandoned by those who located it (except in cases of sickness).

"Art. VIII. No man or party of men shall be permitted to hold two locations, in a condition to be worked at the same time.

"Art. IX. No party shall be permitted to throw dirt, stones, or other obstructions upon located ground adjoining them.

"Art. X. Should a company of men desire to turn the course of a river or stream for the purpose of mining, they may do so (provided it does not interfere with those working below them), and hold and work all the ground so drained; but lots located within said ground shall be permitted to be worked by their owners, so far as they could have been worked without the turning of the river or stream; and this shall not be construed to affect the rights and privileges guaranteed or prevent redress by suit at law.

"Art. XI. No person coming direct from a foreign country shall be permitted to locate or work any lot within the jurisdiction of this encampment.

"Art. XII. Any person who shall steal a mule, or other animal of draught or burden, or shall enter a tent or dwelling and steal therefrom gold dust, money, provisions, goods, or other articles amounting in value to $100 or over, shall, on conviction thereof, be considered guilty of felony, and suffer death by hanging. Any aider or abettor therein shall be punished in like manner.

"Art. XIII. Should any person willfully, maliciously, and premeditatedly take the life of another, on conviction of the murder, he shall suffer death by hanging.

"Art. XIV. Any person convicted of stealing tools, clothing, or other articles, of less value than $100, shall be punished and disgraced by having his head and eyebrows close-shaved and shall leave the encampment within 24 hours.

"Art. XV. The fee of the alcalde for issuing a writ or search warrant, taking an attestation, giving a certificate or any other instrument of writing shall be five dollars; for each witness he may swear, two dollars; and one ounce of gold dust for each and every case tried before him.

"The fee of the sheriff in each case shall be one ounce of gold dust and a like sum for each succeeding day employed in the same case. The fee of the jury shall be half an ounce in each case.

"A witness shall be entitled to four dollars in each case.

"Art. XVI. Whenever a criminal convict is unable to pay the costs of the case, the alcalde, sheriff, jurors, and witnesses shall render their services free of remuneration.

"Art. XVII. In case of the death of a resident of this encampment the alcalde shall take charge of his effects and dispose of them for the benefit of his relatives or friends, unless the deceased shall otherwise desire it.

"Art. XVIII. All former acts and laws are hereby repealed and made null and void, except where they conflict with claims guaranteed under said laws.

"Abner Pitts, Jr., Secretary.

"Jacksonville, January 20, 1850."

the extraordinary conditions which confronted them, and so well did they accomplish their task as to mining that the rules and customs adopted by the miners, first in California and later on in other territories and states, received the approval of the courts, of the local Legislatures,[5] and, finally, of Congress.

Of these miners' rules and regulations, and the relation which the act of Congress of 1866 bore to them, Mr. Justice Field, in a passage often quoted, said: "The discovery of gold in California was followed, as is well known, by an immense immigration into the state, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open by law to occupation and settlement. Little was known of them, further than that they were situated in the Sierra Nevada Mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and cañons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, and their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery followed by appropriation, as the foundation of the possessor's title, and development by working as the condition

[5] The state of California, admitted to the Union in 1850, recognized miners' rules in 1851 by an act which provided that: "In actions respecting mining claims, proof shall be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claims; and such customs, usages or regulations, when not in conflict with the Constitution and laws of this state, shall govern the decision of the action." St. 1851, p. 149, c. 5. Prior to any legislation by Congress, this act was held to make the miners' rules part of the general law.

"These usages and customs were the fruit of the times, and demanded by the necessities of communities who, though living under the common law, could find therein no clear and well-defined rules for their guidance applicable to the new conditions by which they were surrounded, but were forced to depend upon remote analogies of doubtful application and unsatisfactory results. Having received the sanction of the Legislature, they have become as much a part of the law of the land as the common law itself, which was not adopted in a more solemn form." MORTON v. SOLOMBO COPPER MIN. CO., 26 Cal. 527, 532, 533.

of its retention; and they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the lawmakers, as respects mining, upon the public lands in the state. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced." [6]

And again, in St. Louis Smelting & Refining Co. v. Kemp,[7] Mr. Justice Field said: "Previously to the act of July 9, 1870, Congress imposed no limitation to the area which might be included in the location of a placer claim. This, as well as every other thing relating to the acquisition and continued possession of a mining claim, was determined by rules and regulations established by miners themselves. Soon after the discovery of gold in California, as is well known, there was an immense immigration of gold seekers into that territory. They spread over the mineral regions, and probed the earth in all directions in pursuit of the precious metals. Wherever they went they framed rules prescribing the conditions upon which mining ground might be taken up—in other words, mining claims be located and their continued possession secured. Those rules were so framed as to give to all immigrants absolute equality of right and privilege. The extent of ground which each might locate—that is, appropriate to himself—was limited, so that all might, in the homely and expressive language of the day, have an equal chance in the struggle for the wealth there, buried in the earth. * * * The rules and regulations originally established in California have in their general features been adopted throughout all the mining regions of the United States. They were so wisely framed, and were so just and fair in their operation, that they have not to any great extent been interfered with by legislation, either

[6] JENNISON v. KIRK, 98 U. S. 453, 457–458, 25 L. Ed. 240. Of this passage Mr. Lindley says: "This exposition of the law governing mining rights, as it existed in the early history of the mining industry in the West, leaves nothing to be added by the author. The decision stands as a forensic classic. Judge Field was a part of the history of which he wrote. He served as an alcalde during the chaotic period antedating the admission of California as a state. He served his state in its first legislatures, and was the author of many of its early laws. As Chief Justice of its Supreme Court, his was the task to solve the great and overshadowing questions which arose over land titles in a new state coming into the Union under peculiar and novel conditions, and he carried to the Supreme bench of the United States, not only the practical knowledge acquired by personal contact with the mining communities, but a trained judicial mind." I Lindley on Mines (2d Ed.) § 44.

[7] 104 U. S. 636, 649, 650, 26 L. Ed. 875.

state or national. In the first mining statute, passed July 9, 1866, they received the recognition and sanction of Congress, as they had previously the legislative and judicial approval of the states and territories in which mines of gold and silver were found."

The fundamental thing to bear in mind about these early mining rules and customs, which related to district boundaries, the size and method of location of claims, the keeping of records by a district recorder, the amount of work required to keep a location alive, the way in which claims could be forfeited, when they should be deemed abandoned,[8] etc., is that they are the foundation stones upon which our American mining law has been built. They have been called the American common law of mining.[9]

With reference to the origin of these rules, the following words of a prominent mining lawyer are of interest: "Did these miners initiate or create their regulations something after the fashion ascribed to the makers of our own federal Constitution by Mr. Gladstone? Or did they but consciously adopt and here put in force known mining regulations of other countries, of which they were informed by tradition or reading, or by the knowledge of the inhabitants of these different lands who congregated in this new world? This is a subject of dispute. Those who adopt the views of Rousseau find here an illustration of the civil compact; others, the reproduction of laws derived intentionally from older states; others, the application of the organizing faculty of the American people to the circumstances of their new situation. Upon the one hand, it is asserted most vigorously, by those familiar through participation in the work, 'that the large emigration of young men who rushed to this modern Ophir found no laws governing the possession and occupation of mines but the common law of right, which Americans alone are educated to administer; that they were forced by the very necessity of the case to make laws for themselves.' Again, it is asserted that the mining code, as far as it can be traced, has sprung from the customs and usages of the miners, with rare applications of common-law principles by the courts to vary them; or that the origin of the rules and customs of the miners is immediately recognized by those familiar with Mexican ordinances and continental mining codes, and with the regulations of the Stannary convocations among the tin bounders of Devon and Cornwall in England, and the High Peak regulations of the lead mines in the county of Derby; finally, that all

[8] For early district regulations, see the Report of J. Ross Browne on Mineral Resources in 1867, being H. R. Ex. Doc. No. 29, 39th Cong., 2d Sess.; Yale on Mining Claims and Water Rights, pp. 73–84. See, also, address by Mr. C. J. Hughes, Jr., of Denver, in 24 Am. Bar Ass'n Rep. (1901) p. 320 ff.

[9] King v. Edwards, 1 Mont. 235.

these regulations are founded in nature, based upon equitable principles, comprehensive and simple, have a common origin, and are matured by practice. Halleck expressed the opinion that in the main the miners adopted, as best suited to their wants, the principles of the mining laws of Mexico and Spain, by which the right of property in mines is made to depend upon discovery and development, and that discovery is made the source of title, development or working the condition of its continuance, and that these two principles constitute the basis of all their local laws and regulations. The merit of adoption, the power of perceiving their appropriateness, and willingness to enforce them, whatever the source of suggestion or origin, belongs to the men who made these laws. At first they constituted all the law there was upon the subject, and we have here a modern instance of an original congregation of the people creating the law required by their necessities, upon the assumption that the right to legislate was inherent in the people themselves. They proceeded upon the theory that the public domain belonged to the people; that the mineral therein was the subject of free private acquisition, as a reward for discovery and occupation; and thus defied in effect the settled traditions and laws of other countries, and the right of the United States as a government to the mineral contained in its lands. The forms adopted, the methods of operation, the ideas of right, the machinery of justice selected by these miners in their primitive, inartificial, but direct and expressive, resolutions, present to the student of jurisprudence and of its originals instructive objects of investigation, since they contain the history of the formation and growth of a living system of law." [10]

However the rules originated, it must be said that the miners' meetings at which they were adopted played a part in the education and civilization of the mining frontier comparable only to the influence of the New England town meeting on New England institutions.

THE FEDERAL MINING STATUTES.

3. Though the state of California early laid claim to the gold and silver in the public domain within the state, the California Supreme Court in 1861 abandoned the doctrine and opened the way for uncontested federal legislation. Accordingly in 1866 Congress passed the first federal mining act. That act authorized the location of mining claims and provided for the patenting of lode claims. The failure to provide for the patenting of placer claims was corrected by the placer act of 1870, and the acts of 1866 and 1870 were merged in and im-

[10] Mr. Charles J. Hughes, Jr., of Denver, Colo., in 24 Am. Bar Ass'n Rep. (1901) pp. 325–327.

proved by the act of 1872. The act of 1872, as amended, is embodied in the provisions of the Revised Statutes of the United States on mining and the amendments thereto.

The Question of State Sovereignty.

Very early in the history of California the question of whether the state of California or the federal government owned the gold and silver in the public domain arose. It was conceded on all sides that under the government of Spain the right to the minerals was in the crown, and that on the separation of Mexico that right passed to and vested in the Mexican nation. It was also conceded by everybody that by the cession of California to the United States the title to the minerals passed from the Mexican nation to the United States. But it was contended "that the minerals of gold and silver which passed by the cession were held by the United States in trust for the future state, and that upon the admission of California the ownership of them vested in her." [11] The last contention was upheld by the California Supreme Court in 1853.[12] That court said: "It is hardly necessary at this period of our history to make an argument to prove that the several states of the Union, in virtue of their respective sovereignties, are entitled to the jura regalia which pertained to the king at common law" [13]—and asserted further: "In reference to the ownership of the public lands, the United States only occupied the position of any private proprietor, with the exception of an express exemption from state taxation. The mines of gold and silver on the public lands are as much the property of this state, by virtue of her sovereignty, as are similar mines in the lands of private citizens. She has, therefore, solely the right to authorize them to be worked, to pass laws for their regulation, to license miners, and to affix such terms and conditions as she may deem proper to the freedom of their use. In her legislation upon this subject she has established the policy of permitting all who desire it to work her mines of gold and silver, with or without conditions; and she has wisely provided that their conflicting claims shall be adjudicated by the rules and customs which may be established by bodies of them working in the same vicinity." [14]

Perhaps it was this assertion of state rights, as much as anything, that prevented early mining legislation by Congress, for it was not until 1861, at the beginning of the Civil War, in the case of Moore v.

[11] MOORE v. SMAW, 17 Cal. 199, 217, 79 Am. Dec. 123.
[12] Hicks v. Bell, 3 Cal. 219. See, also, Stoakes v. Barrett, 5 Cal. 36.
[13] Hicks v. Bell, 3 Cal. 219, 226.
[14] Hicks v. Bell, 3 Cal. 219, 227.

Smaw,[15] that the California Supreme Court finally abandoned this claim of sovereignty. The opinion in that case by Mr. Justice Field is so important in the history of American mining law that a long quotation from it is desirable, particularly as that quotation will constitute our only reference to the doctrine of the common law as to mines. In that case of Moore v. Smaw the California court said:

"It is undoubtedly true that the United States held certain rights of sovereignty over the territory which is now embraced within the limits of California only in trust for the future state, and that such rights at once vested in the new state upon her admission into the Union. But the ownership of the precious metals found in public or private lands was not one of those rights. Such ownership stands in no different relation to the sovereignty of a state than that of any other property which is the subject of barter and sale. Sovereignty is a term used to express the supreme political authority of an independent state or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty. Thus the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed the 'right of eminent domain,' are all rights of sovereignty, for they are rights essential to the existence of supreme political authority. In this country this authority is vested in the people, and is exercised through the joint action of their federal and state governments. To the federal government is delegated the exercise of certain rights or powers of sovereignty, and, with respect to sovereignty, 'rights' and 'powers' are synonymous terms; and the exercise of all other rights of sovereignty, except as expressly prohibited, is reserved to the people of the respective states, or vested by them in their local governments. When we say, therefore, that a state of the Union is sovereign, we only mean that she possesses supreme political authority, except as to those matters over which such authority is delegated to the federal government or prohibited to the states; in other words, that she possesses all the rights and powers essential to the existence of an independent political organization, except as they are withdrawn by the provisions of the Constitution of the United States. To the existence of this political authority of the state—this qualified sovereignty, or to any part of it—the ownership of the minerals of gold and silver found within her limits is in no way essential. The minerals do not differ from the great mass of property, the ownership of which may be in the United States or in individuals, without affecting in any respect the political jurisdiction of the state. They

[15] 17 Cal. 199, 79 Am. Dec. 123. See the earlier cases of Merced Mining Co. v. Fremont, 7 Cal. 317, 68 Am. Dec. 262, and Boggs v. Merced Min. Co., 14 Cal. 279

may be acquired by the state, as any other property may be; but when thus acquired she will hold them in the same manner that individual proprietors hold their property, and by the same right—by the right of ownership, and not by any right of sovereignty.

"In Hicks v. Bell the court states correctly that according to the common law of England mines of gold and silver were the exclusive property of the crown, and did not pass in a grant of the king under the general designation of lands or mines; but it assumes that this right of the crown—this regalian right—vested in the state. 'It is hardly necessary,' in the language of the opinion, 'at this period of our history, to make an argument to prove that the several states of the Union, in virtue of their respective sovereignties, are entitled to the jura regalia which pertained to the king at common law.' It is in this assumption that the error of the decision consists. Under the general designation of 'jura regalia' are comprehended, not only those rights which pertain to the political character and authority of the king, but also those rights which are incidental to his regal dignity, and may be severed at his pleasure from the crown and vested in his subjects. It is only to certain rights of the first class that the states, by virtue of their respective sovereignties, are entitled. It is to the second class that the right to the mines of gold and silver belongs.

"In the great case of The Queen v. The Earl of Northumberland, 1 Plowden, 310, which was argued before the Barons of the Exchequer and all the Justices of England, it was held by their unanimous judgment 'that by the law all mines of gold and silver within the realm, whether they be in the lands of the queen or of subjects, belong to the queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore,' and also 'that a mine royal, either of base metal containing gold or silver, or of pure gold and silver only, may, by the grant of the king, be severed from the crown, and be granted to another, for it is not an incident inseparable to the crown, but may be severed from it by apt and precise words.' This case was decided in 1568 during the reign of Queen Elizabeth, and continues unto this day an authoritative exposition of the doctrines of the common law. It is conclusive to the point that the right to the mines was not regarded by that law as an incident of sovereignty, but was regarded as a personal prerogative of the king, which could be alienated at his pleasure.

"No reasons in support of the prerogative are stated in the resolution of the judges, and those advanced in argument by the queen's counsel would be without force at the present time. Onslow, the queen's solicitor, says Plowden 'alleged three reasons why the king shall have mines and ores of gold and silver within the realm, in what-

soever land they are found. The first was in respect to the excellency of the thing, for of all things which the soil within this realm produces or yields gold and silver is the most excellent, and of all persons in the realm the king is, in the eye of the law, most excellent; and the common law, which is founded upon reason, appropriates everything to the person whom it best suits, * * * and, because gold and silver are the most excellent things which the soil contains, the law has appointed them (as in reason it ought) to the person who is most excellent, and that is the king. * * * The second reason was in respect to the necessity of the thing; for * * * the office of the king, to which the law has appointed him, is to preserve his subjects; and their preservation consists in two things, viz., in the army, to defend them against hostilities, and in good laws. And an army cannot be had and maintained without treasure, for which reason some authors, in their books, call treasure the sinews of war; and therefore, inasmuch as God has created mines within this realm as a natural provision of treasure for the defense of the realm, it is reasonable that he who has the government and care of the people, whom he cannot defend without treasure, should have the treasure wherewith to defend them. * * * The third reason was in respect of its convenience to the subjects in the way of mutual commerce and traffic; for the subjects of the realm must, of necessity, have intercourse or dealing with one another, for no individual is furnished with all necessary commodities, but one has need of the things which another has, and they cannot sell or buy together without coin.' * * *

"It would be a waste of time to show that none of the reasons thus advanced in support of the right of the crown to the mines can avail to sustain any claim of the state to them. The state takes no property by reason of 'the excellency of the thing,' and taxation furnishes all the requisite means for the expenses of government. The convenience of citizens in commercial transactions is undoubtedly promoted by a supply of coin, and the right of coinage appertains to sovereignty. But the exercise of this right does not require the ownership of the precious metals by the state, or by the federal government, where this right is lodged under our system, as the experience of every day demonstrates. The right of the crown, whatever may be the reasons assigned for its maintenance, had in truth its origin in an arbitrary exercise of power by the king, which was at the time justified on the ground that the mines were required as a source of revenue. * * *

"It follows, from the views we have thus expressed, that the first position advanced by the defendants cannot be sustained; that the gold and silver which passed by the cession from Mexico were not held by the United States in trust for the future state; that the ownership of them

is not an incident of any right of sovereignty; that the minerals were held by the United States in the same manner as they hold any other public property which they acquired from Mexico; and that their ownership over them was not lost, or in any respect impaired, by the admission of California as a state." [16]

The final conclusion of the California court in this matter has ever since been acquiesced in, where the question has been between the United States as a landed proprietor and the state in which the United States land is situated.[17] It must not be supposed, from the foregoing, however, that New York, for instance, is in error in insisting that it owns the gold and silver within its borders. While Moore v. Smaw is law as to United States domain within a state, the New York doctrine would seem to be perfectly sound for New York and other states where the United States never has owned any public lands. The case of Shoemaker v. United States[18] bears this out. In that case, which adopted the opinion of the lower court on the point, it was decided that by the grant of Charles I to Lord Baltimore all veins, mines, and quarries of gold, silver, gems, and precious stones in Maryland passed to the grantee in fee, he yielding to the king the fifth part of all gold and silver ore which should happen from time to time to be found there; that after the Revolution the confiscation act of 1780 passed by Maryland ended the proprietary's title and vested it in the state of Maryland, which had by the Revolution become entitled also to the king's one-fifth; and that the act of cession of 1791, conveying the District of Columbia to the United States, passed the title to gold and silver mines in the District of Columbia to the United States. This decision certainly favors the New York theory for the thirteen original states,[19] but the doctrine of Moore v. Smaw is the one that prevails where what we call the American mining law exists.

Though Moore v. Smaw was decided in 1861, it was not until the act of July 26, 1866, that Congress attempted to regulate mining, and actually legislated on the subject. The power of Congress was, of course, ample.[20] The statute of July 26, 1866,[21] was the first general

[16] MOORE v. SMAW, 17 Cal. 199, 218–222, 79 Am Dec. 123. For the situation in England to-day, see St. 1 W. & M. c. 30, and St. 5 W. & M. c. 6, and the case of Attorney General v. Morgan, [1891] 1 Ch. 432.

[17] Doran v. Central Pac. R. Co., 24 Cal. 245.

[18] 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170.

[19] See, also, Fremont v. U. S., 58 U. S. 542, 15 L. Ed. 241.

[20] "With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property,

[21] 14 Stat. 251, c. 262.

statute providing for the conveyance of mines or minerals by the United States, though curiously enough its title, "An act granting the right of way to ditch and canal owners over the public lands and for other purposes," gives no indication of that fact.[22] The act of February 27, 1865, had previously recognized miners' rights by providing "that no pending action between individuals in any of the courts for the recovery of a mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land on which such mines lie is in the United States, but each case shall be judged by the law of possession."[23] The act of 1866 was, however, the first general federal mining statute.

The Act of 1866.

The essential features of the act of 1866 were: (1) The declaration "that the mineral lands of the public domain, both surveyed und unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."[24] (2) A provision giving extralateral rights. (3) A provision for the patenting of lode claims, with a provision for adverse suits. (4) A provision recognizing and protecting water rights vested by priority of possession.

In this act, incomplete and faulty in many respects though it was, Congress recognized its moral obligations. As the United States Supreme Court said before its passage: "We know, also, that the territorial Legislature [of Nevada] has recognized by statute the validity and binding force of the rules, regulations, and customs of the mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation, not only without interference by

or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise; and, to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union that such interference with the primary disposal of the soil of the United States shall never be made." Gibson v. Chouteau, 13 Wall. (U. S.) 92, 99, 20 L. Ed. 534; Shannon v. U. S. (C. C. A.) 160 Fed. 870.

[22] In Yale on Mining Claims and Water Rights, 12, the explanation of the act's title is made. The mining bill was tacked onto a bill in regard to ditches in order to expedite the mining bill's passage.

[23] 13 Stat. 441, c. 64, § 9, now Rev. St. U. S. § 910 (U. S. Comp. St. 1901, p. 679), given in appendix.

[24] 14 Stat. 251, c. 262.

the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." [25]

By the act of 1866, enacted in recognition of these moral obligations of the United States, Congress "passed a law by which title to mineral lands might be acquired from the government at nominal prices, and by which the idea of a royalty in the product of the mines was forever relinquished." [26] As Mr. Lindley so well says: "What had theretofore been technically a trespass became thenceforward a licensed privilege, untrammeled by governmental surveillance or the exaction of burdensome conditions. Such conditions as were imposed were no more onerous than those which the miners had imposed upon themselves by their local systems. That such a declaration of governmental policy stimulated and encouraged the development of the mining industry in the West is a matter of public history." [27]

One astonishing defect of the act of 1866 was the failure to provide for the patenting of placer claims. The defect was due, probably, to the diminishing importance of placer mining in California and to the widespread feeling that lode mining, which had extended to several states and territories and caused important litigation, was in especial need of legislation.[28] That Senator Stewart of Nevada was one of the authors of the act [29] and that in Nevada the needs of lode mining were all-absorbing were additional reasons. Whatever the reason, it was not until the placer law of 1870 that placer lands could be patented.

But the act of 1866 exhibited other defects, the natural outcome of the mining law evolution. When the miners rushed into California on the discovery of gold, the bar in placer mining, of course, and the discovery lode, as a consequence, in lode mining, became the all-important things. The miners' rules and regulations, originated in California, and copied elsewhere in the mining region, provided that, within certain defined limits, a discovery vein, with all its dips, angles, and variations, should belong to the locator, but that, in general, no other vein or ore should. Take, for instance, the following articles from the

[25] SPARROW v. STRONG, 3 Wall. 97, 104, 18 L. Ed. 49. See Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528; Gold Hill Quartz Min. Co. v. Ish, 5 Or. 104. But see Boggs v. Merced Min. Co., 14 Cal. 279.

[26] IVANHOE MINING CO. v. CONSOLIDATED MIN. CO., 102 U. S. 167, 173, 26 L. Ed. 126.

[27] 1 Lindley on Mines (2d Ed.) § 55. See Wolfley v. Lebanon Min. Co., 4 Colo. 112; Robertson v. Smith, 1 Mont. 410.

[28] See 1 Lindley on Mines (2d Ed.) § 57.

[29] JENNISON v. KIRK, 98 U. S. 453, 459, 25 L. Ed. 240.

Regulations of Reese River District, Nevada, which, because adopted in Senator Stewart's own state, may well have influenced the act of 1866:

"Sec. 6. Each claimant shall be entitled to hold by location two hundred feet on any lead in the district, with all the dips, spurs, and angles, offshoots, outcrops, depths, widths, variations, and all the mineral and other valuables therein contained; the discoverer of and locator of a new lead being entitled to one claim extra for discovery.

"Sec. 7. The locator of any lead, lode, or ledge in the district shall be entitled to hold on each side of the lead, lode, or ledge located by him or them one hundred feet; but this shall not be construed to mean any distinct or parallel ledge within the two hundred feet other than the one originally located." [30]

Such mining regulations were responsible, no doubt, for the provision of section 3 of the act of 1866 that the plat, survey, or description filed on an application for patent "shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued." [31] The lode was the principal thing and the surface an incident under the act of 1866,[32] because it had been so under the miners' rules.

In speaking of Flagstaff Silver Mining Co. v. Tarbet,[33] and other decisions involving the act of 1866, Mr. Justice Brewer says: "These decisions show that, while the express purpose of the statute was to grant the vein for so many feet along its course, yet such grant could only be made effective by a surface location covering the course to such extent." [34] But, while a reasonable amount of surface for the convenient working of the lode was a necessary incident to the lode, other veins within that surface were not necessary, and hence not incident. As to surface ground the act of 1866 merely left the amount to the discretion of the Land Department. "Obviously," says Mr. Justice Brewer, "the statute contemplated the patenting of a certain number of feet of the particular vein claimed by the locator, no matter how irregular its course, [but it?] made no provision as to the surface area or the form of the surface location, leaving the Land Department in each particular case to grant so much of the surface as was 'fixed by local rules,'

[30] Mineral Resources, p. 247.

[31] 14 Stat. 251, c. 262, § 3.

[32] CALHOUN GOLD MIN. CO. v. AJAX GOLD MIN. CO., 27 Colo. 1, 59 Pac. 607, 612, 50 L. R. A. 209, 83 Am. St. Rep. 17; Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U. S. 55, 63, 18 Sup. Ct. 895, 43 L. Ed. 72.

[33] 98 U. S. 463, 25 L. Ed. 253.

[34] Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U. S. 55, 65, 18 Sup. Ct. 895, 43 L. Ed. 72.

or was, in the absence of such rules, in its judgment necessary for the convenient working of the mine. The party to whom the vein was thus patented was permitted to follow it on its dip to any extent, although thereby passing underneath lands to which the owner of the vein had no title. As might be expected, the patents issued under this statute described surface areas very different and sometimes irregular in form. Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom.[35] This strip might be straight, or in a curved or irregular line, following, as was supposed, the course of the vein. Sometimes the surface claimed and patented was a tract of considerable size, so claimed with the view of including the apex of the vein, in whatever direction subsequent explorations might show it to run. And, again where there were local rules giving to the discoverer of a mine possessory rights in a certain area of surface, the patent followed those rules and conveyed a similar area. Even under this statute, although its express purpose was primarily to grant the single vein, yet the rights of the patentee beneath the surface were limited and controlled by his rights upon the surface. If, in fact, as shown by subsequent explorations, the vein on its course or strike departed from the boundary lines of the surface location, the point of departure was the limit of right. In other words, he was not entitled to the claimed and patented number of feet of the vein, irrespective of the question whether the vein in its course departed from the lines of the surface location." [36]

In other words, while before patent the owner of a lode could follow it in whatever direction its strike might go, so long as he kept within the length of strike allowed him by virtue of his location, after patent, even though the surface was an incident of the lode, he could not have more of the strike of the lode than was included in his patent.[37] "One who discovers and locates a lode mining claim under the act of 1866 thereby renounces and abandons all rights and privileges to follow his lode on its course beyond the exterior lines of his patented claim, when he locates it upon the surface of the ground, enters it, and accepts a patent for it under the law." [38]

[35] For curious shapes of claims under the act of 1866, see 1 Lindley on Mines (2d. Ed.) § 59.

[36] Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U. S. 55, 63, 64, 18 Sup. Ct. 895, 898, 43 L. Ed. 72.

[37] Flagstaff Silver Mining Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253.

[38] Larned v. Jenkins, 113 Fed. 634, 636, 51 C. C. A. 344, citing New Dunderberg Mining Co. v. Old, 79 Fed. 598, 606, 25 C. C. A. 116; Wolfley v. Lebanon

Despite the issuance under the act of 1866 of a patent covering a definite surface, a subsequent claimant, who first showed that two lodes were covered, could doubtless locate the extra vein. As the Idaho court said, where the question was between a locator before patent and one seeking to get an extra vein: "It is true that the law allows him [the locator] to hold only one lode by this location; but the fact that two ledges exist within these bounds must first be established before the subsequent claimant has any lawful right to pass into them. If by going outside of these boundaries, and tracing it into them, he shows that another and distinct lode exists, then he may pass boundaries that would otherwise be sacred to the first locator. But until he does so he has no right to go upon the ground which the law has already given to his neighbor." [39] Indeed, the situation was clearly analogous to the case of known lodes in placers under the act of 1872. In both cases the patent states expressly the reservation which the law makes.[40]

But, apart from the question of the extraordinary shape given to claims under the act of 1866, the question of the extent of the strike of the vein located, and the question of several lodes included in the surface boundaries, there were other difficulties under the act, such as the determination of extralateral rights. These we shall have occasion to advert to later.

The Placer Act of 1870.

The act of 1866 was amended by the act of July 9, 1870,[41] which provided for the patenting of placers. This act of 1870 was the first act for the patenting of placers, and therein lies its importance. The general act of May 10, 1872, which is substantially in force today, retained practically all of the provisions of this placer act of 1870.

The Act of 1872.

The act of May 10, 1872,[42] was drawn on a different theory from the act of 1866 with reference to lode claims. A fundamental difference from the earlier act is that under the act of 1872 a miner locates

Min. Co., 4 Colo. 112, 116; Lebanon Min. Co. v. Rogers, 8 Colo. 34, 38, 5 Pac. 661.

[39] Atkins v. Hendree, 1 Idaho, 95, 99. Compare Eureka Cases, 4 Sawy. (U. S.) 302, 323, Fed. Cas. No. 4,548.

[40] "In all patents issued under the act [of 1866] a recital was inserted restricting the grant to one vein, or lode described therein, and providing that any other vein or lode discovered within the surface ground described should be excepted and excluded from the operation of the grant." 1 Lindley on Mines (2d. Ed.) § 58. On reservation of known lodes in placers, see infra, chapters XVIII and XX; 2 Lindley on Mines (2d. Ed.) § 781.

[41] 16 Stat. 217, c. 235.

[42] 17 Stat. 91, c. 152.

a surface, which must be so laid out as to include the top or apex of his lode. If he succeeds in making a valid location, then he also acquires all other veins or lodes apexing within the ground. Where under the law of 1866 the miner located a lode, under the act of 1872 he locates a surface with a lode in it.[43] The act of 1866 threw open to exploration and occupation the mineral lands of the United States, and gave the locator the right to get a patent for his "mine." The act of 1872 threw open to exploration and purchase all valuable mineral deposits, and made free and open to occupation and purchase "the land in which they are found." Under the act of 1866 the patentee got the lode located, but only one lode. Under the act of 1872 his patent gives him all lodes apexing in what the common law would denominate his ground. No longer is the surface ground, as under the act of 1866, merely for the convenient working of the claim; under the act of 1872, it has become an essential part of the claim. It is so essential that where there is a vein, but no surface is left to locate, it is held that the vein cannot be located.[44]

The act of 1872 has been construed to make other important changes. Because of a provision that "the end lines of each claim shall be parallel to each other" the act has been held to mean that there can be no extralateral rights on the vein unless the end lines are parallel, so far at least as the end lines extended would diverge on the dip. Then the possible size of a claim is much increased under the act of 1872. By the act of 1866 no location could exceed 200 feet in length, with an additional claim for discovery to the discoverer. The width of the location was not restricted, however, except by district rules. By the act of 1872 a lode claim cannot exceed 1,500 feet in length nor 600 feet in width. By the act of 1866 only one location on a vein could be made, except that the discoverer could make two locations, and not more than 3,000 feet could be taken in any one claim by any association of persons. By the act of 1872 as many lode claims may be located by one person as he can make discoveries for,[45] it being provided that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."[46] By the act of 1866 the lodes that could be located were those of "quartz or other rock in place, bearing gold, silver, cinnabar, or copper." By

[43] Gleeson v. Martin White Min. Co., 13 Nev. 442, 457.

[44] Traphagen v. Kirk, 30 Mont. 562, 77 Pac. 58, and cases cited. See, also, Heil v. Martin (Tex. Civ. App.) 70 S. W. 430; Gleeson v. Martin White Min. Co., 13 Nev. 442.

[45] But see B. & C. Comp. Or. § 3974. Compare Prosser v Parks, 18 Cal. 47. See discussion of Oregon act in chapter X, § 45, infra.

[46] Rev. St. U. S. § 2320 (U. S. Comp. St. 1901, p. 1424).

the act of 1872 they were those "of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits."

Besides departing from the act of 1866 in the above particulars and in others, the act of 1872 provided for the ownership of cross-veins and veins uniting on the dip, made more complete and definite the provisions about patenting claims, fixed the method of acquiring known lodes in placer ground, and legislated about tunnel site locations, mill sites, etc. With reference to lode claims, the act of 1872 provided that the location must be distinctly marked on the ground, so that its boundaries can be readily traced, that records, where required, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim, and that on each claim, until a patent shall have been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. The act also provided for forfeitures.

Subsequent Statutes.

Since 1872 there have been a number of amendments to the mining laws. Some of the amendments except particular states from the operation of the mining laws. One extends the time for the performance of annual labor; others, such as the act in regard to saline lands, the stone and timber act, the act in regard to petroleum lands, etc., govern special kinds of mining land; and still others, such as the Alaskan and the Philippine acts, are mining codes for isolated parts of United States territory. Perhaps the most important single acts of general application to all kinds of mining claims are the act of January 22, 1880,[47] fixing a uniform time for the performance of annual labor on all unpatented claims located since the act of 1872, and that of March 3, 1881,[48] providing that in adverse suits, if title to the ground in controversy is not established by either party, "the jury shall so find, and judgment shall be entered according to the verdict." The important amendments will be dealt with in the discussion of the mining problems to which they apply.

The United States Revised Statutory Provisions on Mining.

The Revised Statutes of the United States are in effect a revision and consolidation of the previous statutes. It is familiar doctrine of statutory construction that "when the meaning is plain the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful

[47] 21 Stat. 61, c. 9, § 2 (U. S. Comp. St. 1901, p. 1426).
[48] 21 Stat. 505, c. 140 (U. S. Comp. St. 1901, p. 1431).

language used in expressing the meaning of Congress." [49] The acts of 1866, 1870, and 1872 are to be examined only in case of doubt as to the meaning of the Revised Statutes.

SUPPLEMENTAL STATE LEGISLATION.

4. In the act of 1872 Congress authorized the various states in which was situated public mineral domain of the United States to legislate in regard to mining. Such legislation is necessarily only supplemental to the federal legislation, but covers a large and important field. All of the mining law states, except California, have mining codes, and the details of such codes are considered in subsequent chapters.

Since the congressional legislation of 1866, 1870, and 1872, the different mining states have legislated on the subject of mining. Of all the states and territories of the mining region, California is the only one without statutory regulations. In California, because a mining code enacted in 1897 was repealed in 1899 and 1900, all the mining requirements, if any, in excess of those prescribed by the federal statutes (with the exception, probably, of record, which is still a state requirement),[50] are determined by district regulations and customs.[51] The right of Congress to authorize (as in the act of 1872 it did authorize) supplemental state legislation [52] is thoroughly well established by authority. State legislation must, of course, be purely supplemental, in no way infringing any provision of Congress in regard to mining; but a very great latitude is left to the states, as the case of Montana, where down to 1907 somewhat stringent legislation in regard to mining was indulged in, and the cases of Nevada and Oregon, where similar legislation still exists, show.[53]

[49] U. S. v. Bowen, 100 U. S. 508, 513, 25 L. Ed. 631.

"No reference, therefore, can be had to the original statutes, to control the construction of any section of the Revised Statutes, when the meaning is plain, although in the original statutes it may have had a larger or more limited application than that given to it in the revision." Deffeback v. Hawke, 115 U. S. 392, 402, 6 Sup. Ct. 95, 29 L. Ed. 423.

[50] Civ. Code Cal. 1901, §§ 1159–1169.

[51] A location which met federal requirements, but did not comply with the California statute, was upheld, because the locators were in possession when the California statute was repealed, and remained in possession. Dwinnell v. Dyer, 145 Cal. 12, 78 Pac. 247, 7 L. R. A. (N. S.) 763.

[52] Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426). See Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019.

[53] Butte City Water Co. v. Baker, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409; Hickey v. Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963; Wright v. Lyons, 45 Or. 167, 77 Pac. 81.

In 1907 Montana repealed its objectionable law and enacted a very fair one in

The various classes of state legislation will be taken up when we reach the proper topics in the main body of the book; but a very interesting classification of state legislation has been made by Mr. Lindley, and should be stated here. He has two groups: (a) Proper state legislation; and (b) doubtful state legislation.[54]

Under group (a) which consists of matters of legislation "unquestionably proper within certain limits," he classifies: (1) Length of lode claims. (2) Width of lode claims. (3) Posting notices of location. (4) Contents of notices and certificates of location. (5) Recording notices and certificates of location. (6) Posting certificate of recorder to the fact that the location certificate is recorded. (7) Authorizing amended locations and amended location certificates. (8) Marking of boundaries and defining the character of posts and monuments. (9) Requiring sinking of discovery shaft or its equivalent prior to completion of location. (10) Requiring affidavit of sinking discovery shaft or its equivalent to be attached to and recorded with the notice of location. (11) Fixing time within which location shall be completed after discovery. (12) Providing for the manner of relocating abandoned claims. (13) Amount of annual work. (14) Posting notice that annual or development work is in progress. (15) Authorizing the recording of affidavits of performance of annual labor. (16) Prescribing manner of organizing mining districts. (17) Authorizing survey of claim to be made by deputy mineral surveyor, and, when recorded, to become a part of the location certificate, and become prima facie evidence as to all facts therein contained. (18) Manner of locating tunnel claims and length allowed on discovered lode. (19) Manner of locating mill sites and area allowed therefor.

Under group (b), which consists of matters of legislation "either clearly obnoxious to the federal law or open to criticism as being ineffectual," he classifies: (1) Laws giving a locator the right to all lodes which have their tops or apex within the location, and defining the extralateral right. (2) Laws defining the rights of parties in cases of lodes crossing or uniting. (3) Laws determining the rights of locators of two crevices found to be the same lode. (4) Laws prohibiting the proprietor of a mining claim from pursuing his vein on its strike

its place, which even made valid previous locations which complied with the new act, if no intervening rights of third persons were affected. Laws Mont. 1907, pp. 18–23. But in the same year Nevada reaffirmed by amendment its harsh legislation, which really sets a trap for the unwary. Laws Nev. 1907, pp. 418–421. The Nevada act of 1907 seems to have the great merit, however, of curing all defects in previous records of locations not already taken advantage of by third persons. Id. It is to be hoped that Nevada and Oregon will follow Montana in adopting a reasonable statute on mining.

[54] 1 Lindley on Mines (2d Ed.) §§ 250, 251.

beyond vertical planes drawn through surface boundaries. (5) Laws requiring verification of location certificates by oath. (6) Laws providing methods for forfeiting estate of delinquent co-owner. (7) Laws specifying the character of deposits which may be located under the placer laws.

It would seem as if Mr. Lindley made a mistake in not putting (b) (5) under (a).[55] The requirement of the verification of location certificates by oath seems legally unobjectionable.

The various states have legislated, also, in regard to drainage, easements, rights of way, mining corporations, etc.; but, with the exception just noted, the strictly mining code provisions have been well classified by Mr. Lindley as set forth above.*

SUPPLEMENTAL DISTRICT RULES, REGULATIONS, AND CUSTOMS.

5. The so-called common law of mining in America, which consists of the local mining district rules, regulations, and customs, has had a continually decreasing importance, because of the increasingly greater range of state legislation. The district rules, regulations, and customs have shaped the federal and state statutes, and in some localities even to-day they are of considerable importance. Such rules, regulations, and customs are valid, if they are reasonable, if they are actually in force, and if they do not conflict with either state or federal legislation.

A very important effect of state legislation has been the way it has tended to supersede district mining rules and regulations. Under the act of 1872 such rules and regulations must be consistent, not only with Congressional legislation, but also with the supplemental state legislation.[56] There is a tendency on the part of mining law writers to slight the subject of district mining rules, just because in so many of our

[55] See Butte City Water Co. v. Baker, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409.

* The last Nevada Legislature has passed an act which seems to be unconstitutional. It provides for the location of minerals in unfenced and unimproved privately unowned land, of which the legal owner is to be deprived on being paid a compensation based on the value of the land to him without considering the minerals. Sess. Laws Nev. 1907, pp. 140, 141.

[56] Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426); Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666; Original Company of the Williams & Kellinger v. Winthrop Min. Co., 60 Cal. 631; Woodruff v. North Bloomfield Gravel Min. Co. (C. C.) 18 Fed. 753, 9 Sawy. 441. A state statute requiring mining district recorders to deliver their records to the proper county recorders was upheld in Re Monk, 16 Utah, 100, 50 Pac. 810.

mining law states such rules have practically been supplanted by elaborate mining codes; but when it is remembered that in Utah and Wyoming something, and in Arkansas and Alaska still more, is left to district mining rules, that in California practically everything that the state Legislature could require is so left, that under some of the mining codes considerable room still exists for district rules as to placer mining claims, and that other states may some day follow California by repealing their mining statutes, these district rules are seen to have such an actual and potential value, in addition to their historical significance, that it is only right to give them careful attention.[57]

Mining districts were, and so far as they exist to-day are, territorial divisions, varying in size according to the needs and notions of their organizers. It is almost invariably the rule to describe a mining claim in a conveyance as situated in such and such a mining district. "Where land office or other forms contain a blank for the name of the mining district, and no district has ever been formed, it is usual to fill such blank with the word 'unorganized.' And there is no doubt that a mining district may exist to the extent of giving a name to a locality, * * * and such name, when adopted by common consent, is as valid as if adopted at a district meeting." [58] Mining districts have been well described by the authority just quoted as "quasi municipal organizations." [59]

District rules had a much wider range before congressional legislation than they have had since; for, under the acts of Congress, district rules may relate to "the location, manner of recording, [and] amount of work necessary to hold possession of a mining claim," [60] subject to the requirements of Congress about marking the location, about the contents of a record (if one is required by district rules or by state legislation), and about not less than $100 worth of labor or improvements being put on each claim each year. Prior to the federal statutes, the rules and regulations of miners were free from restrictions, except such as were imposed by state statutes,[61] and it is a question how far the latter were valid. Since the acts of Congress, the dis-

[57] It seems as if, under Act Jan. 31, 1901, c. 186, 31 Stat. 745 (U. S. Comp. St. 1901, p. 1435), there is considerable room in states where salt abounds for district mining rules as to salt claims.

[58] Morrison's Mining Rights (13th Ed.) p. 5.

[59] Morrison's Mining Rights (13th Ed.) p. 4. An attempted organization of a mining district by two miners in the presence of three Indians who did not understand English was held insufficient in Fuller v. Harris (D. C.) 29 Fed. 814.

[60] Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426).

[61] Compare Glacier Mountain Silver Min. Co. v. Willis, 127 U. S. 471, 8 Sup. Ct. 1214, 32 L. Ed. 172.

trict rules have been able to affect only those matters not disposed of by the state and federal legislation.

With reference to district rules, wherever such rules are material, the courts have adopted a liberal policy. The courts will not take judicial notice of district mining regulations and customs, for "to say that the court is advised as to the nature and extent of such regulations is contrary to the fact, and therefore they cannot be the subject of judicial notice." [62] But such regulations may be shown to exist by custom or usage, even if their enactment is irregular.[63] A valid district rule need not be found among the written rules of the district before it can be proved; for a custom which is reasonable, and which is recognized and followed by the miners, will prevail against an obsolete written mining regulation.[64] The existence or nonexistence of a mining district regulation or custom is, of course, a question of fact for the jury; [65] but the courts are liberal in allowing evidence of custom to go to the jury, and here, as elsewhere, the courts do all that they can to give effect to reasonable mining customs. A mining regulation adopted at a miners' meeting "does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following its enactment. It is void whenever it falls into disuse or is generally disregarded. It must not only be established, but in force. A custom, reasonable in itself and generally observed, will prevail, as against a written mining law which has fallen into disuse. It is a question of fact for the jury whether the law is in force at any given time." [66]

The Idaho court, in considering a district requirement that placer claims should be no more than 80 rods in length, said: "Rules and customs of miners, reasonable in themselves and not in conflict with any higher law, have long been recognized and sanctioned by legislative enactments and judicial decisions. That such rules may still be adopted and enforced as part of the law of this country is too well settled to admit of argument. We cannot see that the custom in question in

[62] Hallett, C. J., in Sullivan v. Hense, 2 Colo. 424, 429, 430. See Perigo v. Erwin (C. C.) 85 Fed. 904; Poujade v. Ryan, 21 Nev. 449, 33 Pac. 659.

[63] Gore v. McBrayer, 18 Cal. 582; Flaherty v. Gwinn, 1 Dak. 509; Colman v. Clements, 23 Cal. 245.

[64] Harvey v. Ryan, 42 Cal. 626. See Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522, 6 Sawy. 299.

[65] Harvey v. Ryan, 42 Cal. 626. In the absence of proof of miner's rules, it will be presumed that locations are governed simply by the state and federal statutes. Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223.

[66] Harvey v. Ryan, 42 Cal. 626. See Haws v. Victoria Copper Min. Co., 160 U. S. 303, 317, 318, 16 Sup. Ct. 282, 40 L. Ed. 436; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666, 7 Sawy. 96.

any way conflicts with either the acts of Congress or the laws of the territory; but, on the contrary, we think the custom a reasonable one and entirely in harmony with the spirit of the mining laws." [67]

So long as the customs are shown actually to exist, to be acquiesced in, and to be reasonable, and are further found not to be in conflict with state or national laws and Constitutions, they must be complied with. Once proved to exist, regulations are presumed to continue to exist, if the contrary is not shown.[68] They need not exist at all, of course, for a good mining title to be made out,[69] unless the title in fact depends upon them.[70]

There is nothing peculiar about the proof of mining rules and customs, and they are to be shown in evidence in the same way as other written rules and unwritten customs. "The mode of proof, of course, is governed by the ordinary rules of evidence, and it would seem, from the weight of authority and reason, that mining district rules or regulations upon a particular point must be offered in evidence as a whole, must be proven by the best evidence, and must be proved by the books themselves properly produced, if there are books,[71] or by the production of such other paper evidence as there may be of their existence. If there are no books, and the rules are not in writing, they may, of course, be proved by any competent evidence, the same as any other fact. The land department accepts proof of mining district rules by a certified copy of the rules or by-laws, attested by the seal of the district, and the seal of the recorder or other legal custodian.[72] If no proof is made of a custom or by-law upon a given point, the court will assume, for the purposes of the trial, that none exists." [73] Where

[67] ROSENTHAL v. IVES, 2 Idaho (Hasb.) 265, 12 Pac. 904. That prior to the act of 1866 mining district rules could limit a claim to 25 feet, see Prosser v. Parks, 18 Cal. 47.

[68] Riborado v. Quang Pang Min. Co., 2 Idaho (Hasb.) 144, 6 Pac. 125.

[69] Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co., 12 Nev. 312.

[70] Sears v. Taylor, 4 Colo. 38.

[71] Orr v. Haskell, 2 Mont. 225. That a district record, kept in a pocket diary, is no record, see Fuller v. Harris (D. C.) 29 Fed. 814.

[72] The Idaho court has held that in Idaho there cannot be a deputy district mining recorder. Van Buren v. McKinley, 8 Idaho, 93, 66 Pac. 936. In applications for patent, the land department has power to decide what district rules and regulations are in force. Parley's Park Silver Mining Co. v. Kerr, 130 U. S. 256, 9 Sup. Ct. 511, 32 L. Ed. 906.

[73] 1 Snyder on Mines, § 126, citing on manner of proof, English v. Johnson, 17 Cal. 107, 76 Am. Dec. 574; Roberts v. Wilson, 1 Utah, 292; Campbell v. Rankin, 99 U. S. 261, 25 L. Ed. 435; Pralus v. Pacific Gold & Silver Min. Co., 35 Cal. 30; Doe v. Waterloo Min. Co., 70 Fed. 455, 17 C. C. A. 190; St. John v. Kidd, 26 Cal. 263.

there is a question as to whether mining district rules actually are in force, both the written rules and parol proof of the mining customs of the district will be received in evidence.[74]

It is desirable to notice some of the district rules and customs which have been held to be void. A custom which authorized persons engaged in mining to encroach upon and take away the rights of the owners of land which is not mineral and which is not in a mineral region would be invalid.[75] A rule which attempts to restrict the size of a claim located before its adoption is void as to such claim,[76] though a rule requiring increased annual labor in future seems to be valid.[77] So a mining rule cannot limit the number of claims a person may buy;[78] nor can it provide that a given number of days' work shall amount to the $100 required by the United States statute as annual labor;[79] nor can it authorize the location of a mill site on mineral land.[80] So it has been held that a mining rule requiring the annual labor to be done every 60 days is invalid;[81] but the United States Circuit Court of Appeals for the Ninth Circuit has decided that a mining regulation requiring a shaft to be sunk to a depth of 10 feet within 90 days of location, the shaft seemingly being a part of the first year's annual labor, and not a part of the location, is valid;[82] and it seems clear that the states, or, if they do not act, then the mining districts, may increase the amount, and, if so, the frequency, of the annual labor.[83] An Alaska case holds that a mining district rule cannot limit a time for record less than the 90 days allowed by the federal statute applicable to Alaska.[84]

On the effect of a noncompliance with district rules there has been controversy. If the rule is legal, and expressly provides that noncom-

[74] Colman v. Clements, 23 Cal. 245. See Leet v. John Dare Silver Min. Co. 6 Nev. 218.

[75] Woodruff v. North Bloomfield Gravel Min. Co. (C. C.) 18 Fed. 753, 9 Sawy. 441.

[76] Table Mt. Tunnel Co. v. Stranahan, 21 Cal. 548; Id., 31 Cal. 387. A mining district rule requiring all placers to be of a specific form was held void in Price v. McIntosh, 1 Alaska, 286.

[77] Strang v. Ryan, 46 Cal. 33.

[78] Prosser v. Parks, 18 Cal. 47.

[79] PENN v. OLDHAUBER, 24 Mont. 287, 61 Pac. 649; WOODY v. BERNARD, 69 Ark. 579, 65 S. W. 100.

[80] Cleary v. Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207.

[81] ORIGINAL COMPANY OF THE WILLIAMS & KELLIGER v. WINTHROP MIN. CO., 60 Cal. 631. See Johnson v. McLaughlin, 1 Ariz. 493, 500, 4 Pac. 130.

[82] NORTHMORE v. SIMMONS, 97 Fed. 386, 38 C. C. A. 211.

[83] Northmore v. Simmons, 97 Fed. 386, 38 C. C. A. 211; Sisson v. Sommers, 24 Nev. 379, 388, 55 Pac. 829, 77 Am. St. Rep. 815; Strang v. Ryan, 46 Cal. 33.

[84] Butler v. Good Enough Min. Co., 1 Alaska, 246.

pliance shall work a forfeiture, no one doubts that a forfeiture may result; but the dispute arises where the rule does not fix a penalty for its violation. The California court early held that the failure of a party to comply with a mining rule or regulation cannot work a forfeiture, unless the rule itself provides that forfeiture shall follow noncompliance with it, and that has remained the California rule.[85] This California rule has been adopted in Arizona [86] and in one United States Circuit Court decision,[87] and seems to be favored by one Dakota case.[88] On the other hand, the Montana Supreme Court, though giving the California cases careful consideration, declares that the regulations of miners are like conditions subsequent in deeds, and, as in the case of such conditions subsequent, a failure to comply with them works a forfeiture.[89] The analogy of a condition subsequent is, however, only an analogy; for as to ordinary realty it is the grantor who imposes such conditions, whereas the mining district is not a grantor of mining claims, and, besides, a condition subsequent as to ordinary realty can be reserved only to the grantor and his heirs, and they alone have the right to enter for breach, whereas in the case of a mining claim the one to enter is a new locator. While the Montana court might still insist on the analogy on the theory that the United States, through the mining district, imposes the condition for itself and its citizens, and that the United States, through the new locator, makes the entry for breach of condition, or else, as a sovereign grantor, rightfully reserves a condition to third persons, the real question is what view a court, wishing to deal fairly with the mining district rules, as the spirit and the letter of the mining acts require the court to do, should take as to forfeiture. On the one side, it may be argued: "If the district wants a forfeiture to result, let it say so." On the other side, it may be said: "Unless you say that a forfeiture results, you nullify the district resolutions." Perhaps the best way out is frankly to admit that in the early days the Montana rule, which is also followed in Nevada,[90] was fairer

[85] McGARRITY v. BYINGTON, 12 Cal. 427; English v. Johnson, 17 Cal. 108, 117, 76 Am. Dec. 574; Bell v. Red Rock Tunnel & Mining Co., 36 Cal. 214; EMERSON v. McWHIRTER, 133 Cal. 510, 65 Pac. 1036.

[86] JOHNSON v. McLAUGHLIN, 1 Ariz. 493, 4 Pac. 130; Rush v. French, 1 Ariz. 99, 25 Pac. 816.

[87] Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666, 7 Sawy. 96, 117.

[88] See Flaherty v. Gwinn, 1 Dak. 509, 511, where the court says that mining regulations "must impose an obligation to do some certain and specific act which, if not complied with, will, by the terms of the rule, deprive the locator of some right."

[89] KING v. EDWARDS, 1 Mont. 235. See Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153.

[90] Mallett v. Uncle Sam Gold & Silver Min. Co., 1 Nev. 188, 90 Am. Dec. 484;

to the miners and was the one to be adopted, but that to-day, owing to the restricted field of mining district rules and the relatively unimportant things about which alone, in most states, mining districts may legislate, the California and Arizona rule is best. The United States Supreme Court has recently refused to go out of its way to decide the question.†

THE ATTITUDE OF THE COURTS TOWARD THE MINER.

6. The courts construe and enforce the mining statutes with as little technicality as possible.

In closing this historical sketch, it is highly desirable to say a word about the attitude of the courts towards mining rights. There is much in the cases which may seem strange to one who does not know the atmosphere of mining camps. The courts that have had to pass on mining cases have known that they had to fix the rights of typical frontiersmen, often unlettered immigrants, certainly few of them learned in the law, and the most of them actually in the early days shunning and denouncing lawyers; and those courts have realized that Congress, in approving the rules and regulations of the miners enacted in their miners' meetings, spoke in favor of the adoption of the miners' point of view. The result has been that the courts allow as much as may be to hang on the good faith of the miner. As Mr. Charles J. Hughes, Jr., whom we have already quoted, so well says: "Many controversies arise as to whether or not a discovery has been made; whether or not the necessary work has been done, stakes set; whether the location certificate is in proper form, properly recorded; whether or not the vein pursues the proper course within the boundaries of the claim, or has its apex therein; whether or not the vein is continuous in its descent into the earth—and upon each and every of these questions innumerable litigations have arisen, which have taxed the wisdom of the courts, the ingenuity of the lawyers, and the learning and skill of experts and miners in their presentation. The principle followed by the courts, however, in their construction of the law, has been to give it a practicable interpretation, in view of the fact that the prospector and locator of claims is to be governed by it, and that he cannot be attended, in his explorations, by a lawyer to construe the law, a surveyor to determine the boundaries and position of his claim, and assayers and

Oreamuno v. Uncle Sam Gold & Silver Min. Co., 1 Nev. 215; SISSON v. SOMMERS, 24 Nev. 379, 55 Pac. 829, 77 Am. St. Rep. 815.

†Yosemite Gold Mining & Milling Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. 196, 52 L. Ed. ——

geologists to give him the result of their operations and the character of the formation in which he is working, all of which would be necessary, if some of the contentions urged against the validity of locations should be by the courts sustained. A liberal spirit has been adopted generally in these decisions, sustaining good faith and honest effort to comply with the law, and an avoidance of technical defects to meritorious claims, while at the same time requiring a fair, honest, and substantial compliance with the terms upon which the general government extends its bounty to the prospector and locator." [91]

In noticing the general attitude of the courts as above set forth, we must also bear in mind certain rules of statutory construction applicable to American mining law. They are stated by Mr. Lindley as follows: "(1) The mining laws are to be read in the light of matters of public history, relating to the mineral lands of the United States. (2) Where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, that construction should be adopted which will support the claim of the government, rather than that of the individual. (3) In the case of a doubtful or ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and ought not to be overruled without cogent reasons. We might add a fourth rule, deducible from the foregoing and from the current of American authority and decisions of the land department, and that is that the word 'mineral,' as used in these various acts, should be understood in its widest signification." [92]

[91] 24 Am. Bar Ass'n Rep. (1901) pp. 349, 350.
[92] 1 Lindley on Mines (2d Ed.) § 96.

CHAPTER II.

THE MINING LAW STATUS OF THE STATES, TERRITORIES, AND POSSESSIONS OF THE UNITED STATES.

THE MINING LAW STATES AND TERRITORIES.

7. American mining law applies to Alaska, Arizona, Arkansas, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, the Philippine Islands, South Dakota, Utah, Washington, and Wyoming. It applies also to certain land in Oklahoma.

Those parts of the public domain which the mining laws affect form but a comparatively small portion of the lands comprised within the United States and its territorial possessions, and to-day they consist of Alaska,[1] Arizona, Arkansas, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, the Philippine Islands,[2] South Dakota, Utah, Washington, and Wyoming. Parts of Oklahoma are also subject to those laws.

THE MINERAL LAND HISTORY OF THE UNITED STATES.

8. The land history of the United States reveals that parts of the United States have never been subject to the American mining law, because:

(a) The United States never owned any mineral land in the thirteen original states, nor in the states of Kentucky, Maine, Vermont, and West Virginia, created out of them, nor in Texas.

[1] Alaska mining is regulated under special acts. Act June 6, 1900, c. 786, 31 Stat. 321; Act June 6, 1900, c. 796, 31 Stat. 658 (U. S. Comp. St. 1901, p. 1441); Act June 13, 1902, c. 1082, 32 Stat. 385; Act April 28, 1904, c. 1772, 33 Stat. 525 (U. S. Comp. St. Supp. 1907, p. 479); Act March 2, 1907, c. 2559, 34 Stat. 1243 (U. S. Comp. St. Supp. 1907, p. 476); Act May 28, 1908 (quoted in 37 Land Dec. Dep. Int. Adv. Sheets, 22). By Act May 17, 1884, c. 53, 23 Stat. 24, the mineral laws of the United States were extended to Alaska. Meydenbauer v. Stevens (D. C.) 78 Fed. 787; Revenue Min. Co. v. Balderston, 2 Alaska, 363.

[2] A separate elaborate mining code has been provided for the Philippines. Act July 1, 1902, c. 1369, 32 Stat. 697, amended by Act Feb. 6, 1905, c. 453, 33 Stat. 692. It has been supplemented by acts of the Philippine Commission. See Appendix.

(b) In the other states and territories, not subject to American mining law, either there were no mineral lands, or such lands were disposed of prior to the creation of American mining law, or under express statutory exception from that law.

The simplest way to explain why land in a given state or territory is or is not subject to the mining laws is to look at the history of that state or territory. Before taking up individual states and territories, however, a few preliminary words are needed about the general territorial acquisitions of the United States.

The Thirteen Original States.

The thirteen original states of the Union, namely, Connecticut, Delaware, Georgia, Maryland, Massachusetts New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia, so far as concerns the land within their present boundaries, were never affected by the mining or other land statutes of the United States; for no part of the land within such boundaries, other than sites for federal buildings, forts, etc., ever belonged to the United States. These thirteen original states embraced within their conceded boundaries lands which afterwards, with the consent of the interested states, were erected into separate states, and these latter states, namely, Kentucky, Maine, Vermont, and West Virginia, like the parent states, were never subject to the United States mining laws. So, too, the District of Columbia has never been subject to the mining laws.

The thirteen original states also claimed during the Confederation large tracts of land to the west and north of their present boundaries, but during the Confederation and later they made various cessions of such lands to the United States. Taking these cessions in their natural order for our special purposes, rather than in their chronological order, we note first that South Carolina in 1787, North Carolina in 1790, and Georgia in 1798 and 1802, made cession of part of their lands to the United States, and these lands were organized into two territories, namely, the "Territory South of the Ohio," created in 1790, and the "Mississippi Territory," created in 1798. Out of these southern territories and part of Virginia were created the states of Kentucky, Tennessee, Mississippi, and Alabama. For physical reasons, and also because their lands were largely disposed of before the mining laws developed, none of these states have been appreciably affected by the mining laws. As we have just noted, Kentucky never was subject to those laws. Tennessee was formed out of territory ceded to the United States by North Carolina. "The entire area of Tennessee was public domain, but the United States gave the same to the state, after deducting the land necessary to fill the obligations in the

deed of cession of North Carolina." [3] The mineral lands in Alabama and Mississippi were by the act of June 21, 1866,[4] expressly excepted from the land laws applicable to those states. By the act of March 3, 1883,[5] it was provided that all public lands in Alabama, "whether mineral or otherwise, shall be subject to disposal only as agricultural lands." Mississippi does not seem to have had or to have any federal mineral lands.[6]

During the Confederation, New York, Virginia, Massachusetts, and Connecticut ceded to the United States the territory north of the Ohio river, east of the Mississippi, and west of Pennsylvania and New York, known as the "Northwest Territory," and governed under the Northwest Ordinance of June 13, 1787. Even the Western Reserve, the region within 125 miles of Pennsylvania retained by Connecticut, was, on May 30, 1800, ceded as to jurisdiction to the United States. This Northwest Territory, out of which were carved the states of Illinois, Indiana, Michigan, Ohio, and Wisconsin, was subject to the United States land laws, and the mineral lands therein, consisting of coal, iron, lead, and copper, were first leased and finally sold under special laws prior to the general mining legislation.[7] Michigan and Wisconsin were in 1873 expressly excepted from the operation of the mining laws.[8]

[3] Donaldson, Public Domain, pp. 421–423.

[4] 14 Stat. 66, c. 127.

[5] 22 Stat. 487, c. 118 (U. S. Comp. St. 1901, p. 1439).

[6] See Statement of Unappropriated Public Lands of the United States, Issued by the Department of the Interior, General Land Office, on July 1, 1906.

[7] See 1 Lindley on Mines (2d Ed.) §§ 32–35. "The general policy of the United States, as expressed in the statutes, executive acts, and proclamations prior to 1845, was to reserve the mineral lands from sale absolutely. These lands, so far as then known, consisted of lead, iron, copper, and zinc lands in that part of the United States territory which was then called the Northwest or Indian Territory, and comprised that portion of the country now embraced within the states of Michigan, Wisconsin, Illinois, Iowa, Missouri, and Minnesota. This policy was trenched upon occasionally by acts authorizing the President of the United States to lease certain lead lands. This policy and these acts, as might naturally be expected, were provocative of mischief and endless disputes. It was impossible to collect the rents and royalties with certainty or regularity. Sales of mineral lands—that is to say, lead lands—were finally authorized by statute; but this applied only to the lead lands of the upper Mississippi. At first only Missouri was included. By a later statute lead lands in Illinois, Wisconsin, Iowa, and Arkansas were authorized to be sold for the space of six months. By a still later act the copper, lead, and other mineral leads of Michigan were authorized to be sold after an advertisement of six months. Later the lead land in the Chippewa district in Wisconsin was included." 1 Snyder on Mines, § 56.

[8] Act Feb. 18, 1873, c. 159, 17 Stat. 465.

Subsequent Acquisitions.

The Louisiana purchase in 1803, the Florida purchase in 1819, the Texas annexation in 1845, the recognition of our claims to Oregon by Great Britain in 1846, the Mexican cession in 1846, and the Gadsden purchase in 1853, brought to the United States a vast extent of territory, nearly the whole of which, except that inclosed within the borders of the present state of Texas, was subject to the United States land laws. Of the states and territories which have resulted from these acquisitions, a number have not been subject to the United States mining laws, for one reason or another. Texas retained the title to its own lands, so never was subject to the United States mineral or other land laws. It has a mining law code of its own. Other states, because of lack of minerals within their borders or for other reasons, have been without the mining law jurisdiction.

The Alaska purchase in 1867, the Hawaiian annexation in 1898, the Spanish cession in 1899 of Porto Rico, of the Philippines, and of Guam, and the acquisition of part of the Samoan Islands by the treaty of December 2, 1899, ratified in 1900, added other territory. Alaska is mining law territory, and is governed by a special act approved June 6, 1900,[9] and a supplementary act of June 13, 1902.[10] The Philippines are also subject to an elaborate special mining act, of date July 1, 1902,[11] amended February 6, 1905.[12] Porto Rico, the Hawaiian Islands, and the Samoan Islands seem to have no mining law and to need none.

THE MINING LAW STATUS OF THE SEVERAL STATES AND TERRITORIES.

9. Congress has provided specially for Alaska and the Philippines. The other mining law territories and states, with the exception of California, have adopted mining codes. A number of the states not subject to American mining law have legislation for the inspection and other police regulation of coal and other mines.

Now we are ready to take up the different states and territories alphabetically. In doing so we shall note briefly local, as well as national, legislation in mining. It should be pointed out at the start that

[9] 31 Stat. 321, c. 786.

[10] 32 Stat. 385, c. 1082. A special act about Alaskan coal lands, approved May 28, 1908, and land department rules thereunder, will be found in 37 Land Dec. Dep. Int. (Advance Sheets) 20–23. See, also, acts cited in note 1, supra.

[11] 32 Stat. 697, c. 1369.

[12] 33 Stat. 692, c. 453.

under the act of January 31, 1901, the placer mining acts, so far as saline lands are concerned, are extended to all states and territories and to the district of Alaska.[13]

Alabama. By the act of June 21, 1866,[14] Congress expressly excepted mineral lands from the land laws applicable to the state. By the Revision of 1875 it was expressly provided that only homesteaders could acquire public lands in Alabama.[15] By the act of March 3, 1883,[16] all lands in Alabama were declared to be agricultural. Under the act of March 27, 1906,* the coal and iron public lands in Alabama have been reclassified, and such lands are not subject to entry.† By state legislation the inspection and other police regulation of coal mines is provided for.[17]

Alaska. By the act of June 6, 1900,[18] the laws of the United States relating to mining are extended to Alaska, with a provision that the miners may make district rules and regulations not in conflict with the laws of the United States. Recording divisions are provided, and the recording of notices of location of mining claims required. The recording divisions are defined by the act of June 13, 1902.[19] The coal lands laws were extended to Alaska by the act of June 6, 1900,[20] and later the location and patenting of coal lands in Alaska was especially provided for by the act of April 28, 1904.[21] A statute making special provisions about Alaskan coal lands was approved May 28, 1908.‡ The coal land regulations, issued by the General Land Office April 12, 1907, also contain special provisions for Alaska.

[13] 31 Stat. 745, c. 186 (U. S. Comp. St. 1901, p. 1435). See 1 Lindley on Mines (2d Ed.) §§ 514a, 515. Under that act "all unoccupied lands of the United States containing salt springs or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer mining claims, provided that the same person shall not locate or enter more than one claim hereunder."

[14] 14 Stat. 66, c. 127.

[15] Rev. St. U. S. § 2303. This section was repealed by Act July 4, 1876, c. 165, 19 Stat. 73 (U. S. Comp. St. 1901, p. 1411).

[16] 22 Stat. 487, c. 118 (U. S. Comp. St. 1901, p. 1439).

*34 Stat. 88, c. 1347 (U. S. Comp. St. Supp. 1907, p. 476).

†Instructions, 36 Land Dec. Dep. Int. 109.

[17] Civ. Code Ala. 1896, §§ 2899–2936; Gen. Laws 1898–99, p. 86; Gen. Laws 1903, pp. 52, 86, 427.

[18] 31 Stat. 321, c. 786. Compare Act May 17, 1884, c. 53, § 8, 23 Stat. 26.

[19] 32 Stat. 385, c. 1082.

[20] 31 Stat. 658, c. 796 (U. S. Comp. St. 1901, p. 1441).

[21] 33 Stat. 525, c. 1772 (U. S. Comp. St. Supp. 1907, p. 479). See Circular of Land Office, 33 Land Dec. Dep. Int. 114.

‡See 37 Land Dec. Dep. Int. (Advance Sheets) 22, 23.

Arizona is one of the mining law territories. It has a general mining code, supplementary to the federal legislation.[22]

Arkansas. By the act of June 21, 1866,[23] Congress expressly excepted mineral lands from the land laws applicable to the state. By the Revision of 1875 it was expressly provided that only homesteaders could acquire public land in Arkansas.[24] By the act of July 4, 1876,[25] however, the provision of the revision was repealed. The lead lands in Arkansas were sold under special acts prior to the general mining laws, but the federal mining laws seem to be applicable to mineral land in Arkansas other than lead.[26] By state legislation the inspection and other police regulation of coal mines is provided for[27] and a brief general mining code is enacted.[28]

California is one of the mining law states; but it does not have a statutory code to supplement the federal laws. A mining code was enacted in 1897,[29] but repealed in 1899.[30] District mining rules, regulations, and customs there supplement the federal statutes. Various state statutes, including those as to evidence and recording, affect mining claims. Sections 1159 and 1169 of the California Civil Code, for instance, seem to require notices of location of mining claims to be recorded in the county recorder's office.[31] There are also statutes for the inspection and other police regulation of mines.[32]

Colorado is one of the mining law states, and has a general mining code, supplementing the federal legislation, and also statutes providing for the inspection and other police regulation of mines.[33]

Connecticut is one of the original thirteen states, in which the United States never had any public domain. The federal mining laws are

[22] Civ. Code Ariz. 1901, pars. 3231–3259; Laws 1903, p. 12, No. 5; Laws 1907, pp. 20, 27, cc. 20, 22.

[23] 14 Stat. 66, c. 127.

[24] Rev. St. U. S. § 2303.

[25] 19 Stat. 73, c. 165 (U. S. Comp. St. 1901, p. 1411).

[26] See Norman v. Phœnix Zinc Mining & Smelting Co., 28 Land Dec. Dep. Int. 361; Woody v. Bernard, 69 Ark. 579, 65 S. W. 100; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87.

[27] Kirby's Dig. Ark. §§ 5337–5359.

[28] Kirby's Dig. Ark. §§ 5360–5366.

[29] St. Cal. 1897, p. 214, c. 159.

[30] St. Cal. 1899, p. 148, c. 113.

[31] See, also, St. 1905, p. 738, c. 563, for a statute making the date of location recited in a United States patent prima facie evidence of such date.

[32] Gen. Laws Cal. 1903 (Deering's Ed.) pp. 609–626.

[33] 2 Mills' Ann. St. Colo. §§ 3136–3247; Mills' Ann. St. Rev. Supp. 1891–1905, §§ 3136–3247; Laws 1905, pp. 160, 342, cc. 79, 134; Laws 1907, p. 336, c. 153. In Laws 1905, p. 342, c. 134, mining locations on state lands are provided for.

therefore inapplicable. The state taxes "quarries, mines and ore beds," [34] and allows nonresident aliens to acquire and hold real estate "for the purpose of quarrying, mining, dressing or smelting ores on the same, or converting the products of such quarries and mines into articles of trade and commerce." [35] It also regulates the sale of shares of stock in mining corporations.[36]

Delaware is one of the original thirteen states, so never was subject to the federal mining laws. There seems to be no state legislation on mining.

District of Columbia. The mining laws of the United States have never applied here, and there seems to be no legislation on mining for the District. The only suggestion that there are federal mining rights in the District seems to be found in Shoemaker v. United States.[37]

Florida. For federal legislation as to Florida, see Arkansas, down through the act of 1876. Though the mining laws are applicable to Florida, there seems to be no mining land. There also seems to be no state legislation, except in regard to the necessity of inclosing pits and washings.[38]

Georgia is one of the original thirteen states, so never was subject to the federal mining laws. A state statute provides for the condemnation of roads, tracts, tramways, and ditchways needed for the successful operation of mines.[39]

Hawaii. The United States public land laws have not been extended to the Hawaiian Islands. The joint resolution of July 7, 1898,[40] said that the public land laws of the United States should not apply there, and the act of April 3, 1900,[41] declared that the laws of Hawaii as to public lands should remain in force until Congress should otherwise provide. Congress has made no provision about mining in Hawaii. There seems to be no local legislation, and there appears to be no need of any enactment.[42]

Idaho is a mining law state, with a general mining code, supplementing the federal legislation.[43]

[34] Gen. St. Conn. 1902, § 2322.
[35] Gen. St. Conn. 1902, § 4411.
[36] Pub. Laws 1903, p. 179, c. 196.
[37] 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170.
[38] Gen. St. Fla. 1906, §§ 3152, 3394.
[39] 1 Pol. Code Ga. 1895, §§ 650–657; Laws 1897, p. 21.
[40] 30 Stat. 750, Resolution No. 55.
[41] 31 Stat. 141, 154, c. 339.
[42] See 2 Lindley on Mines (2d Ed.) § 877.
[43] Civ. Code Idaho 1901, §§ 2555–2578; Sess. Laws 1903, pp. 4, 290. An eight-hour day is provided by Sess. Laws 1907, p. 97.

Illinois. The public lands in Illinois were practically all sold before the discovery of gold in California. The lead lands were sold under special laws. For the foregoing reason, the federal mining laws never have had a practical operation in Illinois. The state legislation provides for the inspection and other police regulation of coal mines.[44]

Indiana. Same state of facts as Illinois, so far as federal legislation is concerned. The state legislation provides for the inspection and other police regulation of mining.[45]

Iowa. Same state of facts as Illinois, so far as federal legislation is concerned.[46] The state legislation provides for the inspection and other police regulation of mines.[47]

Kansas. By the act of Congress of May 5, 1876,[48] Kansas was excepted from the operation of the federal mining laws and all land made subject to disposal as agricultural lands. The state legislation provides for the inspection and other police regulation of coal mines.[49]

Kentucky was carved out of Virginia, one of the original thirteen states. It has never been subject to the federal mining or other land laws of the United States, but succeeded to the ownership of the lands within its borders undisposed of by Virginia. The state legislation provides for the inspection and other police regulation of coal mines.[50]

Louisiana. For federal legislation, see Arkansas, down through the act of 1876. Though the federal mining laws are applicable to Louisiana, there seems to be no public mining land there. The state legislation provides that the usufructuary is to enjoy mines and quarries already opened, but not others.[51]

Maine was carved out of Massachusetts, one of the original thirteen states. The United States has never owned public land there, so the federal mining laws have never applied there. By the act of separa-

[44] Starr & C. Ann. St. Supp. 1902, pp. 841–868, c. 93, pars. 1–39; Starr & C. Ann. St. Supp. 1903, pp. 385–389, c. 93, pars. 1–13; Laws Ill. 1905, pp. 324–330; Laws 1907, pp. 387–403.

[45] For Indiana state inspection and other police regulation of coal mines, see 2 Horner's Ann. St. Ind. 1901, §§ 5458–5480*ll*; Acts 1903, p. 176, c. 90; Acts 1907, pp. 347–353, c. 204.

[46] But see 1 Snyder on Mines, p. 126, § 153, where the argument is advanced that Iowa has been excluded from the operation of the federal mining law.

[47] McClain's Code 1888, §§ 2449–2482; Code 1897, §§ 1967–1974; Code Supp. 1902, §§ 2478–2496; Laws 1902, p. 63, c. 100; Laws 1907, pp. 129, 130, c. 130.

[48] 19 Stat. 52, c. 91 (U. S. Comp. St. 1901, p. 1439).

[49] 1 Gen. St. Kan. 1901, §§ 4109–4181; Laws 1903, p. 557, c. 360; Laws 1905, pp. 433, 473–476, 898, cc. 278, 304, 534; Laws 1907, pp. 399–403, c. 249.

[50] Ky. St. 1899, §§ 2722–2739a; Acts 1902, p. 125, c. 25.

[51] Merrick's Rev. Civ. Code La. 1900, art. 552.

tion of June 19, 1819, Massachusetts gave Maine half the ungranted lands within the borders of Maine, and in 1853 deeded to Maine the rest.[52] The state legislation establishes a mining bureau to collect information about mines,[53] allows the condemnation of ditches for drainage of mines and quarries,[54] and provides for the inspection of mines and quarries.[55]

Maryland is one of the original thirteen states, in which the United States never had any public domain. The federal mining laws have, therefore, never applied there. The state legislation provides a measure of damages for abstracting minerals from another's land,[56] and regulates mining companies.[57]

Massachusetts was one of the thirteen original states, so never was subject to the federal mining laws. The state legislation provides for the condemnation of roads, ditches, etc., for approaching, draining, etc., quarries, mines, or mineral deposits,[58] and provides for the incorporation of mining companies and their taxation.[59]

Michigan was subject to the general land laws of the United States. Its lead and copper lands were sold under special acts prior to the general mining legislation. By the act of February 18, 1873,[60] the mineral lands of the state were excluded from the operation of the mining act of 1872, and "declared free and open to exploration and purchase according to the legal subdivisions thereof, as before the passage of said act." The state legislation asserts "the sovereign right of the people of Michigan" to "(1) all mines of gold or silver, or either of them," within the state, and "(2) all mines of other metals or minerals * * * which are connected with, or shall be known to contain gold or silver in any proportion," but provides that this sovereign right shall not be enforced against any citizen of the state owning the fee of the soil containing the mines or minerals by bona fide purchase from, through, or under the general or state government, except that he must pay in lieu of all other state taxes a specific tax of 2 per cent. upon the product of iron mines and of 4 per cent. upon the average

[52] See Roberts v. Richards, 84 Me. 1, 5, 24 Atl. 425.
[53] Rev. St. Me. 1903, c. 40, §§ 59–62.
[54] Rev. St. Me. 1903, c. 21, §§ 28–35.
[55] Laws Me. 1907, p. 77, c. 77.
[56] 2 Code Pub. Gen. Laws Md. 1904, art. 75, § 92.
[57] 1 Code Pub. Gen. Laws Md. 1904, art. 23, §§ 227–239; Laws 1906, p. 259, c. 178.
[58] 2 Rev. Laws Mass. 1902, c. 195, §§ 17–25.
[59] 1 Rev. Laws Mass. 1902, c. 14, §§ 49–51.
[60] 17 Stat. 465, c. 159; Rev. St. U. S. § 2345 (U. S. Comp. St. 1901, p. 1438). See U. S. v. Omdahl, 25 Land Dec. Dep. Int. 157.

yield and value of all ores and product of other mines.[61] Known mineral lands of the state are reserved from sale,[62] but may be leased by the commissioner of the state land office.[63] A commission to collect and distribute mining statistics is created.[64] The inspection of coal mines is provided for.[65]

Minnesota. For federal legislation affecting Minnesota, see Michigan. The lands sold under special federal laws in Minnesota were lead lands. Minnesota has a regular mining code.[66] It was adopted in 1867; but in 1873 the federal mining laws were declared by Congress no longer applicable to Minnesota. The code is therefore practically a dead letter. Here it should be noted that Minnesota has a very interesting statutory provision that, where there is a plurality of owners of lands containing minerals, those who own half or more of the property may apply to the proper court and get an order which will entitle the one getting the order, on giving bond, to open, operate, and develop the mine, by keeping accounts and making settlement on demand after monthly statements rendered.[67] Nonoperating owners are given access to the property and workings at all reasonable times to measure up the workings and to verify accounts.[68] If the majority in interest do not want to work the property, or abandon their right for a year, the minority in interest may get an order.[69] Only judgment liens can attach to the lands so being worked.[70] The state legislation also provides, among other things, for the leasing of state lands, for the mining and shipping of iron ore,[71] for the taxation of mineral lands,[72] and for the creation of corporations for mining and smelting ores and manufacturing metals.[73] Minerals in state lands are reserved to the state.[74]

Mississippi. See Louisiana, for federal legislation. There seems to be no state legislation.

[61] 1 Comp. Laws Mich. 1897, §§ 1526–1530. The validity of this legislation may in part be questioned. See 1 Lindley on Mines (2d Ed.) p. 38, § 20.
[62] 1 Comp. Laws Mich. 1897, § 1528.
[63] 1 Comp. Laws Mich. 1897, §§ 1411–1421.
[64] 2 Comp. Laws Mich. 1897, §§ 4630–4635.
[65] Pub. Acts Mich. 1899, p. 93, No. 57; Pub. Acts 1903, p. 147, No. 125; Pub. Acts 1905, pp. 142–147, No. 100.
[66] 1 Gen. St. Minn. 1894, §§ 4059–4075.
[67] Laws Minn. 1907, pp. 198–201, c. 177.
[68] Id.
[69] Id.
[70] Id.
[71] Gen. St. Minn. 1894, §§ 4076–4083.
[72] Laws Minn. 1899, p. 268, c. 235.
[73] 1 Gen. St. Minn. 1894, §§ 2827–2837.
[74] Laws Minn. 1901, pp. 108–110, c. 104.

Missouri came under the general land and mining laws, as part of the Louisiana purchase. Its lead mines were leased by authority of Congress early, and finally sold under special acts prior to the discovery of gold in California. The general mining laws at first applied to Missouri, but by the act of May 5, 1876,[75] deposits of minerals in Missouri were excluded from these laws and made subject to disposal as agricultural lands. The state legislation provides for the inspection and other police regulation of mining.[78]

Montana is a mining law state, and has a general statutory mining code, supplementing federal legislation,[79] and also statutes providing for the condemnation of rights of way and the inspection and other police regulation of mines.[80] Mining partnerships are also legislated about.[81]

Nebraska, as a part of the Louisiana purchase, has been subject to the general land laws. The enabling act of the state, approved April 19, 1864,[82] specifically provided that all laws of the United States not locally inapplicable should have the same force and effect within the state as elsewhere within the United States. Despite the statement of Mr. Snyder to the contrary,[83] it seems clear that Nebraska would be subject to the mining laws, if there were mineral lands in the state. The state legislation offers a reward for the discovery of iron, coal, oil, or gas in the state.[84]

Nevada is a mining law state, and has a general mining code, supplementary to federal legislation,[85] and has also police and other regulation of mines and mine owners.[86]

[75] 19 Stat. 52, c. 91 (U. S. Comp. St. 1901, p. 1439).

[78] 2 Rev. St. Mo. 1899, §§ 8766–8828 (Ann. St. 1906, pp. 4068–4100); Laws 1901, pp. 211–215 (Ann. St. 1906, §§ 8793, 8794, 8811, 8818, 8826, 8828); Laws 1903, pp. 242–247 (Ann. St. 1906, §§ 8819 (1)–8819 (19), 8791, 8791a, 8826, 8827); Laws 1905, pp. 236–238 (Ann. St. 1906, §§ 8796 (1), 8796 (2), 8801a, 8811); Laws 1907, pp. 362–366.

[79] Pol. Code Mont. 1895, §§ 3613, 3614, 3616; Laws 1907, pp. 18–23.

[80] Pol. Code Mont. 1895, §§ 580–590; Pol. Code 1895, §§ 3350–3372, 3630–3654; Laws 1897, pp. 66, 67, 245; Laws 1899, pp. 134, 149; Laws 1905, p. 30; Laws 1907, pp. 337–342.

[81] Civ. Code 1895, §§ 3350–3359.

[82] 13 Stat. 47, c. 59.

[83] 1 Snyder on Mines, § 153, p. 126.

[84] Comp. St. Neb. 1907, §§ 4508–4513.

[85] Comp. Laws Nev. §§ 208–249; Laws 1901, pp. 97, 118, cc. 93, 107; Laws 1907, pp. 140, 193, 373, 418–420, cc. 65, 91, 177, 194; Comp. Laws Nev. §§ 2715, 2716, 2720–2724, 3407–3414, 3706; Laws 1905, p. 199, c. 98; Laws 1907, pp. 370, 371, c. 174.

[86] Comp. Laws Nev. §§ 250–300.

New Hampshire is one of the original thirteen states so never was subject to the federal mining laws. State legislation provides that real estate is to be taxed independently of any mines or ores therein until the latter become a source of profit.[87]

New Jersey. Like New Hampshire, New Jersey is one of the original thirteen states, so never was subject to the federal mining laws. State legislation provides for the inspection of mines.[88]

New Mexico is one of the mining law territories. It has a general mining code, supplementary to the federal legislation.[89]

New York. Like New Hampshire, New York is one of the original thirteen states, so never was within the federal mining laws. The New York statute asserts that "the following mines are the property of the people of the state in their right of sovereignty: (1) All mines of gold and silver discovered, or hereafter to be discovered, within the state. (2) All mines of other metals and of talc, mica or graphite discovered, or hereafter to be discovered, upon any lands owned by persons not being citizens of the United States. (3) All mines of other metals and of talc, mica or graphite discovered, or hereafter to be discovered, upon lands owned by a citizen of the United States, the ore of which, on an average, shall contain less than two equal third parts in value of copper, tin, iron, and lead, or any of these metals. (4) All mines and all minerals and fossils discovered, or hereafter to be discovered, upon any lands belonging to the people of this state." [90] Mines or minerals on state lands discovered by citizens of New York may be appropriated by giving notice to the Secretary of State. That notice gives the right to work "such mine," and the discoverer "and his heirs or assigns shall have the sole benefit of all products therefrom, on the payment into the state treasury of a royalty of two per centum of the market value of all such products," such valuation to be made when the product "shall first be in a marketable form," and to be ascertained from sworn semiannual statements.[91] All mines, other than gold and silver, dis-

[87] Pub. St. N. H. 1901, c. 55, § 4.

[88] 2 Gen. St. N. J. 1895, p. 1904, §§ 37–40.

[89] Comp. Laws N. M. 1897, §§ 2286–2359; Laws 1899, p. 111, c. 57; Laws 1905, p. 196, c. 83.

[90] 4 Cumming & G. Gen. Laws N. Y. Supp. 1906, p. 1237, § 80. The validity of this legislation is not open to the same attack as that of Michigan, for the federal mining laws never applied in New York, as they did in Michigan.

[91] 2 Cumming & G. Gen. Laws N. Y. 1901, p. 3000, §§ 81–83. It is held that under this statute the discoverer does not get a legal title to the mine or to the minerals in the land, but only a right to take the minerals out, and that the discoverer cannot maintain ejectment to recover possession of the

covered in lands owned by a citizen of the United States, "the ore of which, on an average, contains two equal third parts or more in value of copper, tin, iron, and lead, or any of these metals, shall belong to the owner of such land." [92] The discoverer of gold or silver mines, who gives notice of the discovery to the Secretary of State is exempted, and so are his personal representatives and assigns, from paying any royalty for 21 years from the time of giving notice, and after the end of that term "the discoverer, his heirs, or assigns, shall have the sole benefit of all products therefrom on the payment into the state treasury of a royalty of one per centum of the market value of all such products." [93] No trees can be cut or destroyed on state lands, "except such trees as it may be actually necessary to remove in order to uncover or make a road to such mine," and these must be paid for. No one can prospect on lands without the consent of the owner; the commissioners of the land office being the ones to give consent where state lands are concerned.[94] Corporations may acquire by condemnation the right to enter upon and break up lands necessary for the operation of their mines.[95] Various police regulations govern the working of mines.[96]

North Carolina is one of the thirteen original states, and hence has never been subject to the federal mining law. State legislation provides for the inspection and other police regulation of mines and the condemnation of waterways.[97]

North Dakota is a mining law state, and has a general mining code, supplementing the federal legislation.[98]

Ohio. The federal mining laws have had practically no operation in Ohio, because its lands were sold prior to the general mining acts. State legislation provides for the taxation, inspection, and general police regulation of mines.[99]

Oklahoma. By the act of March 3, 1891,[100] all lands in Oklahoma were "declared to be agricultural land," though by the act of June

lands, but must seek relief in equity. MOORE v. BROWN, 139 N. Y. 127, 34 N. E. 772.

[92] 2 Cumming & G. Gen. Laws N. Y. 1901, p. 3000, §§ 81–83.

[93] 2 Cumming & G. Gen. Laws N. Y. 1901, p. 3001, § 84.

[94] 2 Cumming & G. Gen. Laws N. Y. 1901, pp. 3001, 3002, §§ 84, 85.

[95] 2 Cumming & G. Gen. Laws N. Y. 1901, p. 3002, § 85.

[96] See 4 Cumming & G. Gen. Laws N. Y. Supp. 1906, p. 923, §§ 131–133.

[97] 2 Revisal N. C. 1905, §§ 4930–4957.

[98] Rev. Codes N. D. 1905, §§ 1800–1817, 6256–6263, 7536.

[99] 1 Bates' Ann. St. Ohio (3d Ed.) 1900, §§ 290–310, 2792, 2 Bates' Ann. St. (3d Ed.) 1900, §§ 4373–1 to 4379–5, 4935–1; Laws 1904, p. 63; Laws 1906, pp. 169, 259.

[100] 26 Stat. 1026, c. 543, § 16 (U. S. Comp. St. 1901, p. 1617).

6, 1900,[101] the existing mining laws of the United States were extended over Oklahoma lands ceded to the United States by the Comanche, Kiowa, and Apache tribes of Indians. The local legislation provides penalties for malicious injury to mining notices, stakes, shafts, and records,[102] and the Constitution of the new state creates the office of chief inspector of mines, oil, and gas and directs the Legislature to create mining districts.[103] The part of Oklahoma formerly known as Indian Territory was and is subject to certain federal legislation about mining in Indian lands. By the act of June 28, 1898,[104] Congress, in addition to providing for allotments of lands in Indian Territory, legislated about mining in those lands. The act provides that "all oil, coal, asphalt and mineral deposits in the lands of any tribe are reserved to such tribe and no allotment of such lands shall carry the title to such oil, coal, asphalt or mineral deposits," [105] and the Secretary of the Interior is given sole authority to make leases of "oil, coal, asphalt and other minerals in said territory," under rules and regulations from time to time provided by him, and with certain restrictions fixed by the act.[106] The validity of this legislation has been upheld by the United States Supreme Court.[107]

Oregon is a mining law state, and has a general mining code, supplementing the federal legislation.[108]

Pennsylvania was one of the thirteen original states, and so never was subject to the federal land laws. The state legislation provides for the inspection and other police regulation of mines.[109]

Philippine Islands. By the act of July 1, 1902,[110] amended by the act of February 6, 1905,[111] a complete mining law code is provided for the islands. By it the Philippine Commission is authorized to make mining regulations not in conflict with the acts, and has made a num-

[101] 31 Stat. 680, c. 813.
[102] Sess. Laws Okl. 1905, p. 198, c. 13.
[103] Const. Okl. art. 6, §§ 25, 26.
[104] 30 Stat. 495, c. 517; Ind. T. Ann. St. 1899, §§ 57q–57z91.
[105] Act June 28, 1898, c. 517, § 11, 30 Stat. 497.
[106] Act June 28, 1898, c. 517, § 13, 30 Stat. 498.
[107] CHEROKEE NATION v. HITCHCOCK, 187 U. S. 294, 23 Sup. Ct. 115, 47 L. Ed. 183.
[108] 2 B. & C. Comp. Or. 1902, §§ 3974–3990; Laws 1903, pp. 326–330; Laws 1905, p. 254; Laws 1907, pp. 294, 311.
[109] 2 Pepper & Lewis' Dig. (Pa.) pp. 3062ff; 3 Pepper & Lewis' Dig. Supp. p. 417ff; 4 Pepper & Lewis' Dig. Supp. 1239ff; P. L. 1903, 180–184; P. L. 1905, 344–350, 363–368; P. L. 1907, 270.
[110] 32 Stat. 697, c. 1369ff.
[111] 33 Stat. 692, c. 453ff.

ber. The acts and the insular legislation are given in the appendix. The Code differs considerably from the general American mining law. It allows no extralateral rights, but to make up for that a greater width of lode claim is permitted. Only one lode claim, not to exceed 300 meters square, may be located on the same vein by the same locator or locators.

Porto Rico. By the act of July 1, 1902,[112] all public lands in Porto Rico were ceded by the United States to the government of Porto Rico. There is apparently no local legislation, though there seems to be mineral land there.[113]

Rhode Island. Same state of facts as Delaware.

South Carolina was one of the thirteen original states, so the federal mining laws have never applied there. The state legislation provides that, where lands are actually mined, the gross proceeds alone shall be assessed and taxed.[114] It also regulates the employment of children in mines.

South Dakota is a mining law state, and has a general mining code, supplementing the federal legislation.[115]

Tennessee. The entire area of Tennessee was originally public domain; but the United States donated the same to the state,[116] and the federal mining laws have not applied there. The state legislation provides for the inspection and other police regulation of mines.[117]

Texas came into the Union owning its own lands. The federal land laws have never applied there. The state has a complete mining code.[118] It is given in the appendix, and differs from the federal legislation principally in recognizing no extralateral rights.

Utah is a mining law state, and has a general mining code, supplementing federal legislation,[119] as well as acts for the inspection and other police regulation of mines.[120]

[112] 32 Stat. 731, c. 1383.

[113] See 2 Lindley on Mines (2d. Ed.) § 878.

[114] Acts S. C. 1905, pp. 996, 997, § 14.

[115] Rev. Pol. Code S. D. §§ 2656–2711; Laws 1903, pp. 209–213, cc. 178–182.

[116] Donaldson, Public Domain, pp. 421–423.

[117] Mill. & V. Code Tenn. §§ 307–309; Shannon's Code Supp. (1897–1903) pp. 472–502, 683.

[118] 2 Sayles' Ann. Civ. St. Tex. 1897, arts. 3481–3498t; Sayles' Ann. Civ. St. Supp. 1897–1904, pp. 355, 356; Gen. Laws Tex. 1907, p. 331, c. 178.

[119] Rev. St. Utah 1898, §§ 1495–1506; Laws 1899, pp. 26–29; Laws 1901, p. 19; Laws 1903, p. 9; Compiled Laws Utah 1907, §§ 1495–1506x2.

[120] Rev. St. Utah 1898, §§ 1507–1540; Laws 1901, pp. 83–91, 150–151; Laws 1907, p. 34; Compiled Laws Utah 1907, §§ 910, 1337, 1338, 1507–1540x4.

Vermont was created out of territory belonging to some of the thirteen original states, and never has been subject to the federal mining or other land laws. Both New Hampshire and New York had claimed jurisdiction over Vermont territory, but whichever was entitled necessarily gave up its rights to Vermont on the latter's admission into the Union. The state legislation taxes mining and quarry rights.[121]

Virginia was one of the thirteen original states, so the federal mining laws have never applied there. The state legislation requires the state board of agriculture to collect minerals and assay them for the benefit of the owners, provides for the assessment of taxes on mineral lands and the sale or lease of infants' mineral lands, and contains certain police regulations.[122]

Washington is a mining law state, and has a general mining code, supplementing federal legislation,[123] and statutes for the inspection and other police regulation of mines, providing for a mining bureau, giving special rights to mining corporations, etc.[124]

West Virginia was carved out of Virginia, one of the thirteen original states, and was never subject to the federal mining laws. It succeeded to the rights of Virginia in undisposed-of lands. The state legislation provides for the inspection and other police regulation of coal mines.[125]

Wisconsin. For federal legislation and experience, see Michigan supra. The state legislation covers a number of mining matters. Among other things, it provides that corporations may be formed for mining, smelting, quarrying, and other like business. It lays down rules to govern mining contracts, provides for the condemnation of water-ways, for drainage, etc., imposes criminal penalties for digging

[121] V. S. 1894, § 365; Laws 1900, pp. 10–12, No. 12.

[122] 1 Va. Code, 1904, §§ 1783a, 1783g; 2 Va. Code 1904, §§ 2570–2572, 2616–2626, 3657bb.

[123] 1 Ballinger's Ann. Codes & St. Wash. §§ 3151–3157 (Pierce's Code, §§ 6432–6439); Laws 1899, pp. 47, 69, 155, 337, cc. 34, 45, 96, 147; Laws 1901, p. 292, c. 137.

[124] Ballinger's Ann. Codes & St. Wash. §§ 179–182, 3145–3150, 3158–3211, 4081, 4280–4284 (Pierce's Code, §§ 6493, 6494, 6497, 6498, 6501–6504, 6495–6496a, 6499, 6500, 6511, 6513, 6516, 6509, 6515, 6512, 6506, 6505, 6510, 6514, 6517, 6519, 6522, 6524, 6520, 6521, 6471–6479, 6454–6470); Laws 1907, pp. 130, 203, cc. 77, 105.

[125] Code W. Va. 1899, pp. 1045–1061; Laws 1901, pp. 84–86, 142, 224–234, cc. 31, 57, 106 (Code 1906, §§ 420–429, 468, 404, 409, 410, 419); Laws 1903, p. 163, c. 51 (Code 1906, § 471); Laws 1905, pp. 426–430, 491, cc. 46, 75 (Code 1906, §§ 400–403, 455–458).

up, severing, or carrying away minerals from public lands, or lands belonging to or lawfully occupied by another, prescribes rules to be followed in the case of conflicting claims to mining grounds, requires smelters to keep accounts of ores, regulates the employment of children in mines, etc.[126]

Wyoming is a mining law state, and has a general mining code, supplementing federal legislation,[127] and statutes for the inspection and other police regulation of coal mines.[128]

[126] 1 St. Wis. 1898, §§ 220, 1379 (1), 1647–1657, 1728a; 2 St. Wis. 1898, §§ 4441, 4442; Sanborn's St. Supp. 1906, §§ 1042j, 1647a.

[127] Rev. St. Wyo. 1899, §§ 2533–2561; Laws 1901, pp. 39, 104, 105, cc. 41, 100.

[128] Rev. St. Wyo. 1899, §§ 110–115, 2562–2596; Laws 1903, pp. 9, 18–21, 31–33, 101, cc. 6, 23, 35; Laws 1905, p. 100, c. 58.

CHAPTER III.

THE LAND DEPARTMENT AND THE PUBLIC SURVEYS.

THE LAND DEPARTMENT.

10. The land department is a branch of that department of the federal government of which the Secretary of the Interior is the head. The chief functions of the land department are to attend to the survey of the public lands, to supervise land entries, and to issue patents. Under the Secretary of the Interior is the Commissioner of the General Land Office, and subordinate to the latter, are the surveyors general of the different districts and the registers and receivers of the local land offices.

All proceedings begin in the survey and land districts, and reach the Commissioner of the General Land Office on appeal or in due course of ex parte procedure. In proper cases an appeal may be taken to the Secretary of the Interior. All proceedings are governed by the regulations of the land department.

Preliminary to an understanding of our subject, it is desirable to know something about the land department of the national government, as that is intrusted by Congress with the management and sale of the public lands of the United States. The land department has been since 1849 a branch of the Interior Department of the United States government.[1] Prior to that time it was under the Treasury Department.

The Secretary of the Interior.

The head of the land department is, of course, the Secretary of the Interior, who represents the President of the United States. The Secretary is charged with the supervision, among other things, of the public business relating to "the public lands, including mines." [2] The

[1] Act March 3, 1849, c. 108, 9 Stat. 395; Rev. St. U. S. § 437 (U. S. Comp. St. 1901, p. 248) ff. Compare U. S. v. Schlierholz (D. C.) 133 Fed. 333.

[2] Rev. St. U. S. § 441 (U. S. Comp. St. 1901, p. 252). See Knight v. U. S., 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974. "Further, it must be remembered that the general supervision of the affairs of the land department is now vested in the Secretary of the Interior, and that, unless Congress clearly designates some other officer to act in respect to such matters it will

Secretary of the Interior is represented in the land department by assistant secretaries.

The Commissioner of the General Land Office.

Under the Secretary of the Interior is the Commissioner of the General Land Office, who, under direction of the Secretary, is to perform "all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government." [3] An assistant commissioner of the General Land Office and other subordinate officers are provided for.[4]

The Surveyor General.

The Commissioner of the General Land Office being charged, as above, with the executive duties appertaining to the surveying, as well as the sale, of the public lands, it seems to be clear that the surveyors general appointed in the different states and territories by the President, one for each survey district, are subordinate to the Commissioner of the General Land Office.[5] The surveyors general appoint the deputy mineral surveyors, subject to review by the General Land Office.[6] Other officers under the Commissioner of the General Land Office are the registers and receivers of the various local land offices,[7] who have to reside at the place where the land office for which they are appointed is kept.[8]

Registers and Receivers.

When controversies over land arise, it is in the local land offices that they start. "A local land office is an office occupied by two officers. It is the office of the register, and also of the receiver." [9] The duties of the registers and receivers are distinct, the register being primarily a temporary recorder (though, since, sooner or later, all papers are transmitted to the General Land Office, and only plat and tract books remain permanently at the local land office, the local office is not strictly a place of record), and the receiver being primarily a treasurer; but the two officers must act together for so many purposes

be assumed that he is the officer to represent the government." Johanson v. Washington, 190 U. S. 179, 185, 23 Sup. Ct. 825, 47 L. Ed. 1008.

[3] Rev. St. U. S. § 453 (U. S. Comp. St. 1901, p. 257).

[4] U. S. Comp. St. 1901, p. 256; U. S. Comp. St. Supp. 1907, p. 61.

[5] Craigin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566.

[6] Robert Gorlinski, 20 Land Dec. Dep. Int. 283.

[7] Rev. St. U. S. §§ 2234–2237 (U. S. Comp. St. 1901, p. 1366). See list of land offices in section 13 of this chapter.

[8] Rev. St. U. S. § 2235 (U. S. Comp. St. 1901, p. 1366).

[9] Paris Meadows et al., 9 Land Dec. Dep. Int. 41, 44.

that it is held that "the action of each is necessary within their appropriate spheres to the administration of the office," [10] and that a vacancy in the office of either the register or the receiver disqualifies the remaining incumbent from performing the duties of his own office until the vacancy is filled.[11] If both offices are filled, it seems that the register and receiver "can act independently and separately in most of the matters pertaining to their duties in the land office. They need not act jointly in administering oaths, or in examining witnesses, or in hearing testimony, for all testimony is required to be reduced to writing and cases may be decided upon the record so made; but in rendering opinions and publishing decisions on matters affecting the rights or interests of adverse parties the law contemplates that they shall act jointly." [12] Both officers need not act simultaneously. "The receiver may act at one time, and the register at another; but both must act before the case is concluded and the papers signed upon which the patent is subsequently issued."[13]

The practice before these officers is governed by the rules of the General Land Office; [14] all testimony offered being received, subject to their rulings on its admissibility. All papers in matters before them are forwarded, sooner or later, to the General Land Office, where they remain.

Appeals.

Appeal from the registers and receivers lies to the Commissioner of the General Land Office. The latter's decision may be reviewed by the Secretary of the Interior, and perhaps there may be an appeal "under special circumstances to the President." [15] Congress has, of course, the power at any time to withdraw a contest from the land department and determine for itself the rights of the parties.*

[10] Christian F. Ebinger, 1 Land Dec. Dep. Int. 150.

[11] Graham v. Carpenter, 9 Land Dec. Dep. Int. 365; Smith v. McKerracher, 20 Land Dec. Dep. Int. 276.

[12] Peters v. United States, 2 Okl. 116, 131, 33 Pac. 1031.

[13] Smith v. United States, 170 U. S. 372, 377, 18 Sup. Ct. 626, 42 L. Ed. 1074; Potter v. United States, 107 U. S. 126, 1 Sup. Ct. 524, 27 L. Ed. 230.

[14] Department mineral land regulations must be appropriate, reasonable, and within the limitation of the law for the enforcement of which they are provided, or they are void. Anchor v. Howe (C. C.) 50 Fed. 366.

[15] Shepley v. Cowan, 91 U. S. 330, 340, 23 L. Ed. 424.

* Emblen v. Lincoln Land Co., 102 Fed. 559, 42 C. C. A. 499.

ATTITUDE OF THE COURTS TOWARD THE LAND DEPARTMENT.

11. If there has been no fraud nor imposition, the courts regard all decisions of the land department on questions of fact as conclusive. They will give effect to those decisions, despite errors of law, unless the courts are convinced that but for the errors of law the decisions would have been the other way, or unless the land department has exceeded its jurisdiction. The courts, moreover, incline to accept the long-continued construction placed by the land department on ambiguous statutes.

As we have seen, the chief function of the land department is to supervise land entries and to issue patents. In determining between different classes of claimants whether land is mineral or not, and whether, if mineral, an applicant is entitled to a patent, the land department is acting in a quasi judicial capacity. Its chief function is that of a jury, namely, to investigate and pass upon the facts.

If there has been no fraud nor imposition, all questions of fact decided by the department are regarded by the courts as conclusively settled.[16] Even though questions of law are mixed with the questions of fact, and the questions of law may have been wrongly decided, still, if the courts cannot say that but for an error of law the case must have been decided the other way, the courts will not interfere.[17] While, of course, any action of the land department may be attacked on the ground that it was beyond the jurisdiction of that branch of the government, the presumption is in favor of

[16] DE CAMBRA v. ROGERS, 189 U. S. 119, 23 Sup. Ct. 519, 47 L. Ed. 734; Gardner v. Bonestell, 180 U. S. 362, 21 Sup. Ct. 399, 45 L. Ed. 574; Moss v. Dowman, 176 U. S. 413, 20 Sup. Ct. 429, 44 L. Ed. 526; Johnson v. Drew, 171 U. S. 93, 18 Sup. Ct. 800, 43 L. Ed. 88; Stewart v. McHarry, 159 U. S. 643, 16 Sup. Ct. 117, 40 L. Ed. 290; Carr v. Fife, 156 U. S. 494, 15 Sup. Ct. 427, 39 L. Ed. 508; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; Moore v. Robbins, 96 U. S. 530, 24 L. Ed. 848; Peyton v. Desmond, 129 Fed. 1, 63 C. C. A. 651; Mineral Farm Min. Co. v. Barrick, 33 Colo. 410, 80 Pac. 1055; Jeffords v. Hine, 2 Ariz. 162, 11 Pac. 351. See Golden Reward Min. Co. v. Buxton Min. Co. (C. C.) 79 Fed. 868. While the land department decisions are subject to review for fraud, mistakes, or other equitable ground, Estes v. Timmons, 12 Okl. 537, 73 Pac. 303, it seems that perjury during the hearing before the land department is not ground enough, Cagle v. Dunham, 14 Okl. 610, 78 Pac. 561; Kennedy v. Dickie, 34 Mont. 205, 85 Pac. 982. Compare Cragie v. Roberts (Cal. App.) 92 Pac. 97.

[17] MARQUEZ v. FRISBIE, 101 U. S. 473, 476, 25 L. Ed. 800, where the court says: "It is a sound principle that where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

jurisdiction.[18] Where the matter is within the jurisdiction of the land department, and yet that department has made a clear and controlling mistake of law, the courts in a proper case will correct the error.[19] In Hawley v. Diller, the United States Supreme Court says: "It is suggested that the order of the land department canceling the entry was based upon a misconstruction of the law. If it had been, then the error could be corrected by the courts." [20]

The attitude of the courts towards the land department is, however, one of great friendliness, even on matters of law. They are not bound by the land department's construction of the land statutes, yet when the statutes are ambiguous, and the land department has

[18] KING v. McANDREWS, 111 Fed. 860, 50 C. C. A. 29; New Dunderberg Min. Co. v. Old, 79 Fed. 598, 25 C. C. A. 116.

[19] Sanford v. Sanford, 139 U. S. 642, 647, 11 Sup. Ct. 666, 35 L. Ed. 290; Baldwin v. Starks, 107 U. S. 463, 465, 2 Sup. Ct. 473, 27 L. Ed. 526; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; Southern Cross Gold Min. Co. of Kentucky v. Sexton, 147 Cal. 758, 82 Pac. 423; Hoyt v. Weyerhaeuser (C. C. A.) 161 Fed. 324. See Gonzales v. French, 164 U. S. 338, 17 Sup. Ct. 102, 41 L. Ed. 458.

[20] Hawley v. Diller, 178 U. S. 476, 489, 20 Sup. Ct. 986, 44 L. Ed. 1157. Compare Wisconsin Cent. R. Co. v. Forsythe, 159 U. S. 46, 61, 15 Sup. Ct. 1020, 40 L. Ed. 71.

"A patent to land of the disposition of which the land department has jurisdiction is both the judgment of that tribunal and a conveyance of the legal title to the land; but the judgment and conveyance of the department do not conclude the rights of the claimants to the land. They rest on established principles of law and fixed rules of procedure, which condition their initiation and prosecution, the application of which to the facts of each case determines its right decision; and if the officers of the land department are induced to issue a patent to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid the decision and charge the legal title derived from the patent which they issue with his equitable title to it on either of two grounds: (1) That upon the facts found, conceded, or established without dispute at the hearing before the department, its officers fell into an error in the construction of the law applicable to the case, which caused them to refuse to issue the patent to him, and to give it to another; or (2) that through fraud or gross mistake they fell into a misapprehension of the facts proved before them, which had the like effect. If he would attack the patent on the latter ground, and avoid the department's finding of facts, however, he must allege and prove, not only that there was a mistake in the finding, but [also] the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fraud, if any, which induced it, before any court can enter upon the consideration of any issue of fact determined by the officers of the department at the hearing." Sanborn, J., in James v. Germania Iron Co., 107 Fed. 597, 600, 601, 46 C. C. A. 476, 479. Patents will not be set aside for mistake, except where the proof is plain and convincing beyond reasonable controversy. Thallmann v. Thomas, 111 Fed. 277, 49 C. C. A. 317.

consistently and for a considerable length of time followed a given construction of them, particularly where the adoption of the construction was practically contemporaneous with the passage of the statutes, the courts will accept the department's construction.[21]

The court's aid may be sought by litigants either before patent or after patent. Prior to the land department's loss of jurisdiction over a matter by the issuance of a patent[22] or other final action,[23] the courts refuse, in general, to interfere with proceedings in the land department.[24] Under the forcible entry and detainer statutes, and by injunction, however, the courts will prevent wrongful interference with the actual possession of the land affected pending the land office's determination of the questions before that office.[25] After the issuance of patent no disputed question of fact presented to the land department can be litigated in the courts. The patent, if valid on its face and issued under a law authorizing its issuance, cannot be collaterally attacked, but may be subject to several kinds of direct attack. For instance, the United States may file a bill in equity to annul the patent because obtained by fraud,[26] by inadvertence or mistake,[27] or even, it seems, because issued through erroneous views of

[21] Hewitt v. Schultz, 180 U. S. 139, 21 Sup. Ct. 309, 45 L. Ed. 463; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 366, 10 Sup. Ct. 112, 33 L. Ed. 363; U. S. v. Burkett (D. C.) 150 Fed. 208; McFadden v. Mountain View Mining & Milling Co., 97 Fed. 670, 38 C. C. A. 354.

[22] The issuance of patent does not necessarily mean here the actual delivery of the patent, but may precede such delivery. United States v. Schurz, 102 U. S. 378, 26 L. Ed. 167. A patent, duly issued and recorded, passes title without delivery. United States v. Laam (C. C.) 149 Fed. 581; Rogers v. Clark Iron Co. (Minn.) 116 N. W. 739. Until title passes the land department retains jurisdiction over the lands. Peyton v. Desmond, 129 Fed. 1, 63 C. C. A. 651.

[23] As by an irrevocable decision. Noble v. Union River Logging R. Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123.

[24] HUMBIRD v. AVERY, 195 U. S. 480, 25 Sup. Ct. 123, 49 L. Ed. 286; Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 24 Sup. Ct. 860, 47 L. Ed. 1064; Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800; United States v. Schurz, 102 U. S. 378, 395, 26 L. Ed. 167; Northern Lumber Co. v. O'Brien (C. C.) 124 Fed. 819; Wallula Pac. R. Co. v. Portland & S. R. Co. (C. C.) 154 Fed. 902.

[25] Zimmerman v. McCurdy, 15 N. D. 79, 106 N. W. 125; Fulmele v. Camp, 20 Colo. 495, 39 Pac. 407; Northern Pac. R. Co. v. Soderberg (C. C.) 86 Fed. 49; Colwell v. Smith, 1 Wash. T. 92; Utah, N. & C. R. Co. v. Utah & C. R. Co. (C. C.) 110 Fed. 879; Northern Lumber Co. v. O'Brien (C. C.) 124 Fed. 819; Jones v. Hoover (C. C.) 144 Fed. 217; Kitcherside v. Myers, 10 Or. 21. See Marquez v. Frisbie, 101 U. S. 473, 475, 25 L. Ed. 800.

[26] United States v. Iron Silver Min. Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; U. S. v. Maxwell Land Grant Co., 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949. See San Pedro & Cañon del Agua Co. v. U. S., 146 U. S. 120, 13 Sup. Ct. 94, 36 L. Ed. 911.

[27] Germania Iron Co. v. United States, 165 U. S. 379, 17 Sup. Ct. 337,

law.[28] Then, again, where in fraud of the real owner, or by mistake of fact or mistake of law, a patent has been issued to a third person, a court of equity will hold the patentee a trustee for the real owner,[29] or allow the real owner to quiet title.[30]

THE SYSTEM OF PUBLIC LAND SURVEYS.

12. The United States system of public land surveys calls for townships six miles square, and the subdivision of each township into thirty-six sections, each a mile square. The sections in turn are subdivided into halves, quarters, etc. The surveyors, in furnishing the details of the survey, certify to the surveyor general the mineral or nonmineral character of the land; and the surveyor general returns the land as mineral or nonmineral accordingly. The surveyor general's return accompanies the plats of survey transmitted to the proper land offices, and the land officers treat that return as prima facie evidence of the nature of the soil.

By section 2319, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1424), "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase," etc. It is desirable, therefore, to say a word first about surveyed and unsurveyed lands. It was by the placer act of July 9, 1870 (16 Stat. 217, c. 235), that provision was made for extending the public surveys over mineral lands.

Survey Subdivisions.

The United States system of surveys provides for the division of the public lands into townships six miles square, the townships constituting the unit of survey, and being divided by lines run north and south according to the true meridian and by lines run east and west to cross the north and south lines at right angles. Each township is numbered, and is subdivided into thirty-six sections, each a mile square, and each numbered. The following diagram shows a township.

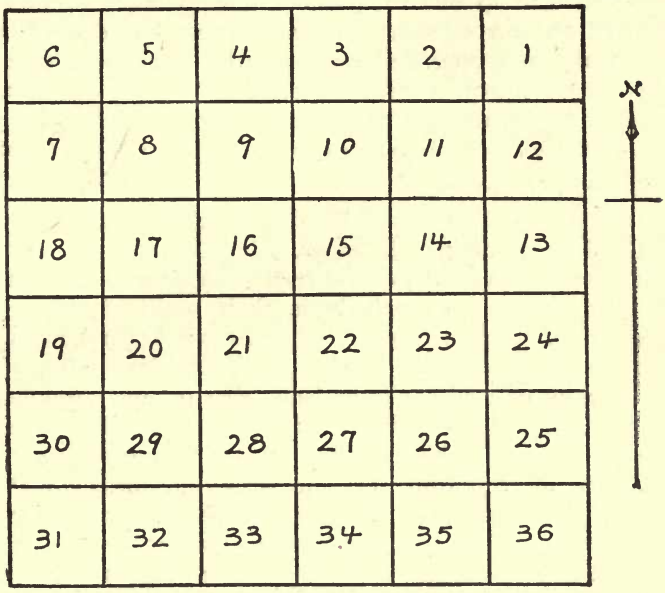
41 L. Ed. 754; Williams v. United States, 138 U. S. 514, 11 Sup. Ct. 457, 34 L. Ed. 1026.

[28] United States v. Winona & St. P. R. Co., 67 Fed. 948, 959, 15 C. C. A. 96.

[29] BERNIER v. BERNIER, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152; United States v. Citizens' Trading Co. (Okl.) 93 Pac. 448; James v. Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476, and cases cited; Hoyt v. Weyerhaeuser (C. C. A.) 161 Fed. 324. See Le Marchel v. Teegarden (C. C.) 133 Fed. 826.

[30] DULUTH & IRON RANGE R. CO. v. ROY, 173 U. S. 587, 19 Sup. Ct. 549, 43 L. Ed. 820; Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C.) 106 Fed. 242.

FIGURE No. 1



The sections are numbered, beginning at the extreme northeast corner and ending at the extreme southeast corner of the township. Each section contains 640 acres, if accurately surveyed, and is subdivided into half sections of 320 acres, and these latter into quarter sections of 160 acres each. These quarter sections are again subdivided into halves and quarters. In the subdivision of a quarter section, to make half quarter sections, the line is run north and south; and in case of the division of half of a quarter section (80 acres) the line of division must run east and west.[31]

Many inaccuracies exist in the surveys as made. The courts, however, cannot make surveys, nor correct surveys already made, as those matters are exclusively in the jurisdiction of the land department.[32] A local surveyor must follow the official field notes in lo-

[31] Donaldson, Public Domain, 582. For a township plat showing the effect on the survey of a lake in the township, see KIRWAN v. MURPHY, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698. For a plat showing the effect of a river, see Johnson v. Hurst, 10 Idaho, 308, 77 Pac. 784, 787. Except where special circumstances necessitate smaller fractional lots, the smallest survey subdivision is a 40-acre tract. Hopper v. Nation (Kan.) 96 Pac. 77. The minor subdivisions are not marked on the ground, but appear on the plats in the surveyor general's office.

[32] KIRWAN v. MURPHY, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698.

cating section and other corners, without regard to whether this gives more land to one subdivision than to another; for he is not authorized to correct what the government has done.[33] A plat of survey made and approved by the land department cannot be impeached, except upon a direct proceeding brought for that purpose.† And the land department itself cannot, by correcting a survey, take away from patentees any part of the tracts patented to them.[34]

The Surveyor's Return.

The surveyors were charged under the ordinance of May 20, 1785, with the duty of noting all mines, salt licks, and mill seats, and the instructions to surveyors general require those who conduct the actual surveys in the field to embody in their notes of survey a general description of the soil, timber, minerals, water, and main geological features of each township, and a particular description of the quality and extent of coal banks or beds, peat or turf grounds, minerals, and ores, and of the diggings therefor.‡ These field notes, with accompanying topographical sketch of the surveyed country, if approved, and the resulting township plats transmitted by the surveyor general to the proper land office, constitute the surveyor general's return. The lands thus returned by the surveyor general as agricultural, timber, mineral, etc., are thereupon deemed prima facie to be what he has described them, though, of course, that means no more than that, in the land department at least, the burden of proof is on one who would seek to show the land to be of a different character than that ascribed to it by the surveyor general.[35] Where land is returned as agricultural, the one who seeks to contradict the return must show that the land contains mineral which makes it more valuable for mining than for agriculture; but where, prior to the grant to a state, a legal location of a mining claim has been made on land returned as agricultural, the return of the surveyor is overcome as between the state and the locator.[36] Indeed, the prima facie value of the surveyor general's return is properly very slight.

"When it is considered," says Mr. Lindley, "that sections of one

[33] Yolo County v. Nolan, 144 Cal. 445, 77 Pac. 1006; Beltz v. Mathiowitz, 72 Minn. 443, 75 N. W. 699.

† McBride v. Whitaker, 65 Neb. 137, 90 N. W. 966.

[34] Kirwan v. Murphy, 109 Fed. 354, 48 C. C. A. 399 (reversed, because case for injunction not made out, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698).

‡ Donaldson's Public Domain, 575 ff.

[35] Magruder v. Oregon & C. R. Co., 28 Land Dec. Dep. Int. 174, 177; Tulare Oil & Mining Co. v. Southern Pac. R. Co., 29 Land Dec. Dep. Int. 269; Johnston v. Morris, 72 Fed. 890, 19 C. C. A. 229. See Winscott v. Northern Pac. R. Co., 17 Land Dec. Dep. Int. 274; Caledonia Min. Co. v. Rowen, 2 Land Dec. Dep. Int. 714; Gold Hill Quartz Min. Co. v. Ish, 5 Or. 104, 109.

[36] State of Washington v. McBride, 18 Land Dec. Dep. Int. 199. But by

mile square are the smallest tracts the out-boundaries of which the law requires to be actually surveyed; that the minor subdivisions are not surveyed in the field, but are defined by law and protracted in the surveyor general's office on the township plats, the lines being imaginary; that surveyors, as a rule, are neither practical miners nor geologists; that they are compensated, not for the value of the information furnished as to the character of the lands, but for the number of linear miles surveyed in the field; and that their investigation as to the character of the land is wholly superficial, it would seem that but little weight should be given to these returns." [37] And, in view of the fact that Land Office Commissioners have themselves commented on the inaccuracy of the returns, he adds: "In the light of these conceded facts, it is a marvel that either the land department or the courts ever announced the doctrine that such returns were prima facie evidence of anything save their own inherent weakness and insufficiency for this purpose." [38] Mr. Lindley concludes that, "While the rule which treats the surveyor general's return as establishing prima facie the character of the land is a convenient one in controversies arising between individuals over an asserted right to enter public lands, as determining upon whom rests the burden of proof, it has been productive of iniquitous results in administering the colossal land grants to railroad companies, and we are justified in asserting that its force as a universal rule has been materially weakened by the recent decisions of both the land department and the courts of last resort." [39]

By the mining acts, unsurveyed, as well as surveyed, lands are thrown open to exploration and location. The mining claim itself must in any event be surveyed when patent is applied for. Lode claims are unaffected by being on surveyed land; but, because of the placer act provision that all placer claims located under Act May 10, 1872, c. 152, § 10, 17 Stat. 94, shall conform as nearly as practicable to the United States system of public land surveys and to the rectangular subdivisions of such surveys,[40] placer claims are affected by being on surveyed lands, and must be rectangular when located on unsurveyed land. That matter will be taken up when we consider placers.

legal location is meant one based on such a discovery of mineral as would warrant a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Magruder v. Oregon & C. R. Co., 28 Land Dec. Dep. Int. 174, citing Castle v. Womble, 19 Land Dec. Dep. Int. 455. See, also, McQuiddy v. State of California, 29 Land Dec. Dep. Int. 181.

[37] 1 Lindley on Mines (2d Ed.) p. 160, § 106.

[38] 1 Lindley on Mines (2d Ed.) p. 162. Cf. Field, J., in Barden v. Northern Pac. R. Co., 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992.

[39] 1 Lindley on Mines (2d Ed.) p. 159, § 106.

[40] Rev. St. U. S. § 2331 (U. S. Comp. St. 1901, p. 1432).

THE LOCATION OF DISTRICT LAND OFFICES.

13. There are United States district land offices in all the mining law states and territories and in some others.

At the time of going to press, the district land offices of the United States are located as follows:

ALABAMA.
Montgomery.

ALASKA.
Fairbanks.
Juneau.
Nome.

ARIZONA.
Phœnix.

ARKANSAS.
Camden.
Dardanelle.
Harrison.
Little Rock.

CALIFORNIA.
Eureka.
Independence.
Los Angeles.
Oakland.
Redding.
Sacramento.
Susanville.
Visalia.

COLORADO.
Del Norte.
Denver.
Durango.
Glenwood Springs.
Hugo.
Lamar.
Leadville.
Montrose.
Pueblo.
Sterling

FLORIDA.
Gainesville.

IDAHO.
Blackfoot.
Boise.
Cœur d'Alene.
Hailey.
Lewiston.

IOWA.
Des Moines.

KANSAS.
Colby.
Dodge City.
Topeka.

LOUISIANA.
Natchitoches.
New Orleans.

MICHIGAN.
Marquette.

MINNESOTA.
Cass Lake.
Crookston.
Duluth.

MISSISSIPPI.
Jackson.

MISSOURI.
Springfield.

MONTANA.
Billings.
Bozeman.
Glasgow.
Great Falls.
Helena.
Kalispell.
Lewistown.
Miles City.
Missoula.

NEBRASKA.
Alliance.
Broken Bow.
Lincoln.
North Platte.
O'Neill.
Valentine.

NEVADA.
Carson City.

NEW MEXICO.
Clayton.
Las Cruces.
Roswell.
Santa Fé.
Tucumcari.

NORTH DAKOTA.
Bismarck.
Devils Lake.
Dickinson.
Fargo.
Minot.
Williston.

OKLAHOMA.
El Reno.
Guthrie.
Lawton.
Woodward.

OREGON.
Burns.
La Grande.
Lakeview.
Portland.
Roseburg.
The Dalles.

SOUTH DAKOTA.
Aberdeen.
Chamberlain.
Lemmon.
Mitchell.
Pierre.
Rapid City.

UTAH.
Salt Lake City.
Vernal.

WASHINGTON.
North Yakima.
Olympia.
Seattle.
Spokane.
Vancouver.
Walla Walla.
Waterville.

WISCONSIN.
Wausau.

WYOMING.
Buffalo.
Cheyenne.
Douglas.
Evanston.
Lander.
Sundance.

CHAPTER IV.

THE RELATION BETWEEN MINERAL LANDS AND THE PUBLIC LAND GRANTS.

Kinds of Land Grants.

The mining law statutes are but part of the general land legislation of the United States. It is impossible to understand them properly without understanding the whole federal public land system, because, while only those lands which contain mineral deposits, and which both belong to the United States and are unappropriated to any other use, are open to mining location, it is impossible to ascertain what those lands are without a discussion of all kinds of public lands. A consideration of the various dispositions of the United States public domain is essential to a proper understanding of American mining law, and it will be convenient to begin with those known under the title of "Land Grants." They are: (1) Mexican land grants; (2) state school land grants; (3) railroad land grants.

MEXICAN LAND GRANTS.

14. Various Mexican land grants, protected by the treaty of Guadalupe-Hidalgo, by the Gadsden purchase treaty, and by the act of cession of Texas, have been adjudicated either by Congress itself or under provision made by acts of Congress. Three methods have been followed:

(1) In California there was an investigation and determination of facts by a board of land commissioners, whose actions were subject to review by the United States courts.

(2) In Arizona, Colorado, and New Mexico prior to the act of 1891, investigations were made by the surveyors general, who reported to the Interior Department.

(3) In Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming the act of March 3, 1891, provided for a Court of Private Land Claims to pass upon the grants.

Under (1) a patent issued; under (2) confirmation was by acts of Congress; while under (3) the title was in the form of a decree of court.

We consider Mexican land grants first, because in those mining law states where Mexican land grants exist the public lands came to the United States burdened with grants. They therefore took priority

over every other claim, since the treaties of Guadalupe-Hidalgo and of the Gadsden purchase with Mexico and the act of cession of Texas all imposed upon the United States the obligation to protect titles to lands acquired from Mexico.[1]

As was to be expected, the United States met properly the obligations imposed upon it. Many land grants from Mexico were claimed; most of them being for colonization, or for the purposes of stock-raising and agriculture. Only a few were for mining ground as such. The various Mexican land grant claims in Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming were adjudicated either by Congress or under provision made by acts of Congress.

As was also to be expected, two great difficulties were experienced in adjudicating Mexican land grants. One difficulty was to determine which grants were genuine and which were fraudulent. The other difficulty was to ascertain just what was granted under the genuine grants, and the chief reason for this latter difficulty was that a number of grants were "floats"; i. e., grants where the boundaries were not yet defined. Then, too, "many of the so-called grants were of an inchoate character—what we would call licenses or equities, not ripened into grants proper." [2]

Kinds of Mexican Land Grants.

"Mexican grants were of three kinds: (1) Grants by specific boundaries, where the donee is entitled to the entire tract, whether it be more or less. (2) Grants of quantity, as of one or more leagues within a larger tract, described by what are called 'outside boundaries,' where the donee is entitled to the quantity specified, and no more. (3) Grants of a certain place or rancho by name, where the donee is entitled to the whole tract, according to the boundaries given, or, if not given, according to its extent as shown by previous possession." [3]

These different kinds of land grants were dealt with variously. With reference to the Mexican grants in California, Congress adopted in 1851 the system which it had previously followed in the Louisiana and Florida cessions,[4] namely, that of investigation and determination of the facts by a board of land commissioners, whose action was subject to review by the United States courts.[5] With reference to

[1] See Peralta v. United States, 3 Wall. 434, 439, 18 L. Ed. 221; Knight v. United Land Ass'n, 142 U. S. 161, 186, 12 Sup. Ct. 258, 35 L. Ed. 974.

[2] Morrison's Mining Rights (13th Ed.) p. 312.

[3] United States v. McLaughlin, 127 U. S. 428, 448, 8 Sup. Ct. 1177, 32 L. Ed. 213.

[4] Donaldson's Public Domain, 375.

[5] Act March 3, 1851, c. 41, 9 Stat. 631.

New Mexico, the act of July 22, 1854,[6] provided for investigations of Mexican land grants by the surveyor general for New Mexico, and for reports by him to the Interior Department, and by the act of February 28, 1861,[7] with reference to Colorado, and the act of February 24, 1863,[8] with reference to Arizona, this New Mexico method was extended to Colorado and Arizona. Finally the act of March 3, 1891,[9] applicable to Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, provided for a Court of Private Land Claims to pass upon these asserted Mexican grants. Under these various acts no Spanish or Mexican mining right grant seems ever to have been sustained,[10] and the only recognized grants, therefore, were claimed for colonization purposes or for stock-raising and farming. Many of these grants included mining lands, however, and the effect of these grants upon the mining lands must be noted.

By the California act all kinds of grants, whether perfect or inchoate, had to be presented to the board of commissioners for determination. Patents were issued for such as were ultimately confirmed. The question then arises, what about the mineral land embraced in the patented area? Under the law of Mexico all mines belonged to the Mexican government, and by a grant of the Mexican government no title to the minerals would pass to the grantee, unless expressly so stated in the patent.[11] The question then arose, did the United States, in confirming the Mexican grants, retain the title to the minerals, just as the Mexican government would have done, or was the confirmation of a Mexican land grant itself a grant from the United States, with all that a grant from the United States would imply? At an early date (1861) the California Supreme Court, in the case of Moore v. Smaw, decided that it was a grant from the United States, and that by a grant from the United States all mineral lands embraced within the granted limits passed, just as they would by a grant from an individual fee-simple owner.[12] That doctrine has remained the law ever since,* except as affected by the express reservation in the act of 1891. A patent issued under the

[6] 10 Stat. 308, c. 103.

[7] 12 Stat. 172, c. 59.

[8] 12 Stat. 664, c. 56.

[9] 26 Stat. 854, c. 539 (U. S. Comp. St. 1901, p. 765).

[10] For the requisites of a Spanish grant of a mine to make the grant binding on the United States, see Castillero, v. United States, 2 Black (U. S.) 17, 17 L. Ed. 360.

[11] See MOORE v. SMAW, 17 Cal. 199, 79 Am. Dec. 123.

[12] Id. See Ah Hee v. Crippen, 19 Cal. 491.

* But see United States v. San Pedro & Cañon del Agua Co., 4 N. M. (Johns.) 225, 17 Pac. 337, discussed infra.

California act in confirmation of a Mexican land grant is a disclaimer by the United States, which passes to the grantee, as the recognized rightful owner of the property, all the interest possessed by the United States.[13]

Under the New Mexico, Colorado, and Arizona acts, prior to the act of March 3, 1891, patents did not issue; but confirmation of such grants as were investigated under that act took place by confirmatory acts of Congress.[14] While there can be no doubt that a direct confirmation by Congress of a Mexican grant passes to the claimant (as effectively as a patent issued under the California board of land commissioners act did) all the title of the United States to mineral lands within the boundaries of the grant, the Supreme Court of New Mexico went out of its way to declare that it did not.[15] The statement of the New Mexican court was an obiter dictum, the judgment of the court being affirmed by the United States court upon another ground,[16] and is clearly erroneous.[17]

The Act of March 3, 1891.

Under the act of March 3, 1891, however, there is a different question. By the third subdivision of section 13 of that act[18] it was provided that "no allowance of confirmation of any claim shall confer any right or title to any gold, silver, or quicksilver mines or minerals of the same, unless the grant claimed effected the donation or sale of such mines or minerals to the grantee, or unless such grantee has become otherwise entitled thereto in law or in equity; but all such mines and minerals shall remain the property of the United States, with the right of working the same, which fact shall be stated in all patents issued under this act. But no such mine shall be worked on any property confirmed under this act without the consent of the owner of such property, until specially authorized thereto by an act of Congress hereafter passed." Congress undoubtedly acted within its rights in making this proviso, for, of course, the Mexican land grant claimant was legally entitled under the treaty of Guadalupe-

[13] Beard v. Federy, 3 Wall. 478; Adam v. Norris, 103 U. S. 591, 26 L. Ed. 583.

[14] Where a Spanish land grant was confirmed by statute, and a survey was provided for, it was held that title passed on the confirmation of survey in 1856, and did not wait to pass until the issuance of patent in 1873. Levy v. Gause, 112 La. 789, 36 South. 684.

[15] United States v. San Pedro & Cañon del Agua Co., 4 N. M. (Johns.) 225, 17 Pac. 337.

[16] San Pedro & Cañon del Agua Co. v. United States, 146 U. S. 120, 13 Sup. Ct. 94, 36 L. Ed. 911.

[17] Compare Catron v. Laughlin, 11 N. M. 604, 72 Pac. 26.

[18] 26 Stat. 854, 860, c. 539 (U. S. Comp. St. 1901, pp. 765, 772).

Hidalgo to no more than the Mexican government's grant called for and that did not call for the minerals; but, on the other hand, despite the doubt expressed by Secretary Hitchcock,[19] Congress seems to have done here what it has done nowhere else, except in the railroad land grants, namely, passed the title to the land and reserved unknown minerals. The only explanation seems to be that Congress was suspicious of the nature of many of the so-called Mexican land grants, and wanted to take away that large part of the inducement to their fraudulent assertion which mineral deposits offered. What the ultimate outcome will be depends upon Congress, and until Congress acts no valid location of these mineral deposits in these granted lands can be made.

Under the act of March 3, 1891, it has been held that the title to imperfect grants did not pass out of the United States on the decree of the Court of Private Land Claims, but only on the confirmation by that court of the survey defining said decree as provided by the statute.[20] Before leaving the various kinds of Mexican land grants, we must notice that in some cases Congress authorized the selection by claimants of lands other than mineral in lieu of the ones claimed.[21] The claimant in such case had the burden of establishing the nonmineral character of the lands selected,[22] but patent was conclusive.[23]

MINING LOCATIONS ON MEXICAN LAND GRANTS.

15. Prior to the act of 1891 a Mexican land grant not yet adjudicated and not yet barred under the nonclaim provisions of the federal statutes was sub judice, and as such was not public land subject to appropriation under the mining or other land laws. But since the act of 1891 mining locations may be made in unconfirmed grants.

And now a word as to mining locations made on Mexican land grant ground. The general rule was that a grant not yet adjudicated and not yet barred under nonclaim provisions of the federal statutes was sub judice, and as such was not public land subject to appropriation under the mining or other land laws.[24] But to this general

[19] Quoted in 1 Lindley on Mines (2d Ed.) § 127.

[20] Territory v. Persons, etc., 12 N. M. 169, 76 Pac. 316. The Court of Private Land Claims ceased to exist June 30, 1904. Act March 3, 1903, c. 1007, § 1, 32 Stat. 1144 (U. S. Comp. St. Supp. 1907, p. 232).

[21] See Shaw v. Kellogg, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1050; Baca Float No. 3, 29 Land Dec. Dep. Int. 44.

[22] Baca Float No. 3, 13 Land Dec. Dep. Int. 624.

[23] Compare Gale v. Best, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44.

[24] SOUTHERN PAC. R. CO. v. UNITED STATES, 200 U. S. 354, 26 Sup. Ct. 298, 50 L. Ed. 512; Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769. See

rule the act of March 3, 1891, has made a clear exception, and now in the states and territories affected by that act mining locations can be made on unconfirmed grants, to abide the final determination of the validity of the grant. If it turns out that the lands are not within the grant, the validity of the mining location is unaffected by the fact that it was claimed to be within the grant.[25] If it was within the grant, it was ended by decree and patent of the grant before the act of 1891;† but that is apparently not true under the act of 1891.* Even prior to the act of 1891 it was true, of course, that where a grant was finally rejected the land, without further action by the land department, became subject to mineral location if really mineral.[26] The same was, of course, true where the claimant's right was barred under the statutory provision of non-claim. And where float grants were defined by confirmation the excluded area became open and unappropriated land of the United States, while Congress by direct legislative grant might dispose of land within the region hovered over by a float so long as enough land within that region was left to provide the acreage called for by the float.[27] In a few adjudicated or confirmed grants, as in the case of the Maxwell land grant, the owners have inaugurated their own system for the location of mining claims.

STATE SCHOOL LAND GRANTS.

16. The United States has granted to the states, as an aid to schools, sections 16 and 36 in every township as well as other lands, and where, for any reason, the specific sections cannot pass, lieu or indemnity lands are given. Under these grants lands known to be mineral at the time of the grant, and not within the proviso of the building stone act, do not pass to the states.

The various states of the mining region have been given by the United States sections 16 and 36 in every township as an aid in the maintenance of the public schools. Some states have been given

Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844; Cameron v. United States, 148 U. S. 301, 13 Sup. Ct. 595, 37 L. Ed. 459.

[25] LOCKHART v. JOHNSON, 181 U. S. 516, 21 Sup. Ct. 665, 45 L. Ed. 979, affirming Lockhart v. Wills, 9 N. M. 344, 54 Pac. 336.

† Manning v. San Jacinto Tin Co. (C. C.) 9 Fed. 726, 7 Sawy. 418.

*Lockhart v. Wills, 9 N. M. 344, 54 Pac. 336, 338.

[26] Katherine Davis, 30 Land Dec. Dep. Int. 220.

[27] United States v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. 1177, 32 L. Ed. 213; Carr v. Quigley, 149 U. S. 652, 13 Sup. Ct. 961, 37 L. Ed. 885. See Wisconsin Cent. R. Co. v. Forsythe, 159 U. S. 48, 15 Sup. Ct. 1020, 40 L. Ed. 71.

additional sections. For instance, Utah received sections 2, 16, 32, and 36 in each township.[28] Nevada was given 2,000,000 acres in lieu of sections 16 and 32.[29] The generosity of the general government has grown with the years, as originally only one section to a township was given for educational purposes.[30]

Where for any reason some of sections 16 and 36 and the other sections granted could not be taken by the states, because of prior agricultural entries, the mineral character of the lands, etc., Congress by statute provided that the state affected might select an equivalent amount of other lands within its borders, known as "lieu" or "indemnity" lands.[31] This right to lieu or indemnity lands is held by the land department to exist in the states and their grantees under the acts of Congress affecting forest reserves,[32] though there is some question of the correctness of the land department's decision.[33] Then other lands have been granted to the states, to be selected by them, for agricultural college purposes, for state university purposes, and for internal improvement purposes. For instance, Utah, in addition to the four sections in each township awarded to it, received 110,000 acres, including all saline lands, for the use of the university, 200,000 acres for the use of the agricultural college, and various lands for other purposes.[34] "Nothing is clearer," says Mr. Justice Brewer, "than that the policy of the government has been a generous one in respect to grants for school purposes." [35]

With reference to these grants two things are important for us, namely, first, that by express reservation in some cases, and by implied reservation in all, mineral lands other than building stone lands are excluded from these grants; and, second, that as this reservation keeps from the state only those lands which, at the time the title is to pass from the United States to the state, are known to be mineral, the time of passing of title is to be ascertained.

[28] Act July 16, 1894, c. 138, 28 Stat. 107, 109. On the nature of the Utah grant, see Brigham City v. Rich (Utah) 97 Pac. 220.

[29] Act June 16, 1880, c. 245, 21 Stat. 288. Oklahoma was given $5,000,000 in lieu of these school sections.

[30] Donaldson's Public Domain, 224.

[31] Rev. St. U. S. § 2275; Act Feb. 28, 1891, c. 384, 26 Stat. 796 (U. S. Comp. St. 1901, p. 1381).

[32] Instructions, 28 Land Dec. Dep. Int. 328. Cf. State of California, 28 Land Dec. Dep. Int. 57; Territory of New Mexico, 29 Land Dec. Dep. Int. 399.

[33] Hibberd v. Slack (C. C.) 84 Fed. 571, 581, 582.

[34] Act June 16, 1894, c. 138, 28 Stat. 107, 109, 110.

[35] Johanson v. Washington, 190 U. S. 179, 183, 23 Sup. Ct. 825, 47 L. Ed. 1008.

Mineral Lands in State Land Grants.

With reference to mineral lands being excluded from these state grants it is only necessary to say that while, in the past, there have been differences of opinion with reference to those grants not containing express reservations, those differences no longer exist. While California once held that mineral lands passed to the state by the grant, since they were not expressly reserved,[36] that state no longer adheres to that doctrine.[37] Indeed, the provision of section 2318 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 1423), that "in all cases lands valuable for minerals shall be reserved from sale except as otherwise directed by law" (which was section 5 of the first federal general mining law act), would to-day be impliedly a part of every land grant not expressly purporting to pass mineral lands. Even as regards the California and other state land grants antedating its existence, the section, since it is merely declaratory of that general mining law policy to which, as we have seen, the federal government prior to the act of 1866 was tacitly committed,[38] must be held to state what always has been an implied exception in mining law states to state land grants. While it is true that in Cooper v. Roberts [39] the United States Supreme Court held that mineral lands passed by a state grant, that decision was rendered prior to the time when American mining law as such was born, and since American mining law, with its permeating influence on the whole land system of the United States, has come into existence, the United States Supreme Court has recognized such mining law by holding that in state land grants Congress has no intention of infringing its uniform policy of dealing with mineral lands by themselves, and that mineral lands known to be such do not pass under state land grants.[40] Cooper v.

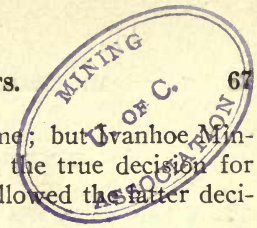
[36] Higgins v. Houghton, 25 Cal. 252.

[37] HERMOCILLA v. HUBBELL, 89 Cal. 5, 26 Pac. 611. California has a statute throwing mineral lands in sections 16 and 36 open to exploration and purchase under the rules and regulations of the United States for the sale of mineral lands. Gen. Laws Cal. 1903 (Deering's Ed.) p. 623, art. 2229.

[38] Sparrow v. Strong, 3 Wall. (U. S.) 97, 104, 18 L. Ed. 49.

[39] 18 How. 173, 15 L. Ed. 338.

[40] IVANHOE MINING CO. v. KEYSTONE CONSOLIDATED MINING CO., 102 U. S. 167, 26 L. Ed. 126; State of Utah, 32 Land Dec. Dep. Int. 117. This is true as well of the 2,000,000-acre grant to Nevada. Garrard v. Silver Peak Mines, 94 Fed. 983, 36 C. C. A. 603; Keystone Lode & Mill Site v. State of Nevada, 15 Land Dec. Dep. Int. 259. See Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U. S. 634, 23 L. Ed. 995. But to be excluded, the lands must be valuable for mining purposes. Merrill v. Dixon, 15 Nev. 401. The surveyor general's return that they are mineral is not conclusive. State of Utah, 32 Land Dec. Dep. Int. 117, and neither is a mineral location antedating the grant. Mahogany No. 2 Lode Claim, 33 Land Dec. Dep. Int. 37.



Roberts was a proper decision under the old régime; but Ivanhoe Mining Co. v. Keystone Consolidated Mining Co. is the true decision for the new. The land department has, of course, followed the latter decision.[41]

But it should be noticed that building stone land, by virtue of a proviso in the building stone act, has been held by the land department to be mineral land which a state can claim under a state land grant of sections 16 and 32, and which, if not previously located, it may claim under other donations. The act reads: "That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone, under the provisions of the law in relation to placer mineral claims: provided, that lands reserved to any state shall not be subject to entry under this act." [42] It seems clear that sections 16 and 32 are the "lands reserved" to the states designated in the proviso, and that the land department, therefore, properly treats the act as an express authorization to turn over to the states all building stone land within those sections 16 and 32 [43] not located under the mining laws prior to the building stone act.[44] It would also seem that the land department is perfectly right in treating the proviso as an authorization for a state to take building stone land sections under grants of lands to be selected by the state,[45] provided, of course, all valid previous building stone locations are recognized and protected. This is doubtless as true of all lieu or indemnity lands as of floating agricultural college, state university, or internal improvement grants.

But, of course, when it is said that the state does not get mineral lands other than building stone lands, that merely means that it does not get lands which, prior to the vesting of title in the state, are known to be mineral.[46] As a matter of fact, Nevada, first in a limited way,[47] and Colorado, now by a general statute,[48] have provided methods for the location of mining claims on state lands. Much valuable mineral land, not known to be such at the time of the federal land grants, has passed to the mining states, and it is important, therefore, to ascertain just when the title to state grants does pass to the state.

[41] State of Utah v. Allen, 27 Land Dec. Dep. Int. 53.
[42] Act Aug. 4, 1892, c. 375, 27 Stat. 348 (U. S. Comp. St. 1901, p. 1434).
[43] South Dakota v. Vermont Stone Co., 16 Land Dec. Dep. Int. 263.
[44] Paris Gibson, 21 Land Dec. Dep. Int. 327.
[45] State of Utah, 29 Land Dec. Dep. Int. 69.
[46] See Mullan v. United States, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. Ed. 170.
[47] See Stanley v. Mineral Union, 26 Nev. 55, 63 Pac. 59.
[48] Laws Colo. 1905, p. 342, c. 134, § 54. For the California Statute, see note 37, supra.

WHEN TITLE PASSES TO THE STATE.

17. When, as in the case of sections 16 and 36 in each township, the state land grant is in præsenti, title passes at once if the sections are surveyed, or immediately upon the approval of the survey if at the time of the grant they are unsurveyed. If the sections are not known to be mineral at the time title is to pass, the state's title is perfect. In lieu or indemnity selections the title does not pass until the selections are approved by the land department and certified to or listed to the state, and if at that time it is not known that the selected land is mineral the title of the state is perfect. In the case of the grant of sections 16 and 36, knowledge that the land is mineral seems to prevent the state from acquiring title; but in the case of lieu selections approved by the land department title passes to the state despite such knowledge, subject to the right of the United States to bring a suit to set aside the selections for fraud.

The passing of title depends upon the nature of the grant. When the grant is in præsenti, as is true of sections 16 and 36, there is no doubt that the title vests in the state at once if the land is surveyed and the sections are designated, or immediately upon the survey if the land is unsurveyed. Title cannot pass until survey, of course, for until then the court cannot say what land comprises sections 16 and 36.[49] Title does not pass until the survey is approved.[50] Sections 16 and 36 are not certified to the states nor patented to them. They pass to the states under the acts of Congress.[51]

If now, in surveying the sections, the surveyor returns sections 16 and 36, or some of them, as mineral, it is held by the land department that, without a further finding as to the mineral character of the ground, the state may, under the act of February 28, 1891,[52] make a lieu or indemnity selection;[53] and this would seem to be sound.[54] Any lieu or indemnity selection would prevent the state from ever contradicting the return;[55] but, if the state is unwilling

[49] Heydenfeldt v. Daney, Gold & Silver Mining Co., 93 U S. 634, 23 L. Ed. 995.

[50] CLEMMONS v. GILLETTE, 33 Mont. 321, 83 Pac. 879, 114 Am. St. Rep. 814; Finney v. Berger, 50 Cal. 248; Medley v. Robertson, 55 Cal. 396. See State of California v. Wright, 24 Land Dec. Dep. Int. 54.

[51] See Instructions, 31 Land Dec. Dep. Int. 212.

[52] 26 Stat. 796, c. 384 (U. S. Comp. St. 1901, p. 1381).

[53] State of California, 23 Land Dec. Dep. Int. 423. But see Instructions, 31 Land Dec. Dep. Int. 212.

[54] Johnston v. Morris, 72 Fed. 890, 19 C. C. A. 229.

[55] State of California, 28 Land Dec. Dep. Int. 57.

to take lieu or indemnity land, it can contest the return,[56] which is called "proving the mineral off." If, on the other hand, the surveyor returns the sections as agricultural, the state can get lieu lands only by affirmatively establishing that the sections 16 and 36 involved are mineral.[58] The state is, of course, a necessary party to any proceeding to get a mineral patent for land embraced in sections 16 and 36, however they are returned by the surveyor,[59] unless, of course, lands in lieu of the section affected have been chosen by the state and the lieu selections have been approved and certified by the proper land officers.

In the case of lieu lands, title can pass only when the lands are selected by the proper state authorities, with the approval of the land department, from lands not known at the time to be mineral.[60] The state may, of course, contest the surveyor general's return as to these lieu sections.[61] It is only when the lieu selections have been approved by the proper land office authorities, an act which withdraws the lands from private entry,[62] and the sections certified to or listed to the selecting state, under section 2449, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1516)—the certificate or listing being an act which is the equivalent

[56] Richter v. State of Utah, 27 Land Dec. Dep. Int. 95.

[58] Bond v. State of California, 31 Land Dec. Dep. Int. 34; Instructions, Id. 212.

"(16) The states will not be permitted to make selections in lieu of lands within a school section alleged to be mineral, in the absence of proof that such lands are known to be chiefly valuable for mineral. Such preliminary proof must show the kind of mineral discovered and the extent thereof."

"(18) A determination by the General Land Office or the department that a portion of the smallest legal subdivision in a school section is mineral land will place that entire subdivision in the class of lands that may be used as a basis for indemnity selection, and where mineral entry was made of any portion of the smallest legal subdivision of a school section, that fact will be taken as determining the right of the state to indemnity for the entire legal subdivision, upon proper showing that the state has not made any disposition of the land not embraced in such mineral entry."

General Land Office Rules Governing State Land Grants, Issued April 25, 1907, rules 16 and 18.

[59] Fleetwood Lode, 12 Land Dec. Dep. Int. 604. See Mahoganey No. 2 Lode Claim, 33 Land Dec. Dep. Int. 37.

[60] See Wisconsin Cent. R. Co. v. Price County, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687. Compare Kern Oil Co. v. Clarke, 31 Land Dec. Dep. Int. 288. That the title may relate back to the date of the grant was held in Brigham City v. Rich (Utah) 97 Pac. 220.

[61] Richter v. State of Utah, 27 Land Dec. Dep. Int. 95; State of California, 22 Land Dec. Dep. Int. 294, 402.

[62] JOHANSON v. WASHINGTON, 190 U. S. 179, 23 Sup. Ct. 825, 47 L. Ed. 1008.

of a patent [63]—that the state has a legal title to the indemnity sections.[64] What has been said with reference to indemnity lands, of course, applies to all floating state grants. Title can pass only when the lands are selected by the state, the selection approved by the land department, and the lands certified or listed to the state. It appears, then, that in the case of sections 16 and 36 it is the date of the approval of the survey, if that comes after the granting act, or the date of the act itself, if that comes after the approval of the survey, that is the time when the lands must be known to be mineral to defeat the grant, and that in the case of lieu selections—i. e., indemnity lands—it is the date of the final approval of the selection and certification thereof to the state that is the time when knowledge of the land's mineral character must exist to defeat the grant.

But there is a marked difference between sections 16 and 36 and the lieu selections. The latter are in the situation of patented lands. There has been an investigation of their character, a finding in regard to it by the land department, and a passing of the title by that department as to lieu selections. In the case of lieu selections, therefore, title passes from the United States, to be regained only when it could be regained from a private patentee, namely, in the case of fraud. But with reference to sections 16 and 36 there is no adjudication by the land department, and the voluntary certificates sometimes given by the registers of local land offices are unauthorized,[65] so the result seems to be that lands in these sections, which at the time title ordinarily would have passed are known to be mineral, never pass to the state.[66] It follows, despite a California decision to the contrary,[67] that where the state has not derived title it cannot pass title to its patentee.[68]

[63] McCreery v. Haskell, 119 U. S. 327, 7 Sup. Ct. 176, 30 L. Ed. 408; Mower v. Fletcher, 116 U. S. 380, 6 Sup. Ct. 409, 29 L. Ed. 593; Frasher v. O'Connor, 115 U. S. 102, 5 Sup. Ct. 1141, 29 L. Ed. 311.

[64] Compare Wisconsin Cent. R. Co. v. Price County, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687; Allen v. Pedro, 136 Cal. 1, 68 Pac. 99. For a special situation, see State v. Tanner, 73 Neb. 104, 102 N. W. 235. Compare case about swamp lands, United States v. Chicago, M. & St. P. R. Co. (C. C.) 148 Fed. 884.

[65] Instructions, 31 Land Dec. Dep. Int. 212.

[66] IVANHOE MINING CO. v. KEYSTONE CONSOL. MINING CO., 102 U. S. 167, 26 L. Ed. 126.

[67] Saunders v. La Purisima Gold Min. Co., 125 Cal. 159, 57 Pac. 656.

[68] Hermocilla v. Hubbell, 89 Cal. 8, 26 Pac. 611. Indemnity selections in lieu of school lands will not be allowed where the offered base lands are covered by outstanding patents issued by the state, nothwithstanding the lands were known to be mineral at the date of survey, and therefore were excepted from the grant. The state having clouded the title to the land, it must remove the obstructions of its own creation before the land department will make an exchange. State of California, 36 Land Dec. Dep. Int. 432.

As will readily be seen, this conclusion is quite important with reference to mining locations hereafter to be made on state lands under the Colorado statute.[69]

When title passes to the state, it passes once for all. A grant of lands to a state for school purposes is an absolute grant, neither a condition nor a possibility of reverter remaining in the United States, and where the statute of limitations runs against a state the title to such lands may be acquired from the state by adverse possession.‡

RAILROAD LAND GRANTS.

18. Railroad land grants convey the fee (1) to right of way strips; (2) to designated odd-numbered sections, called the "in place" sections; and (3) to lieu or indemnity lands. At the time of filing the approved map of definite location, or, if none is filed, then on the actual construction of the road, the right of way strip and the designated surveyed sections, so far as not previously disposed of, pass to the railroad. The grant of the right of way strip and of the odd-numbered sections is in præsenti; but the title to lieu or indemnity land does not pass until the lands have been selected by the railroad and certified by the land department.

19. All mineral lands are reserved to the United States by the railroad land grant acts. For reasons of public policy, however, unlocated mineral lands in the right of way strip at the time the title to the strip passes to the road become railroad lands despite that reservation. Mineral lands in the "in place" sections and in the "lieu" or "indemnity" sections do not pass to the railroad; but there appears to be no method of locating minerals excepted in patents issued to the railroads.

Congress has made from time to time, extensive railroad land grants. Those grants have consisted of: (1) A right of way strip of land for main tracks and necessary additional land for side tracks, depots,[70]

[69] Laws Colo. 1905, p. 342, c. 134, § 34. Where a patent is issued by a state to mineral land reserved by the United States from a grant to the state, the patent is subject to collateral attack. GARRARD v. SILVER PEAK MINES, 94 Fed. 983, 36 C. C. A. 603.

‡SCHNEIDER v. HUTCHINSON, 35 Or. 253, 57 Pac. 324, 76 Am. St. Rep. 474.

[70] The right of way strip becomes fixed by the approval of the profile map of the road or the actual construction of the road. Minneapolis, St. P. & S. S. M. R. Co. v. Doughty, 208 U. S. 251, 28 Sup. Ct. 291, 52 L. Ed. 474; JAMESTOWN N. R. CO. v. JONES, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698; Oregon Short Line R. Co. v. Stalker (Idaho) 94 Pac. 56; Spokane & B. C. Ry. Co. v. Washington & G. N. R. Co. (Wash.) 95 Pac. 64.

etc.; (2) certain designated alternate odd-numbered sections of land within certain designated limits on each side of the line of the road; and (3) lieu or indemnity lands for those of the above odd-numbered sections reserved as mineral or previously disposed of. Beginning with the first Pacific Railroad grant of July 1, 1862,** made by the United States government directly to the corporation receiving the grant, the public mineral domain became affected by such grants.†† From the very start the United States reserved minerals from the railroad grants. In the act of July 1, 1862, appeared the proviso "that all mineral lands shall be excepted from the operation of this act." [71] Subsequent acts contained similar provisions,[72] and they were followed up by a joint resolution, approved January 30, 1865,[73] to the effect that in both state and railroad land grants all mineral lands were reserved to the United States, "unless otherwise specially provided in the act making the grant." The mining act of 1866 was still in the future, but undoubtedly Congress had in mind in the reservation future legislation on mining, as well as the existing conditions in the mining regions already tacitly sanctioned by the United States.

Grants of Right of Way Strips.

We must notice, however, that for reasons of public policy the mineral lands in the right of way strips not actually located at the time when the right of way became fixed by the filing with the Secretary of the Interior and acceptance by him of the railroad's map of definite location, or by the actual construction of the road, became railroad lands despite the reservations above noted. As the Supreme Court of Montana points out: "The mineral lands excluded from the operation of this act are evidently not those covered by the right of way, as nothing could possibly be given in lieu of any lands which might be needed for such a purpose; and it would be destructive of the rights of the railroad company, if mining claims could at any time be located and worked upon the track and land covered by the right of way. See Doran v. Central Pac. R. Co., 24 Cal. 246. The joint resolution of Congress of January 30, 1865, declaring that no act shall be so construed as to embrace mineral lands, which in all cases shall be, and are hereby, reserved exclusively to the United States, cannot be considered

**12 Stat. 489, c. 120.

†† By the grants timber was allowed to be taken for the construction of the railroads from adjacent public lands. Lands 20 miles away were held not to be adjacent in United States v. St. Anthony R. Co., 192 U. S. 524, 24 Sup. Ct. 333, 48 L. Ed. 548. See, also, United States v. Bachelder, 9 N. M. 15, 48 Pac. 310.

[71] Act July 1, 1862, c. 120, § 3, 12 Stat. 492.

[72] See Act July 2, 1864, c. 217, § 3, 13 Stat. 367.

[73] Res. No. 10, 13 Stat. 567.

as a reservation of mineral lands from the operation of grants of the right of way, such as the one in question. A reservation of that character would annihilate the franchise and annul the operation of the entire act of Congress granting the charter. The operations of mining and the business of railroads cannot be conducted at the same time upon the same ground, and a reservation of such a character would beget a conflict of rights and a confusion of interests, not in contemplation of intelligent legislative action." [74]

While this is true, a mining location made across the right of way strip prior to the approval of the map of definite location by the Secretary of the Interior will be given priority,[75] except in a case where the right of way has been definitely located by the construction of the road prior to the location of the mining claim.[76] A railroad right of way grant is also subject to prior homestead claims.[77] Where a mining claim or homestead across the proposed right of way is valid, the railroad must resort to condemnation proceedings to go over it, if an agreement between the company and the owner cannot be reached.[78]

With reference to the grants of rights of way, it must be noted that the term "right of way" does not imply that the railroad company gets only an easement. In a few cases it gets only that;[79] but as a

[74] WILKINSON v. NORTHERN PAC. R. CO., 5 Mont. 538, 547, 548, 6 Pac. 349. See Doran v. Central Pac. R. Co., 24 Cal. 246; Pennsylvania Min. & Imp. Co. v. Everett & M. C. R. Co., 29 Wash. 102, 69 Pac. 628. Compare Sousa v. Pereira, 132 Cal. 97, 64 Pac. 90.

[75] SOUTHERN CALIFORNIA RY. CO. v. O'DONNELL, 3 Cal. App. 382, 85 Pac. 932; Alaska Pac. Ry. & Terminal Co. v. Copper River & N. W. Ry. Co. (C. C. A.) 160 Fed. 862.

[76] PENNSYLVANIA MIN. & IMP. CO. v. EVERETT & M. C. R. CO., 29 Wash. 102, 69 Pac. 628.

[77] Oregon Short Line R. Co. v. Fisher, 26 Utah, 179, 72 Pac. 931; Doughty v. Minneapolis, St. P. & S. S. M. R. Co., 15 N. D. 290, 107 N. W. 971; Slaght v. Northern Pac. R. Co., 39 Wash. 576, 81 Pac. 1062; Northern Pac. Ry. Co. v. McCormick (C. C.) 89 Fed. 659; Union Pac. R. Co. v. Harris (Kan.) 91 Pac. 68.

[78] See Enid & A. Ry. Co. v. Kephart (Okl.) 91 Pac. 1049; Slaght v. Northern Pac. R. Co., 39 Wash. 576, 81 Pac. 1062; Denver & R. G. R. Co. v. Wilson, 28 Colo. 6, 62 Pac. 843. Where a prior mining claimant deeded a right of way to the railway company, and afterward the claimant abandoned the claim, and it was relocated by a third person, it was held that the relocation was subject to the easement of the railway company. Bonner v. Rio Grande S. R. Co., 31 Colo. 446, 72 Pac. 1065. If after the definite location of the road the route is changed to run over homestead or other privately owned lands, the new right of way must be procured by purchase or by condemnation. Northern Pac. R. Co. v. Murray, 87 Fed. 648, 31 C. C. A. 183; Steele v. Tanana Mines Ry. Co., 2 Alaska, 451.

[79] See Grand Canyon Ry Co. v. Cameron, 35 Land Dec. Dep. Int. 495, 497.

rule the grant of the right of way, so called in the acts, is practically the grant of the fee to the strip,[80] upon its being defined by the filing of the approved map of definite location or by the actual construction of the road.[81] This fee is not granted for all purposes, however, but only so long as the land is used for the railroad right of way, and in consequence a title to the right of way cannot be acquired by adverse possession.[82] The importance of this doctrine is apparent in view of the holding that a grant of 100 feet wide right of way must be protected from adverse possession to the full extent of the 100 feet.[83] Since the company gets the fee in such case, the right of way forthwith ceases to be public domain, and no mineral location is thereafter possible upon it.[84]

[80] Missouri, K. & T. Ry. Co. v. Roberts, 152 U. S. 114, 14 Sup. Ct. 496, 38 L. Ed. 377; Melder v. White, 28 Land Dec. Dep. Int. 412; Oregon Short Line R. Co. v. Stalker (Idaho) 94 Pac. 56.

[81] St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. Ed. 578; Missouri, K. & T. Ry. Co. v. Watson, 74 Kan. 494, 87 Pac. 687.

The actual construction of the road fixes the time as definitely as approval of the map of location would. JAMESTOWN & N. R. CO. v. JONES, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698.

[82] "Manifestly the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purpose of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that, to give such efficacy to a statute of limitations of a state as would operate to confer a permanent right of possession thereof upon an individual for his private use would be to allow that to be done by indirection which could not be done directly. * * * Of course nothing that has been said in any wise imports that a right of way granted through the public domain within a state is not amenable to the police power of the state," exercised in providing crossings, etc. NORTHERN PAC. R. CO. v. TOWNSEND, 190 U. S. 267, 271, 272, 23 Sup. Ct. 671, 47 L. Ed. 1044. See, also, McLucas v. St. Joseph & G. I. R. Co., 67 Neb. 603, 97 N. W. 312; Oregon Short Line R. Co. v. Quigley, 10 Idaho, 770, 80 Pac. 401, and cases cited.

[83] Oregon Short Line R. Co. v. Quigley, supra. See Northern Pac. R. Co. v. Smith, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157.

[84] PENNSYLVANIA MIN. & IMP. CO. v. EVERETT & M. C. R. CO., 29 Wash. 102, 69 Pac. 628. See St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. Ed. 578; Montana Cent. R. Co., 25 Land Dec. Dep. Int. 250.

Grants of Designated Sections.

The grant of the designated alternate sections within the prescribed limits on each side of the line of the road, which are "floating" lands until the line of the road is defined and approved, and "in place" lands thereafter, was known as a grant in præsenti; i. e., the title passed as soon after the definite location of the line as the sections were surveyed and identified by number, or, if the government survey of the sections preceded the definite location of the line of the road, then immediately upon that location, and forthwith that title related back to the date of the passage of the land grant act.[85] As a consequence the filing of the map of definite location and its acceptance by the Secretary of the Interior was a final election by the railroad company to take only the lands allowable according to that map, or the lieu lands provided in their place.[86] On the completion of the road the title to granted lands not excepted by the act passes, without a selection by the road or approval by the Secretary of the Interior.[87] In the case of in place sections bona fide settlers within the exterior limits of the grant prior to the definite location of the road are protected.[88] The same, of course, holds true of mining claim locators.

But with reference to the unlocated mineral lands in the sections in place there is no doubt that the mineral reservations in the land grant acts apply. That matter was determined by the case of Barden v. Northern Pac. R. Co.,[89] which involved the grant to the Northern

[85] DESERET SALT CO. v. TARPEY, 142 U. S. 241, 12 Sup. Ct. 158, 35 L. Ed. 999; UNITED STATES v. MONTANA LUMBER CO., 196 U. S. 573, 25 Sup. Ct. 367, 49 L. Ed. 604; Southern Pac. R. Co. v. Lipman, 148 Cal. 480, 83 Pac. 445; Walbridge v. Board of Com'rs of Russell County, 87 Kan. 341, 86 Pac. 473; Wiese v. Union Pac. R. Co. (Neb.) 108 N. W. 75. See United States v. Oregon & C. R. Co., 176 U. S. 28, 20 Sup. Ct. 261, 44 L. Ed. 358. In Sage v. Rudnick, 91 Minn. 325, 98 N. W. 89, 100 N. W. 106, it is held accordingly that adverse possession of granted lands runs against the railroad from the time of the filing of the map of definite location.

[86] See Smith v. Northern Pac. R. Co., 58 Fed. 513, 7 C. C. A. 397; Northern Pac. R. Co. v. Murray, 87 Fed. 648, 31 C. C. A. 183. Prior to the filing of the map of definite location, Congress may dispose of land within the exterior limits of the general route of the railroad shown in the map of that route. United States v. Oregon & C. R. Co., 176 U. S. 28, 20 Sup. Ct. 261, 44 L. Ed. 358; Wilcox v. Eastern Oregon Land Co., 176 U. S. 51, 20 Sup. Ct. 269, 44 L. Ed. 368.

[87] HOWARD v. PERRIN, 200 U. S. 71, 26 Sup. Ct. 195, 50 L. Ed. 374. See Jamestown v. Northern Pac. R. Co., 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698; Wallula Pac. Ry. Co. v. Portland & S. R. Co. (C. C.) 154 Fed. 902.

[88] Nelson v. Northern Pac. R. Co., 188 U. S. 108, 23 Sup. Ct. 302, 47 L. Ed. 406. See Sage v. United States, 140 Fed. 65, 71 C. C. A. 404.

[89] 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992.

Pacific Railroad under the act of July 2, 1864; the line of the road past the lands in controversy having been fixed by the filing of the requisite map of definite location and the approval thereof July 6, 1882. The lands in controversy had been returned by the surveyor general as agricultural, and prior to the discovery of the quartz mining claims in 1888 the railroad company had applied to the land department for a certificate or patent for the land, but one had not yet been issued. The Supreme Court of the United States proceeded to establish in that case the doctrine that a railroad grant of sections in place does not pass mineral lands. Later cases establish that even nonmineral land will not pass under the railroad grants, if a claim has been made to it under the mining laws, and the claim is pending of record in the land office at the time the line of the road is established,[90] or if the lands are sub judice under a Mexican land grant claim prior to the act of 1891.[91] The Barden Case is so important that it must be quoted from:

"The grant was of 20 alternate sections of land, designated by odd numbers, on each side of the road which the plaintiff was authorized to construct—a tract of 2,000 miles in length and 40 miles in width, constituting a territory of 80,000 square miles. It is true that the grant was a float, and the location of the sections could not be made until the line of the proposed road had become definitely fixed. The ascertainment of the location of the sections in no respects affected the nature of the lands or the conditions on which their grant was made. If swamp lands or timber lands, or mineral lands previously, they continued so afterwards. It is also true that the grant was one in præsenti of lands to be afterwards located. From the immense territory from which the sections were to be taken it could not be known where they would fall until the line of the road was established. Then the grant attached to them, subject to certain specified exceptions; that is, the sections, or parts of sections, which had been previously granted,

[90] NORTHERN PAC. R. CO. v. SANDERS, 166 U. S. 620, 17 Sup. Ct. 671, 41 L. Ed. 1139. But see Bonner v. Rio Grande S. R. Co., 31 Colo. 446, 72 Pac. 1065. U. S. v. Chicago, M. & St. P. Ry. Co. (C. C. A.) 160 Fed. 818. Where a claim of record in the land office has in fact been adandoned prior to the selection of the land by the railroad as lieu lands, the railroad may take. Oregon & C. R. Co. v. United States, 190 U. S. 186, 23 Sup. Ct. 673, 47 L. Ed. 1012. But it may not take lands abandoned by homesteaders after the grant. St. Paul, M. & M. Ry. Co. v. Donohue, 210 U. S. 21, 28 Sup. Ct. 600, 52 L. Ed. ——. The railroad may also take lands within the primary or place limits of the grant abandoned prior to the grant. United States v. Oregon & C. R. Co. (C. C.) 152 Fed. 473.

[91] SOUTHERN PAC. R. CO. v. UNITED STATES, 200 U. S. 354, 26 Sup. Ct. 298, 50 L. Ed. 512.

sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, were excepted, and the title of its other sections or parts of sections attached as of the date of the grant, so as to cut off intervening claimants. In that sense the grant was a present one. But it was still, as such grant, subject to the exception of mineral lands made at its date or then excluded therefrom by conditions annexed. Whatever the location of the sections, and whatever the exceptions then arising, there remained that original exception declared in the creation of the grant. The location of the sections and the exceptions from other causes in no respect affected that one or limited its operation. There is no language in the act from which an inference to that effect can be drawn, in the face of its declaration that all mineral lands are thereby 'excluded from its operations,' and of the joint resolution of 1865 that 'no act of the Thirty-Eighth Congress [that is, of the previous session of 1864] granting lands to states or corporations, to aid in the construction of roads or for other purposes, shall be so construed as to embrace mineral lands.'

"The plaintiff, however, appears to labor under the persuasion that only those mineral lands were excepted from the grant which were known to be such on the identification of the granted sections by the definite location of the proposed road and the ascertainment at that time of the exceptions from them of parcels of land previously disposed of, and that the want of such knowledge operated in some way to eliminate the reservation made by Congress of the mineral lands. But how the absence of such knowledge on the ascertainment of the sections granted and the parcels of land embraced therein previously disposed of had the effect, or could have the effect, to eliminate the reservation of mineral lands from the act of Congress, we are unable to comprehend. Such a conclusion can only arise from an impression that a grant of land cannot be made without carrying the minerals therein; and yet the reverse is the experience of every day. The granting of lands, either by the government or individuals, with a reservation of certain quarries therein, as of marble, or granite, or slate, or of certain mines, as of copper, or lead, or iron found therein, is not an uncommon proceeding, and the knowledge or want of knowledge at the time by the grantee in such cases of the property reserved in no respect affects the transfer to him of the title to it. No one will affirm that want of such knowledge, on the identification of the lands granted containing the reserved quarries or mines, would vacate the reservation, and we are unable to perceive any more reason from that cause for eliminating the reservation of minerals in the present case from the grant of the government than for eliminating for a like cause the reservation of quarries or mines in the cases supposed. And it

will hardly be pretended that Congress has not the power to grant portions of the public land, with a reservation of any severable products thereof, whether minerals or quarries contained therein, and whether known or unknown; yet such must be the contention of the plaintiff, or its conclusion will fall to the ground.

"The cases cited in support of the claim of the plaintiff only show that the identification of the sections granted and of the exceptions therefrom of parcels of land previously disposed of leaves the title of the remaining sections, or parts thereof, to attach as of the date of the grant, but has absolutely no other effect. Such is the purport, and the sole purport, of the cases of St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 5, 11 Sup. Ct. 389, 35 L. Ed. 77, and Deseret Salt Co. v. Tarpey, 142 U. S. 241, 247, 12 Sup. Ct. 158, 35 L. Ed. 999, cited by the plaintiff. In both of those cases the writer of this opinion had the honor to write the opinions of this court; and it was never asserted or pretended that they decided anything whatever respecting the minerals, but only that the title to the lands granted took effect, with certain designated exceptions, as of the date of the grant. They never decided anything else. And what was that title? It was of the lands which at the time of the grant were not reserved as minerals, and of the lands which at the time of the location had not been sold, reserved, or to which a pre-emption or homestead right had not attached. If one were to sell land, reserving therefrom the minerals of gold or silver found therein, and tell the purchaser to take the surveyor and measure off the land, would it be urged or pretended that the moment the surveyor ascertained the boundaries of the land sold the reservation of the minerals then undiscovered would be eliminated? Would any one uphold the reasoning, or the doctrine, which would assert such a conclusion? And can any one see the difference between the case now before us and the case supposed? Not a word was said or suggested in the cases cited about the elimination of the reservation for that cause; and not only in the cases cited by the plaintiff, but in a multitude of other cases, almost without number, a like silence was observed. In none of them was it ever pretended that the ascertainment of the location of the lands granted operated to withdraw from the grant the reservation of the minerals then undisclosed. The grant did not exist without the exception of minerals therefrom, and Congress has declared, in positive terms, that the act shall not be construed to embrace them, and there is nothing in any of the cases cited in the plaintiff's contention which indicates in the slightest degree that the original exception was subsequently qualified.

"It seems to us as plain as language can make it that the intention of Congress was to exclude from the grant actual mineral lands, wheth-

er known or unknown, and not merely such as were at the time known to be mineral. After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and among other things that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not reserved, sold, granted, or otherwise appropriated, and were free from pre-emption and other claims or rights at the time the line of the road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that, in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands, in odd sections, nearest to the line of the road, might be selected. There is, in our judgment, a fundamental mistake made by the plaintiff in the consideration of the grant. Mineral lands were not conveyed, but by the grant itself and the subsequent resolution of Congress cited were specifically reserved to the United States and excepted from the operations of the grant. Therefore they were not to be located at all, and if in fact located they could not pass under the grant. * * * The plaintiff in this case, not having a patent, and relying solely upon its grant, which gives no title to the minerals within any of its lands, shows by its complaint no cause of action for the possession of the mineral lands claimed." [92] In a still later case it has been held that lands valuable solely or chiefly for granite quarries are mineral lands within the meaning of the exception of mineral lands in the grant made by the act of July 2, 1864.[93]

But, while the minerals in the lands are excepted from the grant even where patents issue to the railroad for the lands,‡‡ it seems that no valid mining location can be made on the lands, for the reason that the surface of the lands belongs to the railroad. Not only do the mining statutes provide no method of getting possession of or locating minerals in the soil, except where a surface embracing or over the minerals is unappropriated public land of the United States,[94]

[92] BARDEN v. NORTHERN PAC. R. CO., 154 U. S. 288, 313–316, 332, 14 Sup. Ct. 1030, 38 L. Ed. 992.

[93] NORTHERN PAC. R. CO. v. SODERBERG, 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575.

‡‡ A patent issued to a railroad for known mineral lands was held to be void in United States v. Central Pac. R. Co. (C. C.) 84 Fed. 218. In a suit by the United States to cancel a patent issued to a railroad for granted land claimed to be mineral, the burden is on the complainant to show, not only that the land was known mineral land at the time of the patent, but also that it was chiefly valuable for mineral purposes. United States v. Central Pac. R. Co. (C. C.) 93 Fed. 871.

[94] TRAPHAGEN v. KIRK, 30 Mont. 562, 77 Pac. 58, and cases cited.

but it is also impossible to initiate a location by trespass and have it valid, and both of these facts stand in the way of a valid location of minerals in railroad lands.

While mineral lands are excepted by the railroad land grant acts from the grants of sections in place, the railroad company is, of course, entitled to its day in court in the land department on the question of whether the land really is mineral. That right of the railroad company merely requires that notice be given to it in some sufficient way before the land department disposes of the land as mineral. The publication of notice of application for patent by a mineral land claimant in the manner required by statute is such sufficient notice;[95] but otherwise personal notice would seem to be required.[96] The land department requires "prompt and appropriate notice" to the railroad's grantees.[97]

Grants of Lieu or Indemnity Land.

Lieu or indemnity lands, of course, cannot pass in præsenti. They depend upon deficiencies in the "in place" sections, and cannot be determined until those deficiencies are ascertained. As in the case of state indemnity lands, the title does not pass until after the lands have been selected and have been certified by the Secretary of the Interior.[98] Homestead entries within indemnity limits, made in good faith prior to such selection by and certification to the railroad, will be given priority.[99] Lands within the indemnity limits of a grant to a railroad do not pass, on the forfeiture of such grant, to a second railroad, although within the place limits of the grant which was made

See Hill v. Martin (Tex. Civ. App.) 70 S. W. 430; Gleeson v. Martin White Min. Co., 13 Nev. 442.

[95] Northern Pac. R. Co. v. Cannon, 54 Fed. 252, 4 C. C. A. 303.

[96] See McCloud v. Central Pac. R. Co., 29 Land Dec. Dep. Int. 27.

[97] Instructions, 33 Land Dec. Dep. Int. 262.

[98] SJOLI v. DRESCHEL, 199 U. S. 564, 26 Sup. Ct. 154, 50 L. Ed. 311; Oregon & C. R. Co. v. United States, 189 U. S. 103, 23 Sup. Ct. 615, 47 L. Ed. 726; United States v. Missouri, K. & T. R. Co., 141 U. S. 358, 12 Sup. Ct. 13, 35 L. Ed. 766; Sage v. Maxwell, 91 Minn. 527, 99 N. W. 42. The approval by the land department of lieu selections made in sections subject only to entry under homestead laws does not operate to vest title in the railroad company. Clark v. Herington, 186 U. S. 206, 22 Sup. Ct. 872, 46 L. Ed. 1128. The right of a railroad does not attach to any specific lands within the indemnity limits of its grant until selection, notwithstanding the loss on account of which indemnity might be taken is ascertained to be largely in excess of all land subject to indemnity selection. Oregon & C. R. Co., 36 Land Dec. Dep. Int. 349.

[99] Sjoli v. Dreschel, 199 U. S. 564, 26 Sup. Ct. 154, 50 L. Ed. 311; Hoyt v. Weyerhaeuser (C. C. A.) 161 Fed. 324; Osborn v. Froyseth (Minn.) 116 N. W. 1113. That the land may be entered as a homestead after the filing of the list of selections of indemnity land by the railroad, but prior to the approval

to the second railroad prior to the forfeiture of the grant to the first railroad, but, instead, become a part of the public land of the United States.[100]

That lieu or indemnity lands must be nonmineral is as clear as that the "in place" sections must be so.[101] The language of the joint resolution, that no act "granting lands to states or corporations to aid in the construction of roads or for other purposes * * * shall be so construed as to embrace mineral lands," etc., leaves no room for doubt.

The Classification of Railroad Lands.

By the act of February 26, 1895,[102] Congress provided for commissioners to determine the character of railroad lands granted in Idaho and Montana. That act merely relates to the odd-numbered railroad sections; the character of the even-numbered sections, in which the railroad company are not interested, being involved only so far as they help fix the character of the odd-numbered sections.[103] The commissioners have hearings and report their determinations to the land department, and their work is only final when approved by the Secretary of the Interior. Their return is not conclusive, and on a subsequent showing that land classified by them as mineral is really not mineral the land department may make such disposition of the land as is proper.[104] The classification of land by the commissioners as mineral, and the final approval of such classification by the Secretary

of the list by the Secretary, is declared in Northern Pac. Ry. Co. v. Wass (Minn.) 116 N. W. 937. Bona fide settlers within indemnity limits prior to the definite location of the road will be protected, even though it afterwards appears that all the sections in such limits are needed to supply deficiencies. OREGON & C. R. CO. v. UNITED STATES, 189 U. S. 103, 23 Sup. Ct. 615, 47 L. Ed. 726. Or that the land was withdrawn without authority of law from homestead entry. Brandon v. Ard (U. S.) 29 Sup. Ct. 1, 53 L. Ed. ——.

100 San Jose Land & Water Co. v. San Jose Ranch Co., 189 U. S. 177, 23 Sup. Ct. 487, 47 L. Ed. 765, and cases cited; Northern Lumber Co. v. O'Brien, 204 U. S. 190, 27 Sup. Ct. 249, 51 L. Ed. 438. See St. Paul, M. & M. R. Co. v. Donohue, 210 U. S. 21, 28 Sup. Ct. 600, 52 L. Ed. ——. No one but the United States may forfeit the grant. Spokane & B. C. Ry. Co. v. Washington & G. N. Ry. Co. (Wash.) 95 Pac. 64, and cases cited.

101 Southern Pac. R. Co. v. Allen Gold Min. Co., 13 Land Dec. Dep. Int. 165. See Mullen v. United States, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. Ed. 170.

102 Chapter 131, 28 Stat. 683.

103 Instructions, 26 Land Dec. Dep. Int. 684. Since the act does not authorize the classification of lands in even-numbered sections, the fact that such lands are classified as mineral will not avail against the surveyor general's return of the land as nonmineral at the time of actual government survey. Northern Pacific Ry. Co. v. State of Idaho, 37 Land Dec. Dep. Int. (Advance Sheets) 68.

104 LYNCH v. UNITED STATES, 138 Fed. 535, 71 C. C. A. 59. See Holter v. Northern Pac. R. Co., 30 Land Dec. Dep. Int. 442.

of the Interior, is, in effect, however, a cancellation of a previous selection of such land by the railroad, and the latter can question the character of the land only for fraud in classification.[105] An approved classification of lands under the provisions of the act will not be inquired into upon a protest filed subsequently to the time allowed in the act for the filing of protests, where the protest contains no competent allegations that there was such irregularity in the classification as to vitiate it.[106]

[105] Luthye v. Northern Pac. R. Co., 29 Land Dec. Dep. Int. 675; Lamb v. Northern Pac. R. Co., 29 Land Dec. Dep. Int. 102.

[106] Beveridge v. Northern Pac. Ry. Co., 36 Land Dec. Dep. Int. 40.

CHAPTER V.

THE RELATION BETWEEN MINERAL LANDS AND HOMESTEAD, TIMBER, AND DESERT ENTRIES.

Since the pre-emption laws were repealed by the act of March 3, 1891,[1] the homestead laws have been the chief mode of acquiring title to nonmineral lands, though under the stone and timber act of June 3, 1878,[2] as amended by the act of August 4, 1892,[3] lands chiefly valuable for timber may also be acquired, and under the act of March 3, 1877,[4] as amended by the act of March 3, 1891,[5] desert lands may be taken up.

HOMESTEAD ENTRIES.

20. The issuance of a homestead patent for land is an authoritative adjudication by the land department that the land is nonmineral, and, subject to the right of the United States to have it set aside in equity for fraud, the patent passes the title to the land to the patentee, even though he knows the land to be mineral. It is only prior to the patent that the question of the mineral or nonmineral character of the land may be litigated in the land department.

The homestead act (Act May 20, 1862, c. 75, 12 Stat. 392) provides that "every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States or who has filed his declaration of intention to become such, as required by the naturalization laws shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any state or territory shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter

[1] 26 Stat. 1093, c. 559 (U. S. Comp. St. 1901, p. 1531).
[2] 20 Stat. 89, c. 151 (U. S. Comp. St. 1901, p. 1545).
[3] 27 Stat. 348, c. 375 (U. S. Comp. St. 1901, p. 1434).
[4] 19 Stat. 377, c. 107 (U. S. Comp. St. 1901, p. 1548).
[5] 26 Stat. 1095, c. 561 (U. S. Comp. 1901, p. 1535).

other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres." [6]

Under the federal statutes the land is entered by a sworn application, filed by the settler in the proper land office, describing the land and alleging the applicant's qualifications and good faith, and by a payment of the required fee. The entry can, of course, be made only where the land is at the time unappropriated. When the entry is made, the applicant receives a receipt for the fee paid; but no certificate is given him, or patent issued to him, for five years, unless after 14 months the entryman commutes his entry and in that way gets his patent.[7]

Mineral Question Prior to Patent.

At the time of attempted entry the first question about minerals may arise. The land may have been returned by the surveyor general as mineral, and in that case no entry can be made until the applicant "proves off" the mineral,* and if the land department on some former hearing decided that the land was mineral the applicant can prove off the mineral only by showing the result of subsequent investigations.[8] If, however, the applicant proves off the mineral to the satisfaction of the land office and is allowed to make entry of the land as agricultural, the burden of proof thereafter rests on one asserting it to be mineral.[9] No matter if the land is unquestionably mineral nor even if it be shown that a mining claim was located thereon at the time of the entry, the land will not be patented to the mineral claimant without a hearing in the land office and a cancellation of so much of the homestead entry as affects mineral land.[10] Upon the hearing the question is simply: Is the tract more valuable as mineral land than as agricultural? [11] The land having been entered, and hence being prima facie nonmineral, the question then arises,

[6] Rev. St. U. S. § 2289, as amended by Act March 3, 1891, c. 561, § 5, 26 Stat. 1097 (U. S. Comp. St. 1901, p. 1388).

[7] Rev. St. U. S. §§ 2291, 2301 (U. S. Comp. St. 1901, pp. 1390, 1406). See the land department's circular of "Suggestions to Homesteaders and Persons Desiring to Make Homestead Entries," approved March 9, 1908.

* U. S. Mining Regulations, Approved May 21, 1907, Rule 100.

[8] Mackall v. Goodsell, 24 Land Dec. Dep. Int. 553; Leach v. Potter, Id. 573.

[9] Majors v. Rinda, 24 Land Dec. Dep. Int. 277; Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936.

[10] Hooper v. Ferguson, 2 Land Dec. Dep. Int. 712; Elda Mining & Milling Co., 29 Land Dec. Dep. Int. 279.

[11] Tinkham v. McCaffrey, 13 Land Dec. Dep. Int. 517; Long v. Isaksen, 23 Land Dec. Dep. Int. 353. See Aspen Consol. Min. Co. v. Williams, 23 Land Dec. Dep. Int. 34; United States v. Reed (C. C.) 28 Fed. 482. Compare Colo-

can a mining location be made upon it? The answer to that question depends upon the answer to the questions: (1) What interest the claimant acquires by his entry? and (2) can the location be made without its being initiated by a trespass?

The first question may arise where the homstead claimant enters land on which a valid subsisting location exists. In such case, says the land department, the entry does not pass to the homestead claimant any interest in the mining claim land.[12] There is, in effect, an exception of the land from the entry. But the question may also arise where the claim is not located until after the entry. There, also, the land department treats the mineral land as excepted.[13] "The fact that when the alleged mining claim was located the homestead entry of Currence was still of record and uncanceled did not of itself affect the validity of the location. No vested right to the lands had attached under the entry, and until such right should attach the lands belong to the United States, and, if mineral in character, are subject to location and purchase under the mining laws." [14] This ruling, though hard on the homestead claimant, finds some justification in the attitude of the United States Supreme Court toward homestead entries, which are not regarded as giving such vested rights as attach under the mining laws.[15]

For the answer to the second question, the initiation of a mining

rado Coal & Iron Co. v. United States, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182.

At any time before final proof and payment is made on a homestead entry on lands in a district which is subject to the mining laws, a cancellation of the entry may be obtained by showing that the land is more valuable for mineral than for agricultural purposes. Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936. The hearings are governed by Land Office Mining Regulations, Approved May 21, 1907, Rules 99 to 111. See Appendix. The decision of the land department that the land is mineral or that it is nonmineral is conclusive on the courts. Cragle v. Roberts (Cal. App.) 92 Pac. 97.

[12] Manners Construction Co. v. Rees, 31 Land Dec. Dep. Int. 408.

[13] Id.

[14] Manners Construction Co. v. Rees, 31 Land Dec. Dep. Int. 408, 410.

[15] Yosemite Valley Case (Hutchings v. Low) 15 Wall. (U. S.) 77, 21 L. Ed. 82. See Wagstaff v. Collins, 97 Fed. 3, 38 C. C. A. 19; Shiver v. U. S., 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231. Failure to make entry, of course, prevents rights of property from existing. Gonzales v. French, 164 U. S. 338, 17 Sup. Ct. 102, 41 L. Ed. 458; Camfield v. U. S., 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260.

"It appears to have been uniformly held by the federal courts that an entry [of a homestead] in the proper land office does not create any vested right in the entryman as against the United States, and that Congress may, by subsequent legislation, dispose of the land to any one notwithstanding such entry." Oregon Short Line R. Co. v. Quigley, 10 Idaho, 770, 80 Pac. 401, 403, and cases cited.

location by trespass, we must look in part to the solution of the first. If the mineral land is a true exception from the entry, and that seems to be the land department's view of the case, then a mineral claimant who keeps to excepted surface can no more be a trespasser than can the locator of a known lode in a placer who keeps on the strip 25 feet on each side of the vein. But it would certainly seem as if the land department is in error in treating any surface as excepted. The minerals may be excepted; but, unlike the case of known lodes in placers where a definite number of feet of surface is excepted by statute, no surface seems to be excepted from the homestead entry. So far as the courts are concerned, which cannot recognize a location of a lode apart from a surface,[16] it seems clear that no mineral location on lands covered by a homestead entry can be recognized, unless it is made after the homestead entry has been canceled by the land department after notice and hearing.[17] If, however, as seems to be the case, the land department permits a mining location to be made on a homestead entry in order to form the basis of a contest in the land department, a cancellation of the homestead entry would doubtless be held by the courts to inure to the benefit of the locator so favored by the land department;† but that question has not come up. In the case of a homestead entry, however, just as is true in the case of a placer location,[18] it would doubtless be such a trespass to go upon the land to prospect for unknown lodes as to make the location thereby initiated void, even from the land department's point of view. "The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. In order to secure a patent for such land, he must proceed as in other cases, in accordance with the foregoing regulations."‡

Mineral Question after Patent.

So much for the situation before patent. Where a homestead patent is issued for land, that is an authoritative adjudication by the land

[16] Traphagen v. Kirk, 30 Mont. 562, 77 Pac. 58, and cases cited. See Heil v. Martin (Tex. Civ. App.) 70 S. W. 430; Gleeson v. Martin White Mining Co., 13 Nev. 442.

[17] Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936; HEINE v. ROTH, 2 Alaska, 416; Steele v. Tanana Mines Ry. Co., 2 Alaska, 451 (decided on other grounds in 148 Fed. 678, 78 C. C. A. 412). Until the homestead entry is canceled, the mining claimant cannot be permitted to occupy the land jointly with the homesteader. Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936, 940.

†That the land department would so regard it if the mineral claimant stayed with the claim, see Adams v. Polglase, 32 Land Dec. Dep. Int. 477, 33 Land Dec. Dep. Int. 30.

[18] CLIPPER MIN. CO. v. ELI MINING & LAND CO., 194 U. S. 220, 24 Sup. Ct. 632, 48 L. Ed. 944.

‡ Land Office Mining Regulations, approved May 21, 1907, Rule 111.

department that the land is nonmineral. If in fact the land is mineral, and was known to be so at the time of patent, the title nevertheless passes. The patent is for the whole quarter section or other survey subdivision, and while it stands must on principle cover minerals, known as well as unknown.[19] Where known mineral land has been entered as agricultural, the patent may be set aside in equity at the suit of the United States,[20] and, if there was a pre-existing valid mining location on the ground patented to the homestead settler, the patentee may doubtless be declared a trustee of the mining claim ground for the benefit of the mining claim owner at the suit of the latter.[21] Any veins or lodes unknown before patent, but discovered after patent, belong, of course, to the patentee. "In cases of homestead, pre-emption, or townsite entries, the law excludes mineral lands; but it was never doubted that the title, once passed, was free from all conditions of subsequent discoveries of mineral." [22]

TIMBER AND STONE LAND ENTRIES.

21. To timber entries under the timber and stone lands act the same rules about minerals apply as do to homestead entries, though when stone entries are made under that act only gold, silver, cinnabar, copper, and coal deposits are excepted from the entries.

Under the timber and stone lands act, the same doctrines govern as to minerals that apply to homestead entries, except that, when stone lands are acquired under the act, only lands containing gold, silver, cinnabar, copper, or coal are excepted. Building stone lands may still be entered under this act, although the building stone act of August 4, 1892,[23] allows them to be entered as placer claims.[24] Until the final certificate of purchase is issued to a timber applicant,

[19] STANDARD QUICKSILVER CO. v. HABISHAW, 132 Cal. 115, 64 Pac. 113. But see, contra, as to pre-emption, Gold Hill Quartz Mining Co. v. Ish, 5 Or. 104.

[20] Colorado Coal & Iron Co. v. U. S., 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182.

[21] See Salmon v. Symonds, 30 Cal. 301.

[22] SHAW v. KELLOGG, 170 U. S. 312, 332, 18 Sup. Ct. 632, 42 L. Ed. 1050; Kirby v. Potter, 138 Cal. 686, 72 Pac. 338.

[23] 27 Stat. 348, c. 375 (U. S. Comp. St. 1901, p. 1434).

[24] Forsythe v. Weingart, 27 Land Dec. Dep. Int. 680. Lands are subject to entry under the timber and stone act so long as they are chiefly valuable for stone, even though under existing conditions the stone may not be marketable at a profit. Narver v. Eastman, 34 Land Dec. Dep. Int. 123. Under this act one who takes granite from the public domain and shapes it for a tombstone becomes the exclusive owner of it, although he does not acquire the exclusive

the lands, if mineral, are subject to exploration and purchase under the mining laws;** but after the certificate issues to the timber land applicant a subsequent discovery of mineral inures to the purchaser of the lands.[25] One who fraudulently obtains a patent under the timber act to land on which another has a valid mining location will be made to hold the legal title in trust for that other.††

DESERT ENTRIES.

22. Desert entries are governed by the same rules as to minerals as apply to homestead entries.

If mineral deposits are found in desert land entries, the same rules apply as govern in the case of homestead entries.[26]

right to the land from which it is taken. Sullivan v. Schultz, 22 Mont. 541, 57 Pac. 279.

** The surveyor general's return that the land is timber throws the burden of proof of its mineral character upon the person asserting it against a claimant under the timber and stone act. Purtle v. Steffee, 31 Land Dec. Dep. Int. 400. On the right to take timber, see Gallagher v. Gray, 35 Land Dec. Dep. Int. 90.

[25] Chormicle v. Hiller, 26 Land Dec. Dep. Int. 9. Public land covered by a heavy growth of timber, which constitutes its chief value, is held subject to entry under the timber and stone act, although it would be fit for cultivation if the timber were removed. Thayer v. Spratt, 189 U. S. 346, 23 Sup. Ct. 576, 47 L. Ed. 845.

†† MERY v. BRODT, 121 Cal. 332, 53 Pac. 818.

[26] "Desert land claimants will rarely come in conflict with mining claimants. Of course, beds of gypsum, borax, nitrate, and carbonate of soda are found in the desert regions; but their mineral character is generally so obvious that no controversy is likely to arise. It would be much cheaper and more expeditious for a claimant to enter these classes of lands under the placer laws than to attempt to acquire title under the onerous provisions of the desert land law." 1 Lindley on Mines (2d Ed.) § 212.

CHAPTER VI.

THE RELATION BETWEEN MINERAL LANDS AND THE VARIOUS PUBLIC LAND RESERVATIONS.

Those parts of the federal public domain which the national government has not parted with, but which for various public purposes it has withdrawn from the operation of the mining and other land laws, may be grouped under the title of "Land Reservations," and, so grouped, are enumerated as follows: (1) Indian reservations; (2) military reservations; (3) national parks; (4) forest reserves; (5) reservoir sites.

INDIAN RESERVATIONS.

23. Mining locations, properly made prior to the creation of an Indian reservation, are upheld; but mineral lands within an existing reservation are not subject to location, except under acts specifically providing for mining locations on given reservations. After an Indian reservation has been thrown open again, mining locations may, of course, be made.

Under executive orders reserving lands for Indian occupancy, our Indian reservations have been created. The title which the Indians have to the lands thus reserved is one of occupancy only, unless allotments are made which confer greater rights, and, where the United States makes the Indian reservation, the fee is in the United States, subject to this right of occupancy. Since the title is in the United States, the federal government has the power, should it see fit, to pass title to lands in the Indian reservation without the consent of the Indians.[1] But no presumption will be indulged that the federal government intended to exercise that power, and, even if it does actually exercise it, the rights of occupancy of the Indians are protected.[2] It is well settled that, after an Indian reservation has been established by the federal government, the land embraced within the reservation

[1] United States v. Alaska Packers' Ass'n (C. C.) 79 Fed. 152.

[2] Buttz v. Northern Pac. R. Co., 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330. United States v. Moore (C. C. A.) 161 Fed. 513.

is thereafter not unoccupied land of the United States, and hence is not subject to new mining locations. This proposition seems to have been laid down first in French v. Lancaster,[3] and is now well established.[4] As the Supreme Court of the United States said in Kendall v. San Juan Mining Co.: "The effect of the [Indian] treaty was to exclude all intrusion for mining or other private pursuits upon the territory thus reserved for the Indians. It prohibits any entry of the kind upon the premises, and no interest could be claimed or enforced in disregard of this provision. Not until the withdrawal of the land from this reservation of the treaty by a new convention with the Indians, and one which would throw the lands open, could a mining location thereon be initiated by the plaintiffs. The location of the Bear lode, having been made whilst the treaty was in force, was inoperative to confer any rights upon the plaintiffs." [5]

Mining claims cannot, therefore, be located on existing Indian reservations, except under acts specifically allowing such locations.[6] Where no specific statutory authorization for such locations exists, then, the given mining location is invalid, unless it either antedated the Indian reservation or was made after the Indian occupancy was ended and the lands were thrown open to location. If the mining location was made before the Indian reservation was created, the mining location will be upheld by the land department, and so will a valid relocation of it by others.[7] The location is in effect a prior grant of possessory title by the United States to the locator, and as such is excepted from the Indian reservation. After an Indian reservation has been thrown open again, mining locations may, of course, be made*; and it has further been held that a mining location, invalid because made while the land was in an Indian reservation, was validated where the locator, who was in possession when the reservation was withdrawn,

[3] 2 Dak. 346, 47 N. W. 395.

[4] KENDALL v. SAN JUAN MINING CO., 9 Colo. 349, 12 Pac. 198; 144 U. S. 658, 12 Sup. Ct. 779, 36 L. Ed. 583. Gibson v. Anderson, 131 Fed. 39, 65 C. C. A. 277; McFadden v. Mountain View Min. & Mill. Co., 97 Fed. 670, 38 C. C. A. 354; Acme Cement & Plaster Co., 31 Land Dec. Dep. Int. 125. Compare King v. McAndrews, 111 Fed. 860, 50 C. C. A. 29.

[5] KENDALL v. SAN JUAN MIN. CO., 144 U. S. 658, 12 Sup. Ct. 779, 36 L. Ed. 583. Compare Spalding v. Chandler, 160 U. S. 394, 16 Sup. Ct. 360, 40 L. Ed. 469; Missouri, K. & T. R. Co. v. Roberts, 152 U. S. 114, 14 Sup. Ct. 496, 38 L. Ed. 377.

[6] U. S. v. Four Bottles Sour Mash Whisky (D. C.) 90 Fed. 720.

[7] Navajo Indian Reservation, 30 Land Dec. Dep. Int. 515.

* See Collins v. Bubb (C. C.) 73 Fed. 735, where the prospectors were not even made to wait for the president's proclamation, and where the Indians were not allowed to select as part of their allotments lands valuable for minerals.

and who had made a discovery, proceeded upon such withdrawal to post a notice and to mark boundaries, to cause a proper record to be made, and, in addition to adopting what he had previously done, to perform the annual labor necessary to hold the claim.[8] But the location, if not so adopted after the reopening of the reservation, must actually be made after such reopening, or the location is invalid. Accordingly, where an act of Congress subjected mineral lands in an Indian reservation to mineral entry, and on the same day on which the act was passed two joint resolutions were also passed postponing the operation of the act for seven months, a location made the day the act was passed was held invalid, because made seven months too soon.[9] Where a location is attempted during the existence of the Indian reservation, it is held to be invalid as against a location made after the land is open to settlement.[10] Moreover, where an Indian reservation is opened for no other purpose than to permit the location, development, and operation of mines, a clear showing that the ground claimed by location contains minerals in sufficient quantity to pay to work, and that the purpose of the locator is to develop and operate mines, is required.[11]

MILITARY RESERVATIONS.

24. Mineral lands in military reservations are in the same situation as such lands in Indian reservations.

Military reservations are established by presidential proclamation and vacated in the same way.[12] The mineral lands contained in them

[8] Caledonia G. M. Co. v. Noonan, 3 Dak. 189, 14 N. W. 426; NOONAN v. CALEDONIA GOLD MINING CO., 121 U. S. 393, 7 Sup. Ct. 911, 30 L. Ed. 1061; Golden Terra Min. Co. v. Smith, 2 Dak. 377, 11 N. W. 98. The mineral character of the land must be made to appear. Durant v. Corbin (C. C.) 94 Fed. 382. A dedication of a right of way made by the claimant during the existence of the Indian Reservation was enforced against him after the Indian title ceased and patent issued to him, in City of Deadwood v. Whittaker, 12 S. D. 520, 81 N. W. 908.

[9] Gibson v. Anderson, 131 Fed. 39, 65 C. C. A. 277. See Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936; McFadden v. Mountain View Min. & Mill. Co., 97 Fed. 670, 38 C. C. A. 354. Though the lands in Oklahoma, acquired by treaty from the Comanche, Kiowa and Apache Indian tribes, were classed as agricultural lands, they were subject to the mineral laws of the United States. Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936.

[10] KENDALL v. SAN JUAN MINING CO., 9 Colo. 349, 12 Pac. 198; Id., 144 U. S. 658, 12 Sup. Ct. 779, 36 L. Ed. 583.

[11] Durant v. Corbin (C. C.) 94 Fed. 382.

[12] See Florida Town Imp. Co. v. Bigalsky, 44 Fla. 771, 33 So. 450.

seem to be in the precise situation of such lands in an Indian reservation. Mining locations made previous to the reservation will be upheld by the land department,[13] but not those made during the existence of the reservation.[14] The only serious difficulty in the matter is that the government may need to exclude the mining claimant of a previous location from the reservation; but, of course, the government, if it did so, could not forfeit the location for failure in the performance of annual labor. Such exclusion of the claimant by the War Department would simply excuse him from the performance of annual labor while he was so excluded. As to claims located during the military reservation and adopted after its vacation, and as to claims located after the vacation, the rule applicable to Indian reservations would seem to apply.[15]

NATIONAL PARKS.

25. Mineral lands in national parks are in the same situation as such lands in Indian reservations.

National parks, such as the Yellowstone Park and the Yosemite Valley, are governed by the same rules as Indian and military reservations. Unless the acts creating them allow mineral locations, and usually they do not,[16] none can be made after the creation of the parks.

FOREST RESERVES.

26. Mineral lands in forest reserves, as distinguished from national parks, are open to location.

Forest reserves are really national parks, except that they are made under the general act of March 3, 1891,[17] while the so-called parks have usually been created by special acts. Forest reservations are made by

[13] Fort Maginnis, 1 Land Dec. Dep. Int. 552.

[14] Id. A discovery within a naval reservation will not sustain a location which lies partly within and partly without such reservation. Behrends v. Goldsteen, 1 Alaska, 518.

[15] By Act July 5, 1884, c. 214, § 5, 23 Stat. 104 (U. S. Comp. St. 1901, p. 1610), it is provided that, whenever lands containing valuable mineral deposits are vacated by the reduction or abandonment of any military reservation, they shall be disposed of exclusively under the mineral land laws of the United States.

[16] The Mt. Rainier national park act allows them. Act March 2, 1899, c. 377, § 5, 30 Stat. 995.

[17] 26 Stat. 1103, c. 561, § 24 (U. S. Comp. St. 1901, p. 1537).

presidential proclamation.[18] There is, however, a very important distinction between forest reserves and national parks, due to the fact that the act of June 4, 1897,[19] throws open to location and entry under the mineral laws all mineral lands in forest reservations, and allows mining claimants to cut timber and use water for actual mining use on the mining claims. It is perfectly clear, therefore, that all forest reserves, as distinguished from the national parks governed by special acts, are open to mining locations.[20] The purpose of the forest reserves is to protect the forest region from destructive fires and waste, so that it may be available for agriculture and mining, and incidentally, perhaps, to assist in diminishing spring freshets in the mountains. Mining is therefore favored in forest reserves, and roadways and other rights of way are authorized for mining purposes.[21]

Under the forest reserve act of June 4, 1897,[22] and the act of June 6, 1900,[23] homestead claimants who find that their entries or patented lands are included within a forest reserve can make lieu selections elsewhere of lands subject to homestead entry, with full time of residence credit. It of course follows that the lieu lands are subject to all the rules about homestead entries considered heretofore. An attempted lieu selection in a township not yet sectionized, where the selection is liable to be defeated by prior adverse claims or by proof that the land selected is mineral, has been held to pass neither a legal nor an equitable title.[24] Known mineral land, and that means known when the choice is approved,[25] cannot be selected. A mineral claim cannot be made the basis of a lieu selection.[26]

[18] If the proclamation is signed by the Secretary of the Interior, it will be presumed to have been by direction of the President; but only public lands can be reserved. United States v. Blendauer (D. C.) 122 Fed. 703.

[19] 30 Stat. 36, c. 2 (U. S. Comp. St. 1901, p. 1542).

[20] Instructions, 32 Land Dec. Dep. Int. 307. See circular, 30 Land Dec. Dep. Int. 28, § 19. See, also, Act Feb. 20, 1896, c. 28, 29 Stat. 11 (U. S. Comp. St. 1901, p. 1537).

[21] Act Feb. 1, 1905, c. 288, § 4, 33 Stat. 628 (U. S. Comp. St. Supp. 1907, p. 551).

[22] 30 Stat. 11, 33–36, c. 2 (U. S. Comp. St. 1901, p. 1538).

[23] 31 Stat. 588, 614, c. 791.

[24] Peters v. Van Horn, 37 Wash. 550, 79 Pac. 1110.

[25] Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230. See Kern Oil Co. v. Clarke, 31 Land Dec. Dep. Int. 288.

[26] Act June 6, 1900, c. 791, 31 Stat. 588, 614; Instructions, 28 Land Dec. 328.

RESERVOIR SITES.

27. Existing mining locations can be taken for reservoir sites only by condemnation. Known mineral lands can be taken for a reservoir site by the government only.

Under the federal statutes reservoir sites may be located by (1) private individuals and corporations who are engaged in raising live stock, and (2) by the government itself.

(1) By the express provisions of the act providing for the location of reservoir sites by individuals and corporations, mineral lands cannot be selected;[27] but, if a reservoir site has once been selected, a subsequent mining location on it is doubtless invalid, unless it thereafter appears that the land is not required for reservoir purposes.[28]

(2) Similar rules apply to the selection of reservoir sites for irrigation purposes by the government itself, except, of course, that the government may select unappropriated mineral land. Mineral locations may be made and entered for patent, subject to the actual location of the reservoir site, and if the lands located are not needed for reservoir purposes such entries may be perfected.[29] A mining location, made prior to the selection of the reservoir site, has priority as to the conflict area.[30]

By the act of June 17, 1902,[31] Congress provided for the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the mining law states and territories and some others. Under that act the Secretary of the Interior is authorized to withdraw from public entry the lands required for the irrigation works. As the act does not except mineral lands, the action of the secretary in withdrawing such lands would doubtless make it impossible to locate them.[32] Previous mining locations, of course, must be respected,[33] and, if needed for the works, must be taken by condemnation proceedings.

[27] Act Jan. 13, 1897, c. 11, 29 Stat. 484 (U. S. Comp. St. 1901, p. 1574).
[28] See Colomokas Gold Min. Co., 28 Land Dec. Dep. Int. 172.
[29] Id.
[30] John U. Gabathuler, 15 Land Dec. Dep. Int. 418.
[31] 32 Stat. 388, c. 1093, § 3 (U. S. Comp. St. Supp. 1907, p. 513).
[32] See Instructions, 32 Land Dec. Dep. Int. 387.
[33] Id.; Opinion, 34 Land Dec. Dep. Int. 155. But, as to timber and stone lands, see Board of Control v. Torrence, 32 Land Dec. Dep. Int. 472.

CHAPTER VII.

THE RELATION BETWEEN MINERAL LANDS AND TOWNSITES.

"Whenever any portion of the public lands have been or may be settled upon and occupied as a townsite, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests, the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated." Rev. St. U. S. § 2387 (U. S. Comp. St. 1901, p. 1457).

"That townsite entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: provided, that no entry shall be made by such mineral vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral vein applicant." Act March 3, 1891, c. 561, § 16, 26 Stat. 1101 (U. S. Comp. St. 1901, p. 1459).

LANDS SUBJECT TO TOWNSITE ENTRY.

28. Under the early townsite acts, townsites could not be located on mineral lands; but under the act of 1891 townsite entries may be made on mineral lands by incorporated towns and cities. Townsite patents do not, however, carry title to mineral veins which at the time of entry are known to exist. Minerals not known to exist at the time of townsite entry pass to the town.

While there are other methods of acquiring townsites, the one set forth in Rev. St. U. S. § 2387 (U. S. Comp. St. 1901, p. 1457), and in the act of 1891,[1] above quoted, is the one prevailing in the mining region. And it should be noted that the act of 1891 applies expressly only to incorporated towns and cities, and therefore appears not to cover townsite entries made by the judge of the county court, as authorized by section 2387, Rev. St. U. S. Both section 2387 and the act of 1891 must be read and considered in connection with the whole general land law system, and with the mining law as a special, but integral, part of that general system. As was inevitable, the mining regions and the towns have been closely associated. "Some of the most valuable mines in the country," said Mr. Justice Field, "are within the limits of incorporated cities, which have grown up on what was, on its first settlement, part of the public domain; and many of such mines were located and patented after a regular municipal government had been established. Such is the case with some of the famous mines of Virginia City, in Nevada. Indeed, the discovery of a rich mine in any quarter is usually followed by a large settlement in its immediate neighborhod, and the consequent organization of some form of local government for the protection of its members. Exploration in the vicinity for other mines is pushed in such case by the newcomers with vigor, and is often rewarded with the discovery of valuable claims." [2] In the case in which Mr. Justice Field made the above statements, the United States Supreme Court held that a miner who had located a mining claim within the limits of a new town prior to a patent for a townsite had a valid location superior to any claim of the town. Prior to the act of 1891 it is hard to see how the matter could ever have been in doubt, where the location was made peaceably, as was true in the case mentioned, and the actual surface ground thus obtained without the actual occupation of the rest of the land by the townspeople for town purposes being interfered with.[3]

[1] 26 Stat. 1101, c. 561, § 16 (U. S. Comp. St. 1901, p. 1459).

[2] STEEL v. ST. LOUIS SMELTING & REFINING CO., 106 U. S. 447, 449, 1 Sup. Ct. 389, 27 L. Ed. 226.

[3] See Poire v. Wells, 6 Colo. 406.

Effect of Actual Occupancy of Public Land for Town Purposes.

Yet with reference to the actual occupation by the townspeople some very perplexing problems have arisen under the act of 1891. Those problems seem to grow out of the concurrence of two doctrines: (1) That by settling on land not known at the time to be mineral the townsman initiates, under the act of 1891, a right which, taken with the rights of his fellow townsmen, will lead on to a townsite patent, and which, when so initiated, takes the occupied surface;[4] and (2) that the mining act of May 10, 1872 (17 Stat. 91, c. 152), and the revision contemplate no mining location unless a surface containing a lode can be located. The validity of the second doctrine seems not to be questioned,[5] but even prior to the act of 1891 the first doctrine was never satisfactorily discussed by the courts. Certainly the cases of Steel v. St. Louis Smelting & Refining Co.,[6] Deffeback v. Hawke,[7] and Davis v. Weibbold[8] left the question in a far from satisfactory shape.

The problem of actual occupancy by the townspeople is discussed in Bonner v. Meikle,[9] a case arising under the act of 1891. It should be noticed that Bonner v. Meikle was technically an adverse suit, under the statute in reference to the patenting of mining claims, and as such necessarily litigated priority of interest in the surface.[10] Moreover, the case was decided in 1897, after the act of 1881,[11] which required that if, in an adverse suit, it appeared that neither party established title to the ground in controversy, judgment should be entered accordingly. As the court rendered judgment for the townspeople, even though no townsite patent had yet been applied for by them, the conclusion is irresistible that the case stands for the proposition that the surface belongs to the townspeople, even though the town remains inchoate. The court said: "The citizens of a town have as much right to build houses upon the public domain in which to live as others have to locate mining claims upon which to work. One purpose is as

[4] See BONNER v. MEIKLE (C. C.) 82 Fed. 697.

[5] TRAPHAGEN v. KIRK, 30 Mont. 562, 77 Pac. 58; Montana Ore Purchasing Co. v. Boston Mining Co., 20 Mont. 336, 51 Pac. 159; State v. District Court, 25 Mont. 504, 65 Pac. 1020. See Heill v. Martin (Tex. Civ. App.) 70 S. W. 430; Gleeson v. Martin White Min. Co., 13 Nev. 442.

[6] 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226.

[7] 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423.

[8] 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238.

[9] (C. C.) 82 Fed. 697. See, also, Young v. Goldsteen (D. C.) 97 Fed. 303.

[10] The land department, however, holds that an adverse suit does not dispose of the matter. See Ryan v. Granite Hill Mining & Development Co., 29 Land. Dec. Dep. Int. 522; Grand Canyon Ry. Co. v. Cameron, 35 Land Dec. Dep. Int. 495.

[11] Act March 3, 1881, c. 140, 21 Stat. 505 (U. S. Comp. St. 1901, p. 1431).

necessary as the other. Both are entitled to the equal protection of the law. Although complainants have not connected themselves with any government title, nor sought in any manner to secure such title, yet they have such a possessory right to the land upon which their buildings have been erected as will prevent others, not having any title from the government, from entering thereon and taking their property from them without first establishing a superior right thereto. There are many cases where the owners of mining ground valued at millions of dollars have preferred to hold the same under 'a mere possessory right,' rather than to take any steps to secure a patent from the government. Would it not be absurd to claim that in such cases the owners of the possessory title under valid mining locations were not entitled to any protection, and could not even protest against the application of some subsequent locator, for a patent covering a portion or all of their ground, because they had never taken any steps to secure title to their property from the United States?" [12] The court then puts forward the idea of a "townsite location"; i. e., the idea that actual occupancy for business purposes is equivalent to a mining location, so far as to prevent a subsequent mining location of the same ground from being made.[13]

Bonner v. Meikle would seem to announce sound doctrine with reference to occupation by inhabitants of incorporated towns and cities under the act of 1891, but what about the previous acts? As to them, despite the somewhat ambiguous dicta to be found in the decisions, it seems as if Mr. Lindley's "conclusion that the Supreme Court of the United States never intended to establish the rule that prior occupancy of the public mineral lands for trade or business purposes operated to withdraw such lands prior to the issuance of a townsite patent from appropriation under the mining laws, provided, always, that such appropriation was effected by peaceable methods and without resort to force or violence," [14] is the proper one to draw.[15]

Relation of Act of 1891 to Older Acts.

It must not be forgotten that the theory underlying the act of 1891 is very different from that underlying the old acts. Under the old acts title to mineral lands was not to be acquired by townsites, and if the land department, in its investigation of the character of the land

[12] BONNER v. MEIKLE (C. C.) 82 Fed. 697, 699.

[13] Compare White v. Whitcomb, 13 Idaho, 490, 90 Pac. 1080, where there is a dictum that lands occupied for town purposes are not subject to homestead entry.

[14] 1 Lindley on Mines (2d Ed.) § 170. See Martin v. Browner, 11 Cal. 12.

[15] Compare case of railroad grant. NORTHERN PAC. R. R. CO. v. SMITH, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157.

sought to be patented as a townsite, determined that the whole land was mineral, even though nobody else claimed it, it could not patent the land as a townsite, and when a patent issued known mineral land did not pass under it.[16] But under the act of 1891 it is expressly provided that townsite entries may be made on mineral lands by incorporated towns and cities—the usual kind, of course, to-day. No longer, then, if the town or city applying for a townsite patent is incorporated, may the land department refuse the townsite patent because the land is mineral, though, of course, previous mining locations must be protected.[17] In view of such a fundamental difference between the new act and the old, it is possible and proper to have a fundamental difference in the effect on attempted mining locations of a townsman's occupancy prior to townsite patent.

In still another respect the act of 1891 has changed things. Indirectly, if not directly, it changed a ruling of the land department. That department had held that after a townsite patent issued for a tract of land it could not issue a patent to a mining claim validly located prior to the issuance of the townsite patent, but that the mineral claimant must bring a suit in equity to set aside the townsite patent.[18] Since the act of 1891, however, the holding has been reversed, and a patent will now issue for mining claims to which the townsite patent cannot apply.[19] Whether the latest ruling of the land department is right or wrong depends upon whether a previously located mining claim is technically excepted from the townsite patent by virtue of the townsite acts and the reservations actually inserted in the townsite patents pursuant thereto. That it is such a technical exception, just as a lode known to exist in a placer at the time of the application for a patent of the placer is an exception, would seem to be true,[20] though Mr. Lindley intimates, and whatever he says deserves serious consideration, that it is not an exception. "Logically," says Mr. Lindley, "we think the mineral claimant's remedy in this class of cases is in equity to erect

[16] Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69; Brady's Mortgagee v. Harris, 29 Land Dec. Dep. Int. 89, 426.

[17] Nome & Sinook Co. v. Townsite of Nome, 34 Land Dec. Dep. Int. 102, 276; Telluride Additional Townsite, 33 Land Dec. Dep. Int. 542.

[18] See Cameron Lode, 13 Land Dec. Dep. Int. 369; Board of Education v. Mansfield, 17 S. D. 72, 95 N. W. 286, 106 Am. St. Rep. 771.

[19] NOME & SINOOK CO. v. TOWNSITE OF NOME, 34 Land Dec. Dep. Int. 276; Hulings v. Ward Townsite, 29 Land Dec. Dep. Int. 21.

[20] See Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 5 Pac. 570; Talbott v. King, 6 Mont. 76, 9 Pac. 434; Butte City Smoke House Lode Cases, 6 Mont. 397, 12 Pac. 858. That a located mill site is also excepted, see Hartman v. Smith, 7 Mont. 19, 14 Pac. 648.

a trust on the townsite patent, or, perhaps, an application to the land department, to institute a suit to vacate the patent pro tanto." [21]

The California Supreme Court, however, would seem to be right in deciding that a valid mining location existing at the time of townsite entry is excepted from the townsite patent, even though it was not known at the time of townsite entry that the claim contained minerals of sufficient value to justify expenditure for extracting them.[22] If there is mineral enough to sustain the location, the latter is excepted from the townsite entry, even though the claim cannot be worked at a profit. It is, of course, true under all the acts that a townsite patent vests in the town absolutely the title to minerals not then known to exist in the patented area, and a subsequent discovery of minerals will not permit third persons to make a mining location.[23]

The fact that minerals underlie the streets will not prevent the passing of the minerals to the town, if they are unknown at the time of patent. They will pass to the town, and then will stay in the town, if according to the laws of the state where the town is situated the fee to the street is in the town, or, if the abutting landowners get the fee to the streets, with an easement for highway purposes in the town, will pass from the town to the abutting landowners at the time the latter derive title to the abutting lands.[24] This is clearly the intent of the provision in section 2387, Rev. St. U. S., that the execution of the townsite patent trust as to the disposal of lots and their proceeds by the proper authorities shall be "conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated."

[21] 1 Lindley on Mines (2d Ed.) p. 316, § 177.

[22] Callahan v. James, 141 Cal. 291, 74 Pac. 853. See Cascaden v. Bartolis, 146 Fed. 789, 77 C. C. A. 496. But see Horsky v. Moran, 21 Mont. 345, 53 Pac. 1064; Harkrader v. Goldstein, 31 Land Dec. Dep. Int. 87.

[23] Bonner v. Meikle (C. C.) 82 Fed. 697; McCormick v. Sutton, 97 Cal. 373; 32 Pac. 444. See Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; Larned v. Jenkins, 113 Fed. 634, 51 C. C. A. 344.

[24] Where the grantor of lands to a city reserved the minerals under the surface of the street, and then granted to a third person a lot which abutted on the street, the grantee was held to get the minerals under the half of the street immediately in front of his lot. Tousley v. Galena Mining & Smelting Co., 24 Kan. 328; Snoddy v. Bolen, 122 Mo. 479, 24 S. W. 142, 25 S. W. 932, 24 L. R. A. 507; Snoddy v. Clark, 122 Mo. 479, 25 S. W. 935. Where land is dedicated to the public for a street in Colorado, the statute gives the city the fee to the street, and not to the land, and hence the dedicator still has the right to extract minerals beneath the street, so far as he does not interfere with street uses. City of Leadville v. Bohn Mining Co., 37 Colo. 248, 86 Pac. 1038. This is not true, however, in a state where the title to the land passes by dedication. Union Coal Co. v. La Salle, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326;

THE LOCATION OF KNOWN VEINS IN TOWNSITES.

29. Known veins can be located in the town limits prior to the townsite patent, if the location is made peaceably, and after townsite patent issues previous mining locations may be patented. Whether "known veins" in patented townsites may be located —query?

Known veins are not even reserved under the act of 1891, unless they are of gold, silver, cinnabar, copper, or lead, or are validly located prior to the townsite entry. "Known mines" under the townsite reservations, prior to the act of 1891, meant that, to be excepted from the townsite patent, "it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the townsite patent takes effect, but that they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them; and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the townsite patent." [25] Known veins of gold, silver, cinnabar, copper, or lead, under the act of 1891, must doubtless accord with the foregoing test.[26] If they do, then, as was the case with known mines under the earlier acts, they are excepted from the townsite patent as completely as if they were actually located at the time.[27]

The only question about known veins under the act of 1891 that remains, and it does not seem to be as simple as it might be, is whether such known lodes can be located after the townsite patent. The question seems to be much the same as that in regard to Mexican land grants covered by the act of March 3, 1891. Indeed, the townsite act and the Mexican land grant act, both approved March 3, 1891, show a common design to give the surface to the patentee and reserve the mineral. In the case of Mexican land grants Congress seems to reserve unknown minerals, but in the case of townsites only known ones. Under the Mexican land grant act of 1891, no location of minerals can be

City of Des Moines v. Hall, 24 Iowa, 234; Trustees of Hawesville v. Hawes' Heirs, 6 Bush (Ky.) 232.

[25] DOWER v. RICHARDS, 151 U. S. 658, 663, 14 Sup. Ct. 452, 38 L. Ed. 305. See Larned v. Jenkins, 113 Fed. 634, 51 C. C. A. 344. But see Callahan v. James, supra.

[26] See Brophy v. O'Hare, 34 Land Dec. Dep. Int. 596.

[27] See Callahan v. James, 141 Cal. 291, 74 Pac. 853; Hulings v. Ward Townsite, 29 Land Dec. Dep. Int. 21; Lalande v. Townsite of Saltese, 32 Land Dec. Dep. Int. 211.

made without the surface owner's consent until Congress shall act. What about the townsite case? Mr. Lindley says the case is like that of a known lode in a placer; but, unfortunately, there is this marked difference: That in the case of a known lode in a placer Congress has reserved a surface strip of at least 50 feet, 25 feet of surface on each side of the vein or lode,[28] but in the case of a town site no surface is reserved. The question then arises: Can a lode be located without a surface to include it? The Montana Supreme Court has several times asserted that it cannot,[29] and the conclusion of that court seems to be sound. Section 2319, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1424), providing for the location of mining claims "requires the location of surface ground, including the minerals sought to be obtained." [30] It has been decided in at least one case that under the townsite laws prior to the act of 1891 known mineral land in a patented townsite cannot be located,* and the provision in the act of 1891 forbidding *entry* where the owner or occupier of the surface ground on a patented townsite shall have had possession of the same before the inception of the title of the mineral vein applicant would seem to show that a *location* was not to be permitted in such case.

As has several times been noticed, the provisions of Rev. St. U. S. § 2392 (U. S. Comp. St. 1901, p. 1459), reserved from the townsite patent "any valid mining claim or possession held under existing laws," and the act of 1891 has repeated the reservation. That reserves only locations that are not void for uncertainty.[31] Such reserved locations are so fully protected that they may not even protest against the townsite patent successfully as they cannot be prejudiced by its issuance.[32]

[28] Rev. St. U. S. § 2333 (U. S. Comp. St. 1901, p. 1433).

[29] TRAPHAGEN v. KIRK, 30 Mont. 562, 77 Pac. 58; Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 20 Mont. 336, 51 Pac. 159; State v. District Court, 25 Mont. 504, 65 Pac. 1020. See Hill v. Martin (Tex. Civ. App.) 70 S. W. 430; Gleeson v. Martin White Min. Co., 13 Nev. 442.

[30] Traphagen v. Kirk, 30 Mont. 562, 573, 77 Pac. 58, 60.

* Board of Education v. Mansfield, 17 S. D. 72, 95 N. W. 286, 106 Am. St. Rep. 771; Carter v. Thompson (C. C.) 65 Fed. 329. See Duffy Quartz Mine, 18 Land. Dec. Dep. Int. 259. For the rule applicable to certain townsites specially reserved by act of Congress, see Instructions, 31 Land Dec. Dep. Int. 154.

[31] TOMBSTONE TOWNSITE CASES, 2 Ariz. 272, 15 Pac. 26; Blackmore v. Reilly, 2 Ariz. 442, 17 Pac. 72.

[32] Lalande v. Townsite of Saltese, 32 Land Dec. Dep. Int. 211.

CHAPTER VIII.

DEFINITIONS OF PRACTICAL MINING TERMS.

A student of American mining law should acquaint himself at the outset with various technical mining terms used by those engaged in mining the precious metals and in treating those metals after their extraction. It is well to consider first lode mining terms and then placer mining terms.

PRACTICAL MINING TERMS.

30. LODE MINING TERMS.—(a) Terms relating to the working of a lode claim: Adit, back stoping, bottom, breast, chute, cribbing, cross cut, down cast, drift, face, floor, heading, incline drift, lagging, lateral drift, level, lift, man hole, mill hole, open cut, overhand stoping, raise, roof, set work, shaft, stoping, stulls, sump, timber, tunnel, underhand stoping, up cast, winze.

Lode mining starts usually with a "shaft," a perpendicular excavation similar to a well, sunk either on a vein or to reach it, or with a "tunnel"—a horizontal excavation like a railroad tunnel—run into the mountain either on the vein,[1] or to reach it. If the tunnel is driven into the "country rock"—i. e., the ordinary solid part of the mountain—in order to cut across the course of a vein, it is called appropriately a "cross cut." [2]

[1] This kind of tunnel Messrs. Morrison and De Soto seemingly would call an adit, and not a tunnel. Morrison's Mining Rights (13th Ed.) 43. There is no doubt that such a tunnel, run to do the discovery work, is an adit, within a statute allowing an adit to take the place of a discovery shaft. Gray v. Truby, 6 Colo. 278. But it seems to be none the less a tunnel.

[2] Messrs. Morrison and De Soto recognize no tunnel except a cross cut, or what would be a cross cut if it were not so long. They say: "The words 'cross cut' and 'tunnel' are identical terms, except that the former is usually applied to short workings and the latter to those of greater length." Morrison's Mining Rights (13th Ed.) 43. Of course, it has to be borne in mind that they are speaking there of statutes allowing discovery work by an open cut, adit, cross cut, or tunnel.

Sometimes the work on a lode begins with an "adit," or an "open cut." Before the case of Electric Magnetic M. & D. Co. v. Van Auken,[3] it was supposed that an adit had to be, in part, at least, under cover; but that case says that it does not. An open cut, of course, is not under cover, and accordingly, as Messrs. Morrison and De Soto point out, the effect of the above decision "is to confuse all the distinctions between an adit and an open cut." [4]

Where a shaft is sunk, the miners at regular intervals in their descent make horizontal excavations on the vein, called "levels" or "lateral drifts." These are known, according to depth underground, as "the 50-foot level," the "100-foot level," [5] etc. The space between two levels is known as a "lift," while a shaft, other than the main one, sunk from a level, is called a "winze." The "breast," "face," or "heading" of a drift or tunnel is the end where the work of excavating is going on or is to be continued. A ventilating shaft for the air to ascend through is called an "up cast," and one for it to descend through is called a "down cast." When a shaft or winze is made by working from below up, it is called a "raise." A "man hole" is an opening of the right size to permit a man to get from one place of working to another. Where a shaft is sunk a little below a level, to form a cavity for the collection of water found in the level, it is called a "sump." An "incline drift" is one run at an incline for drainage purposes.

Between a level and the surface, or between levels, the ore is taken out by "stoping"; that is, either by digging and blasting it up from the "bottom," "floor," or "sole," of the drift, or by digging or blasting it down from the "roof," "top," or "back" of the level, and following that roof up by the aid of timbering and waste rock. The first kind is "underhand stoping," and the second "overhand or back stoping." Timbers replace the back or roof of the level in overhand stoping, and thereafter the roof or back being stoped is known as the "roof of the stope." Passages left in the stope for throwing down rock or ore are known as "mill holes."

It is often necessary to "timber" a mine. That consists in putting poles on the four sides of a shaft or winze as a lining to keep rock and dirt from caving in on the workers below, in putting poles on the sides and roofs of tunnels for the same purpose, in lining mill holes so that ore will go down readily, etc. "Cribbing" is the name

[3] 9 Colo. 204, 11 Pac. 80.

[4] Morrison's Mining Rights (13th Ed.) 43.

[5] It seems that everything below the 50-foot level and above the 100-foot level is, for stoping purposes, called the "100-foot level." Cambers v. Lowry, 21 Mont. 478, 54 Pac. 816.

given to the light timber used to line shafts, etc. The small poles are also known as "lagging." The extra heavy timber, such as those at the foot of the stope, which often bear a great weight of débris, are called "stulls." The supporting timbers or stulls are also known as "set work."

(b) Terms relating to the vein or lode: Apex, blossom, blow out, bonanza, brecciated vein, cap, chimney, dip, faulting, feeder, float, foot wall, gangue, gouge, hanging wall, horse, lode, out crop, pay streak, pinch, pocket, prospecting, selvage, slickensiding, slipping, spur, strike, veins, vug, wall.

Now a word about the vein or lode. We shall define "vein" or "lode" later in considering what the mining law recognizes as a vein; but for the present we may accept the following very liberal definition of a geologist: "Veins are collections of mineral matter, often closely related to, but differing more or less in character from, the inclosing country rock, usually in fissures formed in those rocks after the rocks had more or less consolidated." [6]

Before a vein is found, it often happens that a miner in "prospecting"—that is, looking for the vein [7]—comes upon pieces of vein matter lying around, and these are known as "float." "A vein, outcropping on the surface, becomes oxidized and crumbles by action of the atmosphere, rain, etc. Pieces break off and fall down hill. Some of this float is barren quartz or country rock, and some may be mineralized." [8] By the "outcrop" of a vein is meant the part showing on the surface. If that outcrop is decomposed, it is known as "blossom." [9] A spreading outcrop is known as a "blow out." The "apex" is the top of the lode, whether that top outcrops, or whether it is overlaid.[10] The "dip" of a vein is its departure from the horizontal or the perpendicular. If the vein dips, its lower wall is its "foot wall" or its "floor," and its upper wall is its "hanging wall"

[6] Lakes' Prospecting for Gold and Silver in North America (3d Ed.) 86.

[7] The word "prospecting" also means opening up a located vein to see if ore that will pay to work can be found.

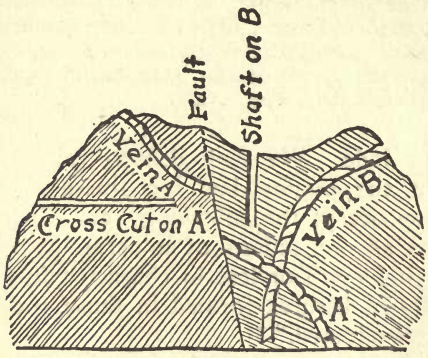
[8] Lakes' Prospecting for Gold and Silver (3d Ed.) p. 17. Float found on the unlocated public domain belongs to the finder. Burns v. Clark, 133 Cal. 634, 66 Pac. 12, 85 Am. St. Rep. 233; Burns v. Schoenfield, 1 Cal. App. 121, 81 Pac. 713. See Robertson v. Smith, 1 Mont. 410; Sullivan v. Schultz, 22 Mont. 541, 57 Pac. 279. But see Brown v. Quartz Mining Co., 15 Cal. 152, 76 Am. Dec. 468.

[9] Lakes' Prospecting for Gold and Silver (3d Ed.) p. 90.

[10] A more detailed definition of "apex" is given in the next chapter.

or its "roof." [11] The vein matter proper is called the "gangue." [12] "A layer or sheet of clay, called 'gouge' or 'selvage,' often lines one or both walls of a vein between the country rock and the gangue, or vein proper. It is derived from the elements of the adjacent country rock, decomposed by water, and sometimes by the friction of the walls of the fissure against one another, or against the vein matter, in the process of 'slipping' or 'faulting,' which is often shown by its being smoothed, 'slickensided,' polished, or grooved. Gouge often contains some rich decomposed mineral in it, such as sulphurets of silver. * * * Gouge is sometimes useful in defining the limit of the vein between walls, thus preventing unprofitable exploration into the 'country.' It is also a guide for following down a vein, when mineral and gangue may be wanting or obscure." [13]

FIGURE No. 2.



Showing how cross-cut tunnels and shafts may miss veins by change of dip or faulting.[14]

A "brecciated vein" is one containing small, irregular pieces of country rock scattered through it. A vein with a "horse" in it is one having a very large piece or mass of country rock in it.[15] A "spur" or "feeder" of a vein is a small branch or offshoot of the vein. A "pinch" or "cap" in a vein is a place where the walls contract so as to leave only a very thin vein, or none. A "pocket" is an enlargement of the pay ore in a vein. A "chimney" or "chute" of ore is a perpendicular enlargement of the ore body; that is, it is

[11] "It is not uncommon for a fissure vein to have but one clearly defined wall; the other, if it exists, being obscured or changed by mineral solutions. Sometimes two cracks or fissures occur parallel to each other, and the intervening country rock has been altered and mineralized into a vein. It is probable that in this way many wide veins were formed." Lakes' Prospecting for Gold and Silver (3d Ed.) 88.

[12] "Gangue minerals" is a term sometimes applied to the nonmetallic minerals, "which carry no values worth extracting"; the word "ore" being used in contrast to cover "those portions of the ore body of which the metallic minerals form a sufficiently large proportion to make their extraction profitable." See Prof. Heinrich Ries' Economic Geology of the U. S. 223.

[13] Lakes' Prospecting for Gold and Silver (3d Ed.) p. 87.

[14] From Lakes' Prospecting for Gold and Silver (3d Ed.) p. 105.

[15] See Book v. Justice Min. Co. (C. C.) 58 Fed. 106, 126.

a particular kind of pocket of ore. A "bonanza" is a large body of paying ore. The "pay streak" is the part of the vein containing the valuable or pay ore. A "vug" is a cavity in the ore body.

(c) Terms relating to the ore and its treatment: Amalgam, assay, base ores, clean-up, concentrates, dump, free milling ores, leaching, mill run, refractory ores, retort, roasting, smelting, sorting, tailings.

When the ore is mined, it is usually "sorted," either underground or after it reaches the surface; i. e., the valuable part of the rock mined is separated from the part that is to be thrown on the "dump," or place of deposit for waste rock. The word "dump" is also used to mean the piled-up rock which has been thrown away. The ore having been sorted, it is ready for "treatment," which varies with its needs. "Those ores whose precious metal contents can be readily extracted after crushing,[16] by amalgamation with quicksilver, are termed 'free milling ores.' This includes the ores which carry native gold or silver, and often represent the oxidized portions of ore bodies. Others, containing the gold as telluride, or containing sulphides of these metals, are known as 'refractory ores,'[17] and require more complex treatment. These, after mining, are sent direct to the smelter,[18] if sufficiently rich; but, if not, they are often crushed and mechanically concentrated. The smelting process is also used for mixed ores; the latter being often smelted primarily for their lead or copper contents, from which the gold or silver is then separated. * * * Low-grade ores may first be 'roasted,' and the gold then extracted by 'leaching' with cyanide or chlorine solutions. The introduction of the cyanide and chlorination processes, which are applied chiefly to gold ores, has permitted the working of many deposits formerly looked upon as worthless, and in some regions even the mine dumps are now being worked over for their gold contents. * * * The value of ore and bullion is determined by a 'sample

[16] The crushing is either in stamp mills or in rotary mills. In both kinds of mills, after the ore is crushed, the mashed matter is washed over copper plates covered with quicksilver, so as to catch the gold and silver. Every once in a while there is a clean-up; the amalgam—i. e., the quicksilver, with the gold and silver it has caught up—being scraped off the plates. The gold and silver are then separated from the quicksilver in a "retort" and sent to a branch of the United States mint to be refined. The crushed rock not taken up by the plates becomes either complete waste, known as "tailings," or becomes "concentrates," which are waste so far as this particular mill is concerned, but may pay to ship to a smelter.

[17] Also known as "base ores."

[18] "Smelting" is a melting process.

assay,'[19] and the smelter, in paying the miner for his ore, allows for gold in excess of $1 per ton of ore at the coinage rate of $20.67 per ounce, and for silver at the New York market price, deducting 5 per cent. in each case for smelter losses.[20] Lead and copper are paid for in the same manner, as are also iron and manganese, if there is a sufficient quantity present. No allowance is, however, made for zinc, and, in fact, a deduction is made if it exceeds a certain per cent." [21]

PLACER MINING TERMS.

31. Bar diggings, booming, clean-up, cradle, deep placers, dredging, drift mining, dry blowing, hydraulic mining, nuggets, panning, riffles, rocker, sluice, tailings.

The early California placer mining took place in river bars of sand and gravel, known as "bar diggings," or simply as "diggings." The gold was gotten out by "panning"; i. e., by so manipulating an iron "prospecting pan," or basin, filled with gravel and water, that the sand would wash away, leaving the gold in the pan, or by the use of a "rocker," or "cradle," a short wooden trough used in substantially the same way. "Hydraulic mining," by which gold-bearing gravel is washed from its resting place by water under heavy pressure and

[19] An "assay" is the determination of the value of a particular mineral in a selected quantity of ore. A "sample assay" is one made from a portion of the ore, carefully selected to make it representative of the whole lot. For a discussion, where assays were made from mine specimens, from car samples, and from mill or battery samples, see Fox v. Hale & Norcross Silver Min. Co., 108 Cal. 369, 392 ff, 41 Pac. 308, 314 ff. See, also, chapter XXIV, § 134, infra.

A "mill run" is where a number of tons of supposedly representative ore are run through a mill to serve as an indication of the values of the ore in the mining claim. It is, of course, a far better test of the worth of the ore than an assay is, since an assay tests the value of only a very small piece of ore, and so is much less likely to be representative of the lode.

[20] What smelters pay for gold in ore varies slightly from time to time and in different localities. It depends somewhat, also, upon the amount of gold in the ore. The general rule in Colorado at present seems to be to pay for gold in small amounts of not less than $^5/_{100}$ of an ounce per ton on the basis of $19 an ounce; but in some districts payment is made when the assay shows $^3/_{100}$ of an ounce of gold per ton. In some districts, also, payment is made at the rate of $20 an ounce. The words "in excess of $1 per ton" in the text seem to be erroneous.

[21] Prof. Heinrich Ries' Economic Geology of the U. S. 329-330.

It is the lead smelters that do not pay for zinc. That is because zinc in excess of 6½ per cent. is injurious to the treatment of such ores in lead smelters. Since many ores carry less than 6½ per cent. of zinc, the lead smelters in Colorado have fixed 10 per cent. as the ordinary amount of zinc in ores for which no penalty will be exacted. It is found that the ores hav-

forced into sluices, where the gold's specific gravity separates it from the gravel,[22] came later; and so did "drift mining," "dredging," and "dry blowing."

The cause of gold in the gravel and the methods of placer mining are well described by Professor Ries as follows:

"These auriferous gravels represent the more resistant products of weathering, such as quartz and native gold, which have been washed down from the hills on whose slopes the gold-bearing quartz veins outcrop, and were too coarse or heavy to be carried any distance, unless the grade was steep. They have consequently settled down in the stream channels; the gold, on account of its higher gravity, collecting usually in the lower part of the gravel deposit. * * * The gold occurs in the gravels in the form of nuggets, flakes, or dust-like grains; the last being usually hard to catch. The 'nuggets' represent the largest pieces. * * * During the early days of gold mining in California the gravels at lower levels and in the valley bottoms were worked; but, as these became exhausted, those farther up the slopes or hills were sought. In the earlier operations the gravels were washed entirely by hand, either with a pan or rocker, and this plan is even now followed by small miners and prospectors; but mining on a larger scale is carried on by one of three methods, viz., drift mining, hydraulic mining, and dredging.

" 'Drift mining' is employed in the case of gravel deposits covered by a lava cap;[23] a tunnel being run into the paying portion of the bed and the auriferous gravel carried out and washed. In 'hydraulic mining' a stream is directed against the bank of gravel, and the whole washed down into a rock ditch lined with tree sections, or into a wooden trough,[24] with cross-pieces or riffles[25] on the bottom. The gold, being heavy, settles quickly, and is caught in the troughs or ditches, while other materials are carried off and discharged into some neighboring stream. Mercury is sometimes put behind the riffles to aid in catching the gold.[26] * * * Owing to the great amount of

ing 10 per cent. of zinc or less in them average less than 6½ per cent. of zinc. While the lead smelters do not pay for zinc, there are zinc smelters that pay for zinc and something for lead. The writer is indebted for the information in this note and in the preceding one to the American Smelting & Refining Company.

[22] "Hydraulic mining is mining by means of the application of water, under pressure, through a nozzle against a natural bank." Civ. Code Cal. § 1425.

[23] These are the "deep placers," described when we come to define placers.

[24] Called a "sluice" or "sluice box."

[25] Riffle blocks.

[26] In placer mining, too, there is a "clean-up." Where no quicksilver has been used, the gold which has settled in the flume is simply gathered up.

débris which was swept down into the lowlands [of California by hydraulic mining], a protest was raised by the farmers dwelling there, who claimed that their farms were being ruined, and it soon became a question which should survive, the farmer or the miner; for in places the gravels and sand from the washings choked up streams and accumulated to a depth of 70 or 80 feet. The question was settled in 1884 in favor of the farmer by an injunction issued by the United States Circuit Court which caused many of the hydraulic mines to suspend operations, and at a later date this was extended by state legislation adverse to the hydraulic mining industry. Owing to this setback, hydraulic mining fell to a comparatively unimportant place in the gold-producing industry of California, while at the same time quartz mining increased. The passage of the Camietti law now permits hydraulic mining, but requires that a dam shall be constructed across the stream to catch the 'tailings.' [27]

" 'Dredging' consists in taking the gravel from the river with some form of dredge. * * * The gravel, when taken from the river, is discharged onto a screen, which separates the coarse stones, and the finer particles pass over amalgamated plates, tables with riffles, and then over felt. * * * In arid regions, where the gold-bearing sands are largely the product of disintegration, and water for washing out the metal is wanting, a system known as 'dry blowing' is resorted to." [28]

The author should also have mentioned "booming," where the water is dammed up from time to time and let out in a flood to cut away the gravel.

Where quicksilver has been used, the amalgam is taken and treated as in the case of a clean-up at a stamp or rotary mill.

[27] The refuse which goes over the tail end of the sluice box or is otherwise washed down.

[28] Prof. Heinrich Reis' Economic Geology of the U. S. 346–349.

CHAPTER IX.

DEFINITIONS OF MINING LAW TERMS.

In addition to defining practical mining terms, it is desirable to define some of the mining law terms as a preparation for the discussion of specific mining law problems.

VALUABLE MINERAL DEPOSITS.

32. Lands are mineral if they contain recognized minerals in such quantities that they are more valuable for mining purposes than for agricultural, and the mineral deposits in such lands are valuable within the meaning of the federal statute if, when taken up first for mining, they have such value that the locator cannot be called irrational in locating and working them, or if, when taken up first for agriculture, they can be mined at a profit.

The federal statute throws open to exploration and purchase "all valuable mineral deposits in lands belonging to the United States." [1] By "valuable mineral deposits" is meant, in the first place, deposits known to be mineral at some time prior to the issuance of a United States patent. "It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws, or the townsite laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri, and Kansas. We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the

[1] Rev. St. U. S. § 2319 (U. S. Comp. St. 1901, p. 1424).

statute is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and re-enacted one of broader import, it is 'valuable mineral deposits' which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that 'lands valuable for minerals' shall be reserved from sale, except as otherwise expressly directed, and that 'valuable mineral deposits' in lands belonging to the United States shall be free and open to exploration and purchase. We also say 'lands known at the time of their sale to be thus valuable,' in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore use the term 'known to be valuable at the time of sale,' to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry was made and the patent issued." [2]

What is a "mineral deposit" depends somewhat upon the meaning of "mineral." "It is not easy in all cases to determine whether any given piece of land should be classed as mineral land or otherwise. The question may depend upon many circumstances, such as whether it is located in those regions generally recognized as mineral lands, or in a locality ordinarily regarded as agricultural in its character. Lands may contain the precious metals, but not in sufficient quantities to justify working them as mines, or make the locality generally valuable for mining purposes, while they are well adapted to agricultural or grazing pursuits, or they may be but poorly adapted to agricultural purposes, but rich in minerals; and there may be every gradation between the two extremes. There is, however, no certain well-defined, obvious boundary between the mineral lands and those that cannot be classed in that category. Perhaps the true criterion would be to consider whether upon the whole the lands appear to be better adapted to mining or other purposes. However that may be, in order to determine the question, it would, at all events, be necessary to know the condition and circumstances of the land itself, and of the immediate locality in which it is situated. It is the duty of the officers of the government having the

[2] DEFFEBACK v. HAWKE, 115 U. S. 392, 404, 405, 6 Sup. Ct. 95, 29 L. Ed. 423.

matter in charge, before making a grant, to ascertain these facts, and to determine the problem whether the lands are mineral or not." [3] The fact is that the term "mineral deposits" cannot be considered apart from the word "valuable," and that the full term "valuable mineral deposits" is not used in any technial mineralogical sense, but, like the term "fixture" in the law of real property, has a flexible meaning according to the circumstances of the given case, and particularly to the situation of the contending parties.

In Lynch v. United States,[4] where the question of the right of the defendant to cut certain timber on public lands depended upon whether the land was "mineral and not subject to entry under existing laws of the United States except for mineral entry," [5] or whether it was agricultural, the United States Circuit Court of Appeals, Ninth Circuit, said that the classification of the land as mineral by commissioners appointed under the act of Congress of February 16, 1895,[6] was not conclusive, but was of the same effect as the return of mineral lands made by the surveyor general; and the court accordingly considered the evidence of the actual use to which the land had been put. A verdict against the defendant because of the nonmineral character of the land, the verdict being based on testimony that the region had been prospected, and, though float was found over it, no mineral-bearing veins had been discovered, and that small tracts near defendant's mill, and also adjoining the land from which defendant cut the timber, were cultivated to crops, was allowed to stand. The court said: "Was the land mineral, and subject to entry as such under the laws of the United States, or was it agricultural land? The question of the character of land is always one of fact, and what evidence is more satisfactory than the actual use to which it has been placed by those who occupied it and made it a means of livelihood? It may not be conclusive evidence, since there are many instances where valuable mineral deposits have been found in ground devoted to other than mining purposes, and where such deposits were not supposed to exist. But nevertheless this testimony as to the actual use of the land tends to establish its character and clearly is relative and material for that purpose." [7]

[3] Ah Yew v. Choate, 24 Cal. 562, 567. In conveyances and leases of land "mineral" is generally used in the commercial sense of any inorganic substance found in nature, having sufficient value, separated from its situs as part of the earth, to be mined, quarried, or dug for its own sake, or its own specific purposes. Hendler v. Lehigh Valley R. Co., 209 Pa. 256, 58 Atl. 486, 103 Am. St. Rep. 1005.

[4] 138 Fed. 535, 71 C. C. A. 59.

[5] Act Cong. June 3, 1878, c. 150, 20 Stat. 88 (U. S. Comp. St. 1901, p. 1528).

[6] 28 Stat. 683, c. 131.

[7] Lynch v. United States, 138 Fed. 535, 540, 71 C. C. A. 59.

The same court, in the earlier case of United States v. Rossi,[8] involving the same timber act, where the verdict below was in favor of the defendants, avoided passing on an instruction below about mineral lands, because a proper exception to it was not saved. The trial court, after telling the jury that "the law includes as mineral lands, not only those tracts on which mineral has actually been discovered, and which has been or can be legally located as mining locations, but also all other lands lying in reasonably close proximity to or in the general neighborhood of such tracts, and all such neighboring lands as have the general characteristics of mining lands, even if mineral has not been actually discovered therein," [9] instructed them further as follows: "Much has been said as to the quantity of mineral that must be found in ground to constitute it mineral land. The laws themselves fix no limits. They do not even say that it must be more valuable for mineral than for other purposes. It is therefore a subject for conjecture, —one upon which opinions may and do differ. But I feel justified in saying to you that ground containing only a trace of mineral—a color —or containing it in such small quantities that a miner would not expect it ever to prove profitable, cannot be held mineral land; but when it contains sufficient to encourage the miner to claim and locate it in good faith as mining ground, and to work and develop it in the reasonable expectation of finding paying quantities, even if it never proves valuable, it is, within the law, mineral land. The question may arise, how are we to know the miner's opinions on these questions? My answer is, by his actions—by what he does, whether or not he located the ground and continues to occupy it and develop it. I may add in this connection that an occasional location here and there over a country, which is not developed and not worked, is just such evidence as constitutes the entire country a mineral district; but the mining operations carried on must be such as to indicate that those who do locate claims and who carry on the work have faith in the country. I mean by that that you cannot make the mere appearance of mineral in a country the excuse for claiming the whole country to be mineral. There must be something substantial back of it in order to justify the claim that a country is mineral. Now, in this particular case you must judge of the country by what has been produced there, by what has been done, and from all that conclude whether or not the men who are engaged in mining in good faith look upon that as mineral country. I do not know any better rule or test than the judgment of men who are engaged in mining. If that class of men deem a country a mineral

[8] 133 Fed. 380, 66 C. C. A. 442.
[9] United States v. Rossi, 133 Fed. 380, 382, 66 C. C. A. 442.

country, and show it by their acts and works, it justifies us in concluding that it is a mineral country." [10]

The prior bona fide claimant is given the benefit of the doubt. If the ground is taken up first as agricultural land, or is part of lands granted to a railroad or to a state for school purposes, from which lands minerals are excepted, then it cannot be shown to be a valuable mineral deposit, unless it will pay to work and in general is more valuable for mining than for agriculture.[11] This is so, even though the agricultural entry has been made to cover an abandoned mining claim.[12] But if the ground is located as mining land first, then it must be deemed mineral if it contains a placer deposit or a vein of mineral of such value, however slight, that a miner cannot be called wholly irrational for working it in the hope of a successful outcome.

"There may be a vast difference between mineral ground which is valuable for exploitation and that which appears to be valuable for exploration. There are immense tracts which appear to the miner to be valuable for the latter purpose, and a large portion of which develops to be valueless for the former. This is evidenced by the honeycombed and deserted mountains throughout the mining regions, where toil and wealth have been expended on leads which once attracted the miner's exploration, but where the sound of the pick and the drill is long since stilled. And it is just this fact that has made and will make the mines the ever-present and alluring appearance of value and the occasional reward of development. Without prospecting there will be no discovered mines. Without the privilege to claim and locate and hold a discovery, there will be no prospecting. A prospect not once in 100 times is a mine in sight. If the locator must show a paying mine at location, the riches in these mountains are a locked treasury. The law does not contemplate this. The mineral lands are open for two purposes—for exploration and for purchase. Exploration precedes purchase. It opens the way for purchase. Without exploration, purchase would be rare. A miner would desire to purchase the mineral lands at once, if they at once appeared to be of sufficient value to pay to work. He would desire to explore them, if they seemed sufficiently valuable to attract exploration. It is a rare claim that is a mine at the grass roots, or where the paying vein is first found at or near the surface. The history of the mining countries has shown that, in the vast

[10] Id.

[11] Hunt v. Steese, 75 Cal. 621, 17 Pac. 920; United States v. Reed (C. C.) 12 Sawy. 99, 28 Fed. 482; Alford v. Barnum, 45 Cal. 482; DAVIS v. WIEBBOLD, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; United States v. Central Pac. R. Co. (C. C.) 93 Fed. 871.

[12] Blackburn v. United States, 5 Ariz. 162, 48 Pac. 904.

majority of cases, years of toil and thousands of dollars have been required to demonstrate that a mineral vein will pay to work. And in many of them, even after years of immense production, when dead work, prospecting, and development is offset against output, whether they have paid to work is a doubtful proposition. Must the miner await large development and tremendous expenditure before he can take the first steps, by locating and recording, to secure to himself the right of possession, and of a grant from the government, when the great mine is developed? I think not.

"Again, the government will not issue a patent for a mine at once upon a discovery, no matter how valuable it then appears and actually is. It requires, first, the expenditure of $500 in improvement and development. For what purpose? In order to demonstrate that the claim is of that character that the government will grant ground as a mine. Before the mining acts of Congress, the miner was a trespasser upon the public domain. The acts of Congress gave him rights upon the mineral lands. The object of the requirement of the expenditure of $100 annually before the issuance of patent, and of $500 in the aggregate before patent, was to develop the mines and demonstrate their character. If it were the ordinary nature of valuable mining claims to appear, upon the instant of discovery, to be of sufficient value to pay to work them, why make the requirements of these expenditures in development before the issuance of patent? The whole spirit of the statutes, and the construction given by the learned tribunals that have considered them, is not that the prospector must find a paying mine before he can locate his claim. If it were, mining prospecting in these regions would suffer an instant and well-nigh total paralysis. If the fear be suggested that speculative locations may take the public domain, we can do no better than adopt the language of Mr. Justice Field, cited above from Erhardt v. Boaro, 113 U. S. 536, 5 Sup. Ct. 565, 28 L. Ed. 1116, which he concludes with the remark that 'a jury from the vicinity of the claim will seldom err in their conclusions on the subject.'

"I find an ample support in my views in the decisions of the United States Supreme Court. 'A valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following in expectation of finding ore.' Harrington v. Chambers, 3 Utah 94, 1 Pac. 362. This language I do not feel that I can fully adopt. It goes further than there is necessity for, or is required to sustain the views I hold. If it were modified to say, 'in expectation of finding ore sufficiently valuable to work,' the views of the learned justice would be

nearer to the opinion I hold. But observe Judge Hallett's words cited above, where he says: 'Nor is it necessary that the ore shall be of economical value for treatment'—and the language of the context. Stevens v. Gill, Fed. Cas. No. 13,398. 'It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery.' North Noonday Min. Co. v. Orient Mining Co. (C. C.) 1 Fed. 522, 6 Sawy. 299. 'With well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of the lode'—and the context. Iron Silver Min. Co. v. Cheesman, 116 U. S. 538, 6 Sup. Ct. 481, 29 L. Ed. 712. And in the language adopted by Mr. Justice Field in speaking of a lode: 'It is an alteration of the verb "lead" and whatever the miner could follow expecting to find ore was his "lode." Some formation within which he could find ore, and out of which he could not expect to find ore, was his lode. The terms "lode star," "guiding star," and "north star" are of the same origin.' So that, if the miner finds that which is a lode or vein within the approved definition, containing valuable mineral deposits, if it is a vein of that character, and that which he can follow, as indicated—a mineral lode, his guide, his star—he may claim it and locate it and hold it, without being required to show that at the time of location it contained mineral deposits of sufficient value to justify work to extract them." [13]

"Reverting to the characteristic of a vein or lode, appearing from the definitions above quoted, that its filling must consist of a body of mineral or mineral-bearing rock, what value such material should contain is a matter not devoid of difficulty, and no standard of value applicable to all such cases has yet, and probably never will be, devised. It must necessarily depend upon the characteristics of the district or country in which the vein or lode, in any particular instance claimed to exist, is located, and upon the character, as to boundaries, of the vein itself. If the country rock, or the general mass of the mountain outside of the limits of the vein, is wholly barren, slight values of the vein material, as before stated, would seem to satisfy the law; but if, on the other hand, the rock of the district generally carries values, then undoubtedly the values in the vein materials, where the boundaries of the vein are not well or not at all defined, either on the surface or at depth, should be in excess of those of the country rock, else there can be no line of demarkation, nor, where the rock is generally broken, shattered, and fissured, anything to separate it from the adjacent coun-

[13] SHREVE v. COPPER BELL MIN. CO., 11 Mont. 309, 343–345, 28 Pac. 315. This was a dissenting opinion, but on this point the majority opinion was in accord. 11 Mont. 327, 28 Pac. 315.

try. Values, therefore, of the filling of a vein, must be considered with special reference to the district where the vein or lode is found." [14]

So Judge Hallett, in charging a jury as between two mining claimants, said: "A lode cannot exist without valuable ore; but, if there is value, the form in which it appears is of no importance. Whether it be of iron or manganese, or carbonate of lead, or something else yielding silver, the result is the same. The law will not distinguish between different kinds and classes of ore, if they have appreciable value in the metal for which the location was made. Nor is it neccessary that the ore shall be of economical value for treatment. It is enough if it is something ascertainable, something beyond a mere trace, which can be positively and certainly verified as existing in the ore. In the case of silver ore the value must be recognized by ounces—one or more in the ton of ore; and if it comes to that it is enough, other conditions being satisfied, to establish the existence of the lode." [15] An ounce of silver to the ton is therefore enough to make value,[16] and what constitutes mineral sufficient to make a mineral deposit is in general determined by mineralogy and trade. The land department declares that "whatever is recognized as mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality to render the land more valuable on account thereof than for agricultural purposes should be treated as coming within the purview of the mining laws." [17] And while the authorities have not been uniform to that effect,[18] it seems perfectly clear that mineral in no sense means metal. "In its common and ordinary signification the word 'mineral' is not a synonym of 'metal,' but is a comprehensive term, including every description of stone and rock deposits, whether containing metallic substances or entirely nonmetallic." [19]

[14] GRAND CENTRAL MIN. CO. v. MAMMOTH MIN. CO., 29 Utah, 490, 83 Pac. 648, 678.

[15] STEVENS v. GILL, 1 Morr. Min. Rep. 576, 579, Fed. Cas. No. 13,398. That merely showing the presence of quartz and vein matter, without proof of some value, will not do, see Territory v. Mackey, 8 Mont. 168, 19 Pac. 395.

[16] But see the instruction of the lower court in United States v. Rossi, 133 Fed. 380, 382, 66 C. C. A. 442.

[17] Pacific Coast Marble Co. v. Northern Pac. R. Co., 25 Land Dec. Dep. Int. 233, 244.

[18] See, for instance, Wheeler v. Smith, 5 Wash. 704, 32 Pac. 784, where the court tried to confine mineral to "mineral ores" and to "metals for which mining works were prosecuted."

[19] Northern Pac. R. Co. v. Soderberg (C. C.) 99 Fed. 506, 507; Id., 104 Fed. 425, 43 C. C. A. 620; Id., 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575; Webb v. American Asphaltum Min. Co., 157 Fed. 203, 84 C. C. A. 651; McCombs v. Stephenson (Ala.) 44 South 867; Henderson v. Fulton, 35 Land Dec. Dep. Int.

Among minerals classified as such by the land department, in addition to the gold, silver, cinnabar, lead, tin, and copper specifically named by section 2320, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1424), are asphaltum,[20] borax,[21] building stone,[22] carbonate of soda,[23] auriferous cement,[24] clay,[25] (other than brick clay),[26] coal,[27] fire clay,[28] guano,[29] gypsum,[30] kaolin,[31] limestone,[32] marble,[33] mica,[34] nitrate of

652. For definitions of mineral, see Johnston v. Crimpton (1899) 2 Ch. 190; Glasgow v. Fairlie, 13 A. C. 683, 689, 690; Hendler v. Lehigh Valley R. Co., 209 Pa. 256, 58 Atl. 486, 103 Am. St. Rep. 1005. In the last case common mixed sand which could be used only for grading was held not to be a mineral, within an exception in a deed.

[20] Tulare Oil & Min. Co. v. Southern Pac. R. Co., 29 Land Dec. Dep. Int. 269. See Webb v. American Asphaltum Min. Co., 157 Fed. 203, 84 C. C. A. 673.

[21] Regulations, 1 Land Dec. Dep. Int. 560.

[22] Conlin v. Kelly, 12 Land Dec. Dep. Int. 1; Beaudette v. Northern Pac. R. Co., 29 Land Dec. Dep. Int. 248. Any stone deposit of special commercial value makes the ground placer. Vandoren v. Plested, 16 Land Dec. Dep. Int. 508; McGlenn v. Wienbroeer, 15 Land Dec. Dep. Int. 370. See Freezer v. Sweeney, 8 Mont. 508, 21 Pac. 20. Stone land cannot be located or patented as a lode claim. Henderson v. Fulton, 35 Land Dec. Dep. Int. 652; Long v. Isaksen, 23 Land Dec. Dep. Int. 353; Wheeler v. Smith, 23 Land Dec. Dep. Int. 395. Act Aug. 4, 1892, c. 375, 27 Stat. 348 (U. S. Comp. St. 1901, p. 1434), settles it that land "valuable chiefly for stone" may be located as mineral under the timber and stone act, and with less trouble than under the placer mining act.

[23] See soda.

[24] Phifer v. Heaton, 27 Land Dec. Dep. Int. 57.

[25] Aldritt v. Northern Pac. R. Co., 25 Land Dec. Dep. Int. 349.

[26] King v. Bradford, 31 Land Dec. Dep. Int. 108.

[27] Brown v. Northern Pac. R. Co., 31 Land Dec. Dep. Int. 29. But coal lands are entered and patented under special statutes. Rev. St. U. S. §§ 2347–2352 (U. S. Comp. St. 1901, pp. 1440, 1441).

[28] See clay.

[29] Richter v. Utah, 27 Land Dec. Dep. Int. 95. Under the United States guano islands act a discoverer of an unoccupied guano island has only a license to occupy the island and remove the guano, and the license is revocable at the will of the United States. Duncan v. Navassa Phosphate Co., 137 U. S. 647, 11 Sup. Ct. 242, 34 L. Ed. 825.

[30] W. H. Hooper, 1 Land Dec. Dep. Int. 571; McQuiddy v. California, 29 Land Dec. Dep. Int. 181.

[31] Is china clay. See clay.

[32] Shepherd v. Bird, 17 Land Dec. Dep. Int. 82; Morrill v. Northern Pac. R. Co., 30 Land Dec. Dep. Int. 475. But see Wheeler v. Smith, 5 Wash. 704, 32 Pac. 784.

[33] Henderson v. Fulton, 35 Land Dec. Dep. Int. 652; Pacific Coast Marble Co. v. Northern Pac. R. Co., 25 Land Dec. Dep. Int. 233; Schrimpf v. Northern Pac. R. Co., 29 Land Dec. Dep. Int. 327. Compare Phelps v. Church of Our Lady Help of Christians, 115 Fed. 882, 53 C. C. A. 407.

[34] See Union Oil Co., 25 Land Dec. Dep. Int. 351, 354.

soda,[35] oil (petroleum),[36] phosphates,[37] porcelain clay,[38] salt,[39] slate,[40] soda,[41] sandstone,[42] stone,[43] sulphur.[44]

The definitions of minerals have been discussed quite fully recently by the Supreme Court of the United States. That court in holding granite quarries to be mineral lands said:

"The word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to [the exception of minerals from] a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it. Upon the other hand, a definition that would confine it to the precious metals—gold and silver—would so limit its application as to destroy at once half the value of the exception. Equally subversive of the grant would be the definition of minerals found in the Century Dictionary, as 'Any constituent of the earth's crust,' and that of Bainbridge on Mines, 'All the substances that now form, or which once formed, a part of the solid body of the earth.' Nor do we approximate much more closely to the meaning of the word by treating minerals as sub-

[35] See soda.

[36] McQuiddy v. State of California, 29 Land Dec. Dep. Int. 181. See Gill v. Weston, 110 Pa. 312, 1 Atl. 921; Murray v. Allred, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740; Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 Pac. 995; Isom v. Rex Crude Oil Co., 147 Cal. 659, 82 Pac. 317; Preston v. White, 57 W. Va. 278, 50 S. E. 236; Gird v. California Oil Co. (C. C.) 60 Fed. 532; Van Horn v. State, 5 Wyo. 501, 40 Pac. 964; Sult v. Hochstetter Oil Co. (W. Va.) 61 S. E. 307. But see Union Oil Co., 23 Land. Dec. Dep. Int. 222, reversed in Union Oil Co., 25 Land Dec. Dep. Int. 351. And see Dunham v. Kirkpatrick, 101 Pa. 36, 47 Am. Rep. 696; Detlor v. Holland, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266. By Act Cong. Feb. 11, 1897, c. 216, 29 Stat. 526 (U. S. Comp. St. 1901, p. 1434), oil lands may be entered and patented as placers. This provides for lands containing "petroleum or other mineral oils." See Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936.

[37] Gary v. Todd, 18 Land Dec. Dep. Int. 58; Pacific Coast Marble Co. v. Northern Pac. R. Co., 25 Land Dec. Dep. Int. 233; Florida Center & P. Ry. Co., 26 Land Dec. Dep. Int. 600.

[38] See clay.

[39] Salt is governed by Act Cong. Jan. 31, 1901, c. 186, 31 U. S. Stat. 745 (U. S. Comp. St. 1901, p. 1435). That saline lands are mineral anyway, see Garrard v. Peak Mines, 94 Fed. 983, 36 C. C. A. 603.

[40] Schrimpf v. Northern Pac. R. Co., 29 Land Dec. Dep. Int. 327.

[41] See Regulations, 1 Land Dec. Dep. Int. 560.

[42] See building stone.

[43] See building stone.

[44] See Regulations, 1 Land Dec. Dep. Int. 560.

stances which are 'mined,' as distinguished from those which are 'quarried,' since many valuable deposits of gold, copper, iron, and coal lie upon or near the surface of the earth, and some of the most valuable building stone, such, for instance, as the Caen stone in France, is excavated from mines running far beneath the surface. * * * Considerable light is thrown upon the congressional definition of the word 'mineral' by the acts subsequent to the Northern Pacific grant of 1864 and prior to the definite location of the line in 1884. [The mining law acts of 1866, 1870, and 1872, and the stone and timber act of 1878, and amendments thereto, were here cited and discussed.]

"Conceding that in 1864 Congress may not have had a definite idea with respect to the scope of the word 'mineral,' it is clear that in 1884, when the line of this road was definitely located, it had come to be understood as including all lands containing 'valuable mineral deposits,' as well as lands 'chiefly valuable for stone,' and that, when the grant of 1864 first attached to particular lands by the definite location of the road in 1884, the railway found itself confronted with the fact that the word 'mineral' had by successive declarations of Congress been extended to include all valuable mineral deposits. As no vested rights had been acquired by the railway company prior to the definite location of its line, it took the lands in question incumbered by such definitions as Congress had seen fit to impose upon the word 'mineral' subsequent to 1864. * * * The rulings of the land department, almost uniformly, have lent strong support to the theory of the patentee that the words 'valuable mineral deposits' should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including nonmetallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, building stone, and coal. The cases are far too numerous for citation and there is practically no conflict in them.

"The decisions of the state courts have also favored the same interpretation. * * * We do not deem it necessary to attempt an exact definition of the words 'mineral lands' as used in the act of July 2, 1864. * * * Indeed, we are of the opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include, not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture." [45]

[45] NORTHERN PAC. R. CO. v. SODERBERG, 188 U. S. 526, 530, 531, 533, 534, 536, 537, 23 Sup. Ct. 365, 47 L. Ed. 575.

A VEIN OR LODE OF ROCK IN PLACE.

33. A vein or lode, within the meaning of the federal statute, is incapable of a hard and fast legal definition; but in general it may be said to be a reasonably continuous body of mineral-bearing rock in the general mass of the mountain and of greater value than the surrounding country rock. While the body of mineral-bearing rock must be reasonably continuous, its contents are rock in place, if held together by inclosing walls, even though those contents are broken up.

All mineral deposits that may not be located as lode claims and have no special provision for them are to be located as placers, as the statute provides that "claims usually called 'placers' including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent." [46] The first thing to do, therefore, is to get an idea of what a vein is. The law has tried to look at the matter from the miner's standpoint; but, though the miner's idea of a vein still differs somewhat from the geologist's, the proper starting place is with geology.

The Geologist's Definition of a Vein.

When a geologist talks of a true vein he means a fissure vein. "A fissure vein may be defined as a tabular mineral mass occupying or closely associated with a fracture or set of fractures in the inclosing rock, and formed either by filling of the fissures as well as pores in the wall rock, or by replacement of the latter (metasomatism). When the vein is simply the result of fissure filling, the ore and gangue minerals are often deposited in successive layers on the walls of the fissure (Rico, Colo.); the width of the vein depending on the width of the fissure and the boundaries of the ore mass being sharp. In most cases, however, the ore-bearing solutions have entered the wall rock and either filled its pores or replaced it to some extent, thus giving the vein an indefinite boundary. Therefore the width of the fissures does not necessarily stand in any direct relation to the width of the vein (Butte, Mont.)." [47] And the same writer states at another place: "The manner in which fissure veins have been filled and the source of the metals which they contain formed a most fruitful subject of discussion among the earlier geologists. Four general theories were advanced at an early date. They are: (1) Contemporaneous formation, a theory no longer advocated by any one. (2) Descension, which likewise no longer has any adherents. (3) Lateral secretion, in which the vein

[46] Rev. St. U. S., § 2329 (U. S. Comp. St. 1901, p. 1432).
[47] Prof. Heinrich Ries' Economic Geology of the U. S. 236

contents are supposed to have been leached from the wall rock, usually in the immediate vicinity of the fissure, but at variable depths below the surface. Some geologists holding this view believe that the area leached was very extensive, and not confined to the immediate vicinity of the walls. (4) Ascension, the material being deposited by infiltration, sublimation with steam, sublimation as gas, or igneous injection. The several arguments for or against these theories are well set forth in Kemp's paper,[48] and it will suffice here to state that of the various ones those of lateral secretion and ascension by infiltration are the most rational. It is probable that the majority of geologists now believe in a modified theory of lateral secretion, in which the area of supply extends beyond the immediate walls of the fissure, and that the ore-bearing solutions have either ascended the fissure or entered through the walls." [49]

On the following page is a very interesting picture from Lakes' Prospecting for Gold and Silver, supra, showing two systems of exposed fissure veins crossing each other.[50]

A "dike" is a fissure which has become filled with lava or porphyry because it tapped a molten rock reservoir. "In such cases the porphyry dike or intrusive sheet may, if it be mineralized, answer all intents and purposes of a mineral vein, or the ore may be found on one or both sides of such a sheet, in the line of separation and weakness between it and the adjacent strata, or it may permeate and mineralize, by a 'substitution' process, an adjacent porous or soluble rock, such as limestone. Thus both in the dike or intrusive sheet itself, as well as at its contact with other rocks, the prospector should look for signs of precious metal." [51]

A "contact vein" is a vein along the plane of contact between unlike rock formations. "Another line of weakness for the attack of mineral solutions is at the juncture of porphyry sheet or dike with some other rock. The interval between them is often occupied by a 'contact vein.' The heat of the volcanic matter, together with steam, may have influenced the solutions, even if the porphyry did not actually supply the metallic element in the vein." [52] A frequent instance of a contact vein is between porphyry and limestone.[53]

After treating fissure veins, Ries disposes of "other forms of ore deposits" as follows: "'Impregnations' represent deposits in which

[48] 14 School of Mines Quarterly, 8 (1893).
[49] Ries' Economic Geology of the U. S. 240, 241.
[50] Lakes' Prospecting for Gold and Silver (3d Ed.) 91.
[51] Lakes' Prospecting for Gold and Silver (3d Ed.) 75.
[52] Lakes' Prospecting for Gold and Silver (3d Ed.) 73, 74.
[53] See 1 Chamberlain & Salisbury, Geology, 461, for the reason for this.

FIGURE No. 3.

Metalliferous veins exposed to view near Howardsville, San Juan, Colorado, showing two systems of fissure veins crossing each other.

the ore has been deposited in the pores of the rock, or the crevices of a breccia,[54] (Keweenaw Point, Mich.) 'Fahlband' is a belt of schist impregnated with sulphides. Ore channels include those 'ore bodies' formed along some path which the mineral solutions could easily

[54] Country rock shattered into small angular fragments. The name "breccia" is usually applied to a number of such small pieces of country rock, which the process of vein formation has left unconsumed in the vein mat-

follow, as the boundary between two different kinds of rock (Leadville Colo.; Mercur, Utah). 'Bedded deposits,' found parallel with the stratification of sedimentary rocks, and sometimes of contemporaneous origin (Clinton iron ore). 'Contact deposits,' as now understood, represent ore bodies formed along the contact of a mass of igneous and sedimentary rock (usually calcareous), the ore having been derived wholly or in part from the intrusive mass (Clifton, Ariz., in part). 'Chamber deposits,' whose ore has been deposited in caves of solution (Missouri lead and zinc ores). 'Disseminations,' deposits in which the ore is disseminated through the rock (southeastern Missouri lead ores)." [55]

The Miner's Conception of Veins.

So much for the geology of veins. It was early pointed out, however, that, while the miner regarded as veins all that the geologists did, he also gave the term a more liberal interpretation, and that the mining acts adopted the miner's point of view in talking of veins, lodes, or ledges. "These acts," said Mr. Justice Field in the Eureka Case, "were not drawn by geologists or for geologists. They were not framed in the interests of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose." [56] Under the mining acts the words, "lode," "vein," and "ledge" all mean the same thing. "Ledge" is a term used in California and Nevada. Mr. Lindley suggests that "of the three terms, the word 'lode' is the more comprehensive. A lode may, and often does, contain more than one vein." [57] And Messrs. Morrison and De Soto think that "vein" is broader than "lode," because "the word 'vein' is universally used to include coal and other flat nonmetallic deposits, while the word 'lode'

ter. Pieces which, if small, would be called breccia, are, when large enough, called "horses." Lakes' Prospecting for Gold and Silver (3d Ed.) 73. "The rock in which a vein is found is called the 'country rock'; e. g., limestone, granite, porphyry." Id. 86.

[55] Ries' Economic Geology of the U. S. 241, 242.

[56] EUREKA CONSOL. MIN. CO. v. RICHMOND MIN. CO., 4 Sawy. 302, 311, Fed. Cas. No. 4,548, affirmed in Richmond Min. Co. v. Eureka Consol. Min. Co., 103 U. S. 839, 26 L. Ed. 557, 560.

[57] 1 Lindley on Mines (2d Ed.) § 290, citing United States v. Iron Silver Min. Co., 128 U. S. 673, 680, 9 Sup. Ct. 195, 32 L. Ed. 571. It should be noticed, however, that practical miners often use the word "lode" to mean the whole mining claim or lode location (Buckeye Min. & Mill. Co. v. Carlson, 16 Colo. App. 446, 66 Pac. 168), a use to which they never put the word "vein," and that lode was probably used in that sense in the passage from United States v. Iron Silver Min. Co., supra, on which Mr. Lindley relies.

is not so used." [58] But all authorities agree that the terms, however differently shaded in meaning in popular use, are legal equivalents.

The first thing to realize is that "many definitions of veins have been given, varying according to the facts under consideration. The term is not susceptible of an arbitrary definition applicable to every case. It may be controlled, in a measure, at least, by the conditions of locality and deposit." [59] And the second thing to notice is that some courts have been willing to follow the Eureka Case idea that anything is a lode which a miner would be justified in following to find ore,[60] while other courts have inclined toward the geologists' point of view.[61] Finally, whether there is in the given case a vein or lode is always a question of fact,[62] and the determination of that question is affected by the rights asserted by the parties and the order of time in which those rights arise.[63]

Legal Definitions of Veins.

The way to ascertain the legal notion of a vein is to take various definitions that have been given. In Iron Silver Mining Co. v. Cheesman, it is stated by Mr. Justice Miller, for the United States Supreme Court, that "what constitutes a lode or vein of mineral matter has been no easy thing to define. In this court no clear definition has been given. Mr. Justice Field, in the Eureka Case, 4 Sawy. 302, 311, Fed. Cas. No. 4,548, shows that the word is not always used in the same sense by scientific works on geology and mineralogy and by those engaged in the actual working of mines." [64]

[58] Morrison's Min. Rights (13th Ed.) 162. "Coal bed" was held to be synonymous with "coal vein" in Delaware, L. & W. R. Co. v. Gleason (C. C. A.) 159 Fed. 383.

[59] Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

[60] See Harrington v. Chambers, 3 Utah, 94, 1 Pac. 362; Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029 (but see Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 Pac. 648, 677, that this is true only where the question of a discovery of a vein is involved, and not where the question is one of extralateral rights); Burke v. McDonald, 3 Idaho (Hasb.) 1296, 29 Pac. 98. See Shoshone Min. Co. v. Rutter, 87 Fed. 801, 31 C. C. A. 223.

[61] See Stinchfield v. Gillis, 96 Cal. 33, 30 Pac. 839, adopting definition of Judge Sawyer in Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 675.

[62] Bluebird Min. Co. v. Largey (C. C.) 49 Fed. 289, stating properly that the question of what is the apex of a vein is also a question of fact. That the latter question should be submitted to a jury, see Campbell v. Golden Cycle Min. Co., 141 Fed. 610, 615, 73 C. C. A. 260.

[63] See MIGEON v. MONTANA CENT. R. CO., 77 Fed. 249, 254, 23 C. C. A. 156.

[64] IRON SILVER MIN. CO. v. CHEESMAN, 116 U. S. 529, 533, 6 Sup. Ct. 481, 29 L. Ed. 712.

In that very case, however, the Supreme Court adopted the charge to the jury given by Judge Hallett on the trial, viz.: "To determine whether a lode or vein exists it is necessary to define those terms, and, as to that, it is enough to say that a lode or vein is a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a lode or vein. * * * Reverting to that definition, if there is a continuous body of mineral or mineral-bearing rock extending from one claim to the other, it must be that there are boundaries to such body and the lode exists; or if there is a continuous cavity or opening between dissimilar rocks, in which ore in some quantity and value is found, the lode exists. These propositions are correlative and not very different in meaning, except that the first gives prominence to the mineral body and the second to the boundaries. Proof of either proposition goes far to establish a lode, and it may be said that without proof of one of them a lode cannot exist. * * * Excluding the wash, slide, or débris on the surface of the mountain, all things in the mass of the mountain are in place. A continuous body of mineral or mineral-bearing rock, extending through loose and disjointed rocks, is a lode as fully and certainly as that which is found in more regular formation; but if it is not continuous, or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that case it lacks the individuality and extention which is an essential quality of a lode or vein." [65] And Mr. Justice Miller, in approving the charge, said: "Certainly the lode or vein must be continuous, in the sense that it can be traced through the surrounding rocks, though slight interruptions of mineral-bearing rock would not be alone sufficient to destroy the identity of the vein. Nor would a short partial closure of the fissure have that effect, if a little farther on it re-

[65] Iron Silver Min. Co. v. Cheesman, 116 U. S. 529, 536, 537, 6 Sup. Ct. 485, 29 L. Ed. 712.

curred again with mineral-bearing rock within it.[66] And such is the idea conveyed in the previous part of the charge." [67]

The reason why the Supreme Court of the United States has been content to approve as occasion required the definitions of veins framed by other courts is "that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found." [68] What may be a vein for one purpose and with reference to one party may not be a vein for another purpose and with reference to a differently situated party.[69] In the case of United States v. Iron Silver Mining Co., Mr. Justice Field, for the court, said of lodes in placers: "By veins or lodes as here used, are meant lines or aggregations of metal imbedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock. Yet a lode may and often does contain more than one vein. In Iron Silver Mining Co. v. Cheesman, 116 U. S. 529, 533, 6 Sup. Ct. 481, 29 L. Ed. 712, a definition of a lode is given, so far as it is practicable to define it with accuracy, and it is not necessary to repeat it." [70]

Eureka Consol. Mining Co. v. Richmond Mining Co.[71] is the classic case on the definition of a lode or vein. But the Utah court has given more briefly the essential conclusions of that case as follows: "Looking at the above, and other evidence in the record of like import, from a strictly scientific view, it probably would not show the existence of a vein or lode within the limits of the claim. Geologists, when accurately speaking, apply the terms 'vein' and 'lode' to a fissure in the earth's crust filled with mineral matter. In Von Cotta's treatise on Ore Deposits (Prime's Translation, § 16) the author says: 'Veins are aggregations of mineral matter in fissures of rocks. Lodes are therefore aggregations of mineral matter containing ores in fissures.' Similar definitions have been given by Dana, Steele, and others. It will thus be noticed that, in the judgment of a geologist, a fissure or fracture in the earth's crust seems to be an essential element in the definition

[66] See Cheesman v. Shreeve (C. C.) 40 Fed. 787, 792–796.

[67] IRON SILVER MIN. CO. v. CHEESMAN, 116 U. S. 529, 538, 6 Sup. Ct. 481, 29 L. Ed. 712. The definition of Judge Hallett was further approved in IRON SILVER MIN. CO. v. MIKE & STARR GOLD & SILVER MIN. CO., 143 U. S. 394, 404, 12 Sup. Ct. 543, 36 L. Ed. 201.

[68] MIGEON v. MONTANA CENT. R. CO., 77 Fed. 249, 255, 23 C. C. A. 156. See Book v. Justice Min. Co. (C. C.) 58 Fed. 106, 121.

[69] See GRAND CENT. MIN. CO. v. MAMMOTH MIN. CO., 29 Utah, 490, 83 Pac. 648; Tabor v. Dexler, 9 Morr. Min. Rep. 614, Fed. Cas. No. 13,723.

[70] United States v. Iron Silver Min. Co., 128 U. S. 673, 679, 9 Sup. Ct. 195, 32 L. Ed. 571.

[71] 4 Sawy. 302, Fed. Cas. No. 4,548.

of either of these terms. If, therefore, the validity of a mining location, when assailed, were to be tested strictly by these definitions, it would doubtless be incumbent upon the locator to show that the location was made upon a fissure with well-defined walls on each side and filled with metalliferous matter. That many mining claims, the locations of which have never been questioned, could not withstand such a test, cannot be doubted. The practical miner has paid little attention to scientific definitions of these terms. As to the term 'lode,' it has been said that the miners made the first definition, and that, as used by them, before defined by any authority, it simply meant whatever they could follow, expecting to find ore—that formation by which a miner could be led or guided. This is implied by its derivation; the term being a variation of the verb 'lead.' The word 'vein' with the miner means practically the same thing. By him the two terms are used, interchangeably or together, to mean some formation within which, or following which, he can find ore, and outside of which he cannot expect to find it. The fissure, therefore, and its walls, are of importance, in the business of mining, only as defining the boundaries within which miners may reasonably expect to find ore. Doubtless, in practical mining, the terms 'vein' and 'lode' apply to all deposits of mineralized matter within any zone or belt of mineralized rock separated from the neighboring rock by well-defined boundaries, and the discoverer of such a deposit may locate it as a vein or lode. We apprehend that the several acts of Congress relating to mining locations were enacted for the protection of the miners, and that the terms 'vein' and 'lode' were employed in the sense in which they had used them, uncontrolled by scientific definitions. The act of July 26, 1866, provided for the procuring of a patent by any person or association of persons claiming a 'vein, or lode of quartz or other rock in place, bearing gold, silver, cinnabar, or copper.' The act of May 10, 1872, speaks of 'veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper,' and other valuable deposits. No definitions of the terms 'vein' and 'lode' are given in either of the acts, and, from the fact that cinnabar and lead ores are included, it would seem that it was not the intention of the framers of the acts that purely scientific definitions should be applied in giving them effect; for it is not a characteristic of cinnabar that it is found in fissures of the earth's crust, or in veins or lodes as defined by geologists. It occurs generally in fibrous or amorphous masses bedded in shales or slate rock. So lead is frequently found between strata in flat cavities, in beds within sandstones and rudimentary limestones—formations which would not answer to veins or lodes, when speaking with scientific accuracy. A definition of 'vein' or 'lode' which would exclude any

one of the metals mentioned would, with reference to those enactments, be defective; and its application, in interpretation, would not be in harmony with the spirit and intent manifest from contexts. Evidently these laws were not enacted in the interests of science, but for the purpose of protecting the rights of miners as to their mining claims located and developed, and therefore should be construed with such liberality as to effectuate that purpose, and protect miners as to their mining claims located upon any kind of vein or lode of quartz or other rock in place, bearing any of the metals named in the acts, regardless of the kind or character of rock or formation in which the mineral may have been found. The fact that the terms 'vein' and 'lode' have been used by the legislators in connection with each other is suggestive that Congress intended to avoid any limitation in the application of the acts which might be imposed by a scientific definition of either term. Mr. Justice Field, in the Eureka Case, 4 Sawy. 302, Fed. Cas. No. 4,548, after discussing the term 'lode' as used in scientific works and in the acts of Congress, said: 'It is difficult to give any definition of the term, as understood and used in the acts of Congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a 'lode,' in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for, and reasonably expect to find, the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface, and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term, as used in the acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.' It would seem, from these considerations, that any deposit of mineral matter, or indication of a vein or lode, found in a mineralized zone or belt within defined boundaries, which a person is willing to spend his time and money to follow in expectation of finding ore, is the subject of a valid location, and that, when metallic vein matter appears at the surface, a valid location of a ledge deep in the ground, to which such vein matter leads, may be made." [72]

The argument drawn from the use of "cinnabar" in the mining acts, first advanced in the Eureka Case, and repeated in Hayes v. Lavagnino, does not seem to Mr. Lindley to have much weight. He

[72] HAYES v. LAVAGNINO, 17 Utah, 194–197, 53 Pac. 1029.

says: "It is not likely, therefore, that the inclusion of cinnabar with gold and silver in the act was based upon any very clear conception of its mode of occurrence. However, as we understand the matter now, the typical cinnabar deposits are in fact fissured, fractured, and mineralized zones, formed in a way somewhat similar to the more complex of the gold, silver, copper, and lead bearing lodes. They were probably regarded as lodes by the miner. There may be differences of opinion among scientists regarding the proper place for these deposits in a system of classification; but that is a matter of little moment here. They have become 'lodes' in the eye of the law. Be that as it may, the miner first applied the terms 'lode' and 'vein,' and they had with him a definite meaning. Whether it accorded with scientific theories and abstractions is, at this late date, at least, of no serious moment." [73]

It is apparent that a lode is differentiated from mere impregnations of mineral. "A lead or lode," said the Montana court, "is not an imaginary line without dimensions. It is not a thing without shape or form; but before it can legally and rightfully be denominated a lead or lode it must have length, width, and depth. It must be capable of measurement. It must occupy defined space and be capable of identification." [74] In the case of a broad vein, with no distinct hanging wall, but with a distinct and persistent foot wall, a United States Circuit Court has said: "To hold that the ledge extends to the extreme limits of all evidence of mineralization is not a reasonable or practical proposition in such a formation as this. If not, where then? Not beyond the ore deposit line, or where such strong indications of it are found that the miner would work or explore with the expectation of compensation. It cannot be doubted from the evidence that, far beyond the line where any miner acquainted with the formation would look for ore, there is much evidence of mineralized rock, quite similar to the material recognized as clearly within the ledge." [75] As the Utah court has recently said: "But if, on the other hand, the rock of the district generally carries values, then undoubtedly the values in the vein material, where the boundaries of the vein are not well or not at all defined, either in the surface or at depth, should be in excess of those of the country rock, else there can be no line of demarkation, nor where the rock is gen-

[73] 1 Lindley on Mines (2d Ed.) § 289.

[74] Foote v. National Min. Co., 2 Mont. 402.

[75] BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. v. EMPIRE STATE IDAHO MINING & DEVELOPING CO., 134 Fed. 268, 270.

erally broken, shattered and fissured, anything to separate it from the adjacent country." [76]

An impregnation of minerals, therefore, which is not in excess of that found in the ordinary country rock of the district, does not establish a vein; but, if an impregnation greater than that of the surrounding country rock is found, then it will be a vein or lode if it is in the general mass of the mountain, for its boundaries can be ascertained by assay and analysis. As Judge Hallett said in Hyman v. Wheeler: "An impregnation, to the extent to which it may be traced as a body of ore, is as fully within the broad terms of the act of Congress as any other form of deposit. * * * It is true that a lode must have boundaries; but there seems to be no reason for saying that they must be such as can be seen. There may be other means of determining their existence and continuance, as by assay and analysis." [77] And in approving the above definition the Colorado court said: "The controlling characteristic of a vein is a continuous body of mineral-bearing rock in place, in the general mass of the surrounding formation. If it possesses these requisites, and carries mineral in appreciable quantities, it is a mineral-bearing vein, within the meaning of the law, even though its boundaries may not have been ascertained." [78]

There are other definitions of veins, and some of them will have to be stated when we consider questions of discovery, known lodes in placers, extralateral rights, etc.; but for our present purpose the foregoing are enough.[79]

"Rock in Place."

And now for the phrase "veins or lodes of quartz or other rock in place." [80] The first thing to notice is that it is the quartz or rock that must be "in place." The vein or lode necessarily is in place before

[76] GRAND CENT. MIN. CO. v. MAMMOTH MIN. CO., 29 Utah, 490, 83 Pac. 648, 678.

[77] HYMAN v. WHEELER (C. C.) 29 Fed. 347, 354.

[78] Beals v. Cone, 27 Colo. 473, 486, 62 Pac. 948, 83 Am. St. Rep. 92.

[79] For other definitions, see Webb v. American Asphaltum Min. Co., 157 Fed. 203, 84 C. C. A. 673; Stevens v. Williams, Fed. Cas. No. 13,414; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522, 6 Sawy. 299; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666, 7 Sawy. 96; Book v. Justice Min. Co. (C. C.) 58 Fed. 106; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C.) 63 Fed. 540; Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87. For a full land department discussion of veins, see Henderson v. Fulton, 35 Land Dec. Dep. Int. 652. For a case where there were held to be two parallel veins, instead of one, see Waterloo Min. Co. v. Doe, 82 Fed. 45, 27 C. C. A. 50.

[80] Rev. St. United States, §§ 2320, 2329 (U. S. Comp. St. 1901, pp. 1424, 1432).

it can be said to be a vein or lode. "In place," in the above statutory phrase, has reference to the contents of the vein or lode, though this fact is often forgotten. A vein or lode must be in place to be a vein or lode, and it is only the contents or filling of the vein which the statute requires to be "in place." When it is said, however, that the contents of the vein or lode must be in place, it is not meant that they must be in a solid mass. In Stevens v. Williams, Miller, J., stated that: "I want to say that by rock in place I do not mean merely hard rock, merely quartz rock, but any combination of rock, broken up, mixed up with minerals and other things, is rock within the meaning of the statute."[81] So in Tabor v. Dexter, Judge Hallett stated that: "Whether the ore is loose and friable, or very hard, if the inclosing walls are country rock, it may be located as a vein or lode. But if the ore is on top of the ground, or has no other covering than the superficial deposit, which is called alluvium, diluvium, drift, or débris, it is not a lode or vein within the meaning of the act, which may be followed beyond the lines of the location. In this bill it is alleged that the overlying material is boulders and gravel, which cannot be in place as required by the act. * * * For the decision of this motion [for preliminary injunction] it is enough to say that where the mass overlying the ore is a mere drift, or loose deposit, the ore is not in place within the meaning of the act. Upon principles recently explained, a location on such a deposit of ore may be sufficient to hold all that lies within the lines; but it cannot give a right to ore in other territory, although the ore body may extend beyond the lines."[82] So in Burke v. McDonald the court said: "It must be remembered that every seam or crevice in the rock, even though filled with clay, earth, or rock, does not constitute a vein, nor every ridge of stained rock its cropping; nor, on the contrary, is it required that well-defined walls shall be developed or paying ore found within them. But something must be found in place, as rock, clay, or earth, so colored, stained, changed, and decomposed by the mineral elements as to mark and distinguish it from the inclosing country."[83]

It was in regard to the blanket deposits at Leadville, Colo., that the question about lodes being in place became important; and even there "in place" was not important because of that statutory provision, but because a vein, to be a vein at all, as contrasted with a placer deposit, must be in place. In Leadville Mining Co. v. Fitzgerald,[84] Judge

[81] STEVENS v. WILLIAMS, 1 McCrary, 480, Fed. Cas. No. 13,413.
[82] TABOR v. DEXTER 9 Morr. Min. Rep. 614, Fed. Cas. No. 13,723.
[83] Burke v. McDonald, 2 Idaho (Hasb.) 679, 33 Pac. 49.
[84] LEADVILLE MIN. CO. v. FITZGERALD, 4 Morr. Min. Rep. 380, 381, 386, Fed. Cas. No. 8,158.

Hallett indirectly shows that the idea that a vein or lode must be embraced in the mass of the mountain, an idea which he originated [85] and which certainly seems thoroughly sound, arose from his misconception that the words "in place" referred to vein or lode, instead of referring to the contents of the vein or lode. He said, when discussing the motion for an injunction: "Until the discovery of mineral deposits near Leadville, no controversy had arisen in this state as to whether a lode or vein is in place within the meaning of the act of Congress. The mines opened in Clear Creek, Gilpin, Boulder, and other counties descend into the earth so directly that no question could arise as to whether they were inclosed in the general mass of the country. Whatever the character of the vein, and whatever its width, it was sure to be within the general mass of the mountain; but the Leadville deposits were found to be of a different character. In some of them, at least, the ore was found on the surface, or covered only by the superficial mass of slide, débris, detritus, or movable stuff, which is distinguishable from the general mass of the mountain, while others were found beneath an overlying mass of fixed and immovable rock which could be called a wall as well as that which was found below them. It then becomes necessary to consider very carefully the meaning of the words "in place" in the act of Congress, in order to determine whether these deposits were of the character described in that act. Section 2320 of the Revised Statutes (U. S. Comp. St. 1901, p. 1424) refers to veins and lodes in 'rock in place,' and of course no other can be brought within the terms of the act. After careful consideration, it was thought that a vein or lode could not be in place within the meaning of the act unless it should be within the general mass of the mountain. It must be inclosed by or held within the general mass of fixed and immovable rock. It is not enough to find the vein or lode lying on the top of fixed or immovable rock; for that which is top is not within, and that which is without the rock in place cannot be said to be within it." [86] And again in charging the jury he said: "As to the first question, if the lode is in the general mass of the mountain, as distinguished from the slide, débris, or 'tumble stuff,' of the surface, it is in place within the meaning of the act of Congress. If the rock above the lode is in its original position, although somewhat broken and shattered by the movement of the country or other cause, it is in place. And in this kind of deposits it may be said that

[85] STEVENS v. WILLIAMS, 1 Morr. Min. Rep. 558, 559, 560, Fed. Cas. No. 13,413; Stevens v. Gill, 1 Morr. Min. Rep. 576, 580, Fed. Cas. No. 13,398; Iron Silver Min. Co. v. Cheesman (C. C.) 8 Fed. 299, 301.

[86] LEADVILLE MIN. CO. v. FITZGERALD, 4 Morr. Min. Rep. 380, 381, Fed. Cas. No. 8,158.

the lode is in place wherever the rock above is in place. * * * If the principal part of the rock above the mineral is in its original position according to the present structure of the mountain, the lode is in place, although some masses of rock or boulders may be associated with the ore." [87]

Even though the misconception of the statute caused the holding that the vein must be in the mass of the mountain to be a vein, that holding is well established and certainly furnishes the only sound way in which to distinguish between veins and placers.[88] It is also highly important in the working out of extralateral rights; for, because of the great interference of extralateral rights with common-law notions of ownership of land, only well-defined and continuous veins are deemed within the statute awarding extralateral rights to the owner of an apex.[89] Before we define "apex" and "extralateral rights," however, we must distinguish between "lodes" and "placers."

A PLACER.

34. A placer is any form of mineral deposit other than a vein or lode.

Now what is a placer? Messrs. Morrison and De Soto have this to say about the matter: "As commonly and properly understood, a 'placer claim' means a location in which gold is found loose in sand or gravel, and not in the vein or in place. It includes gulch claims, old channels, cement, and drift diggings. But the United States Mining acts make an arbitrary division of all minerals into two classes, to wit, 'lodes' and 'placers.' All deposits of (metallic) minerals in place are called, when located, 'lode claims,' and all deposits of other minerals, in place or not in place, are 'placers.'" [90] Under the United States mining acts, therefore, a placer is any form of mineral deposit "excepting veins of quartz or other rock in place." [91] And by the

[87] Leadville Min. Co. v. Fitzgerald, 4 Morr. Min. Rep. 386, Fed. Cas. No. 8,158. Compare Iron Silver Min. Co. v. Cheesman (C. C.) 8 Fed. 297, 2 McCrary, 191.

[88] "A lode is a zone, belt, or body of quartz or other rock lodged in the earth's crust, and presenting two essential and inherent characteristics, namely: (1) It must be held 'in place' within or by the adjoining country rock; and (2) it must be impregnated with some of the minerals or valuable deposits mentioned in the statute." Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

[89] GRAND CENT. MIN. CO. v. MAMMOTH MIN. CO., 29 Utah, 490, 83 Pac. 648; Butte & B. Min. Co. v. Societe Anonyme des Mines de Lexington, 23 Mont. 117, 58 Pac. 111, 75 Am. St. Rep. 505.

[90] Morrison's Mining Rights (13th Ed.) 210. The idea here expressed, that only metallic deposits in place are lodes, seems unsound. Webb v. American Asphaltum Min. Co., 157 Fed. 203, 84 C. C. A. 651.

[91] Rev. St. U. S. § 2329 (U. S. Comp. St. 1901, p. 1432); Gregory v.

term "placer claim," as used in the section of the statutes in regard to patenting lodes in placer claims,[92] "is meant ground within defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place—that is, not fixed in rock—but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling." [93]

Ordinarily there is little difficulty in discriminating veins from placer deposits,* yet the case of Gregory v. Pershbaker [94] is an instance of a troublesome situation. This case had to deal with what are known in California as "deep placers," namely, the sandy or gravelly beds or bottoms of ancient streams long since covered over by lava. "These gravel beds," said Mr. Lindley, "lie upon a 'bed rock,' which at some period of geological history formed the bed of an ancient river. They are usually immediately overlain by a formation of clay gouge, and on this clay covering is a capping of lava, sometimes hundreds of feet in thickness. These subterranean deposits are reached by means of tunnels to the bed rock, and thence following the meanderings of the channel. These deposits certainly occupy a fixed position in the mass of the mountain, although they do not fall within the popular definition of lodes or veins. The land department at an early period classified them as 'placers,' and patents have uniformly been issued upon location of this class of deposits made under the placer laws." [95] The California court, being called upon to deal with such a deposit, said that the definition of a lode in the Eureka Case[96] (namely, that the term is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from neighboring rock) would not include a bed of gravel from which particles of gold may be washed. "The words 'mineralized rock,'" said the court, "were evidently intended to qualify the * * * sentence. That which in the Eureka Case was declared to be a 'lode' was a zone of limestone lying between a wall of quartz and a seam of clay or shale; the ore having a dip of

Pershbaker, 73 Cal. 109, 14 Pac. 401; Webb v. American Asphaltum Min. Co., 157 Fed. 203, 84 C. C. A. 673.

[92] Rev. St. U. S. § 2333 (U. S. Comp. St. 1901, p. 1433).

[93] United States v. Iron Silver Min. Co., 128 U. S. 673, 679, 9 Sup. Ct. 195, 32 L. Ed. 571.

* Yet recently a United States court has had to decide that gilsonite and the harder forms of asphaltum in veins or lodes of rock in place may be located as lodes, and may not be located as placer deposits. Webb v. American Asphaltum Min. Co., 157 Fed. 203, 84 C. C. A. 651.

[94] 73 Cal. 109, 14 Pac. 401.

[95] 1 Lindley on Mines (2d Ed.) § 427.

[96] 4 Sawy. 302, Fed. Cas. No. 4,548.

45° and the other of 80°." [97] And the court therefore insisted that a bed of gravel from which particles of gold may be washed, even though that bed is between an underlying bed of slate rock and an overlying bed of lava rock,[98] and even though the gravel is of a hard nature, and in mining and extracting the same has to be detached from its position by the use of picks and gads,[99] is not a lode, because it is not mineralized rock in place, and is within the definition of placers in section 2329, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1432) which declares all forms of deposit, excepting veins of quartz or other rock in place, to be placers. The court added: "Referring to the common use of the word by miners, to the dictionaries, and to the adjudications of courts, the gravel bed with gold therein as described in the finding is a placer." [100]

The deposit in Gregory v. Pershbaker was so hard as to require the use of a pick and gad to extract, so could properly be called mineralized rock, and it certainly occupied a fixed position in the mass of the mountain. But for the peculiar geological formation noted above, and which properly governed the California court, the deposit should have been held to be a lode. That is clear from Jones v. Prospect Mountain Tunnel Co. [101] In that case,[102] a ledge, consisting of "broken limestone, boulders, low-grade ore, gravel, and sand, which appeared to have been subjected to the action of the water," and "found at a depth of several hundred feet, and where there seems to have been no question that it was within the original and unbroken mass of the mountain," was held by the court to be mineral matter "in place."

THE APEX OF A VEIN.

35. The apex of a vein is the width and length—i. e., the surface—of its upper edge.

In connection with veins it is important to define the apex of a vein, its dip, and its course or strike. Though there is a controversy as to whether the law of the apex was properly applied in Duggan v. Davey,[103] there is no question that "apex" was clearly defined in that

[97] GREGORY v. PERSHBAKER, 73 Cal. 109, 114, 14 Pac. 401.
[98] 73 Cal. 109, 111, 14 Pac. 401.
[99] 73 Cal. 113, 14 Pac. 401, 402.
[100] 73 Cal. 115, 14 Pac. 401, 403.
[101] 21 Nev. 339, 31 Pac. 642.
[102] JONES v. PROSPECT MOUNTAIN TUNNEL CO., 21 Nev. 339, 351, 31 Pac. 642.
[103] 4 Dak. 110, 26 N. W. 887.

case.[104] It need only be premised that under the federal statutes the owner of a claim which has the apex of a vein or lode inclosed within the parallel end lines of the claim has the right to follow the vein down in the earth as far as it goes, even if in going down it departs from his common-law boundaries and enters what at common law would be his neighbor's grounds, so long as he does not go beyond planes drawn through the extralateral right end lines and extended in their own direction. As the apex right is only to go outside one's side boundaries, it has come to be called the "extralateral right." The extralateral right depending on the ownership of the apex of the vein or lode, the question is: What is the apex of a vein or lode? Duggan v. Davey has this to say about it:

"Secondly. Is the top or apex of this vein or lode within the lines of the Sitting Bull location? The definition of the top or apex of a vein usually given is: 'The end or edge of a vein nearest the surface.' And to this definition the defendants insist we must adhere with absolute literal and exclusive strictness, so that wherever, under any circumstances, an edge of a vein can be found at any surface, regardless of all other circumstances, that is to be considered as the top or apex of the vein. The extent to which this view was carried by the defendants, and, I must confess, its logical results, were exhibited by Prof. Dickerman, their engineer, who, replying to an inquiry as to what would be the apex of a vein cropping out at an angle of one degree from the vertical on a perpendicular hillside, and cropping out also at a right angle with that along the level summit of the hill, stated that in his opinion the whole line of that outcrop from the bottom clear over the hill, as far as it extended, would be the apex of the vein. Some other witnesses had a similar opinion. The definition given is no doubt correct under most circumstances, but, like many other definitions, is found to lack fullness and accuracy in special cases; and I do not think important questions of law are to be determined by a slavish adherence to this letter of an arbitrary definition. It is, indeed, difficult to see how any serious question could have arisen as to the practical meaning of the terms 'top' or 'apex'; but it seems in fact to have become somewhat clouded. I apprehend, if any intelligent person were asked to point out the top or apex of a house, a spire, a tree, or hill, he would have no difficulty in doing so; and I do not see why the same common sense should not be applied to a

[104] Mr. Snyder says that in DUGGAN v. DAVEY, 4 Dak. 110, 26 N. W. 887, the court misapplied the law through faultless reasoning from false premises. 1 Snyder on Mines, § 802. Mr. Lindley, however, with what seems to the writer sound exposition and argument, approves the decision. 1 Lindley on Mines (2d Ed.) § 310.

vein or lode. Statutory words are to receive their ordinary meaning and interpretation, except where shown to have a special meaning; and, as I think the testimony shows that these terms were unknown to miners in their application to veins before the statute, the ordinary rule would seem to apply to them. Justice Goddard, a jurist of experience in mining law, in his charge to the jury in the case of Iron Silver v. Louisville, defines 'top' or 'apex' as the highest or terminal point of a vein, where it approaches nearest the surface of the earth, and 'where it is broken on its edge, so as to appear to be the beginning or end of the vein.' Chief Justice Beatty of Nevada, who is mentioned in the report of the Public Land Commission of 1878–80, as 'one of the ablest jurists who has administered the mining law,' in his letter to that commission says, after defining dip and course of strike: 'The top or apex of any part of a vein is found by following the line of its dip up to the highest point at which vein matter exists in the fissure.' According to this definition the top or apex of a vein is the highest part of a vein along its entire course. If the vein is supposed to be divided into sections by vertical planes at right angles to the strike, the top or apex of each section is the highest part of the vein between the planes that bound that section; but, if the dividing planes are not vertical or not at right angles to a vein which departs at all from the perpendicular in its downward course, then the highest part of the vein between such planes will not be the top or apex of the section which they include.'

"I am aware that in several adjudged cases 'top' or 'apex' and 'outcrop' have been treated as syonymous, but never, so far as I am aware, with reference to a case presenting the same features as the present. The word 'apex' ordinarily designates a point, and, so considered, the apex of the vein is the summit, the highest point in the vein in the ascent along the line of its dip or downward course, and beyond which the vein extends no further, so that it is the end, or, reversely, the beginning, of the vein. The word 'top,' while including 'apex,' may also include a succession of points—that is, a line—so that by the top of a vein would be meant the line connecting a succession of such highest points or apices, thus forming an edge."[105]

Conceiving a vein or lode to be an intrusive sheet of mineralized matter of varying thickness found in the mass of the mountain, the apex of a vein is thus seen to be that edge of the sheet which shows on the surface of the location, or is nearest to the surface. It is not a point, though apex naturally suggests point. It is not a line, though

[105] DUGGAN v. DAVEY, 4 Dak. 110, 139–143, 26 N. W. 887.

it has the full extension of the upper edge of the lode.[106] It is the whole surface of the upper edge of the vein, with all the width and length which that edge has. That is what the Dakota court means when it says that "the top or apex of a vein is the highest part of a vein along its entire course.[107]

THE "COURSE" OR "STRIKE" OF A VEIN.

36. The course or strike of a vein means either the length of the apex or the direction taken by the length of the apex.

The "course" or "strike" of a vein is its continuous apex; that is, the path of the apex across the country, if the apex outcrops, or the wandering direction taken by that apex underground, if it does not outcrop. The mining law acts are not concerned with the true strike of a vein or lode—i. e., with the direction which would be taken by the apex if the vein were cut along its entire length by a horizontal plane[108]—for they are talking about that "course of the vein" (the word "strike" does not appear in the mining acts at all) which a miner can have some hope of ascertaining.† They mean by the "course" of a vein either the length of that upper part of the vein which is known as the apex, or else the direction in which that length lies.

THE "DIP" OF A VEIN.

37. The dip of a vein is its departure from either the perpendicular or the horizontal in its descent into the earth, and is usually computed in its variation from the horizontal.

[106] But see LARKIN v. UPTON, 144 U. S. 19, 12 Sup. Ct. 614, 36 L. Ed. 330, stating that the apex is often a line of great length. A mathematical line is not meant, however.

[107] DUGGAN v. DAVEY, 4 Dak. 110, 141, 26 N. W. 887. See Stevens v. Williams, 1 McCrary, 480, Fed. Cas. No. 13,413; Id., Fed. Cas. No. 13,414; Iron Silver Mining Co. v. Murphy (D. C.) 3 Fed. 368.

[108] See Duggan v. Davey, 4 Dak. 110, 143, 26 N. W. 887; Flagstaff Silver Mining Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253; Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 Pac. 648.

† "Perhaps the true course of a vein should correspond with its strike, or the line of a level through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed. The most practical rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined." Flagstaff Silver Min. Co. v. Tarbet, 98 U. S. 463, at pages 469, 470, 25 L. Ed. 253.

The "dip" of a vein is the extent to which the vein, in its descent into the earth, departs from the perpendicular, and it departs from that perpendicular whenever it has any departure from the horizontal plane other than the direct perpendicular. In Stevens v. Williams Judge Hallett said: "Now it was said, with reference to the lode which is now in litigation here, that whenever, in its departure from the vertical course, it reaches an inclination which is greater than forty-five degrees, that then it is no departure from the perpendicular, but from a horizontal plane, and therefore it is not within the terms of the act. That position, gentlemen, is merely a verbal distinction, which goes for nothing at all. Of course, in its departure, it may depart in any degree up to the horizontal plane, and it is still a departure from the perpendicular throughout the whole course, until it comes to a right angle from the perpendicular. * * * It appears to be exactly within the provisions of this act, if the vein clearly extends outside of the limits of the surface in any angle between the perpendicular and horizontal. I agree that if we should ever find a lode which in its course extends precisely on the plane of the horizon, and it is extremely doubtful whether we shall ever find one in that position, but if we should ever find a lode which is precisely in that position, there may be some difficulty in locating it under this act." [109]

"Dip" is therefore the direction taken by the vein as it goes down into the earth, where there is a departure from either the perpendicular or the horizontal. It also seems to be applicable to a case where the vein has dipped beneath another's mining claim and then goes down straight; the owner of the apex being still regarded as going down on the dip when he is going down straight. However that may be, there is no legal dip unless there is at some time in the vein's descent a departure both from the horizontal and from the perpendicular. That explains why there is no uniformity in the method of calculating the degree of dip. Miners generally figure the degree of dip from the perpendicular, but surveyors calculate it from the horizontal.[110] "A vein or ore deposit will not infrequently begin with a gentle dip, and increase rapidly in steepness with depth. The angle of dip is usually taken from its variation from a horizontal, not a perpendicular, line. Thus, a dip of 75° means one that is very steep, while one of 10° is a gentle inclination." [111]

[109] Stevens v. Williams, 1 Morr. Min. Rep. 557, 563, Fed. Cas. No. 13,413.

[110] See Morrison's Mining Rights (13th Ed.) 185.

[111] Lakes' Prospecting for Gold and Silver (3d Ed.) 87.

"MINING CLAIM" OR "LOCATION."

38. While, strictly, location is the act of creating a mining claim, the word "location" is ordinarily used as a synonym of "mining claim". A mining claim is a part of the public mineral domain appropriated in accordance with the mining law for mining purposes.

"Mining Claim" or "Location."

There are some other terms needing preliminary definition, namely, "mining claim," "location," and "mine." "Mining claim" and "location" may be considered together. In St. Louis Smelting & Refining Co. v. Kemp the court said: "The difficulty with the court below, as seen in its charge, evidently arose from confounding 'location' and 'mining claim,' as though the two terms always represent the same thing, whereas they often mean different things. A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel according to certain established rules. It usually consists in placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel, according to the local customs, or, since the statute of 1872, according to the provisions of that act. Rev. St. § 2324 (U. S. Comp. St. 1901, p. 1426). The location, which is the act of taking the parcel of mineral land, in time became, among the miners, synonymous with the mining claim originally appropriated. So now, if the miner has only the ground covered by one location, 'his mining claim' and 'location' are identical, and the two designations may be indiscriminately used to denote the same thing. But if by purchase he acquires the adjoining location of his neighbor—that is, the ground which his neighbor has taken up—and adds it to his own, then his mining claim covers the ground embraced by both locations, and henceforth he will speak of it as his 'claim.' Indeed, his claim may include as many adjoining locations as he can purchase, and the ground covered by all will constitute what he claims for mining purposes, or, in other words, will constitute his 'mining claim,' and be so designated. Such is the general understanding of miners and the meaning they attach to the term." [112] So in McFeters v. Pierson the court said: "The term 'mining claim,' meaning a parcel of mineral land containing precious metals, is often used in mining parlance as syonymous with the term 'location,' which means the act of appro-

[112] ST. LOUIS SMELTING & REFINING CO. v. KEMP, 104 U. S. 636, 648, 649, 26 L. Ed. 313.

priating a mining claim upon the public domain according to law or established rules. St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 648, 26 L. Ed. 313." [113]

While, strictly and literally, location is the act of locating, rather than the result of doing so, it still remains true that in the mining statutes "location" and "mining claim" are treated as synonymous.[114] The term "claim" as applied to mining, means either a lode or placer location.[115] Still, as the court, in St. Louis Smelting & Refining Co. v. Kemp, supra, recognized, "mining claim" often means to miners a group of mining claims,[116] a point in which it resembles the word "mine." [117] Technically "a 'mining claim' is the name given to that portion of the public mineral lands which the miner for mining purposes takes up and holds in accordance with mining laws, local and statutory. It must, under the law of Congress of 1872, be located upon at least one known vein or lode; but the vein or lode is not the whole claim." [118] It is also used sometimes to mean an unpatented location, as distinguished from the patented location, called by contrast a "mine." [119]

"MINE."

39. The word "mine," because of the various meanings given to it, is to be avoided.

The word "mine" is a word to be avoided, because of its complex meaning. It is used so variously that it cannot be used safely without coupling with it each time a statement of the sense intended. The following are a number of meanings attached to the word:

(1) The word "mine," in its primary meaning, seems to mean an

[113] McFETERS v. PIERSON, 15 Colo. 201, 203, 24 Pac. 1076, 22 Am. St. Rep. 388.

[114] DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO., 171 U. S. 55, 74, 18 Sup. Ct. 895, 43 L. Ed. 72. A contract to convey a mining claim implies a located claim. La Grande Inv. Co. v. Shaw, 44 Or. 416, 72 Pac. 795, 74 Pac. 919.

[115] Sweet v. Weber, 7 Colo. 443, 449, 4 Pac. 752. The word "lode" is often used in the sense of "lode mining claim." See Buckeye Min. & Mill. Co. v. Carlson, 16 Colo. App. 446, 66 Pac. 168.

[116] See Hamilton v. Delhi Min. Co., 118 Cal. 148, 50 Pac. 378.

[117] Tredinnick v. Red Cloud Consolidated Min. Co., 72 Cal. 78, 13 Pac. 152; Idaho Min. & Mill. Co. v. Davis, 123 Fed. 396, 59 C. C. A. 200; Phillips v. Salmon River Min. & Development Co., 9 Idaho, 149, 72 Pac. 886. See, also, "locations," Leet v. John Dare Silver Min. Co., 6 Nev. 218.

[118] Mt. Diablo Mill. & Min. Co. v. Callison, 5 Sawy. 439, 454, Fed. Cas. No. 9,886; La Grande Inv. Co. v. Shaw, 44 Or. 416, 72 Pac. 795, 74 Pac. 919.

[119] See Bewick v. Muir, 83 Cal. 368, 373, 23 Pac. 389, 390.

underground excavation, or, rather, all the underground workings, as distinguished from superficial workings or quarries;[120] but that meaning is not the one prevalent in the United States, where placer workings, which, except in the case of deep placers, are on the surface, are always called "mines," [121] and where, under the act of Congress of August 4, 1872, building stone lands may be taken up as placers.

(2) The word "mine," as the meaning just given has suggested, may mean any excavation or working to get out minerals.[122]

[120] "According to the ordinary sense of the term 'mine,' does it mean a quarry? I apprehend clearly not. The meaning of the term does not depend on the nature of the fossil body obtained. It depends on the nature of the mode of working it. Some mines may be worked by means of mining, others by means of quarrying, and upon the case here shown the limestone was worked by quarrying. They were not limestone mines, but limestone quarries. That which is worked by mines is by a means of working in which the surface is not disturbed; and, when limestone is so worked, then it is a limestone mine. It is clear that in the popular, and I think in the just and accurate, sense of the distinction between mines and quarries, the question is whether you are working so as to remove the surface, including, perhaps, portions of the lateral surfaces, so as not to leave a roof. Mining is when you begin only on the surface, and by sinking shafts, or driving lateral drifts, you are working so that you make a pit or a tunnel, leaving a roof overhead." Sir R. T. Kindersley, V. C., in Darvill v. Roper, 3 Drewry, 294, 298, 299. See Rex v. Sedgley, 2 Barn. & Adol. 65; Rex v. Brettell, 3 Barn. & Adol. 424. See also Marvel v. Merritt, 116 U. S. 11, 12, 6 Sup. Ct. 207, 29 L. Ed. 550, approving Webster's definition, distinguishing between mines and quarries.

[121] 27 Stat. 348, c. 375 (U. S. Comp. St. 1901, p. 1434).

[122] "But the position is assumed that the business of obtaining this ore is not mining, as it is not conducted underground, but on the surface. It has been held in England, under their tax laws, that a slate work is not a mine. So of a lime work. But where a shaft was sunk, and limestone worked out underground, held to be a mine. So, where a peculiar clay was obtained in like manner, held to be a clay mine. And it is said that the expense of sinking a shaft will much exceed £5,000. In coming to these conclusions, the English courts doubtless had in view the customs of their country. Few, if any, of their valuable minerals are now found on the surface of the earth, and probably never were, but are obtained from great depths, and are generally under the water level. On the contrary, in most parts of the United States, the iron ore is obtained on or near the surface, above the water level, and is worked by sunlight. Such is also the case in regard to coal in many places, whilst in others shafts are sunk to a considerable depth, and the mineral obtained by drifting, as mines are worked in England. But few, if any, of these shafts cost £5,000 to sink. Our idea of mining is derived from our own habits and customs. Hence our most approved lexicographer, Webster, says that a mine is a 'pit or excavation in the earth from which metallic ore, mineral substances, and other fossil bodies are taken by digging.' * * * And Jacob's Law Dictionary, by Tomlin, says that 'mines are quarries or places whereout any-

(3) The word "mine" may also mean the veins or deposits of mineral, rather than the workings to get at them, or than the land in which they are found.[123]

(4) The word "mine" is used to designate a deposit of mineral which has been opened or worked, as distinguished from one which has been untouched.[124]

(5) The word "mine" is also used as synonymous with that sense of the word "mining claims" which embraces either one or more locations.[125]

(6) The word "mine" has also been used to designate patented mineral land, as distinguished from an unpatented location.[126]

thing is dug.' * * * Barber's Law Dictionary says: 'It is held to have the sense of quarry.' * * * We have dwelt more particularly on this branch of the case, because the counsel seemed to consider that much depended on establishing that taking the ore from the mine holes described in the bill and answers was not mining, within the decisions which require an account. It certainly is not mining under the English tax laws; but to us it appears that it clearly is such, under the decisions requiring an account between tenants in common." Coleman v. Coleman, 1 Pears. (Pa.) 470, 474, 475.

[123] Bullion Beck & Champion Min. Co. v. Eureka Hill Min. Co., 5 Utah, 3, 51, 11 Pac. 515, 523 (defining "mine," as used in the act of 1866, as "synonymous in its meaning with the terms 'vein' or 'lode'"); Shaw v. Wallace, 25 N. J. Law, 453, 469.

[124] Westemoreland Coal Co.'s Appeal, 85 Pa. 344, where the question was as to waste by purchaser from a tenant for life.

[125] Phillips v. Salmon River Min. & Development Co., 9 Idaho, 149, 72 Pac. 886; Tredinnick v. Red Cloud Consol. Co., 72 Cal. 78, 81, 13 Pac. 152, 153; Hamilton v. Delhi Min. Co., 118 Cal. 148, 50 Pac. 378; Idaho Min. & Mill. Co. v. Davis, 123 Fed. 396, 59 C. C. A. 200. See Smith v. Sherman Min. Co., 12 Mont. 524, 31 Pac. 72.

[126] FORBES v. GRACEY, 94 U. S. 762, 766, 24 L. Ed. 313, where, in speaking of a Nevada taxation statute, the court said: "The use of the words 'mines or mining claims' is evidently intended to distinguish between the cases in which the miner is the owner of the soil, and therefore has perfect title to the mine, and those in which the miner does not have title to the soil, but works the mine under what is * * * recognized by the act of Congress as a mining claim. In the first case the statute makes the tax a lien on the mine, because the title to the mine is in the person who owes and should pay the tax. In the other, the tax is a lien only on the claim of the miner; that is, on his possessory rights to explore and work the mine under the existing laws and regulations on the subject." But see Bewick v. Muir, 83 Cal. 368, 372, 23 Pac. 389, where it is said: "The words 'mining claim,' as used in the law [a mechanic's lien statute] have no reference to the different stages in the acquisition of the government title. In our opinion, it includes all mines, whether the title is inchoate, as in the case of a mining claim in its strict sense, or perfect, as in the case of a fee-simple title."

(7) The word "mine" is also used among miners to mean a paying mining location, as contrasted with a location not yet demonstrated to be paying, and hence known as a "prospect."

Upon the whole, it will be safer and better always to use the term "mining claim," rather than "mine," and, when it is necessary to discriminate an unpatented claim from a patented one, to use the words "unpatented" and "patented."

CHAPTER X.

THE DISCOVERY OF LODE AND PLACER CLAIMS.

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Rev. St. U. S. § 2320 (U. S. Comp. St. 1901, p. 1424).

THE DISCOVERY OF LODE CLAIMS.

40. Discovery in mining is essentially the same thing as discovery elsewhere. In lode mining a discovery is the finding of a vein or lode in land of the United States which is unappropriated and which may be located under the mining law. It exists as effectually where a prospector notes and claims a vein or lode uncovered by a previous locator and abandoned or forfeited by the latter as it does where the prospector is the original discoverer.

41. Whether a genuine vein has actually been discovered is a question of fact for the jury. The law for the guidance of the jury varies slightly, however, according as the dispute over the lode arises (a) between a lode claimant and a subsequent lode claimant; (b) between a lode claimant and a subsequent placer claimant; (c) between a placer claimant and a subsequent lode claimant; (d) between a placer claimant and a subsequent placer claimant; (e) between mineral claimants and townsite claimants; or (f) between mineral claimants and agricultural claimants.

What is a Discovery.

In lode mining, discovery is the finding of a vein or lode which may be located. Extracting tons of float from the claim will not make a discovery. A genuine vein or lode must be found.[1] If only

[1] Waterloo Min. Co. v. Doe (C. C.) 56 Fed. 685. See Overman Silver Min. Co. v. Corcoran, 15 Nev. 147; Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019. But see Score v. Griffin (Ariz.) 80 Pac. 331; Reiner v. Schroeder, 146 Cal. 411, 80 Pac. 517. The discovery must be within the limits of the claim. Michael v. Mills, 22 Colo. 439, 45 Pac. 429. A mere guess will not serve as a discovery. Copper Globe Min. Co. v. Allman, supra. "Discovery is the all-important fact upon which the title to mines depends." LAWSON v. UNITED STATES MINING CO., 207 U. S. 1, 28 Sup. Ct. 15, 19, 52 L. Ed. —.

the ore exists in appreciable quantities, the value of the ore is relatively immaterial. "When the locator finds rock in place containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the proprietor in making a location of a mining claim." [2]

It is not necessary that the locator should be the original discoverer,[3] but simply that he should find the vein or lode when it is in unappropriated land of the United States.[4] A discovery on the dip of a vein, the apex of which has already been located, will not support a location of the dip belonging to such located apex.[5] Noting and claiming a vein or lode discovered and disclosed to view by a

[2] BOOK v. JUSTICE MIN. CO. (C. C.) 58 Fed. 106, 120. See Jupiter Min. Co. v. Bodie Consol. Min. Co., 11 Fed. 666, 675, 676; Moore v. Steelsmith, 1 Alaska, 121; Meydenbauer v. Stevens (D. C.) 78 Fed. 787; McShane v. Kenkle, 18 Mont. 208, 44 Pac. 979, 33 L. R. A. 851, 56 Am. St. Rep. 579; Fox v. Myers (Nev.) 86 Pac. 793; Score v. Griffin (Ariz.) 80 Pac. 331. The vein need not contain ore in paying quantities, as long as enough ore is found to warrant a prudent man in spending time and money on it. MULDRICK v. BROWN, 37 Or. 185, 61 Pac. 428; Charlton v. Kelly, 2 Alaska, 532. Where there is evidence that gold has been found within a claim, and the question is whether such finding amounts to a discovery, the locator is entitled to show the situation, character, value, and mineralogical conditions of adjacent claims, and to follow that evidence up with expert testimony to show that he is justified in expending time and money in prospecting, developing the ground, and so has made a discovery. Cascaden v. Bortolis (C. C. A.) 162 Fed. 267.

[3] JUPITER MIN. CO. v. BODIE CONSOL. MIN. CO. (C. C.) 11 Fed. 666, 7 Sawy. 96; BOOK v. JUSTICE MIN. CO. (C. C.) 58 Fed. 106; Wenner v. McNulty, 7 Mont. 30, 14 Pac. 643; Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029; Willeford v. Bell (Cal.) 49 Pac. 6.

[4] Lands below ordinary high tide on the ocean, arms of the sea, and navigable rivers in Alaska are not subject to location under the mining laws. Alaska Gold Min. Co. v. Barbridge, 1 Alaska, 311; Heine v. Roth, 2 Alaska, 416. James W. Logan, 29 Land Dec. Dep. Int. 395. For a similar holding as to land below the high-water mark of the Missouri river, see Argillite Ornamental Stone Co., 29 Land Dec. Dep. Int. 585.

[5] Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Min. Co., 33 Land Dec. Dep. Int. 142. That a discovery and location only on the dip of the vein, but made prior to discovery and location of the apex, will be upheld, is stated in VAN ZANDT v. ARGENTINE MIN. CO. (C. C.) 8 Fed. 725. Compare Hope Min. Co. v. Brown, 7 Mont. 550, 19 Pac. 218. But "it is unquestioned law that the top or apex of a vein must be within the boundaries of the claim in order to enable the locator to perfect his location and obtain title." LARKIN v. UPTON, 144 U. S. 19, at page 21, 12 Sup. Ct. 614, 36 L. Ed. 330. Unless a location is on the apex of a vein, it is, of course, without extralateral right. IRON SILVER MIN. CO. v. MURPHY (D. C.) 3 Fed. 368.

previous prospector, who has abandoned or forfeited it, and adopting the discovery as one's own, is making a discovery.[6] That the discovery is underground and secret is immaterial, if it is followed in proper time by the requisite acts of location on the surface;[7] and, as we shall see later, a discovery of a blind vein in a statutory tunnel probably need not be followed by acts of location on the surface unless a patent is desired,[8] or unless questions of extralateral rights are sought to be simplified by a surface location.[9] Whether a vein or lode has actually been discovered is a question of fact for the jury.[10] Only one location can be based on one discovery.[11]

Discovery as Affected by Parties Between Whom Question Arises.

What is a vein or lode for discovery purposes often depends somewhat upon the situation of the parties between whom the question

[6] Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029. But there can be no location on a discovery within the limits of an existing valid location, GWILLIM v. DONNELLAN, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; except where the new location is made after forfeiture of the old, Russell v. Dufresne, 1 Alaska, 486. See Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673; Fleming v. Daly, 12 Colo. App. 439, 55 Pac. 946; McMillen v. Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 74.

[7] "In Little Gunnell Co. v. Kimber, 1 Morr. Min. Rep. 536, Fed. Cas. No. 8,402, a secret underground working from an old claim was not allowed to hold as a valid basis for relocation of an adjoining claim; but that decision was upon the letter of the Colorado statute concerning relocations, which in terms requires a shaft to be sunk or other new opening to be made, nor had such secret discovery been followed by proper surface notice." Morrison's Mining Rights (13th Ed.) p. 44. See Reiner v. Schroeder, 146 Cal. 411, 80 Pac. 517. An offer to prove a secret underground discovery was properly rejected, where a previous discovery and location thereon by the adverse party were shown. McMillen v. Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 74. A tunnel discovery was held to support surface location in BREWSTER v. SHOEMAKER, 28 Colo. 176, 63 Pac. 309, 53 L. R. A. 793, 89 Am. St. Rep. 188, though the tunnel was not located under the tunnel site act of Congress.

[8] Chapter XIV, §§ 65, 66, infra.

[9] Id.

[10] Columbia Copper Min. Co. v. Duchess Mining, Milling & Smelting Co., 13 Wyo. 244, 79 Pac. 385; Charlton v. Kelly, 2 Alaska, 532. Locators, who recorded a location certificate reciting discovery and sold an interest on the faith of the record, were held estopped to deny that there had been a discovery in McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590. See Eberle v. Carmichael, 8 N. M. 169, 42 Pac. 95. On evidence of a discovery, see Conway v. Hart, 129 Cal. 480, 62 Pac. 44; Ormund v. Granite Mt. Min. Co., 11 Mont. 303, 28 Pac. 289; Davidson v. Bordeaux, 15 Mont. 245, 38 Pac. 1075; Walsh v. Mueller, 16 Mont. 180, 40 Pac. 292.

[11] See McKinstry v. Clark, 4 Mont. 370, 1 Pac. 759; Reynolds v. Pascoe, 24 Utah, 219, 66 Pac. 1064; Reiner v. Schroeder, 146 Cal. 411, 80 Pac. 517; Poplar Creek Consol. Quartz Mine, 16 Land Dec. Dep. Int. 1.

arises. If we put to one side the question of extralateral rights, it seems to be true that "there are four classes of cases where the courts have been called upon to determine what constitutes a lode or vein, within the intent and meaning of different sections of the Revised Statutes: (1) Between miners who have located claims on the same lode. * * * (2) Between placer and lode claimants. * * * (3) Between mineral claimants and parties holding townsite patents to the same ground. (4) Between mineral and agricultural claimants of the same land. The mining laws of the United States were drafted for the purpose of protecting the bona fide locators of mining ground, and at the same time to make necessary provisions as to the rights of agriculturists and claimants of townsite lands. The object of each section and of the whole policy of the entire statute should not be overlooked. The particular character of each case necessarily determines the rights of the respective parties, and must be kept constantly in view, in order to enable the court to arrive at a correct conclusion. What is said in one character of cases may or may not be applicable in the other." [12]

In case (1), supra, very slight evidence of a lode will suffice. As between two conflicting lode claimants the question must be which first discovered such a vein as the ordinary reasonable miner would concede might justify the discoverer in expending time and money to develop. Above all it should be remembered that "it was never intended that the court should weigh scales to determine the value of mineral found as between a prior and subsequent locator of a mining claim on the same lode." [13] Even in such a case, though it is true that "the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to [mineral] lands in a controversy between [mineral] claimants the question is simply which is entitled to priority," yet "there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral or, if it be claimed as placer ground, that it is valuable for such mining." [14]

In case (2), supra, if the attempted lode location preceded the

[12] MIGEON v. MONTANA CENT. R. CO., 77 Fed. 249, 254, 23 C. C. A. 156.

[13] BONNER v. MEIKLE (C. C.) 82 Fed. 697, 703. See Fox v. Myers (Nev.) 86 Pac. 793. The court will view the evidence of the senior locator's prior discovery in the most favorable light possible. AMBERGRIS MIN. CO. v. DAY, 12 Idaho, 108, 85 Pac. 109.

[14] CHRISMAN v. MILLER, 197 U. S. 313, 323, 25 Sup. Ct. 468, 49 L.

placer in point of time, the same test should be applied;[15] but, if the placer preceded the lode, then a "known lode" in the placer should be recognized by the courts only on clear proof that a vein has been discovered which it will pay to work.[16]

What is true in case (2), supra, is also true in case (3), supra.

In case (4), supra, the land must be more valuable for mining than for agriculture before it can be located. Where no homestead entry has been made, less evidence will justify a mining location than will do so where the first claimant seeks to hold it as agricultural land.[17]

42. While a mining claim, based upon a discovery within the limits of an already existing patented or unpatented claim, is void, it is believed that, under a logical extension of the doctrines of Lavagnino v. Uhlig and of Farrell v. Lockhart, an abandonment by the senior locator of the junior locator's discovery will make valid the void junior location, if prior to the abandonment the junior ground has not been included in another valid location.

The discovery must be made within the limits of the claim located, and must be upon unappropriated lands of the United States,[18] and therefore, if it is made within the limits of a prior valid loca-

Ed. 770; Charlton v. Kelly, 156 Fed. 433, 84 C. C. A. 295. Compare, however, Ambergris Min. Co. v. Day, 12 Idaho, 108, 85 Pac. 109.

[15] LANGE v. ROBINSON, 148 Fed. 799, 79 C. C. A. 1.

[16] See Brownfield v. Bier, 15 Mont. 403, 39 Pac. 461. The same test should be applied, it seems, where a placer is located over an abandoned lode claim. McCONAGHY v. DOYLE, 32 Colo. 92, 75 Pac. 419. But a recent case takes the apparently indefensible position that any vein "which would support a location on the public domain is, when known to exist as a clearly ascertained vein, such a vein as is excepted from the operation of the placer patent." Noyes v. Clifford (Mont.) 94 Pac. 842, 848.

[17] Steele v. Tanana Mines R. Co., 148 Fed. 678, 78 C. C. A. 412.

[18] Behrends v. Goldsteen, 1 Alaska, 518; Porter v. Tonopah North Star Tunnel & Development Co. (C. C.) 133 Fed. 756; Michael v. Mills, 22 Colo. 439, 45 Pac. 429; Tartar v. Spring Creek Water & Mining Co., 5 Cal. 395; McPherson v. Julius, 17 S. D. 98, 95 N. W. 428; Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633; Peoria & Colorado Mill. & Min. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915; Shattuck v. Costello, 8 Ariz. 22, 68 Pac. 529; McWilliams v. Winslow, 34 Colo. 341, 82 Pac. 538. See Conway v. Hart, 129 Cal. 480, 62 Pac. 44; Risch v. Wiseman, 36 Or. 484, 59 Pac. 1111, 78 Am. St. Rep. 783. Where discovery and location by a citizen are proven, a prima facie showing that the land was unoccupied mineral land of the United States is made out. Goldberg v. Bruschi, 146 Cal. 708, 81 Pac. 23. But see McWilliams v. Winslow, 34 Colo. 341, 82 Pac. 538; semble contra in adverse suits. Where public land has been granted to private parties with-

tion, it is not a valid discovery. It is not such a discovery unless the lode is within or below a surface that is unoccupied public domain.[19] Indeed, a discovery within the limits of a valid prior location has uniformly been treated as making the junior attempted location absolutely void, even though the senior location be unpatented.[20]

Effect of Lavagnino v. Uhlig and of Farrell v. Lockhart.

It is believed, however, that the prevailing notion is erroneous, and that a location based on a discovery in a prior unpatented claim is voidable merely, not absolutely void. The question to ask is whether, on an application to patent the junior attempted location, protest would be proper. It has been assumed by the courts and mining law writers that a location made on a discovery within the limits of a prior location is void for all purposes, and, if it is, then protest would seem proper. But is it? As against third persons, who make a discovery on unappropriated public domain and validly throw the lines of their location so as to include the ground of this ineffectual location while it remains such, a location based on a discovery within a prior location undoubtedly is void. But if the

out reservations or exceptions, third persons have no right to prospect thereon. Francoeur v. Newhouse (C. C.) 40 Fed. 618; Henshaw v. Clark, 14 Cal. 460. See Pacific Coast Min. & Mill. Co. v. Spargo (C. C.) 16 Fed. 348. Where a judgment was entered that neither of the parties to the action had any possessory right in certain claims, and the plaintiff in the action at once relocated them and did the required assessment work, a finding that the relocations were made on unoccupied public land was upheld in Lauman v. Hoofer, 37 Wash. 382, 79 Pac. 953.

[19] TRAPHAGEN v. KIRK, 30 Mont. 562, 77 Pac. 58, and cases cited; Michael v. Mills, 22 Colo. 439, 45 Pac. 429. See Girard v. Carson, 22 Colo. 345, 44 Pac. 508; Heil v. Martin (Tex. Civ. App.) 70 S. W. 430; Gleeson v. Martin White Min. Co., 13 Nev. 442. For case on the validity of location on the dip of a vein, see note 5, supra.

[20] LOCKHART v. FARRELL, 31 Utah, 155, 86 Pac. 1077; Atkins v. Hendree, 1 Idaho, 95; Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69 (patented); Tuolumne Consol. Min. Co. v. Maier, 134 Cal. 583, 66 Pac. 863; Sierra Blanca Mining & Reduction Co. v. Winchell, 35 Colo. 13, 83 Pac. 628; Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223; Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054; Hoban v. Boyer, 37 Colo. 185, 85 Pac. 837; Watson v. Mayberry, 15 Utah, 265, 49 Pac. 479; Russell v. Dufresne, 1 Alaska, 486; Fisher v. Seymour, 23 Colo. 542, 49 Pac. 30; Molina v. Luce (Ariz.) 76 Pac. 602. This is so, even though the senior and junior claims are both owned by the same locator, Reynolds v. Pascoe, 24 Utah, 219, 66 Pac. 1064; Erwin v. Perego, 93 Fed. 608, 35 C. C. A. 482; and though the second location was made on the suggestion of one of the two locators of the first, Russell v. Dufresne, 1 Alaska, 486. A location based on a discovery on the dip of a vein of which the apex has already been located is void. Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Min. Co., 33 Land Dec. Dep. Int. 142.

senior location is abandoned, so that the discovery place becomes open to location and the rights of third persons have not intervened, will not the location become good, just as it would to the part not in conflict if a discovery had been made outside the conflict area? If so—and a logical extension of the doctrine announced in Lavagnino v. Uhlig,[21] that on the abandonment of the senior location the conflict area inures, without more, to the junior location,* seems to require us to say that it does[22]—then only an adverse instead of a protest, will suffice to keep the junior location from getting a patent; and such is the land department rule.[23] Of course, in Lavagnino v. Uhlig, so far as the published opinion shows, the junior location was at the start good against all the world except as to the conflict area, while in the situation being discussed it is good at the start against nobody;[24] but, since a location good against nobody for want of any discovery may be perfected by a discovery anywhere within the claim limits,[25] just as in some states a claim which has allowed a junior claim to patent its discovery may be,[26] why may it not also be perfected as against third persons by the senior locator abandoning the discovery area or failing to adverse, and so the discovery finally turning out to be within the claim limits? While the latest expression of the United States Supreme Court is impliedly against the doctrine here contended for,[27] it is believed that, prior to the attaching of intervening

[21] 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119.

* The case of Moorhead v. Erie Min. & Mill. Co. (Colo.) 96 Pac. 253, is contra to Lavagnino v. Uhlig, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119, and therefore cannot be supported until that case is expressly overruled The Colorado opinion does not even mention Lavagnino v. Uhlig.

[22] But see, contra, LOCKHART v. FARRELL, 31 Utah, 155, 86 Pac. 1077. See, also, Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054.

[23] Gowdy v. Kismet Gold Min. Co., 22 Land Dec. Dep. Int. 624; American Consolidated Mining & Milling Co. v. De Witt, 26 Land Dec. Dep. Int. 580; MUTUAL MINING & MILLING CO. v. CURRENCY CO., 27 Land Dec. Dep. Int. 191; Burnside v. O'Connor, 30 Land Dec. Dep. Int. 67.

[24] From the brief of counsel for plaintiff in error in FARRELL v. LOCKHART, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——, it appears that the record in LAVAGNINO v. UHLIG showed a location based on a discovery in a prior claim.

[25] CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL, MINING & TRANSPORTATION CO., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501; SILVER CITY GOLD & SILVER MIN. CO. v. LOWRY, 19 Utah, 334, 57 Pac. 11; TONOPAH & S. L. MIN. CO. v. TONOPAH MIN. CO. (C. C.) 125 Fed. 408; Whiting v. Straup (Wyo.) 95 Pac. 849. GOLDEN TERRA MIN. CO. v. MAHLER, 4 Morr. M. Rep. 390. And see cases in Note 51, infra.

[26] TREASURY TUNNEL, MINING & REDUCTION CO. v. BOSS, 32 Colo. 27, 74 Pac. 888, 105 Am. St. Rep. 60.

[27] FARRELL v. LOCKHART, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed.

rights of third parties, the supposed void location may be thus perfected.† In one view it is giving a retroactive effect to the abandonment; but in the more exact view it is allowing the junior claim, which was ineffective because of no proper discovery, to become effective by the acquisition of such a discovery through the senior locator's abandonment of the discovery ground. The doctrine contended for protects the junior claim only when its locator is diligent in preserving it,‡ and does so only against subsequent parties who knowingly seek to get a technical advantage over him, and it is difficult to see why he is not entitled to that protection. Until the federal Supreme Court actually decides the point, however, a prudent miner who has such a precarious location will promptly make a complete relocation to include the abandoned discovery place.[28]

43. The discovery must be discriminated from the discovery shaft, which in some states must disclose a vein.

The discovery must be distinguished from the discovery shaft required by state statute as part of the location. The discovery shaft is one of the acts of location which normally follows discovery. As Messrs. Morrison and De Soto point out, a drill hole will suffice for discovery, but, of course, will not answer for a discovery shaft.[29] Yet in Colorado a discovery and a discovery shaft are very closely connected, because the state statute requires the discovery shaft "to show a well-defined crevice," [30] and, as "crevice" there means "mineral-bearing vein," [31] that is held to make a discovery in the discovery shaft essential to a valid location.[32] In other states a discovery other

——. For cases of premature relocation involving a similar question, see chapter XVII, § 95b.

† Compare Tonopah & S. L. Min. Co. v. Tonopah Min. Co. of Nevada (C. C.) 125 Fed. 408, where the second claim was validated both because the senior locator changed the lines of the claim so as to give the junior claim its original discovery, and because new discoveries were made in the junior claim. To the same effect, see Golden Link Mining, Leasing & Bonding Co., 29 Land Dec. Dep. Int. 384.

‡ Adams v. Polglase, 32 Land Dec. Dep. Int. 477, 33 Land Dec. Dep. Int. 30.

[28] That relocation by amendment will not do was held in Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054.

[29] Morrison's Mining Rights (13th Ed.) p. 33.

[30] Mills' Ann. St. Colo. § 3152.

[31] Beals v. Cone, 27 Colo. 473, 62 Pac. 958, 83 Am. St. Rep. 92.

[32] McMILLEN v. FERRUM MIN. CO., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64; Beals v. Cone, 27 Colo. 473, 62 Pac. 958, 83 Am. St. Rep. 92. See Van Zandt v. Argentine Min. Co. (C. C.) 8 Fed. 725, 2 McCrary, 159;

than in the discovery shaft is sufficient.[33] But even in Colorado one need not make the first place of work the discovery shaft, but may try one place after another until he makes a discovery, and then put the shaft there.[34]

PEDIS POSSESSIO.

44. Pending a discovery by anybody, the actual possession of the prior prospector will be protected to the extent needed to give him working room and to prevent probable breaches of the peace; but this pedis possessio must yield to an actual location, based on a valid discovery, and made peaceably and openly. There is an apparent conflict in the cases on the latter point, however.

But the difficult question is how far Erhardt v. Boaro extends, for that case seems to say that one who has discovered sufficient "float" to justify a reasonable belief in the proximity of a vein, and who prosecutes diligently discovery work which finally uncovers the vein, will have priority over one who makes an intermediate discovery. It is believed, however, that Erhardt v. Boaro will ultimately be construed simply to permit a discovery by a prior prospector, who acts diligently and in good faith, to be predicated on very slight evidence.

A difficult question in regard to discovery is that of how long one's possession will be protected in the making of a discovery. That question is involved in difficulty because of the established doctrine that a valid location cannot be made by one who forcibly dispossesses another to do it, and because of some definitions of a lode which make the word mean anything which will lead a miner to ore. In Crossman v. Pendery, Mr. Justice Miller said: "A prospector on the public mineral domain may protect himself in the possession of his pedis possessionis while he is searching for mineral. His possession

Terrible Min. Co. v. Argentine Min. Co. (C. C.) 89 Fed. 583; Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140.

[33] HARRINGTON v. CHAMBERS, 3 Utah, 94, 1 Pac. 362; Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522; Tonopah & S. L. Min. Co. v. Tonopah Min. Co. (C. C.) 125 Fed. 408; O'Donnell v. Glenn, 8 Mont. 284, 19 Pac. 302. See McShane v. Kenkle, 18 Mont. 208, 44 Pac. 979, 33 L. R. A. 851, 56 Am. St. Rep. 579.

[34] TERRIBLE MIN. CO. v. ARGENTINE MIN. CO. (C. C.) 89 Fed. 583; Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140. If the discovery is made in the discovery shaft before the rights of others intervene, the location will be upheld. McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652.

so held is good as a possessory title against all the world, except the government of the United States." [35]

But, though this dictum makes the whole ground staked out as one claim pedis possessio, that certainly is too broad for our notions to-day.[36] "Pedis possessio" means actual possession, and pending a discovery by anybody the actual possession of the prior arrival will be protected to the extent needed to give him room for work and to prevent probable breaches of the peace.[37] He will also be protected against mere trespassers.[38] But, while the pedis possessio is thus protected, it must yield to an actual location on a valid discovery made by one who has located peaceably and neither clandestinely nor through fraudulent purposes.[39] "It is true," said the court in

[35] CROSSMAN v. PENDERY (C. C.) 8 Fed. 693. See Cowell v. Lammers (C. C.) 21 Fed. 200. For rule prior to 1872, see Rush v. French, 1 Ariz. 99, 25 Pac. 816.

[36] Becker v. Pugh, 9 Colo. 589, 13 Pac. 906. See Gemmell v. Swain, 28 Mont. 331, 72 Pac. 662, 98 Am. St. Rep. 570.

[37] FIELD v. GREY, 1 Ariz. 404, 25 Pac. 793; Whiting v. Straup (Wyo.) 95 Pac. 849. See Meydenbauer v. Stevens (D. C.) 78 Fed. 787; Weese v. Barker, 7 Colo. 178, 2 Pac. 919.

[38] Brandt v. Wheaton, 52 Cal. 430; Aurora Hill Consol. Min. Co. v. Eighty-Five Min. Co. (C. C.) 34 Fed. 515; Bulette v. Dodge, 2 Alaska, 427; Whiting v. Straup (Wyo.) 95 Pac. 849; Phillips v. Brill (Wyo.) 95 Pac. 856. See Malecek v. Tinsley, 73 Ark. 610, 85 S. W. 81; Ware v. White, 81 Ark. 220, 108 S. W. 831.

[39] BELK v. MEAGHER, 3 Mont. 65, 104 U. S. 279, 26 L. Ed. 735; Hopkins v. Noyes, 4 Mont. 550, 2 Pac. 280; Noyes v. Black, 4 Mont. 527, 2 Pac. 769; Whiting v. Straup (Wyo.) 95 Pac. 849; Thallmann v. Thomas, 111 Fed. 277, 49 C. C. A. 317; Malone v. Jackson, 137 Fed. 878, 70 C. C. A. 216; COPPER GLOBE MIN. CO. v. ALLMAN, 23 Utah, 410, 64 Pac. 1019; Charlton v. Kelly, 2 Alaska, 532. See Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197. So a peaceable relocation for failure to do annual labor will be upheld, although the claim at the time of the relocation is occupied by the original locator, if the latter have not resumed work in time. DU PRAT v. JAMES, 65 Cal. 555, 4 Pac. 562. Compare Walsh v. Henry, 38 Colo. 393, 88 Pac. 449. But there are cases which hold that no location can be made within the lines of a claim in the actual possession of another, no matter how defective the location invaded may be. Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66; Phenix Mill. & Min. Co. v. Lawrence, 55 Cal. 143; Weese v. Barker, 7 Colo. 178, 2 Pac. 919; Rush v. French, 1 Ariz. 99, 25 Pac. 816; Craig v. Thompson, 10 Colo. 517, 16 Pac. 24. Compare Omar v. Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246; Phillips v. Smith (Ariz.) 95 Pac. 91; Ware v. White, 81 Ark. 220, 108 S. W. 831; New England & Coalinga Oil Co. v. Congdon (Cal.) 92 Pac. 180. A complete answer to those cases would seem to be found in the following passage:

"A valid claim to unappropriated public land cannot be instituted while it is in the possession of another, who has the right to its possession under an earlier lawful location. Nor can such a claim be initiated by forcible or fraudulent entry upon land in possession of one who has no right

Nevada Sierra Oil Co. v. Home Oil Co., "that upon mineral land of the United States upon which there is no valid existing location any competent locator may enter, even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no right upon any government land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry thereon. Such entry must be open and aboveboard, and made in good faith. One who is in the actual possession of a mining claim, working it for the mineral it contains and claiming it under the laws of the United States, whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely, or otherwise fraudulently intruded upon or ousted, while he is asleep in his cabin or temporarily absent from his claim." [40]

If the location is peaceable, it is hard to see why the fact that it is clandestine or accomplished by strategy should make it objectionable; [41] but the theory seems to be that such a course will naturally lead to a breach of the peace, and so should be discountenanced. Where several competing locators are in possession by common consent, the first one to make a discovery and to follow it up in due time with the acts of location gets the claim.**

Effect of Erhardt v. Boaro.

The real difficulty, however, in regard to the efficacy of a prospector's possession prior to discovery is created by Erhardt v. Boaro,[42] which says, in effect, that one who has discovered sufficient "float" to justify a reasonable belief in the proximity of a vein, and who

either to the possession or to the title. But every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or to hold the possession. Any other rule would make the wrongful occupation of public land by a trespasser superior in right to a lawful entry of it under the acts of Congress by a competent locator." THALLMANN v. THOMAS, 111 Fed. 277–279, 49 C. C A. 317.

[40] NEVADA SIERRA OIL CO. v. HOME OIL CO. (C. C.) 98 Fed. 673, 680. See Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Traphagen v. Kirk, 30 Mont. 562, 77 Pac. 58; Clipper Min. Co. v. Eli Mining & Land Co., 194 U. S. 220, 24 Sup. Ct. 632, 48 L. Ed. 944. Compare Phillips v. Smith (Ariz.) 95 Pac. 91.

[41] A clandestine completion of part of the acts of location by the first discoverer was upheld in ERHARDT v. BOARO, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113.

** Johanson v. White (C. C. A.) 160 Fed. 901.

[42] Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113.

prosecutes diligently discovery work which finally uncovers the vein, will be protected in his location as against one who has made a discovery pending the first prospector's uncovering of the vein.[43] In view of the express wording of section 2320, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1424), it seems certain that this doctrine properly applies only to those cases where the one having possessio pedis can be said to have actually discovered a vein at the time the second man tries to locate.[44] In Erhardt v. Boaro, however, the court said: "And whenever preliminary work is required to define and describe the claim located, the first discoverer must be protected in the possession of the claim until sufficient excavations and development can be made, so as to disclose whether a vein or deposit of such richness exists as to justify work to extract the metal." And the court added: "This allowance of time for the development of the character of the lode or vein does not, as intimated by counsel, give encouragement to mere speculative locations. * * * There must be something more than a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence. * * * It would be difficult to lay down any rules by which to distinguish a speculative location from one made in good faith, with a purpose to make excavations and ascertain the character of the lode or vein, so as to determine whether it will justify the expenditures required to extract the metal; but a jury from the vicinity of the claim will seldom err in their conclusions on the subject." [45]

It is believed that the above language will be qualified so as to compel a discovery before protection is given beyond the mere pedis possessio, but yet to permit a discovery to be predicated upon very slight evidence, "because," as the court in Bonner v. Meikle points out, "it never was intended that the courts should weigh scales to determine the value of the mineral found [or the extent of the find]

[43] Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113. See Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019; Redden v. Harlan, 2 Alaska, 402. Compare Biglow v. Conradt (C. C. A.) 159 Fed. 868.

[44] Compare Waterloo Min. Co. v. Doe (C. C.) 56 Fed. 685.

[45] ERHARDT v. BOARO, 113 U. S. 535, 5 Sup. Ct. 560, 28 L. Ed. 1113. Of course, the "float" found actually belongs to the finder. One finding and taking possession of gold on public land may recover it from any one taking it from him. Burns v. Clark, 133 Cal. 634, 66 Pac. 12, 85 Am. St. Rep. 233; Burns v. Schoenfeld, 1 Cal. App. 121, 81 Pac. 713. See Sullivan v. Schultz, 22 Mont. 541, 57 Pac. 279; Robertson v. Smith, 1 Mont. 410. But see Brown v. 249 & 256 Quartz Min. Co., 15 Cal. 152, 76 Am. Dec. 468.

as between a prior and subsequent locator of a mining claim on the same lode." [46] Moreover, despite the dictum of Miller, J., in Crossman v. Pendery,[47] it seems that the possessio pedis of a prospector "could not be enlarged to include the entire 20-acre [placer] tract, or [even] the whole amount of ground which he might have claimed under one or more quartz locations," because until discovery "the prospector's rights are confined to the ground in his actual possession." [48]

THE RELATION BETWEEN DISCOVERY AND LOCATION.

45. Discovery should precede the acts of location, but it often follows them. In the latter case, if no rights of third persons intervene pending discovery, the claim is as valid as if discovery had preceded the acts of location. In any case the location dates only from the discovery.

The local mining codes allow varying times within which to perfect the location after discovery, and mining custom and common prudence both call for the posting of a dated notice of discovery to evidence to the world the fact and time of discovery. Except in Oregon, no limit seems to be placed on the number of lode locations, each based on a valid discovery, that may be made by one person.

After discovery the states allow varying times for the completion of location. Immediately upon finding the vein, the discoverer should place at the point of discovery a notice that he has made a discovery, and in it should claim the statutory time to perfect location. Unless he does this, or otherwise continuously indicates to the world his claim, he runs the risk of being held to have abandoned his discovery. In

[46] BONNER v. MEIKLE (C. C.) 82 Fed. 697, 703. Compare Burke v. McDonald, 3 Idaho, 296, 29 Pac. 98, where as between two lode claimants the court approved the requested instruction that "a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore," and held that the lower court erred in substituting the words "justified in spending" for the words "willing to spend."

[47] 8 Fed. (C. C.) 693.

[48] GEMMELL v. SWAIN, 28 Mont. 331, 72 Pac. 662, 663, 98 Am. St. Rep. 570; Lacey v. Woodward, 5 N. M. 583, 25 Pac. 785; Zollars v. Evans (C. C.) 5 Fed. 172. See Hess v. Winder, 30 Cal. 349; Hamilton v. Huson, 21 Mont. 9, 53 Pac. 101. See, also, Burns v. Clark, 133 Cal. 634, 66 Pac. 12, 85 Am. St. Rep. 233, where a similar rule was applied in the case of a mill site. But see Charlton v. Kelly, 2 Alaska, 532; Bulette v. Dodge, 2 Alaska, 427. Compare Lorenz v. Waldron, 96 Cal. 243, 31 Pac. 54, where the claimant of a right of way for a ditch with vertical and lateral support for it was not allowed to object to the location of a mining claim subject to the right of way.

Idaho, by statute, this preliminary notice is required. Then in some states the discoverer has 60 days in which to sink a discovery shaft, in others 90, and a reasonable time or a fixed statutory time in which to stake boundaries, etc. Whatever the time allowed, the party who makes the first discovery, and who within the time allowed follows it up with the remaining acts necessary to a valid location, will prevail over a subsequent discoverer who is more expeditious in completing the required acts of location.[49]

Discovery after Location.

Discovery should precede the acts of location, as the federal statute expressly provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."[50] But discovery often follows, instead of preceding, the acts of location, and, if no rights of third parties have been acquired pending discovery, the location is made good by the subsequent discovery.[51] In any event the location dates from discovery.[52] The

[49] PELICAN & DIVES MIN. CO. v. SNODGRASS, 9 Colo. 339, 12 Pac. 206; Barnette v. Freeman, 2 Alaska, 286. See Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401; Sierra Blanca Mining & Reduction Co. v. Winchell, 35 Colo. 13, 83 Pac. 628.

[50] Rev. St. U. S. § 2320 (U. S. Comp. St. 1901, p. 1424).

[51] CREEDE & CRIPPLE CREEK MIN. & MILL. CO. v. UINTA TUNNEL, MINING & TRANSP. CO., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522, 6 Sawy. 299; Jupiter Min. Co. v. Bodie Consol Min. Co. (C. C.) 11 Fed. 666, 7 Sawy. 96; SHARKEY v. CANDIANI, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791; Silver City Gold & Silver Min. Co. v. Lowry, 19 Utah, 334, 57 Pac. 11; Tonopah & S. L. Min. Co. v. Tonopah Min. Co. (C. C.) 125 Fed. 408; Brewster v. Shoemaker, 28 Colo. 176, 63 Pac. 309, 53 L. R. A. 793, 89 Am. St. Rep. 188; Fisher v. Seymour, 23 Colo. 542, 49 Pac. 30; Whiting v. Straup (Wyo.) 95 Pac. 849. See Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673; Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; La Grande Inv. Co. v. Shaw, 44 Or. 416, 72 Pac. 795, 74 Pac. 919. The case of Upton v. Larkin, 5 Mont. 600, 6 Pac. 66, 7 Mont. 449, 17 Pac. 728, contra, is clearly wrong. A discovery will not relate back to cut out intervening rights. BEALS v. CONE, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92. See Tuolumne Consol. Min. Co. v. Maier, 134 Cal. 583, 66 Pac. 863. In Merced Oil Mining Co. v. Patterson (Cal.) 96 Pac. 90, the extreme position is taken that where 40 acres of placer claim of 160 acres is granted away before discovery, and the grantee later makes a discovery on the 40 acres granted, such discovery will not make the location of the other 120 acres good unless at the time of the grant of the 40 acres, and as part of the consideration for it, there is an express agreement that the discovery work shall be for the benefit of the whole claim. It is believed that this case is unsound, and that a discovery on either the granted or the retained part of

[52] HEALEY v. RUPP, 37 Colo. 25, 86 Pac. 1015; Redden v. Harlan, 2 Alaska, 402.

federal statutory provision means nothing more than that no location shall be considered complete until there has been a discovery.[53] No presumption of a discovery arises from the fact that acts of location, such as marking boundaries, record, etc., have been performed,[54] and the burden of proving a prior discovery is upon the one relying upon such discovery.[55]

Number of Locations for Each Discoverer.

For each location a distinct discovery is requisite;[56] but, except in Oregon, no limit seems anywhere to be put to the number of lode locations which may be made on valid discoveries by any one person.[57] The annual labor requirement attached to each location is regarded by the United States as full protection to it against objectionable monopoly of the public mineral domain. Even in Oregon, if the statute limiting the number of locations which one person may make on a given vein[58] be valid, the restriction on the number of locations is imposed for the benefit of the United States, and, as in the case of locations by aliens hereafter discussed, it would seem that on principle no one but the United States, and then only in direct proceedings brought for the purpose, could raise the objection of the excessive number of locations.[59]

the claim should make good the whole claim so long as no intervening rights have been acquired by third parties.

[53] CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501. So interpreted it is mandatory. Ledoux v. Forester (C. C.) 94 Fed. 600. See Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029; Waterloo Min. Co. v. Doe (C. C.) 56 Fed. 685; Tuolumne Consol. Min. Co. v. Maier, 134 Cal. 583, 66 Pac. 863. Intervening vested rights cannot be cut out by subsequent discovery. BEALS v. CONE, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92. Lack of discovery may be shown in an action to recover back the purchase price of the claim. Whitney v. Haskell, 216 Pa. 622, 66 Atl. 101.

[54] SMITH v. NEWELL (C. C.) 86 Fed. 56, 60; Fox v. Myers (Nev.) 86 Pac. 793. But see infra chapter XII, p. 220.

[55] Sands v. Cruikshank, 15 S. D. 142, 87 N. W. 589.

[56] See note 11, supra. Compare the discussion of whether one discovery shaft will serve for two contiguous lode locations, infra, chapter XII, § 54.

[57] There is no limitation on the number of mining claims which one may acquire by purchase. Carson City Gold & Silver Min. Co. v. North Star Min. Co. (C. C.) 73 Fed. 597; Poire v. Wells, 6 Colo. 406; Poire v. Leadville Improvement Co., 6 Colo. 413. See English v. Johnson, 17 Cal. 117, 76 Am. Dec. 574. A miner's rule restricting the number of claims a person may buy is void. Prosser v. Parks, 18 Cal. 47.

[58] B. & C. Comp. Or. § 3974.

[59] See Aliens, chapter XI, § 47, infra.

THE DISCOVERY OF PLACER CLAIMS.

46. Discovery is as essential to the validity of placer claims as to that of lode claims. There must be a discovery for each claim; but, where a location of 160 acres as a placer is made by an association of persons, one discovery will hold the whole 160 acres, subject to inquiry by the land department into the mineral character of the different included acres.

In the case of placers, as in the case of lodes, there must be a discovery, and, as in the case of lode locations, the discovery may follow location.[60] Indications of mineral will not do in the case of placers, any more than "float" will in the case of lode claims.[61] As between two competing locators, the first to make a discovery will be protected, unless he has done something to estop him from claiming the benefit of the discovery.[62] "Without a valid discovery of mineral within the limits of the claim, there could be no valid location of the ground as a placer mining claim. * * * Whether or not the finding of seepages of oil and its residuum upon a given piece of public land and upon the lands adjoining it on different sides, and the finding thereon of shale and oil-bearing sand rock of a character similar to that in which petroleum in large and paying quantities had been found and developed in the vicinity, which veins and strata extend to and across the ground in question [amounts to a discovery], manifestly depends upon the application and true construction of the laws of the United States." [63]

While the court in the case just quoted from held that a bill which pleaded a discovery as above was good on demurrer, the case of Miller v. Chrisman [64] shows what is really needed in the way of discovery. With reference to the discovery of oil, the California court pointed out that the testimony was "that Barieau had walked over the land at the time he posted his notice, and had discovered 'indications' of petroleum. Specifically he says that he saw a spring, and 'the oil comes out and floats over the water in the summer time, when it is

[60] WEED v. SNOOK, 144 Cal. 439, 77 Pac. 1023; Barnette v. Freeman, 2 Alaska, 286; New England & Coalinga Oil Co. v. Congdon (Cal.) 92 Pac. 180; Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936.

[61] See Steele v. Tanana Mines R. Co., 148 Fed. 678, 78 C. C. A. 412; Charlton v. Kelly, 2 Alaska, 532.

[62] Thompson v. Burk, 2 Alaska, 249.

[63] NEVADA SIERRA OIL CO. v. MILLER (C. C.) 97 Fed. 681, 688, 689.

[64] MILLER v. CHRISMAN, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63, affirmed Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770.

hot. In June, 1895, there was a little water with the oil and a little oil with the water coming out. It was dripping over a rock about two feet high. There was no pool. It was just dripping; a little water and oil, not much water.' This is all of the 'discovery' which it is even pretended was made under the Barieau location, and we think it clear that such testimony does not establish a discovery within the meaning of the law. To constitute a discovery, the law requires something more than conjecture, hope, or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this, there may be other surface indications, such as 'seepage' of oil. All these things combined may be sufficient to justify the expectation and hope that, upon driving a well to sufficient depth, oil may be discovered; but one and all they do not, in and of themselves, amount to a discovery. * * * While, perhaps, it would be stating it too broadly to say that no case can be imagined where a surface discovery may be made of oil sufficient to fill the requirements of the statute, yet it is certainly true that no such case has ever been presented to our attention, and that in the nature of things such a case will seldom, if ever, occur." [65]

In the same case the Supreme Court of the United States added: "It is true that, when the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that, where land is sought to be taken out of the category of agricultural lands, the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority.[66] That, it is true, is the

[65] Miller v. Chrisman, 140 Cal. 440, 445, 446, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63. See Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936. "It is the common experience of persons of ordinary intelligence that petroleum in valuable quantities is not found on the surface of the ground nor is it found in paying quantities seeping from the earth. Valuable oil is found by drilling or boring into the interior of the earth, and either flows or is pumped to the surface; and, until some body or vein has been discovered from which the oil can be brought to the surface, it cannot be considered of sufficient importance to warrant a location under the mineral laws." Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936, 940.

[66] See Bevis v. Markland (C. C.) 130 Fed. 226, where a placer claimant failed to recover mineral land from a prior lode claimant, because the placer claimant "failed to prove by a preponderance of the evidence, or any affirmative evidence, that there is not within the disputed ground a vein of metallic ore such as may be located only as a vein or lode claim."

case before us. But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or, if it be claimed as placer ground, that it is valuable for such mining. Giving full weight to the testimony of Barieau, we should not be justified, even in a case coming from a federal court, in overthrowing the finding that he made no discovery. There was not enough in what he claims to have seen to have justified a prudent person in the expenditure of money and labor in exploitation for petroleum. It merely suggested a possibility that the ground contained oil sufficient to make it 'chiefly valuable therefor.' If that be true were the case one coming from a federal court, a fortiori must it be true when the case comes to us from a state court, whose findings of fact we have so often held to be conclusive." [67]

It is not necessary to a discovery, however, that it should be shown with reasonable clearness that for the labor and capital expended in working the placer it would yield a reasonable profit. [68]

Pedis Possessio.

With reference to placers, and particularly with reference to oil and gas locations, the necessity of protecting a prospector in his possession prior to actual discovery is greater even than in the case of lode claims.[69] In Chrisman v. Miller it was stated by the California court that one who has in good faith fulfilled the various acts of location of lands as oil lands, but has not yet made a discovery, and remains in possession, "and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession." [70] Upon that as a basis a California commissioners' decision says: "And we regard the law as settled that while a locator, who has made his location, is engaged in good faith in prospecting it for minerals, and complies with the laws as to expenditures, and is in possession, the land is not open for location by others. In case of petroleum lands the discovery cannot, in most cases, be made except by considerable labor and expense in sinking wells. In making the location the locator necessarily takes into consideration surface indications, geological formations,

[67] CHRISMAN v. MILLER, 197 U. S. 313, 323, 25 Sup. Ct. 468, 49 L. Ed. 770.

[68] Cascaden v. Bartolis, 146 Fed. 739, 77 C. C. A. 496.

[69] See Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936. Merely placing a tent, a few tools, and a small supply of provisions upon a placer mining claim does not of itself constitute taking actual possession thereof. Acts of mining are necessary. Charlton v. Kelly, 2 Alaska, 532.

[70] MILLER v. CHRISMAN, 140 Cal. 440, 447, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Phillips v. Brill (Wyo.) 95 Pac. 856.

proximity to known mines or wells producing oil. He must make his location in good faith, and use proper diligence to make discovery of oil. If he does not do so, he will lose his rights under his location as to parties who may afterwards in good faith acquire rights. But where the locator is in possession under his location, and is actively at work, through his lessees or otherwise, and expending money for the purpose of discovering oil, his rights cannot be forfeited to third parties, who attempt to make locations under such circumstances. The law must be given a liberal and equitable interpretation, with a view of protecting prior rights acquired in good faith." [71]

But while very considerable labor and expense is necessarily expended in making an oil or gas discovery, and in consequence the oil or gas prospector should be dealt with liberally on the question of when a discovery has been made, and should be given as large as possible a pedis possessio, it still remains true that the first discoverer who can locate peaceably must be given priority over prior prospectors. [72] What we found to be true of lode claims in this regard must also be true of placers. Moreover, it is true in placer mining, as in lode mining, that a discovery to sustain a location may be made, although what is discovered will not pay to work at the start.[73] The line must be drawn between indications disclosing merely a possibility of oil, where, of course, nothing has really been discovered, and the ascertained presence of oil in a situation to justify a prudent person in the expenditure of money and labor in exploitation for petroleum.[74] Whether a discovery has been made in a given case is, of course, a question of fact under all the circumstances of that case. It is not possible, however, to locate as placer any lands which are chiefly valuable for ores found in them in lodes.[75]

[71] WEED v. SNOOK, 144 Cal. 439, 77 Pac. 1023, 1026; Hanson v. Craig (C. C. A.) 161 Fed. 861. See New England & Coalinga Oil Co. v. Congdon (Cal.) 92 Pac. 180.

[72] Whiting v. Straup (Wyo.) 95 Pac. 849; Redden v. Harlan, 2 Alaska, 402. But see Hanson v. Craig (C. C. A.) 161 Fed. 861. Prior to a discovery by the locator, others may by legal means acquire title from the United States. Olive Land & Development Co. v. Olmstead (C. C.) 103 Fed. 568. But in Biglow v. Conradt (C. C. A.) 159 Fed. 868, an extension of boundaries not based on a discovery in the added ground was not allowed to cover land embraced in an attempted location in the possession of locators who about two months later made their discovery.

[73] See NEVADA SIERRA OIL CO. v. HOME OIL CO. (C. C.) 98 Fed. 673, 676; Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401.

[74] CHRISMAN v. MILLER, 197 U. S. 313, 323, 25 Sup. Ct. 468, 49 L. Ed. 770; New England & Coalinga Oil Co. v. Congdon (Cal.) 92 Pac. 180.

[75] Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 576, 91 Am. St. Rep. 87. See Bevis v. Markland (C. C.) 130 Fed. 226.

Number of Acres for One Discovery.

The question of discovery in the case of placers has been complicated by a question as to the necessity of separate discoveries on each 20 acres of a joint location of 160 acres. In placers the unit of a placer location is 20 acres, "and two or more persons, or association of persons, having contiguous claims of any size, * * * may make joint entry thereof; but no location of a placer claim * * * shall exceed one hundred and sixty acres for any one person or association of persons." [76] The land department for a long time held that, where an association of eight persons located 160 acres as a placer, there must be a separate discovery for each 20 acres; [77] but that ruling has been reversed, and one discovery is now enough for one joint location.[78] The land department still insists, however, that "while a single discovery is sufficient to authorize the location of a placer claim, and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify the patenting thereof, such single discovery does not conclusively establish the mineral character of all the land included in the claim, so as to preclude further inquiry in respect thereto." [79]

Number of Locations for Each Discoverer.

Except where special provision, such as exists in the case of coal lands, is made by Congress, as many placer claims may be located by one individual as separate discoveries will warrant.

[76] Rev. St. U. S. § 2330 (U. S. Comp. St. 1901, p. 1432).

[77] Ferrell v. Hoge, 18 Land Dec. Dep. Int. 81; Union Oil Co., 23 Land Dec. Dep. Int. 222.

[78] Union Oil Co. (on review) 25 Land Dec. Dep. Int. 351; Terrell v. Hoge, 27 Land Dec. Dep. Int. 129; Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am St. Rep. 63; Whiting v. Straup (Wyo.) 95 Pac. 849.

[79] Ferrell v. Hoge (on review) 29 Land Dec. Dep. Int. 12, 15. A discovery and location on 80 acres will not justify taking in another and adjoining 80 acres as a consolidated claim of 160 acres. Weed v. Snook, 144 Cal. 439, 77 Pac. 1023.

CHAPTER XI.

WHO MAY AND WHO MAY NOT LOCATE MINING CLAIMS.

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." Rev. St. U. S. § 2319 (U. S. Comp. St. 1901, p. 1424).

Before we take up the acts of location, it is desirable to inquire who may perform those acts. Anybody may make a discovery, but only citizens of the United States and those who have declared their intention to be such are expressly authorized to locate mining claims.[1] We shall therefore take up first the question of location by an alien, and then discuss a location by a land office employé, by a corporation, by a minor, and by an agent.

ALIENS.

47. While aliens are not authorized to locate mining claims, an alien's location may be questioned only in an adverse suit where an alien is applying for patent, or in direct proceedings brought by the United States while the alien still owns the claim. The question of citizenship is an issue in an adverse suit only because the United States is a silent party to the suit, and the alien may make his location valid ab initio by taking out his first naturalization papers after suit is commenced.

Effect of Location by an Alien.

Whatever may have been the intention of the framers of the act of 1872 (Act May 10, 1872, c. 152, § 3, 17 Stat. 91 [U. S. Comp.

[1] Rev. St. U. S. § 2319 (U. S. Comp. St. 1901, p. 1424). That certain Filipinos may now be naturalized, see opinion, 37 Land Dec. Dep. Int. (advance sheets) 86. Married women who are citizens may, of course, locate mining claims.

St. 1901, p. 1425]), with reference to the point, it is now well settled that a location by an alien or the transfer of an existing location to him is valid except against direct attack by the government while the alien still owns the land, or except when questioned in an adverse suit where the alien is applying for patent or is adversing.[2] Moreover, if pending the trial of the adverse suit the alien takes out his first naturalization papers, his location becomes valid ab initio.[3] Except in adverse suits, and except in direct proceedings brought by the United States government, the citizenship of the parties need neither be alleged nor proved,[4] unless, as in the case of the federal courts, such allegation and proof are needed to give the court jurisdiction. It seems fair to say that even in adverse suits a presumption exists that a resident locator is a citizen.[5] In any event, the citi-

[2] McKINLEY CREEK MINING CO. v. ALASKA UNITED MIN. CO., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331; TORNANSES v. MELSING, 109 Fed. 710, 47 C. C. A. 596; Stewart v. Gold & Copper Co., 29 Utah, 443, 82 Pac. 475, 110 Am. St. Rep. 719; BILLINGS v. ASPEN MINING & SMELTING CO., 51 Fed. 338, 2 C. C. A. 252; Id., 52 Fed. 250, 3 C. C. A. 69; LONE JACK MINING CO. v. MEGGINSON, 82 Fed. 89, 27 C. C. A. 63; Providence Gold Mining Co. v. Burke, 6 Ariz. 323, 57 Pac. 641; Gorman Mining Co. v. Alexander, 2 S. D. 557, 51 N. W. 346. See Territory v. Lee, 2 Mont. 124. The doctrine announced in Wilson v. Triumph Consol. Min. Co., 19 Utah, 66, 56 Pac. 300, 75 Am. St. Rep. 718, and in Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co., 12 Nev. 312, that a citizen may relocate land located by an alien and still held by the latter, if only the relocation is peaceable, cannot be supported. TORNANSES v. MELSING, 109 Fed. 710, 47 C. C. A. 596. Compare a similar ruling in regard to a state statute requiring foreigners to pay a license fee for the privilege of mining. People v. Naglee, 1 Cal. 232, 52 Am. Dec. 312; Mitchell v. Hagood, 6 Cal. 148.

[3] LONE JACK MINING CO. v. MEGGINSON, 82 Fed. 89, 27 C. C. A. 63; Ferguson v. Neville, 61 Cal. 356; Gorman Mining Co. v. Alexander, 2 S. D. 557, 51 N. W. 346; Id., 3 S. D. 3, 51 N. W. 349; MANUEL v. WULFF, 152 U. S. 507, 14 Sup. Ct. 651, 38 L. Ed. 532; Shea v. Nilima, 133 Fed. 209, 66 C. C. A. 263. See Crœsus Mining, M. & S. Co. v. Colorado Land & M. Co. (C. C.) 19 Fed. 78; Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419.

[4] Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708; Buckley v. Fox, 8 Idaho, 248, 67 Pac. 659; Gruwell v. Rocca, 141 Cal. 417, 74 Pac. 1028. In Buckley v. Fox, supra, the state statute authorized locations by aliens not of Mongolian descent. Such a statute would seem ineffective to prevent direct proceedings by the United States.

[5] JANTZON v. ARIZONA COPPER CO., 3 Ariz. 6, 20 Pac. 93; Garfield Min. & Mill. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153. The issue of citizenship is properly raised in an adverse suit, as it is in effect made on behalf of the government. MATLOCK v. STONE, 77 Ark. 195, 91 S. W. 553. See McFeters v. Pierson, 15 Colo. 201, 206, 207, 24 Pac. 1076, 22 Am. St. Rep. 388; Tonopah Fraction Mining Co. v. Douglass (C. C.) 123 Fed. 936, 941; Wilson v. Triumph Consol. Min. Co., 19 Utah, 66, 56 Pac. 300, 75 Am. St. Rep. 718.

For a case showing on how slight evidence a court will find citizenship, see Strickley v. Hill, 22 Utah, 257, 62 Pac. 893, 83 Am. St. Rep. 786.

zenship of a locator is immaterial, except where he has not parted with title prior to the raising of the question in an adverse suit, where the question of citizenship is involved, or prior to direct proceedings brought by the United States government.[6]

Special Acts about Aliens.

What is said above applies only to the requirement of Rev. St. U. S. § 2319 (U. S. Comp St. 1901, p. 1424). Under the federal alien act of March 3, 1887,[7] as amended by the act of March 2, 1897,[8] aliens may acquire and hold by purchase in the United States territories possessory as well as patented claims. Whether that permits an alien to locate in the United States territories a mining claim that will be valid against the government on direct attack or in adverse suits is as yet undetermined.[9] So by the act of May 14, 1898. native-born citizens of the Dominion of Canada are accorded the same mining rights and privileges in Alaska as Canada accords in British Columbia and the Northwest Territory to citizens of the United States.[10]

Effect of Patent on Rights of Aliens.

After a claim has been patented to a citizen, the question of whether it may be acquired by an alien depends on the state laws. A patent issued to a citizen who took in trust for an alien is doubtless subject to direct attack by the United States government, except where prior to the attack title is conveyed to innocent purchasers.[11]

[6] If a citizen and an alien jointly locate a claim and convey it to a citizen, the latter gets a valid title. North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522, 6 Sawy. 299; Wilson v. Triumph Consol. Min. Co., 19 Utah, 66, 56 Pac. 300, 75 Am. St. Rep. 718; Providence Gold Mining Co. v. Burke, 6 Ariz. 323, 57 Pac. 647; Strickley v. Hill, 22 Utah, 257, 62 Pac. 893, 83 Am. St. Rep. 786. See Stewart v. Gold & Copper Co., 29 Utah, 443, 82 Pac. 475, 110 Am. St. Rep. 719.

The interest of the citizen co-locator is, of course, valid, even against the government, unless he colludes with the alien. Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co., 12 Nev. 312. Query as to the effect of knowledge that one's co-locator is an alien?

[7] 24 Stat. 476, c. 340, § 1 (U. S. Comp. St. Supp. 1907, p. 776).

[8] 29 Stat. 618, c. 363, § 2 (U. S. Comp. St. Supp. 1907, p. 778).

[9] The land department thinks that an alien in the territories is given by the act of March 2, 1897, no right to occupy or purchase from the government any mining claims. See opinion, 28 Land Dec. Dep. Int. 178.

[10] 30 Stat. 415, c. 299, § 13 (U. S. Comp. St. 1901, p. 1424). According to the land department this act "never has been operative for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of Canada are those of leasing mineral lands upon the payment of a stated royalty, and the mining laws of the United States make no provision for such leases." Instructions, 32 Land Dec. Dep. Int. 424, 445.

[11] Justice Min. Co. v. Lee, 21 Colo. 260, 40 Pac. 444, 52 Am. St. Rep. 216.

Where a claim has been located by a citizen, and he dies leaving an alien heir, the latter is in the situation of an alien locator. His claim is good against all the world except the United States.[12]

LAND OFFICE EMPLOYES.

48. General land officers, clerks, and employés are prohibited by statute from purchasing or becoming interested in the purchase of public lands. While one state decision intimates that a location by such an employé is absolutely void, and hence can pass no title to an innocent purchaser, it is believed that such a location is only voidable, and that innocent purchasers will be protected. Whether deputy United States mineral surveyors are covered by the above-mentioned statute is a matter on which there are conflicting decisions. The better view seems to be that they are covered by it.

It has been held in a Utah case that under Rev. St. U. S. § 452 (U. S. Comp. St. 1901, p. 257), prohibiting officers, clerks, and employés of the General Land Office from purchasing or becoming interested in the purchase of public lands, the locating of a mining claim by a deputy mining surveyor of the government is void, and he can convey no rights in the claim to another.[13] This is but a state decision, for the United States Supreme Court, when the case came before it, avoided the point by basing its decision on the ground that the land was not open to location.[14] The whole tenor of the Utah decision is that the location by the deputy mineral surveyor is absolutely void, whereas the protection of innocent purchasers requires that a rule like that applicable to locations by aliens be applied. It is upon this ground only that a recent Nevada decision[15] upholding a location by a deputy mineral surveyor can be supported. While the court seems to have been in error in the last-mentioned case in saying that deputy United States mineral surveyors are not covered by the above-mentioned statute, nobody but the government could possibly object to a location by a deputy mineral surveyor, and the court was therefore right in its decision, but erred in the reason given for it. The dissenting judge in the case being discussed seems right in adhering "to the broader construction that clerks, officers, and employés in the General Land Office include officers, clerks and employés in the offices

[12] BILLINGS v. ASPEN MINING & SMELTING CO., 51 Fed. 338, 2 C. C. A. 252, 52 Fed. 250, 3 C. C. A. 69; LOHMANN v. HELMER (C. C). 104 Fed. 178.

[13] LAVAGNINO v. UHLIG, 26 Utah, 1, 71 Pac. 1046, 99 Am. St. Rep. 808.

[14] Lavagnino v. Uhlig, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119.

[15] Hand v. Cook (Nev.) 92 Pac. 3.

of the surveyors general and the local land offices, which are merely arms or branches of the General Land Office," [16] but he also erred in regarding the location as absolutely void.

The land department properly refused to allow a mineral entry by a deputy United States mineral surveyor who was interested in the mining claim at the time of survey or of application for patent,[17] and doubtless will continue to do so until the matter is regulated by further federal legislation, or settled by a decision of the United States Supreme Court.[18]

CORPORATIONS.

49. Mining locations may legally be made by corporations created under the laws of the United States or of a state or territory of the United States. Other corporations are aliens, and governed by those rules in regard to locations by aliens which can apply to corporations.

It would seem that a corporation is only one person, and not "an association of persons," so far as the placer mining laws are concerned.

A corporation created under the laws of the United States, or of a state or territory of the United States, and having corporate powers which, as such, permit it to make a mining location, is competent to make such a location by itself or to join with others in making one.[19] Even if a location is ultra vires, that fact still leaves the location like an ultra vires purchase of land, and therefore it is valid until assailed in a direct proceeding brought by the state creating the corporation.[20] A corporation organized under the laws of a state or territory of the United States is a citizen of the United States within the meaning of the mining statutes, and therefore may locate, pur-

[16] Hand v. Cook (Nev.) 92 Pac. 12. Compare Prosser v. Finn, 208 U. S. 67, 28 Sup. Ct. 225, 227, 52 L. Ed. 392, where special agents of the General Land Office were held to be within the statute because "they have official connection with the General Land Office and are under its supervision and control with respect to the administration of the public lands."

[17] Floyd v. Montgomery, 26 Land Dec. Dep. Int. 122; Frank A. Maxwell, 29 Land Dec. Dep. Int. 76; W. H. Leffingwell, 30 Land Dec. Dep. Int. 139. The deputy mineral surveyor's appointment was revoked for that reason in Seymour K. Bradford, 36 Land Dec. Dep. Int. 61.

[18] As the matter has been brought to the attention of Congress, it will probably be settled by legislation.

[19] McKINLEY v. WHEELER, 130 U. S. 630, 9 Sup. Ct. 638, 32 L. Ed. 1048; Thomas v. Chisholm, 13 Colo. 105, 21 Pac. 1019.

[20] Rose No. 1 and Rose No. 2 Lode Claims, 22 Land Dec. Dep. Int. 83. See Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 628, 25 L. Ed. 188.

chase, and hold a mining claim.[21] The only question in regard to such a corporation has been whether all of the incorporators had to be citizens of the United States for the corporation to be a citizen. That question has arisen because in McKinley v. Wheeler [22] the Supreme Court of the United States said that a state corporation, "all of whose members are citizens of the United States," could hold a mining claim. That dictum, however, does not say that all must be citizens, and seems satisfactorily met in Doe v. Waterloo Min. Co., where it was held that under the mining laws, as in the case of the statutes and constitutional provisions governing the jurisdiction of the federal courts, it will conclusively be presumed that all the stockholders of a corporation are citizens of the state chartering the corporation. [23]

Strictly foreign corporations are aliens, of course, and subject to the rules affecting aliens, except so far as their inability to be naturalized necessarily makes a difference.

Corporations and Placer Locations.

With reference to placer mining locations a special corporation question arises. Doubt exists there because the placer mining statutes allow one person to embrace only 20 acres in one location, while an association of persons not less than eight in number may include 160 acres in one location. The query has arisen whether under the placer laws a corporation is merely "one person," entitled to locate only 20 acres, or whether, if it has eight or more incorporators, it is "an association of persons" entitled to locate 160 acres of placer ground. The query is based on the language of the United States Supreme Court in McKinley v. Wheeler, where the court held that a private corporation formed under the laws of a state could locate a mining claim, but added: "There may be some question raised as to the extent of a claim which a corporation may be permitted to locate as an original discoverer. It may perhaps be treated as one person, and entitled to locate only to the extent permitted to a

[21] North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522, 6 Sawy. 299, 316. Where the complaint in an adverse suit alleges and the answer admits that plaintiff is a domestic corporation, the citizenship of plaintiff's stockholders need not be proved. Jackson v. White Cloud Gold Min. & Mill. Co., 36 Colo. 122, 85 Pac. 639; Doe v. Waterloo Min. Co., 70 Fed. 455, 17 C. C. A. 190.

[22] 130 U. S. 630, 9 Sup. Ct. 638, 32 L. Ed. 1048.

[23] DOE v. WATERLOO MIN. CO., 70 Fed. 455, 17 C. C. A. 190. To the same effect is Jackson v. White Cloud Gold Min. & Mill. Co., 36 Colo. 122, 85 Pac. 639. Compare opinion, 28 Land Dec. Dep. Int. 178. See Princeton Min. Co. v. First Nat. Bank of Butte, 7 Mont. 530, 19 Pac. 210.

single individual. That question, however, is not before us and does not call for an expression of opinion." [24]

Considering that it requires at least eight bona fide locators to make a valid placer location of 160 acres, locators who lend their names under an agreement to convey without consideration being regarded as engaging in such a fraud against the government that the location is void, [25] and considering that a corporation is really in the eyes of the law for most purposes one person, it certainly seems to be clear that a corporation is only one person, entitled to include only 20 acres in one placer location, rather than an association of persons. [26] The placer law must have meant by an "association of persons" a number of individual locators, whether natural or corporate, or both, joining together to make a common location. At any rate, until the United States Supreme Court shall determine that a corporation is an association of persons within the meaning of the placer act, it would be very risky for any intending locators to act as if it were such. [27]

MINORS.

50. Minors may locate mining claims.

Minors may locate mining claims, as well as adults; the statute saying nothing as to age. [28] They may, of course, take mining claims by descent.

AGENTS.

51. Mining locations may be made for principals by agents.

One may locate a mining claim by his agent. [29] The matter is governed by general agency principles, and, as the authority need

[24] McKINLEY v. WHEELER, 130 U. S. 630, 636, 9 Sup. Ct. 638, 32 L. Ed. 1048.

[25] Mitchell v. Cline, 84 Cal. 409, 24 Pac. 164; Gird v. California Oil Co. (C. C.) 60 Fed. 531. See Durant v. Corbin (C. C.) 94 Fed. 382.

[26] But see 1 Lindley on Mines (2d Ed.) § 449. Compare United States v. Trinidad Coal & Coking Co., 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640.

[27] See GIRD v. CALIFORNIA OIL CO. (C. C.) 60 Fed. 531, 545, where the court found that an attempted placer location of a little over 48 acres made by three natural persons was in fact made by them for a private corporation, and therefore must be limited to 20 acres of land.

[28] THOMPSON v. SPRAY, 72 Cal. 531, 14 Pac. 182. This does not apply to coal lands. Compare Davis v. Dennis, 43 Wash. 54, 85 Pac. 1079.

[29] DUNLAP v. PATTISON, 4 Idaho, 473, 42 Pac. 504, 95 Am. St. Rep. 140; Schultz v. Keeler, 2 Idaho, 333, 13 Pac. 481; Whiting v. Straup (Wyo.) 95 Pac.

not be in writing,[30] an oral authorization or ratification is enough. Moreover, as a locator is presumed to assent to a location when his assent to a deed of realty would be presumed,[31] ratification may often be proved by the absence of dissent after notice.[32] While the legal title inures to the principal by the location, the authority to locate may also be accompanied by the authority to abandon, and, if it is, then the principal will be bound by the abandonment.[33] An agent who locates a mining claim for and in the name of his principal, without any contract to acquire an interest therein, does not acquire any interest in the claim.[34]

In making the location, the correct form is for the agent to act in the principal's name, signing all notices "A., by B., Agent." Yet, if he simply signs the principal's name, that should be enough. Since the authority to act may be oral, the proof that the name was signed by such authority may well be oral. A careful miner, however, will take no chances.

If an agent locates for himself claims which he was employed to locate for his principal, he will be held a trustee for the latter.[35] On relocations by agents, see chapter XVII, infra.

849; Moore v. Steelsmith, 1 Alaska, 121; McCulloch v. Murphy (C. C.) 125 Fed. 147; Murley v. Ennis, 2 Colo. 300; Rush v. French, 1 Ariz. 99, 25 Pac. 816; MOORE v. HAMERSTAG, 109 Cal. 122, 41 Pac. 805. See Book v. Justice Min. Co. (C. C.) 58 Fed. 106.

[30] Murley v. Ennis, 2 Colo. 300; MOORE v. HAMERSTAG, 109 Cal. 122, 41 Pac. 805.

[31] Gore v. McBrayer, 18 Cal. 582, 588; Kramer v. Settle, 1 Idaho, 485; Van Valkenburg v. Huff, 1 Nev. 142, 149. But see Thompson v. Spray, 72 Cal. 531, 14 Pac. 182.

[32] That ratification will defeat a location subsequent to that ratified, though prior to ratification, see RUSH v. FRENCH, 1 Ariz. 99, 25 Pac. 816. Bringing a suit to quiet title is sufficient ratification. Thompson v. Spray, 72 Cal. 528, 14 Pac. 182.

[33] KINNEY v. FLEMING, 6 Ariz. 263, 56 Pac. 723. See, also, Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791.

[34] McMahon v. Meehan & Larson, 2 Alaska, 278.

[35] Copper River Mining Co. v. McClellan, 2 Alaska, 134.

CHAPTER XII.

THE LOCATION OF LODE CLAIMS.

DEFINITION OF LOCATION.

52. By location is meant both (1) the act or acts required to appropriate a mining claim, and (2) the mining claim itself. In this chapter meaning (1) is intended.

Location is sometimes used to include discovery, but here the word is used to cover all acts of location following discovery. These acts of location include: (a) The discovery notice; (b) the discovery shaft, or its equivalent; (c) the marking of the location upon the ground; (d) the posting of notices of location; and (e) record.

"Location is the act or series of acts by which the right of exclusive possession of mineral veins and the surface of mineral land is vested in the locator." [1] In its more restricted sense the word "location" excludes discovery,[2] and it is used in that restricted sense here. It may, perhaps, exclude record, which in one sense may only proclaim the fact of location; [3] but it is used here to include record. "The location of a mining claim is the act of appropriating a parcel of public mineral land in accordance with the provisions of the mining laws. The term is also applied to the parcel of land so appropriated." [4]

Land to be embraced in one location must be parcel of the land where discovery is made, and must be embraced within one set of

[1] Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel, Min. & Transp. Co., 196 U. S. 337, 346, 25 Sup. Ct. 266, 49 L. Ed. 501.

[2] Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co., 141 Fed. 563, 73 C. C. A. 35.

[3] See Morrison's Mining Rights (13th Ed.) pp. 25, 26.

[4] Tomera Placer Claim, 33 Land Dec. Dep. Int. 560. For the property nature of a location, see chapter XX, § 108.

boundary lines.[5] The acts of location normally follow discovery and in general consist of (1) the posting of a discovery notice; (2) the sinking of a discovery shaft or its equivalent; (3) the marking of boundaries; (4) the posting of a location notice; (5) the recording of the proper papers. If only the acts of location are completed before the rights of third persons intervene, the order in which the acts are performed is immaterial.[6] The validity of the location is to be tested, of course, by the law in force at the time the location is made.[7]

THE DISCOVERY OR PROSPECTOR'S NOTICE.

53. Custom and prudence everywhere, and statutes in some states, call for the posting of a notice of discovery, giving the date of discovery and containing a statement that the statutory time to complete location is claimed. This notice should be posted or written on a stake, called the "discovery stake," or on the discovery monument prescribed by statute, and placed at the point of discovery. In Idaho the distance claimed along the vein each way from the discovery monument must be stated in the notice.

The Discovery Notice.

It has been the universal custom in the mining region for prospectors to put up a temporary notice at the point of discovery, so as to apprise all comers that a discovery has been made on which a location is to be perfected. In Idaho such a temporary notice is required by statute. In that state the discoverer, at the time of discovery, must erect a discovery monument and give notice of discovery, by placing on the monument his name, the name of the claim, the date of discovery, and the distance claimed along the vein each way from the monument.[8] In New Mexico a discovery notice is unknown to the local law; but it is held that the discovery and the posting of the regular notice of location must be practically contemporaneous,[9] and the regular notice of location, therefore, fully answers the purpose of a discovery notice. The same is probably true under the Montana statute of 1907,[10] and is certainly true in Utah, where the statute re-

[5] Id.

[6] PERIGO v. ERWIN (C. C.) 85 Fed. 904; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111; Heman v. Griffith, 1 Alaska, 264; Charlton v. Kelly, 2 Alaska, 532.

[7] WILSON v. FREEMAN, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833.

[8] 2 Ann. Codes Idaho (Civ. Code) 1901, § 2557.

[9] Deeney v. Mineral Creek Milling Co., 11 N. M. 279, 67 Pac. 724.

[10] Laws Mont. 1907, p. 18.

quires the location notice to be posted at the time of making discovery.

Reason for Discovery Notice.

The purpose of the discovery notice is to show that there has been no abandonment of location rights, and it would seem that a discovery notice, or something equivalent, is absolutely essential where one is seeking to locate a vein which outcrops so fully that all who go by may see it with the naked eye. A written notice would seem not to be essential, in the absence of a statute like that in Idaho, provided work is already begun and any prospector could see, from tools on the ground and the state of the work, that the acts of location were in process of completion; but some kind of notice certainly would seem to be vital.[11] The whole spirit of American mining law, as evidenced in the practically uniform custom to post a discovery notice, calls for a notice of discovery, and preferably a written notice. But a notice which is not followed by a marking of the location on the ground, and which does not contain a description identifying the claim by reference to some natural object or permanent monument, does not create a location.[12]

Contents of Discovery Notice.

The particularity required by the Idaho statute need not, of course, be observed elsewhere, yet fairness requires everything called for by that statute. Taking the names contained in Erhardt v. Boaro,[13] a proper discovery notice would be:

"Hawk Lode.

"The undersigned have discovered this lode, and claim 750 feet on it each way from discovery. They also claim the statutory time to complete location.

"Date of discovery, June 17, 1907.

"Joel B. Erhardt.
"Thomas Carroll."

Except in Idaho, the number of feet each way from discovery need not be stated, and almost any kind of informal notice will do. The Idaho discovery notice is required to be as full as the posted loca-

[11] See 1 Snyder on Mines, § 375. On the value of discovery notice, see Omar v. Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246. In Washington it gives a reasonable time in which to mark boundaries. Union Min. & Mill. Co. v. Leitch, 24 Wash. 585, 64 Pac. 829, 85 Am. St. Rep. 961.

[12] Malececk v. Tinsley, 73 Ark. 610, 85 S. W. 81.

[13] 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113.

tion notice is in Colorado.[14] For Colorado the following would answer for discovery:

"Hawk Lode.

"The undersigned claim the statutory time to complete location of this lode, discovered June 17, 1907.

"Joel B. Erhardt.
"Thomas Carroll."

DISCOVERY SHAFT OR ITS EQUIVALENT.

54. A discovery shaft, sunk on unappropriated public land embraced within the claim sought to be located, or the statutory equivalent of a discovery shaft, is by local statutes in most jurisdictions made essential to a lode location. The discovery shaft must comply with the local statutory requirements as to width, depth, disclosure of vein, etc. The equivalents of a discovery shaft are an adit, a cross cut, an open cut, and a tunnel, disclosing the length of vein, or cutting the vein at the depth, and excavating the number of cubic feet, prescribed by the local statute.

Alaska, California, and Utah leave the question of requiring a discovery shaft to district rules. In the other mining law states and territories the shaft, in addition to disclosing a well-defined vein, must be at least 10 feet deep; the depth being measured from the lowest part of the surface rim.[15] No width is usually prescribed; but, of course, such size of opening must be made as ordinary miners could reasonably regard as a shaft. A drill hole would not suffice.[16] In Nevada the shaft must be 4 feet by 6 feet and sunk to at least 10

[14] See Mills' Ann. St. Colo. § 3152.

[15] "In the instance of a shaft sunk, not vertical, but following a vein with a heavy pitch, it is obvious that a slight difference would exist between a vertical measurement and a measurement following the pitch of the shaft; the latter measurement being the shorter distance and favoring the prospector. And although usually the measurement is taken vertically, yet in such case we do not see but that the measure following the dip would strictly conform to the law, unless, as in Montana, the statute mentions vertical depth specifically. * * * After a shaft has been sunk ten feet, the ground at the collar may cave, or the shaft may become filled with débris, or the making of a platform or raised collar may make it difficult to ascertain the exact line of the original rim of the shaft, or to ascertain its original bottom. In view of these facts, and of the essential importance of the shaft being full ten feet deep, it is always advisable to sink it two or three feet deeper, and remove all ground for cavil or contention." Morrison, Mining Rights (13th Ed.) p. 40.

[16] Morrison, Mining Rights, p. 33.

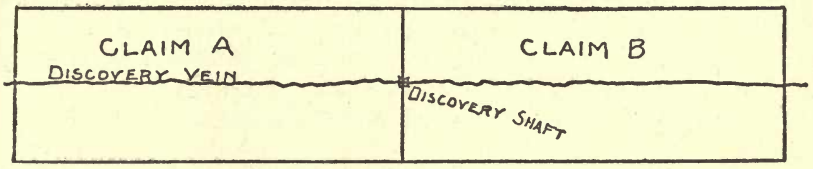
feet in depth;[17] while in Montana the shaft must be sunk vertically 10 feet, or as much more as is necessary to disclose the vein or deposit located, and the cubical contents of such shaft must be not less than 75 cubic feet, if the vein is found short of 10 feet, and at least 150 cubic feet otherwise, and any deficiency of the 150 cubic feet above 75 may be made up by other excavations.[18] The Montana requirement is likely to be adopted in other states.

Reason for Discovery Shaft Requirement.

The chief purpose of requiring a discovery shaft is to demonstrate the presence of a vein; but it also serves another purpose, namely, "to compel the discoverer to manifest his intention to claim the ground in good faith under the mining laws."[19] It is this latter purpose that causes perplexity when we ask whether, by laying out two locations with a common end line, which bisects one discovery shaft in such a way as to disclose the vein as existing in each location, the locator has a discovery shaft for both.

Two Locations Claimed through One Discovery Shaft.

FIGURE No. 4.



The chief purpose of a discovery shaft has been fulfilled for both locations in the case illustrated by Figure No. 4; but the locator is endeavoring to get by one exertion twice what the law intended him to have thereby. The fact that a discovery shaft sunk by a junior locator is good, even though it be cut in two by the line of the senior location,[20] may be disregarded, because in that case only one location is predicated upon one discovery and one discovery shaft. To claim two locations through one discovery shaft of only the depth required for one claim is clearly to act in bad faith, and in such bad faith that

[17] Laws Nev. 1907, p. 419, c. 194, § 2.

[18] Laws Mont. 1907, p. 20.

[19] 1 Lindley on Mines (2d Ed.) § 344. In Colorado, prior to the act of 1866, development work was required by miners' rules and customs. Consolidated Rep. M. M. Co. v. Lebanon M. Co., 9 Colo. 343, 12 Pac. 212.

[20] See UPTON v. LARKIN, 7 Mont. 449, 17 Pac. 728; Id., 144 U. S. 19, 12 Sup. Ct. 614, 36 L. Ed. 330; Phillips v. Brill (Wyo.) 95 Pac. 856 (placer); Healey v. Rupp, 28 Colo. 102, 63 Pac. 319.

both locations should be held void.[21] It is a case of excessive location, where the whole is bad because of fraud.[22]

But if the one shaft is sunk twice the required depth for a discovery shaft, and the vein is disclosed in both claims, the requisite good faith to sustain both locations might be held to exist, though a prudent miner would not take the risk. The chief objection to letting one shaft of twice the ordinary discovery shaft depth serve to perfect two locations seems to be the uncertainty as to the real situation which it would leave in the mind of a subsequent prospector, but that objection is not overpowering. The question is often regarded as one of insufficient discovery for two claims; but, if the vein is disclosed in both claims, it is clearly only one of a sufficient or insufficient discovery shaft.[23]

Relation of Discovery Shaft to the Location.

The discovery shaft must, of course, be upon land not already taken properly for other purposes by other parties. A known lode within a townsite patent [24] may be, and a known lode within a placer certainly is, exceptional; but apart from them the discovery shaft must be outside the boundaries of any previously located mining claim or patented mine, or else the location is void.[25] Moreover, if a senior locator permits a junior locator to patent the ground covering the senior's discovery shaft, the senior location is thereby rendered invalid; for a claim must include the discovery shaft, and without it is not a valid location.[26] In most states, however, where the lode has been

[21] McKINSTRY v. CLARK, 4 Mont. 370, 1 Pac. 759; Poplar Creek Consol. Quartz Mine, 16 Land Dec. Dep. Int. 1. See REYNOLDS v. PASCOE, 24 Utah, 219, 221, 66 Pac. 1064, 1065. Compare Reiner v. Schroeder, 146 Cal. 411, 80 Pac. 517.

[22] Compare the case of an attempt to claim two mill sites by one mill or reduction works. Hecla Consol. Min. Co., 14 Land Dec. Dep. Int. 11. But see 1 Snyder on Mines, § 351.

[23] See Phillips v. Brill (Wyo.) 95 Pac. 856.

[24] Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69.

[25] GWILLIM v. DONNELLAN, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; Peoria & Colorado Mill. & Min. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915; Armstrong v. Lower, 6 Colo. 393; Id. 581; Tuolumne Consol. Mining Co. v. Maier, 134 Cal. 583, 66 Pac. 863; REYNOLDS v. PASCOE, 24 Utah, 219, 66 Pac. 1064; Watson v. Mayberry, 15 Utah, 265, 49 Pac. 479; Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69; Little Pittsburgh Consolidated Min. Co. v. Amie Min. Co. (C. C.) 17 Fed. 57, 5 McCrary, 298; Upton v. Larkin, 5 Mont. 600, 6 Pac. 66. See McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652.

[26] McGinnis v. Egbert, 8 Colo. 54, 5 Pac. 652; Michael v. Mills, 22 Colo. 439, 45 Pac. 429; McMillen v. Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64; Girard v. Carson, 22 Colo. 345, 44 Pac. 508; Miller v. Girard, 3 Colo. App. 278, 33 Pac. 69. But where the junior claim goes to

validly located, the location would be good despite the subsequent loss of discovery shaft, if only a new discovery is made within the remaining portion of the located ground prior to any intervening rights of third persons.[27] That is because the locator may make any shaft his discovery shaft.[28] It is a question, however, whether in Colorado anything would answer in such case except a relocation based upon the new discovery which would involve an abandonment of the original location.[29] The reason for the doubt on that question will be found in the Colorado cases and statutes compelling a discovery in the discovery shaft.

The discovery shaft may be anywhere upon the claim, except, it seems in Wyoming, where by statute it must be half way between the side lines of the claim.

Essentials of the Discovery Shaft.

The depth of the discovery shaft need not be the statutory number of feet before the other acts of location are completed, if only the required depth is reached before adverse rights intervene.[30] The depth, of course, is estimated from the lowest rim of the surface,

patent under an agreement to deed to the owners of the senior the discovery shaft as soon as patent is received, and the agreement is actually carried out, the land department has held the senior location not to be invalidated. Duxie Lode, 27 Land Dec. Dep. Int. 88. And see LITTLE PITTSBURGH CONSOLIDATED MIN. CO. v. AMIE MIN. CO. (C. C.) 17 Fed. 57, which held that a locator may sell the ground containing the discovery shaft without invalidating the rest of the location. The last case was decided prior to GWILLIM v. DONNELLAN, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348, with which it would seem to be inconsistent in principle. See, also, Tonopah & S. L. Min. Co. v. Tonopah Min. Co. of Nevada (C. C.) 125 Fed. 408. A late case holds that a locator may patent the part of his claim containing his discovery shaft without losing his right to retain and by annual labor hold the rest. Miller v. Hamley, 31 Colo. 495, 74 Pac. 980.

[27] See SILVER CITY GOLD & SILVER MIN. CO. v. LOWRY, 19 Utah, 334, 57 Pac. 11; TONOPAH & S. L. MIN. CO. v. TONOPAH MIN. CO. OF NEVADA (C. C.) 125 Fed. 408.

[28] O'DONNELL v. GLENN, 8 Mont. 248, 19 Pac. 302. But query under the Montana statute of 1907 (Laws Mont. 1907, pp. 21, 22). A loss of discovery shaft would seem, under that statute, to call for a complete relocation.

[29] BEALS v. CONE, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92. But see Terrible Min. Co. v. Argentine Min. Co. (C. C.) 89 Fed. 583 (affirmed Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140); Treasury Tunnel Mining & Reduction Co. v. Boss, 32 Colo. 27, 74 Pac. 888, 105 Am. St. Rep. 60; McMillen v. Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64.

[30] McGINNIS v. EGBERT, 8 Colo. 41, 5 Pac. 652. So a shaft need only disclose the lode required by statute before other parties acquire interven-

even though that surface be slide rock.[31] While the discovery shaft must disclose a vein or lode, that vein need not contain pay ore,[32] or anything except sufficient vein matter on which to base a discovery.[33] Though at one time in Montana the state statute required at least one wall of the vein to be disclosed by the discovery shaft,[34] the provision was of doubtful validity and has been repealed. There may be veins or lodes sufficient when discovered to support a location, yet showing no well-defined walls after months or years of development, and in the absence of a statute it is not essential that the discovery shaft disclose a vein with a wall.[35] In the Colorado statute requiring the shaft to show a well-defined crevice, the term "crevice" means a mineral-bearing vein.[36] The discovery shaft need not be sunk at the precise point where the prospector first discovers the lode.[37]

Equivalents of Discovery Shaft.

Nearly all the mining codes permit certain other development work to be substituted for a discovery shaft. The Colorado statute is typical, and provides that "any open cut, cross cut or tunnel which shall cut a lode at a depth of ten feet below the surface shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft." [38] We have already defined these different terms.[39] Under the wording of this statute the Colorado court has held that an adit need not be 10 or any other specified number of feet deep, though it must be 10 feet in length along the vein,[40] and that an adit need

ing rights. Strepey v. Stark, 7 Colo. 614, 5 Pac. 111; Zollars v. Evans, (C. C.) 5 Fed. 172, 2 McCrary, 39; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652.

[31] Van Zandt v. Argentine Min. Co. (C. C.) 8 Fed. 725, 2 McCrary, 159; Waterloo Min. Co. v. Doe (C. C.) 56 Fed. 685.

[32] Muldrick v. Brown, 37 Or. 185, 61 Pac. 428.

[33] COPPER GLOBE MIN. CO. v. ALLMAN, 23 Utah, 410, 64 Pac. 1020; Terrible Min. Co. v. Argentine Min. Co. (C. C.) 89 Fed. 583.

[34] Foote v. National Min. Co., 2 Mont. 402; O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302.

[35] Fleming v. Daly, 12 Colo. App. 439, 56 Pac. 946.

[36] BEALS v. CONE, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

[37] Harrington v. Chambers, 3 Utah, 94, 1 Pac. 362, 375; Terrible Min. Co. v. Argentine Min. Co. (C. C.) 89 Fed. 583.

[38] Mills' Ann. St. Colo. § 3154.

[39] Chapter VIII, § 30 (a).

[40] Gray v. Truby, 6 Colo. 278; ELECTRO-MAGNETIC M. & D. CO. v. VAN AUKEN, 9 Colo. 204, 11 Pac. 80.

not be under cover for the 10 feet to comply with the statute.[41] As Messrs. Morrison and De Soto point out, "the effect of the latter decision is to confuse all the distinctions between an adit and an open cut, so that, if the hole or stripping discloses 10 feet in length of the vein, it may be styled an adit, although in fact an open cut. It is not safe to rely on this construction, and no prospector should consider his discovery complete until he has 10 feet in depth at the breast of his cut, or a covered adit at least 10 feet in along the vein." [42]

The Montana statute wisely avoids the words "adit" and "open cut," and makes the equivalent of a discovery shaft any cut or tunnel which discloses the vein lode or deposit located at a vertical depth of at least 10 feet below the natural surface of the ground and which constitutes at least 150 cubic feet of excavation.[43]

The Time to Complete Discovery Work.

The time for sinking a discovery shaft is controlled by statute, or else is a reasonable time.[44] In the absence of a statute, 90 days has been held an unreasonable time.[45] In Colorado, Idaho, Montana, North Dakota, Oregon, South Dakota, and Wyoming 60 days is the statutory period. In Arizona, Nevada, New Mexico, and Washington it is 90 days. In Alaska, California, and Utah discovery shafts

[41] ELECTRO-MAGNETIC M. & D. CO. v. VAN AUKEN, 9 Colo. 204, 11 Pac. 80. But the development must be such in dimensions and character as to make it fairly the equivalent of a discovery shaft. Id.

[42] Morrison's Mining Rights (13th Ed.) 43. In speaking of the difference between cuts and shafts, Messrs. Morrison and De Soto say: "It is obvious that, a cut being equivalent to a shaft and the pitch of the vein varying to any degree between true vertical and the horizontal, it is impossible to say at which angle the cut would be so flat as to be no longer in strictness a shaft. But a pit dug on a blanket vein reaching in ten feet being in compliance with the law, and no more work being required on a blanket vein than on a fissure, the pit or shaft following the vein by measurement along the vein would be a compliance with the law, without regard to its relation to the vertical." Morrison's Mining Rights (13th Ed.) 40. But this is not true of the new Montana statute, as that calls for vertical measurement. Laws Mont. 1907, p. 20.

[43] Laws Mont. 1907, p. 20. That the cut, cross-cut, or tunnel which is the equivalent of a discovery shaft must not be concealed or reached by some secret means of ingress beneath the surface, but must be run from some opening on the claim itself, is held in Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177.

[44] Doe v. Waterloo Min. Co. (C. C.) 55 Fed. 12; Murley v. Ennis, 2 Colo. 300. The state statute, requiring a discovery shaft or equivalent within 90 days, is not in conflict with the federal statute, giving a longer time for the performance of annual labor. Sisson v. Sommers, 24 Nev. 379, 55 Pac. 829, 77 Am. St. Rep. 815.

[45] Patterson v. Hitchcock, 3 Colo. 533.

are not required unless district rules so provide, and, if required, are governed by those rules. In Colorado the time runs from the date of the discovery of mineral and the erection of the discovery notice, and a renewal of the notice of discovery will not extend the time.[46]

Effects of Failure to Do Discovery Work.

Where plaintiffs are kept from completing a discovery shaft, because by the fraud and violence of the defendants they have been ousted, and by threats intimidated from returning, the defendants can take no advantage from the failure.[47] Where, for other reasons, the discovery work has not been done, a peaceable relocation will be upheld.[48]

MARKING THE LOCATION UPON THE GROUND.

"The location must be distinctly marked on the ground so that its boundaries can be readily traced." Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426).

55. By the federal statute the "location must be distinctly marked upon the ground so that its boundaries can be readily traced," and by the state statutes and district rules the boundaries themselves must be marked in designated ways. The federal requirement is far less exacting than are the local requirements, but all must be complied with.

All corners and angles of the claim should be marked by posts of the size required by the local rules and statutes, and these posts should be numbered and marked with the name of the claim, the date of location, and a reference to the discovery stake. Care should be taken to tie the claim to natural objects or permanent monuments.

Such marking should be done within the time fixed by statute; but where there is no statute the jurisdictions differ on the question whether the marking must follow discovery immediately or may take place within a reasonable time.

[46] Ingemarson v. Coffey (Colo.) 92 Pac. 908.

[47] MILLER v. TAYLOR, 6 Colo. 41. But nothing short of prevention from such cause will serve as an excuse for not perfecting the location. Lockhart v. Wills, 9 N. M. 344, 54 Pac. 336.

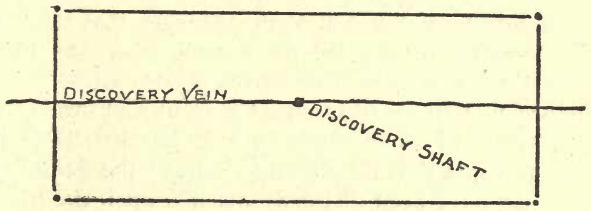
[48] Walsh v. Henry, 38 Colo. 393, 88 Pac. 449.

"It is a very common notion among prospectors in this country that if they sink a shaft, which they call a 'discovery shaft,' to a depth of more than ten feet, and put up their stakes, they acquire thereby some sort of an interest in the public domain, although within the limits of their shaft or cut there may be no indications whatsoever of a vein or mineral deposit and work has ceased. Whatever may be the comity in respect of this matter

The federal statute of 1872 requires all claims to be marked on the ground, so that their boundaries can readily be traced. That statute has been supplemented in most mining law states by statutes requiring a specific kind of marking; but in Alaska, California, and Utah, where there are no local statutes requiring the marking, only the federal statute and district rules need be complied with. Though all the local mining codes should be repealed, the requirement of marking the location would still exist because of the federal statute. The requirement is mandatory.[49] And a failure to mark the location is fatal.*

In the marking of boundaries the first requisite is to designate the corners and angles of the claim by stakes or posts. The mining law contemplates that a mining claim shall be a parallelogram, not exceeding 1,500 feet in length nor 600 feet in width;[50] but a departure from that ideal may be made if the location is not excessive. The statute specifically says, too, that "the end lines of each claim shall be parallel to each other;[51] but that provision is merely directory.[52] An ideal location would be laid out lengthwise along the strike of the vein, with the end lines at right angles to that strike,[53] and with only four corners, viz.:

FIGURE No. 5.



among miners and prospectors, as a matter of law such a location is absolutely worthless for any purpose." McLaughlin v. Thompson, 2 Colo. App. 135, 29 Pac. 816, 817. See Erhardt v. Boaro, 113 U. S. 527, 535, 536, 5 Sup. Ct. 560, 28 L. Ed. 1113, Bulette v. Dodge, 2 Alaska, 427.

[49] Ware v. Smith (Ark.) 108 S. W. 831.

* In Neuebaumer v. Woodman, 89 Cal. 310, 36 Pac. 900, the plaintiffs, who had been in the possession of an unmarked claim until put out by defendants, who attempted to make a location, but did not mark the location, were allowed to recover in ejectment. As the plaintiffs had bought and were in under deeds which doubtless described the ground which they claimed, they probably came under the rule as to constructive possession announced in Hess v. Winder, 30 Cal. 349.

[50] See DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO., 171 U. S. 55, 84, 18 Sup. Ct. 895, 43 L. Ed. 72.

[51] Rev. St. U. S. § 2320 (U. S. Comp. St. 1901, p. 1424).

[52] "There is liberty of surface from under the act of 1872." WALRATH v. CHAMPION MIN. CO., 171 U. S. 312, 18 Sup. Ct. 909, 43 L. Ed. 170.

[53] DAGGETT v. YREKA MIN. & MILL. CO., 149 Cal. 357, 86 Pac. 968.

In the absence of state legislation, such a location would ordinarily be marked on the ground, so that its boundaries could readily be traced, if posts or other monuments were erected at each of the four corners with notices on them, or marks cut in them, sufficiently definite to enable them readily to be found from the discovery or location notice.[54]

The Purpose of Marking the Location.

The marking is to give full notice to other prospectors of the extent of the claim, and such marking as will give that kind of notice is required.[55] As has well been said: "The law is equally mandatory in requiring that mining claims must be so marked upon the ground that the boundaries thereof can be readily traced. This requirement is not fulfilled by simply setting a post at or near the place of discovery and setting stakes at each of the corners of the claim and at the center of the end lines, unless the topography of the ground is such that a person accustomed to tracing the lines of mining claims can, after reading the description of the claim in the posted notice of location, by a reasonable and bona fide effort to do so, find all of the stakes, and thereby trace the lines. Where the country is broken, and the view from one corner to another is obstructed by intervening gulches and timber and brush, it is necessary to blaze the trees along the lines, or cut away the brush, or set more stakes at such distances that they may be seen from one to another, or dig up the ground in a way to indicate the lines, so that the boundaries may be readily traced." [56]

In Willeford v. Bell the Supreme Court of California approved the following instructions as to marking boundaries: "The jury are instructed by the court that the mining claim of the defendant, in order to be valid, must have been distinctly marked upon the ground, so that

[54] Stakes and stone monuments put at each corner of the claim and at the center of each of the end lines were held a sufficient marking in Southern Cross Gold & Silver Min. Co. v. Europa Min. Co., 15 Nev. 383, and in Howeth v. Sullenger, 113 Cal. 547, 45 Pac. 841. Compare Marshall v. Harney Peak Mfg. Co., 1 S. D. 350, 47 N. W. 290.

[55] Where writings on corner and center stakes identify them with the claim, a posted notice of location is not essential to a proper marking of the location on the ground. HAWS v. VICTORIA COPPER MIN. CO., 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436.

[56] LEDOUX v. FORESTER (C. C.) 94 Fed. 600, 602. This decision was rendered May 22, 1899, and the language used was doubtless influenced by the state statute of March 8, 1899, still in force, which provided that, if a mining claim "be located on ground that is covered wholly or in part with brush or trees, such brush shall be cut and trees be marked or blazed along the line of such claim to indicate the location of such lines." Laws Wash. 1899, p. 70, c. 45, § 2. See Charlton v. Kelly, 2 Alaska, 532, 156 Fed. 433, 84 C. C. A. 295.

its boundaries could be readily traced, on or before the 28th day of February, 1895. The law requires this marking of the claim upon the ground to be done in such a manner that any person of reasonable intelligence may go upon the ground and readily trace the claim out, and readily find the boundaries and limits of the claim, without instructions, advice, or information from any one or thing other than the marking upon the ground; and it is not necessary or required that such person shall have a copy of the notice of location or necessarily use it in the tracing the boundaries of the claim, but where such notice is posted upon the claim, and constitutes a part of the marking of the claim, it may [and should] be used as a part of the means by which the boundaries of the claim can be traced. And if you believe from the evidence that the defendant, prior to the 28th day of February, 1895, failed to so mark his claim upon the ground so that any person of reasonable intelligence could go upon the ground, either with or without a copy of the notice of location, and readily trace the claim out, and find its boundaries and limits, your verdict should be that the claim was not so marked on the ground that its boundaries could be readily traced." [57]

Another way of stating the matter is the following: "Marking the boundaries of the surface claim as required by statute is one of the first steps towards a location. It serves a double purpose. It operates to determine the right of the claimant as between himself and the general government and to notify third persons of his right. Another seeking the benefits of the law, going upon the ground, is distinctly notified of the appropriation and can ascertain its boundaries. He may thus mark his own location with certainty, knowing that the boundaries of the other cannot be changed so as to encroach on grounds duly appropriated prior to the change. The prevention of fraud by swinging or floating is one of the purposes served." [58]

The Minimum Marking under the Federal Statute.

Even less marking than having a post at each of the four corners has on occasion sufficed; [59] but while less marking may be justified, where the nature of the ground makes it impossible to get at some of the corners to mark them, [60] it certainly would seem on principle that

[57] WILLEFORD v. BELL (Cal.) 49 Pac. 6, 8.

[58] POLLARD v. SHIVELY, 5 Colo. 309, 317.

[59] NORTH NOONDAY MIN. CO. v. ORIENT MIN. CO. (C. C.) 1 Fed. 522, 6 Sawy. 299, 311; Gleeson v. Martin White Min. Co., 13 Nev. 442, 463; Oregon King Min. Co. v. Brown, 119 Fed. 48, 55 C. C. A. 626. See Mt. Diablo Mill. & Min. Co. v. Callison, 5 Sawy. 439, 449, Fed. Cas. No. 9,886.

[60] Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66; Id., 111 U. S. 356, 4 Sup. Ct. 432, 28 L. Ed. 454.

ordinarily the federal requirement could not properly be complied with unless at least three corners of the claim were marked.[61] It has to be admitted, however, that the federal Supreme Court has announced with reference to the marking of placer claims a rule which would make far less marking do.[62] While the question of whether the markings are such that the boundaries can be readily traced is one of fact for the jury,[63] the court must decide whether there is or was enough to go to the jury; but the federal Supreme Court has been exceptionally liberal in its holdings about markings.

State Statutory Requirements for Markings.

The state statutes usually require at least six stakes, posts, or monuments—one at each of the four corners, and one in the center of each side line, or in the center of each end line. Colorado, Nevada, North Dakota, South Dakota, and Wyoming require posts at the center of each side line; Idaho requires posts at each angle of the side lines; and Arizona, North Dakota, Oregon, and South Dakota require posts

[61] See WALSH v. ERWIN (C. C.) 115 Fed. 531.

[62] McKINLEY CREEK MIN. CO. v. ALASKA UNITED MIN. CO., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331. See Loeser v. Gardiner, 1 Alaska, 641. Any marking on the ground whereby the boundaries can readily be traced is all that is required. The federal statute does not prescribe the marks, nor point out where they shall be placed. North Noonday Min. Co. v. Orient Min. Co., 1 Fed. 522, 6 Sawy. 299; Jupiter Min. Co. v. Bodie Consol. Min. Co., 11 Fed. 666, 7 Sawy. 96; OREGON KING MIN. CO. v. BROWN, 119 Fed. 48, 55 C. C. A. 626.

That it is not enough to put a single stake on the claim, and post notices on that, see DOE v. WATERLOO MIN. CO., 70 Fed. 455, 17 C. C. A. 190. That case, however, was decided before the McKinley Creek Case, supra. Two stakes, set one at each end of the lengthwise center line of the location, were held sufficient, where one bore a written notice that the length from stake to stake and a specified number of feet in width on each side of that line was claimed. NORTH NOONDAY MIN. CO. v. ORIENT MIN. CO. (C. C.) 1 Fed. 522, 6 Sawy. 299. See Gleeson v. Martin White Min. Co., 13 Nev. 442. Merely posting a notice on a tree at each end of the claim was held not a sufficient marking in HOLLAND v. MT. AUBURN GOLD QUARTZ MIN. CO., 53 Cal. 149. That case, also, of course, long antedates the McKinley Creek Case, supra. Posting notice on a house, with no ground markings and no reference to objects or monuments which would identify the claim, was held insufficient in Malececk v. Tinsley, 73 Ark. 610, 85 S. W. 81. The posting of a notice on a tree, and having the four corners marked by stakes referred to in the notice, was held sufficient in Eaton v. Norris, 131 Cal. 561, 63 Pac. 856.

[63] Taylor v. Middleton, 67 Cal. 656, 8 Pac. 594; Farmington Gold Min. Co. v. Rhymney Gold & Copper Co., 20 Utah, 363, 58 Pac. 832, 77 Am. St. Rep. 913; Fissure Min. Co. v. Old Susan Min. Co., 22 Utah, 438, 63 Pac. 587; MEYDENBAUER v. STEVENS (D. C.) 78 Fed. 787.

at the center of each end line—i. e., at each end of the lode.[64] Montana now calls, under the Act of 1907, for a monument at each corner or angle of the claim, but leaves the effectiveness of a lesser marking to the jury.

The state statutes also often prescribe the kind of posts or stakes. In Arizona stone monuments will do, if 3 feet high; but posts must be 4 feet above ground. In Colorado, New Mexico, North Dakota, South Dakota, Washington, and Wyoming the posts must be "substantial" and sunk in the ground.[65] That doubtless means that the land office requirement at least should be met, namely, each post to be at least 3 feet long by 4 inches square, set 18 inches in the ground, or, if of stone, to be at least 24 inches long, set 12 inches in the ground.[66] In Idaho monuments must be 4 feet above ground, and posts or trees must be 4 inches in diameter, or, if square, 4 inches square. In Montana and Nevada trees and rocks in place of specified size will serve. In both states posts must be at least 4 inches square by 4 feet 6 inches in length, set 1 foot in the ground, with a mound of stone or earth 4 feet in diameter by 2 feet in height around the post;[67] and when a stone is used, not a rock in place, it must be at least 6 inches square and 18 inches in length, which in Montana must be set two-thirds of its length in the ground, with a mound alongside 4 feet in diameter by 2 feet in height, and in Nevada must be set two-thirds of its length in a mound 4 feet in diameter by 2½ feet in height. In Colorado, if bed rock prevents the sinking of posts, they may be placed in a pile of stones; and where the proper placing of a post is impractical, or dangerous to life or limb, the post, called in such case "a witness stake," may be placed at the nearest practicable point and suitably marked to designate the proper place.[68] Similar provisions exist in Idaho, Nevada, North Dakota, South Dakota, and Wyoming.

[64] On the necessity of conforming to these requirements, see WRIGHT v. LYONS, 45 Or. 167, 77 Pac. 81. Under the Montana statute of 1907, where lesser monuments than those called for by statute are used, the question of whether the location is so marked that its boundaries can be readily traced becomes one of fact for the jury or for the court trying the case without a jury. Laws Mont. 1907, p. 18. Query whether, under that statute, the slight marking which will suffice to meet the federal requirement will do in Montana.

[65] That a stake was bound to a tree by twigs, instead of sunk in the ground, was held to be immaterial in McPHERSON v. JULIUS, 17 S. D. 98, 95 N. W. 428.

[66] Land Office Rule No. 143.

[67] In Montana a squared stump of the requisite size will do in place of a post, and both are to be surrounded by the proper mound. Laws 1907, p. 19.

[68] The witness stake must indicate by course or distance, or both, where

The state statutes often prescribe the markings on the stakes or posts. In Colorado the post must be hewn or marked on the side or sides in towards the claim. In Idaho the monuments at the corners and at the angles of side lines must be marked with the name of the claim and the corner or angle the monument represents, and, if a post or tree, it must be hewn or marked upon the side facing the discovery. In Montana and Nevada the trees, stakes, or monuments must be marked so as to designate the corners, and in Montana they are to be marked with the name of the claim. In North Dakota and South Dakota the posts must be hewn or blazed on the side facing the claim, and marked with the name of the lode and the corner, end, or side of the claim that they respectively represent. In Washington the posts or monuments must bear the name of the lode and the date of location. In Wyoming the requirement is the same as in Colorado.

Tying the Claim to Natural Objects or Permanent Monuments.

In addition to requiring the boundaries to be marked, the United States statute provides that, if state legislation or local rules compel a record to be made, that record shall contain, among other things, "such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." [69] As record seems everywhere to be required, it becomes essential to consider, in connection with the marking of boundaries, how such a "natural object or permanent monument" is to be ascertained and the claim referred to it in such a way as to identify the claim. Among natural objects and permanent monuments are big stones,[70] cliffs of rock,[71] trees,[72] mountain peaks,[73] cañons,[74] lakes and rivers,[75] the con-

the true corner may be found. BEALS v. CONE, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92. Where the correct place for a stake is on a railroad embankment, it must be placed there, even under the Colorado statute, unless it appears that it is impracticable to place it there, or that it would be interfered with by the passage of trains. Id.

[69] Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426).

[70] Russell v. Chumasero, 4 Mont. 309, 1 Pac. 713; Gamer v. Glenn, 8 Mont. 371, 20 Pac. 654. See Land Office Rule No. 143, recognizing for survey corner stones and rock in place.

[71] Farmington Gold Min. Co. v. Rhymney Gold & Copper Co., 20 Utah, 363, 58 Pac. 832, 77 Am. St. Rep. 913.

[72] Quimby v. Boyd, 8 Colo. 194, 6 Pac. 462; Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361; Hansen v. Fletcher, 10 Utah, 266, 37 Pac. 480.

[73] Craig v. Thompson, 10 Colo. 517, 16 Pac. 24; Jackson v. Dines, 13 Colo. 90, 21 Pac. 918; Vogel v. Warsing, 146 Fed. 949, 77 C. C. A. 199; Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co. (Idaho) 95 Pac. 14.

[74] Flavin v. Mattingly, 8 Mont. 242, 19 Pac. 384; Duncan v. Fulton, 15

[75] Credo Mining & Smelting Co. v. Highland Mining & Milling Co. (C. C.) 95 Fed. 911.

fluence of streams,[76] a neighboring shaft,[77] a mining claim,[78] posts firmly fixed in the ground,[79] a town,[80] a road,[81] and houses.[82] The business of the locator is, of course, to select the most prominent natural object or permanent monument possible under the circumstances, and, if more than one is accessible, to have at least two such objects or monuments to tie the claim to. The whole purpose of the law, namely, to enable other prospectors to identify the claim, should be met in the best available way.[83]

Time in Which Boundaries must be Marked.

There are conflicting views as to the time when the boundaries must be marked, where the state legislation and district rules fail to provide

Colo. App. 140, 61 Pac. 244; McKinley Creek Min. Co. v. Alaska United Min. Co., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331; Wells v. Davis, 22 Utah, 322, 62 Pac. 3.

[76] Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361.

[77] Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522; Wilson v. Triumph Consol. Min. Co., 19 Utah, 66, 56 Pac. 300, 75 Am. St. Rep. 718.

[78] HAMMER v. GARFIELD MIN. & MILL. CO., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; Butler v. Good Enough Min. Co., 1 Alaska, 246; Book v. Justice Min. Co. (C. C.) 58 Fed. 106; Seidler v. Lafave, 4 N. M. 369, 20 Pac. 789 (overruling Baxter Mountain Gold Min. Co. v. Patterson, 3 N. M. [Gildersleeve] 269, 3 Pac. 741); Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955 (explaining, yet impliedly overruling, Brown v. Levan, 4 Idaho, 794, 46 Pac. 661; but see Clearwater Short-Line Ry. v. San Garde, 7 Idaho, 106, 61 Pac. 137); Londonderry Min. Co. v. United Gold Mines Co., 38 Colo. 480, 88 Pac. 455; Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244 (but see Gilpin Co. Min. Co. v. Drake, 8 Colo. 586, 9 Pac. 787; Drummond v. Long, 9 Colo. 538, 13 Pac. 543); Carlin v. Freeman, 19 Colo. App. 334, 75 Pac. 26; Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723; Riste v. Morton, 20 Mont. 139, 49 Pac. 656; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869; Shattuck v. Costello, 8 Ariz. 22, 68 Pac. 529; Russell v. Chumasero, 4 Mont. 309, 1 Pac. 713; Southern Cross Gold & Silver Min. Co. v. Europa Min. Co., 15 Nev. 383; Wilson v. Triumph Consol. Min. Co., 19 Utah, 66, 56 Pac. 300, 75 Am. St. Rep. 718; McCann v. McMillan, 129 Cal. 350, 62 Pac. 31; Wells v. Davis, 22 Utah, 322, 62 Pac. 3. But see Baxter Mountain Gold Min. Co. v. Patterson, 3 N. M. (Johns.) 179, 3 Pac. 741.

[79] Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666; Russell v. Chumasero, 4 Mont. 309, 1 Pac. 713; Hansen v. Fletcher, 10 Utah, 266, 37 Pac. 480; Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244; Credo Mining & Smelting Co. v. Highland Mining & Milling Co. (C. C.) 95 Fed. 911; Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869.

[80] Fissure Min. Co. v. Old Susan Min. Co., 22 Utah, 438, 63 Pac. 587.

[81] McCann v. McMillan, 129 Cal. 350, 62 Pac. 31.

[82] Farmington Gold Min. Co. v. Rhymney Gold & Copper Co., 20 Utah, 363, 58 Pac. 832, 77 Am. St. Rep. 913.

[83] A claim's own permanent stone corner and other boundary monuments were held sufficient reference in TALMADGE v. ST. JOHN, 129 Cal. 430, 62 Pac. 79. See cases cited in note 181, infra. Parol evidence is admissible

a specific period. The proper interpretation of the federal and state requirements in such case would seem to be to allow the locator a reasonable time for the marking, and such time thereafter as there may be prior to the location of the ground by other prospectors. This proper interpretation has been adopted by a number of courts;[84] but in California and in Oregon the rule is adopted that the marking must follow the discovery "immediately."[85] The California and Oregon cases would seem clearly to lay down an erroneous rule. The reasonable time rule is the proper one. What is a reasonable time in which to mark boundaries depends upon the nature of the ground, the means of marking, etc.; but the sickness of the locator is not, it seems, a circumstance to be taken into account.[86]

The statutory periods fixed for the marking of boundaries vary considerably. In Arizona and Washington 90 days are allowed. In Montana and Oregon 30 days are allowed. In Nevada 20 days are allowed. In Idaho only 10 days are allowed.

The location is marked in time if the boundaries are fixed before a location by third parties is attempted.[87]

How to Mark Boundaries.

It is desirable at this point to indicate what the locator should do to mark his boundaries. For a perfectly rectangular claim he should provide at least eight posts, so as to meet the most rigid statutory requirements, and for other claims he should provide an additional post for each additional angle. These posts should comply with the state law as to size, depth set in ground or mound of rock, etc. If, as is true in a number of states, the state statute merely requires the posts to be

to show that a monument referred to in the recorded paper is in fact permanent. Metcalf v. Prescott, 10 Mont. 283, 25 Pac. 1037; Seidler v. Lafave, 4 N. M. (Johns.) 369, 20 Pac. 789; Seidler v. Maxfield, 4 N. M. (Johns.) 374, 20 Pac. 794. See Russell v. Chumasero, 4 Mont. 309, 1 Pac. 713.

[84] DOE v. WATERLOO MIN. CO. (C. C.) 55 Fed. 11, 70 Fed. 455, 17 C. C. A. 190; Burke v. McDonald, 2 Idaho, 679, 33 Pac. 49; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037; Union Min. & Mill. Co. v. Leitch, 24 Wash. 585, 64 Pac. 829, 85 Am. St. Rep. 961; Gleeson v. Martin White Min. Co., 13 Nev. 442; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522, 6 Sawy. 299; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666, 7 Sawy. 96. See Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113; Funk v. Sterrett, 59 Cal. 613.

[85] NEWBILL v. THURSTON, 65 Cal. 419, 4 Pac. 409; PATTERSON v. TARBILL, 26 Or. 29, 37 Pac. 76. In Oregon 30 days is now allowed by statute. Laws Or. 1901, p. 140.

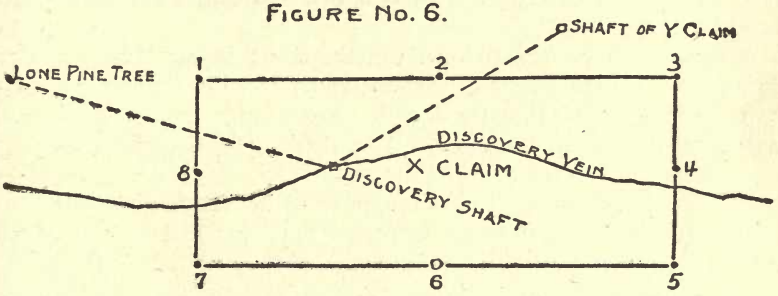
[86] DOE v. WATERLOO MIN. CO., 70 Fed. 455, 460, 17 C. C. A. 190.

[87] Crown Point Min. Co. v. Crismon, 39 Or. 364, 65 Pac. 87; Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791. The last Montana statute expressly so provides. Laws Mont. 1907, pp. 22, 23.

"substantial," it would be well to have them meet at least the test required of posts when set by the deputy mineral surveyor in an authorized survey, viz.: "Second. A post at least 3 feet long by 4 inches square, set 18 inches in the ground and surrounded by a substantial mound of stone or earth." [88] Such a mound should be at least 4 feet in diameter by 2½ feet in height. The state law must in any event be complied with.[89]

These posts should be set, one at each of the four corners, one at the center of each side, and one at the center of each end line, and they should be so placed that the end lines will be parallel. The latter point will be emphasized when we consider extralateral rights. If there are angles in the side lines, an extra post should be placed at each angle. No angles should be allowed in the end lines, which should be parallel. The posts would then be located as follows:

FIGURE No. 6.



The center posts, as well as the corner ones, should be numbered. Each stake should be blazed on the side toward the discovery, and on the blazed part should be written the number of the stake, the name of the claim, and the date of location. Though the latter date seems to be required only in Washington, it is well to comply with the strictest tests in all cases. If one does more than the state statute requires, no harm is done; but one must not do less. If under the local statute still more needs to be done, as, for instance, to blaze trees, cut away brush, etc., so as to enable an intelligent searcher for the claim to find it, that should be done. Then the locator should measure the distance from his discovery shaft, and ascertain the direction therefrom of the natural objects or permanent monuments selected.

[88] Land Office Regulations Approved May 21, 1907, rule 143.

[89] COPPER GLOBE MIN. CO. v. ALLMAN, 23 Utah, 410, 64 Pac. 1019. In making a relocation, posts or monuments already on the ground may in some states be adopted. CONWAY v. HART, 129 Cal. 480, 62 Pac. 44; BROCKBANK v. ALBION MIN. CO., 29 Utah, 367, 81 Pac. 863.

In placing the posts careful measurements should be taken, for while as a rule the statutes are liberally construed, and slight variations are immaterial, some courts take a different view of the situation. For instance, in Oregon a failure to establish a center end stake was, with other changes, held fatal;[90] and in Colorado the same was held true of a corner stake.[91] In Colorado, also, cutting a letter into solid rock was held not equivalent to placing a stake.[92] So the mere fact that it was difficult or inconvenient to put the stake where it belonged was held not to be enough to excuse putting it there under a statute allowing "a witness stake" to be placed at the nearest practicable point to a place impracticable or dangerous to life and limb.[93] On the other hand, it is held in Colorado that, if the corner stakes are placed properly, it is not a fatal defect not to have the center side line stakes exactly in the center;[94] and in Utah the absence of a corner stake is not fatal.[95] The Utah case, however, is a decision under the federal statute only.

In Brockbank v. Albion Min. Co. the court says: "The appellant, among other things, contends that the court erred in finding that neither at the time of making the location nor at any time since were the boundaries of the Homestake No. 1 marked by posts or monuments, so as to indicate the boundaries of the claim. We think this point is well taken. Such a finding does not appear to be warranted by the evidence. While the boundaries were not fully marked on the day the location notice was posted, because, the snow then being from 10 to 15 feet deep, it was impracticable to do so, still the notice having contained a full description of the claim by courses and distance from the discovery monument, where it was posted, and the claim being a relocation of one covering the same ground, the corners of which were yet substantially in place, the location was at least sufficient to entitle the locator to perfect it within a reasonable time, or before other parties had acquired rights in the ground. When afterwards, before any rights of the defendant or adverse rights intervened, the plaintiff had the old monuments repaired, and the boundaries marked with a post 3 inches thick and about 4 feet high set in a stone monument at each corner, the location became complete, and subsequent locators were

[90] Wright v. Lyons, 45 Or. 167, 77 Pac. 81.

[91] Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

[92] Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505.

[93] CRŒSUS MINING, M. & S. CO. v. COLORADO LAND & M. CO. (C. C.) 19 Fed. 78; Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

[94] Pollard v. Shively, 5 Colo. 309.

[95] WARNOCK v. DE WITT, 11 Utah, 324, 40 Pac. 205. So in Utah the lack of a side line monument, caused by the inaccessible nature of the ground, was held to be immaterial in Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66.

bound to take notice of the plaintiff's rights. Corner monuments having formerly been placed on the ground, and their location corresponding with the calls in the notice, the locator, under the circumstances, had a right to adopt these monuments by repairing or reconstructing them as was necessary, and the notice of location could properly be made to refer to the boundary monuments or stakes of the previous location." [96]

With reference to staking—i. e., putting up the boundary marks—it should be noted that the stakes may be set on prior located ground, or even on patented ground, if only it be done peaceably and openly. Where fractional pieces only of land are left by prior locations, it is highly desirable to lay out the location of such pieces with parallel end lines, so as to have extralateral rights, and if, to include the whole unlocated ground, it is necessary to put all the stakes on previously located ground, the location, if such placing of stakes is peaceably done, will be valid.[97] The same is true of patented ground, whether mineral,[98] or a mill site,[99] or agricultural land.[100] Then, too, under the de-

[96] BROCKBANK v. ALBION MIN. CO., 29 Utah, 367, 81 Pac. 863. A relocator may adopt his former stakes. Conway v. Hart, 129 Cal. 480, 62 Pac. 44.

[97] DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; Cleary v. Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57; Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 114 Fed. 417, 52 C. C. A. 219; Id., 131 Fed. 591, 66 C. C. A. 99; Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. (C. C.) 134 Fed. 268; McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823. See Hustler and New Year Lode Claims, 29 Land Dec. Dep. Int. 668; War Dance Lode, 29 Land Dec. Dep. Int. 256. Such a location vests in the locator all free public land embraced within its boundaries and all veins apexing in such free public land. Crown Point Min. Co. v. Buck, 97 Fed. 462, 38 C. C. A. 278.

[98] Hidee Gold Mining Co., 30 Land Dec. Dep. Int. 420. See Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co., 109 Fed. 538, 542, 48 C. C. A. 665; Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 114 Fed. 417, 419, 52 C. C. A. 219. But see State v. District Court, 25 Mont. 572, 65 Pac. 1020, 1024.

[99] Paul Jones Lode, 31 Land Dec. Dep. Int. 359. But, if the mill site cuts the lode in two, both parts of the lode cannot be patented, unless there is a valid discovery on the same vein on both parts. Id. That rule may not apply to a lode intersected by a placer. Volcano Lode Mining Claim, 30 Land Dec. Dep. Int. 482. And, it seems, does not apply to a lode intersected by a lode. See Crown Point Min. Co. v. Buck, 97 Fed. 462, 465, 38 C. C. A. 278.

[100] Alice Lode Mining Claim, 30 Land Dec. Dep. Int. 481.

cision in Lavagnino v. Uhlig, [101] it is settled that, if the unpatented senior location is abandoned or forfeited, the conflict area will inure to the junior locator by virtue of those provisions of the statute authorizing him to patent such area, and consequently the junior locator, by putting his lines over the senior claim, will get a right to acquire the conflict area, should the senior abandon or forfeit it.

Indeed, even in a location which does not conflict with previously located ground, it is not material that some or all of the stakes are by mistake set upon adjoining land. As the Montana Supreme Court says: "All that the statute requires, in our opinion, is that the land shall be so marked upon the ground that the boundaries can be readily traced. This does not mean that the marks shall be upon the actual ground included within the mining claim; but they may be upon any ground adjoining near enough to readily designate the boundaries. It was certainly never intended that a slight mistake in setting up stakes should invalidate the location. All that was intended is that a person seeking to make a subsequent location could go upon the ground referred to and from the marks find the boundaries of the claim." [102]

Since the posts are placed on previously located ground without any claim to priority, but either to facilitate the acquisition of full extralateral rights, or else by accident, the previous locator has no just cause for complaint, and, as subsequent locators are fully apprised of the situation by the marked boundaries of the claims, they have no rights that are infringed.

EXCESSIVE LOCATIONS.

55a. The marking may result in an excessive location (1) where the statutory allowance in length or width of claim is exceeded; and (2) where the vein runs in the claim, or departs from it, in such a way that part of the claim is distant from the center of the vein more than the number of feet allowed by statute.

Growing out of the marking of boundaries is the question of excessive locations. According to the cases there seem to be two kinds of excessive locations, viz.: (1) Those where the statutory allowance in length or width is exceeded, as, for instance, where a claim is laid

[101] 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119. But see Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. 994.

[102] WEST GRANITE MOUNTAIN MIN. CO. v. GRANITE MOUNTAIN MIN. CO., 7 Mont. 356, 17 Pac. 547. See Doe v. Tyler, 73 Cal. 21, 14 Pac. 375; McElligott v. Krogh, 90 Cal. 126, 90 Pac. 823; Watson v. Mayberry, 15 Utah, 265, 49 Pac. 479; Perigo v. Erwin (C. C.) 85 Fed. 904.

out 1,600 feet in length, whereas only 1,500 feet in length can be taken; and (2) where the limit of surface for a single location is not exceeded, but the vein runs in or departs from the location in such a way as to leave part of the claim as marked more than the allowed statutory number of feet distant from the center of the vein, as, for instance, where a claim 1,500 feet in length is laid across, instead of along, the strike of a vein. These two kinds of excessive locations are distinct, and on principle require different dispositions. We shall therefore take them up separately.

THE FIRST KIND OF EXCESSIVE LOCATION.

55a (1). In the first kind of excessive location, the validity of the location seems to turn on the good faith of the locator. If the error is innocently made, the claim is valid; but the excess is void, and the locator must draw in his lines, so as to leave that excess out. If the error is fraudulently made, it seems that the whole location is void.

In considering those cases where more surface ground is marked off than the law allows, it is desirable to get in mind the requirements of the length and width of locations. Under the act of Congress of 1866 the discoverer of a lode was allowed 400 feet in length and each associate locator 200 feet, not exceeding 3,000 feet to be taken under one location, while the width was covered by the words "together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules." Questions of excessive location seem seldom to have arisen as to locations made under that statute, and it is therefore to the act of 1872 that we turn. By the act of Congress of 1872 a claim may equal, but not exceed, 1,500 feet in length, and shall not extend more than 300 feet on each side of the middle of the vein at the surface.[103] In all the states the full 1,500 feet in length is allowed, and in most of the states and territories the full 600 feet in width is allowed, except where the district rules prescribe otherwise. In Colorado 300 feet in width—i. e., 150 feet on each side of the center of the vein—is fixed for all locations except in certain counties, viz., Gilpin, Clear Creek, Boulder, and Summit, where only 150 feet in width—i. e., 75 feet on each side of the center of the vein—can be taken.[104] In

[103] Rev. St. U. S. § 2320 (U. S. Comp. St. 1901, p. 1424). Where the end lines are not at right angles to the side lines, the distance between the side lines measures the width of the claim. DAVIS v. SHEPHERD, 31 Colo. 141, 72 Pac. 57.

[104] Mills' Ann. St. Colo. § 3149.

North Dakota 300 feet in width—i. e., 150 feet on each side of the center of the vein—is fixed for all locations.[105]

It should be noticed that, in all cases where the statutory length or width of surface is exceeded, the notices posted on the claim and the recorded papers call for only the legal length or width.[106] It is in the marking on the ground that the error lies; but, of course, it is just there that the evil, which consists in misleading prospectors, lies. The dicta all support the proposition that, if the excess is fraudulently staked, the whole location is invalid;[107] and it has been decided that an inexcusable mistake has the same effect.[108] It should be noted that an excessive location may also be invalid because the stakes are so far from where they ought to be that a reasonable search will not reveal them, and so the boundaries of the claim are not properly marked.[109] But where the excess, whether in length or width, is innocently embraced in the boundaries, the whole claim is not rendered invalid, but only the excess is void.[110] As the California Supreme Court has said: "Nor is it material that the lines and monuments of the official survey do not correspond to or be identical with those of the original location, since the courses and distances are simply estimated by miners in making their locations, and hence it often happens that claims are located more than 1,500 feet in length and 600 feet in width; and in such case the surveyor contracts the lines and draws in the monuments, so as to make the location conform to the requirements of the statute, the location being void only as to the excess." [111] In Hanson v. Fletch-

[105] Rev. Codes N. D. 1899, § 1427.

[106] In Pratt v. United Alaska Min. Co., 1 Alaska, 95, at page 103, the court suggests that a mining location notice which by its terms includes more land than can legally be located invalidates the whole location.

[107] Stemwinder Min. Co. v. Emma & Last Chance Consol. Min. Co., 2 Idaho, 456, 21 Pac. 1040; Hansen v. Fletcher, 10 Utah, 266, 37 Pac. 480. See English v. Johnson, 17 Cal. 107, 76 Am. Dec. 574.

[108] LEGGATT v. STEWART, 5 Mont. 107, 2 Pac. 320. See Hauswirth v. Butcher, 4 Mont. 299, 1 Pac. 714; Ledoux v. Forester (C. C.) 94 Fed. 600.

[109] LEDOUX v. FORESTER (C. C.) 94 Fed. 600.

[110] RICHMOND MIN. CO. v. ROSE, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666, 7 Sawy. 96; McPherson v. Julius, 17 S. D. 98, 95 N. W. 428; Burke v. McDonald, 2 Idaho, 679, 33 Pac. 49. See Stemwinder Min. Co. v. Emma & Last Chance Consol. Min. Co., 2 Idaho, 456, 21 Pac. 1040; Glacier Mountain Silver Min. Co. v. Willis, 127 U. S 471, 481, 8 Sup. Ct. 1214, 32 L. Ed. 172; Atkins v. Hendree, 1 Idaho, 95; Conway v. Hart, 129 Cal. 480, 62 Pac. 44; Hansen v. Fletcher, 10 Utah, 266, 37 Pac. 480.

[111] Howeth v. Sullenger, 113 Cal. 547, 45 Pac. 841. See Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66.

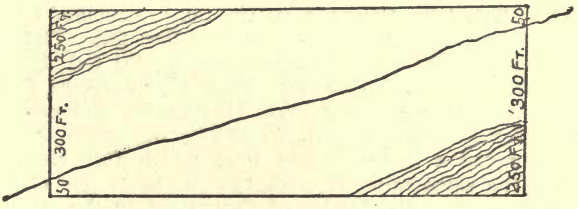
er, for instance, an excess of 200 feet in length and from 40 to 50 feet in width was innocently taken in, and only the excess held bad.[112] In that case the point of beginning and direction of the boundary lines in the location notice enabled the court to say what was excess. In any case of doubt as to where the excess lies, the locator, where the mistake is innocent, should be given an opportunity to draw in his lines, to include if possible, just the land he wants;[113] but of, course, if he designates to a third person a part to locate as excess, and that third person makes a void location, other parties may locate thereon.[114]

THE SECOND KIND OF EXCESSIVE LOCATION.

55a (2). In the second kind of excessive location the claim seems to be valid in any event; but by the majority of the few cases on the subject the excess is void, no matter in how good faith the locator acted. On principle the test of excess in such cases should be the good or bad faith of the locator at the time of location.

But what of the case where the surface location is no wider and no longer in number of feet than the law allows, and yet the vein runs in such a way as to make part of the ground exceed the permissible number of feet on one side or both sides of the vein? Messrs. Morrison and De Soto give the following diagram by way of illustration, namely:

FIGURE No. 7.



[112] HANSEN v. FLETCHER, 10 Utah, 266, 37 Pac. 480.

[113] See McINTOSH v. PRICE, 121 Fed. 716, 58 C. C. A. 136, and Zimmerman v. Funchion (C. C. A.) 161 Fed. 859, cases of excessive width in a placer.

[114] Gohres v. Illinois Min. Co., 40 Or. 516, 67 Pac. 666. After one tenant in common has conveyed his interest to his co-tenants, he may with their consent locate the excess width of the claim for himself. Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943.

And they say that the shaded ground, which is the land more than 300 feet from the center of the vein, is subject to a valid hostile discovery and location.[115] This is giving a very literal interpretation to the provisions of section 2320, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1424), that "no claim shall extend more than 300 feet on each side of the middle of the vein at the surface," but is supported by two of the three local courts that have passed on the point.[116] With all deference, however, it appears to be erroneous doctrine.[117] The whole history of American mining law is opposed to such a strict construction of that statute. If under the act of 1866, or under district rules prior to the act of 1872, there had been such a provision, it would doubtless have received the construction which Messrs. Morrison and De Soto favor, because at that time the lode was everything, and the surface only a necessary incident. But since the act of 1872 the surface is as essential as the lode—indeed, the surface is so essential that no lode may be located unless there is unappropriated surface which may be so staked as to include the lode[118]—and, in consequence, surface can properly be taken away from a locator only where the statute necessarily so requires. While land is located for the sake of the vein, it still remains true that "the location is of a piece of land including the vein," [119] and that the locator who substantially complies with the statute and who acts in good faith is to be protected. The soundness of this conclusion may be demonstrated by considering the difficulties of the other view.

[115] Morrison's Mining Rights (13th Ed.) pp. 20, 21.

[116] PATTERSON v. HITCHCOCK, 3 Colo. 533; SOUTHERN CALIFORNIA R. CO. v. O'DONNELL, 3 Cal. App. 11, 85 Pac. 932. See, also, Armstrong v. Lower, 6 Colo. 393, 400; Colorado M. Ry. Co. v. Croman, 16 Colo. 381, 27 Pac. 256; Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283. That the claim is void only as to the excess, see McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823.

[117] See WATERVALE MIN. CO. v. LEACH, 4 Ariz. 34, 33 Pac. 418.

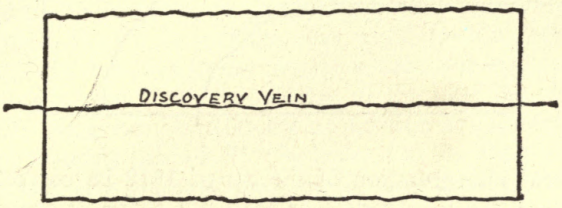
[118] Traphagen v. Kirk, 30 Mont. 562, 77 Pac. 58, and cases cited. See Heil v. Martin (Tex. Civ. App.) 70 S. W. 430.

"There is no provision in the mining laws which authorizes the issue of two patents for the same mineral land, the patent to one claimant to embrace only the surface of the land, and the patent to the other to embrace only the veins or lodes beneath the surface. It is not within the contemplation of the mining statutes that vein or lode deposits may be claimed, located, and patented independently of the surface ground connected with and containing or overlying them." Lellie Lode Mining Claim, 31 Land Dec. Dep. Int. 21, 23.

[119] Gleeson v. Martin White Min. Co., 13 Nev. 442, 457. "Under the original statute the miner located the lode. Under the later and present law he locates a definite piece of land containing the apex of the lode." Pilot Hill and Other Lodes, 35 Land Dec. Dep. Int. 592, 594.

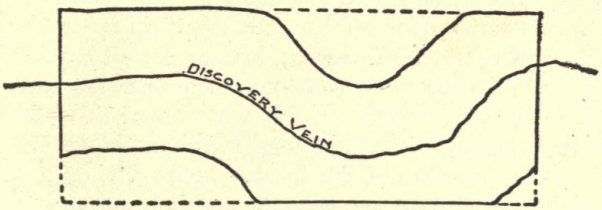
Everybody knows that veins almost never have a straight line for a center—their course is irregular—and yet the side lines of a location are always straight. If, however, the statute above quoted is to be taken literally, a claim which has the center of its vein in its center should be represented as follows:

FIGURE No. 8.



A claim having a variable vein would be represented thus:

FIGURE No. 9.



Surely Congress did not intend such absurd shapes for locations, but simply intended that there should be a substantial compliance with the statute. A literal interpretation is no more required in the case of this statute than in the case of the statute forbidding a location until discovery.[120]

But it is with reference to extralateral rights that the most serious consequences of Messrs. Morrison and De Soto's contention might ensue. It is well established that where end lines are parallel, and the discovery vein comes in through an end line and departs through a side line, there are extralateral rights. But take a case where the vein departs more than 300 feet from the other end line and there are diffi-

[120] Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501.

culties, if Messrs. Morrison and De Soto's contention that the claim is excessive is to stand. Take figure No. 10.

FIGURE No. 10.

If the literal interpretation of the act of 1872 be correct, the black lines other than the vein represent the legal shape of the claim. The dotted lines represent the part actually marked on the ground, but void for excess. Can it be said that the end lines are parallel, so as to permit of extralateral rights, or must the lines which Messrs. Morrison and De Soto insist are the legal end lines determine that there are no extralateral rights, since those actual end lines are not parallel? We allow end lines to be thrown over on previous locations in order to facilitate the acquisition of extralateral rights; but we permit that on the theory that, if the previous locations were not there, the land would legally be included in the new location. But what about this case, where by supposition it is apparent that it cannot legally so be included? Every instinct leads one to help out the locator here; but on a literal interpretation of the statute how can it be done? Is it not wrong to say that the legal end line, which is not parallel to the other, may be disregarded? Certainly, on Messrs. Morrison and De Soto's theory, that would seem to be wrong, and on their theory extralateral rights would have to be denied to such a location.

Other difficulties with the literal interpretation might be suggested; but the above are sufficient for our purpose. Now, what does the statute mean? Any one familiar with mining knows that it may take months, and often years, to ascertain the true course of a vein.[121] The

[121] See CONSOLIDATED WYOMING GOLD MIN. CO. v. CHAMPION MIN. CO. (C. C.) 63 Fed. 540, where, though a vein had been worked extensively for 40 years, it was difficult to tell where it actually ran. At page 548 the court says: "The Wyoming vein has been located and at different times worked upon during the past 40 years, and it is still a disputed and closely contested question as to where the lode actually runs; and in addition to all the regular workings of the mine it has required the expenditure of money, time, and labor in order to enable the witnesses to testify with

framers of the federal mining law knew that, and, in consequence, it is impossible to impute to Congress the intention that acts of location, which require only superficial investigations, should be subject to partial defeat by the ascertainment, years after the location, that the vein located runs in a direction other than that supposed at the time of location. The locator's surface is given him to put his buildings and surface works on, and if he does not exceed the number of surface feet allotted to one location, and acts in good faith he should retain the surface located, even if in fact the vein wanders in a direction he did not foresee. He does not locate merely a vein, but instead "a piece of land including a vein." [122] Knowledge at the time the property right is acquired is the great test as to the acquisition of mineral under agricultural and townsite patents.[123] So here, if at the time of the location the locator honestly believed that his location corresponded with the course of the vein, the ground located should all be his, even though the location turns out to lie across, instead of along, the strike of the vein.[124] The only cases on the subject that seem to be distinctly contrary to this view are Patterson v. Hitchcock,[125] Southern California

any degree of certainty to the 'true course and direction of the vein.' Every practical miner knows the difficulty that is often experienced in ascertaining these facts. The truth is that the miner is often compelled by the law to make his lines of location upon the surface ground before such facts can be ascertained. There is a limit to the time he can take before marking the boundaries of his claim. He is required to exercise his best judgment from the developments he has been able to make, and he is, of course, confined to his surface location, whether his judgment was right or wrong. The statute should be so construed as to give to the locator what he actually locates; no more and no less. It should be liberally construed in his favor, so as to give him the full benefit of the statute, in its true spirit and intent, in order to carry out the wise and beneficent policy of the general government in opening up the mineral lands for exploration and development."

[122] GLEESON v. MARTIN WHITE MIN. CO., 13 Nev. 442, 457.

[123] DAVIS v. WIEBBOLD, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238.

[124] WATERVALE MIN. CO. v. LEACH, 4 Ariz. 34, 33 Pac. 418. Compare Beik v. Nickerson, 29 Land Dec. Dep. Int. 662; Van Horn v. State, 5 Wyo. 501, 40 Pac. 964. But, if the location is fraudulently made, a different situation is presented. Compare Walsh v. Mueller, 16 Mont. 180, 40 Pac. 292.

[125] 3 Colo. 533. See, also, Zollars v. Evans (C. C.) 5 Fed. 172; Terrible Min. Co. v. Argentine Min. Co. (C. C.) 89 Fed. 583; Meydenbauer v. Stevens (D. C.) 78 Fed. 787. The case of Taylor v. Parenteau, 23 Colo. 368, 48 Pac. 505, seems to have been a case where the parties knew the course of the vein at the time of the location. Prima facie the vein is co-extensive in length with the lode location, Armstrong v. Lower, 6 Colo. 393; even when the lode location conflicts with a placer location, San Miguel Consol. Gold Min. Co. v. Bonner, 33 Colo. 207, 79 Pac. 1025. See Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283.

Lumber Ry. Co. v. O'Donnell,[126] and McElligott v. Krogh.[127] Against them is the doctrine of Watervale v. Leach.[128]

After patent, of course, the fact that a regular sized location includes ground extending more than 300 feet on one side of the lode does not render the patent invalid as to that ground.[129]

CHANGING BOUNDARIES.

55b. The markings may be changed from time to time to change boundaries, so long as intervening rights of third parties are not infringed, and so long as the proper amended notices and certificates are posted and recorded, as required by local rules and statutes.

Even though a locator has marked his boundaries and recorded his certificate, he may change the boundaries, so as to accord with subsequent information as to the course of the vein, and thus take in new ground,[130] or so as to make his end lines parallel,[131] or so as to get rid of excess ground located,[132] provided that no intervening rights of others are interfered with in so doing.[133] Amended certificates must,

[126] 3 Cal. App. 382, 85 Pac. 932. This case was decided on the extraordinary idea that, where side lines become end lines for extralateral right purposes, they do so for all purposes.

[127] 151 Cal. 126, 90 Pac. 823.

[128] "The statute, as we understand it, only intends to prescribe the limit along the course of the lode that the locator may claim, not that he shall locate so that the greatest dimension of his claim shall coincide with the course of the lode. * * * Of course, Congress expected that the miner would avail himself of the privilege accorded him, and locate along the course of the lode; but it does not require him to do so. The only result of not so locating is that the locator gets less, in extent of the lode, than he otherwise would have located, and that, if the side lines, instead of the end lines, cross the course of the lode, in order to define the locator's rights to pursue the lode on its dip, the side lines will be treated as end lines." WATERVALE MIN. CO. v. LEACH, 4 Ariz. 34, 60, 61, 33 Pac. 418, 421.

[129] PEABODY GOLD MIN. CO. v. GOLD HILL MIN. CO. (C. C.) 97 Fed. 657; Argonaut Consol. Min. & Mill. Co. v. Turner, 23 Colo. 400, 48 Pac. 685, 58 Am. St. Rep. 245.

[130] Tonopah & S. L. Min. Co. v. Tonopah Min. Co. (C. C.) 125 Fed. 389; Seymour v. Fisher, 16 Colo. 189, 27 Pac. 240.

[131] Doe v. Sanger, 83 Cal. 203, 23 Pac. 365; Last Chance Min. Co. v. Tyler Min. Co., 61 Fed. 557, 9 C. C. A. 613.

[132] Credo Mining & Smelting Co. v. Highland Mining & Milling Co. (C. C.) 95 Fed. 911.

[133] See Crœsus Mining, M. & S. Co. v. Colorado Land & M. Co. (C. C.) 19 Fed. 78; Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co., 12 Nev. 312.

of course, be recorded,[134] and under the Montana statute of 1907 it would seem as if an amended certificate would not serve where the changed boundaries necessitate a change in the point of discovery as shown by the discovery shaft, but that a complete relocation in such case is essential.[135]

Maintaining Boundary Marks.

Since monuments control courses and distances in recorded papers, it is highly desirable to keep them up.[136] But the location is not rendered invalid if, without the fault of the locator, the stakes are subsequently removed or the marks obliterated.[137]

POSTING NOTICES OF LOCATION.

56. While the federal statute does not require the posting of a notice of location on the claim, nearly all the mining law states and territories require it. The local requirements should be complied with strictly. Where the kind of posting is not prescribed, the notice should be placed where prospectors may easily find it. A few jurisdictions require the posting to take place immediately on discovery, but the most allow a reasonable time.

[134] See sections 57, 57a, infra.

[135] Laws Mont. 1907, pp. 21, 22.

[136] See Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723. Yreka Min. & Mill. Co. v. Knight, 133 Cal. 544, 65 Pac. 1091; Meydenbauer v. Stevens (D. C.) 78 Fed. 787. In POLLARD v. SHIVELY, 5 Colo. 309, it was held that a monument to control courses and distances must be the one called for, and that where the record called for a "post," and only a stump existed, there was not the monument called for. In BONANZA CONSOL. MIN. CO. v. GOLDEN HEAD MIN. CO., 29 Utah, 159, 80 Pac. 736, the court properly held, however, that a stump was a post, if intended as such. See Thallman v. Thomas (C. C.) 102 Fed. 935. Where the courses and distances are not defined with certainty by monuments or stakes, the calls in the location certificate must govern. Treadwell v. Marrs (Ariz.) 83 Pac. 350. "In ascertaining boundaries, where monuments are definitely established, these control courses and distances. Where these are not definitely established, then courses and distances must be followed, unless they are irreconcilable, in which case courses prevail over distances." Meyer-Clarke-Rowe Mines Co. v. Steinfield (Ariz.) 80 Pac. 400.

[137] ZERRES v. VANINA (C. C.) 134 Fed. 610; BOOK v. JUSTICE MIN. CO. (C. C.) 58 Fed. 106, 114; Moore v. Steelsmith, 1 Alaska, 121; McEvoy v. Hyman (C. C.) 25 Fed. 596; SMITH v. NEWELL (C. C.) 86 Fed. 56; Walsh v. Erwin (C. C.) 115 Fed. 531, 537; Temescal Oil Mining & Development Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666, 7 Sawy. 96. Where the established corner stake was moved by third parties, its original situation was allowed to prevail against

The federal statute does not require the posting of a notice of location on the claim; but, outside of Alaska and California, the local statutes require it. In California the state Supreme Court at one time enumerated the posting of a notice on the claim as one of the essential parts of location,[138] and it certainly seems as if it should be held to be such everywhere,[139] except in cases where the boundary stakes of the claim have writings on them which identify the claim;[140] but a late California case says that the posting of a notice is not essential, in the absence of a local custom of miners requiring it.[141] Even when required by a mining district rule, it seems to be an unnecessary act as against one who is otherwise fully informed of the extent of the claim.[142]

The local statutes differ in requirements. The fundamental need of a posted notice is to apprise other prospectors of the extent of the claim.[143] Whether it is sufficient to answer that purpose is a question of fact.[144] The marked boundaries are for that purpose, too; but the notice supplements them, and frequently relieves the prospector of the burden of searching for them. Some states, therefore, are content with requiring a very simple notice, not necessarily like the notice required to be recorded later. This is true of Colorado, Montana, Nevada,[145] North Dakota, South Dakota, Washington, and Wyoming.

a subsequent locator in TONOPAH & S. L. MIN. CO. v. TONOPAH MIN. CO. (C. C.) 125 Fed. 408.

[138] Adams v. Crawford, 116 Cal. 495, 498, 48 Pac. 488.

[139] See 1 Snyder on Mines, § 375. Everywhere it is a help in tracing boundaries. MEYDENBAUER v. STEVENS (D. C.) 78 Fed. 787.

[140] HAWS v. VICTORIA COPPER MIN. CO., 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436. See Book v. Justice Min. Co. (C. C.) 58 Fed. 106.

[141] Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223. But such notice is an act tending to show a proper marking of the location. DAGGETT v. YREKA MIN. & MILL. CO., 149 Cal. 357, 86 Pac. 968.

[142] Yosemite Gold Min. & Mill. Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. 196, 52 L. Ed. ——.

[143] The stakes and monuments on the ground prevail over the calls in the notice of location. BOOK v. JUSTICE MIN. CO. (C. C.) 58 Fed. 106; Hansen v. Fletcher, 10 Utah, 266, 37 Pac. 480. In an early case, prior to the act of 1866, it was held that the posted notice need only substantially identify the lode. Johnson v. Parks, 10 Cal. 446.

[144] Seidler v. Lafave, 4 N. M. 369, 20 Pac. 789; Wells v. Davis, 22 Utah, 322, 62 Pac. 3; Eilers v. Boatman, 111 U. S. 356, 4 Sup. Ct. 432, 28 L. Ed. 454.

[145] See Gleeson v. Martin White Min. Co., 13 Nev. 442; Poujade v. Ryan, 21 Nev. 449, 33 Pac. 659; Brady v. Husby, 21 Nev. 453, 33 Pac. 801. A substantial compliance with the Nevada statute was held sufficient in ZERRES v. VANINA (C. C.) 134 Fed. 610. See, also, Porter v. Tonopah North Star Tunnel & Development Co. (C. C.) 133 Fed. 756.

Other states and territories contemplate the record of a copy of the notice posted, and, since the federal and state statutes require special things to be in the recorded notice, a location notice posted in this second group of states and territories cannot be as informal as in the former. Such states and territories are Arizona, Idaho, New Mexico, Oregon, and Utah.[146]

The Notice in the First Group of States.

In Colorado and Washington the state statutes require the posting of a notice containing the name of the lode, the name of the locator, and the date of discovery. In Montana the approximate dimensions of the area intended to be appropriated are to be stated also. The Wyoming statute calls for "the name of the discoverer and locator," the name of the claim, and the date of discovery. In North and South Dakota the Colorado and Washington requirements exist, and in addition the number of feet claimed in length on each side of discovery and number of feet claimed in width on each side of the lode must be given. In Nevada the North and South Dakota requirements are added to by the statute calling also for the general course of the vein to be stated. In Nevada two location notices have to be posted, and the first must be put at the place of discovery, so that a subsequent prospector may not only see that ground is claimed, but also see upon what alleged discovery the location is based.†

A notice that would satisfy the requirements of most of these states would read, when modeled on the notice approved in Erhardt v. Boaro:[147]

"Hawk Lode.

"We, the undersigned, who discovered this mineral-bearing lode June 17, 1907, claim 1,500 feet thereof, 750 feet easterly and 750 feet westerly from discovery, and 300[148] feet on each side of the center of the vein. The general course of the vein is east and west.

"Joel B. Erhardt, 4/5.
"Thomas Carroll, 1/5."[149]

[146] See Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019.

† Fox v. Myers (Nev.) 86 Pac. 793, 797.

[147] 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113.

[148] In Colorado and North Dakota 150 feet on each side of the center of the vein would be the limit; and in Gilpin, Clear Creek, Boulder, and Summit counties in Colorado 75 feet on each side would be the limit.

[149] Such a notice as this, posted on a monument in the center of the claim, was held insufficient, without other marking, to make a location in Gelcich v. Moriarty, 53 Cal. 217. See Newbill v. Thurston, 65 Cal. 419, 4 Pac. 409; Malecek v. Tinsley, 73 Ark. 610, 85 S. W. 81.

Of course, a less complete notice will do for Colorado. For instance, the notice sustained in Erhardt v. Boaro read:

"Hawk Lode.

"We, the undersigned, claim 1,500 feet on this mineral-bearing lode, vein, or deposit.

"Dated June 17, 1880.

"Joel B. Erhardt, 4/5.
"Thomas Carroll, 1/5." [150]

Because, however, the notice did not specify the number of feet claimed on each side of discovery, the locators were restricted to 750 feet on each side of the discovery point.[151]

The Colorado court has declared that: "A location notice, properly made and posted upon a valid discovery of mineral, is an appropriation of the territory therein specified for the period of 60 days. During this period no one can initiate title thereto which would be rendered valid by the mere failure of the first appropriator to perform the necessary discovery work within the time prescribed by law." [152] The notice is essential, and its substance must conform to the statute; but its form may vary. It is requisite, however, that the notice be put where it may readily be found by other prospectors.[153] Where mounds have been built that would naturally be investigated by prospectors, notices covered up in the mounds, so as to escape obliteration by the weather, have been held good; [154] but such loose practices are not to be encouraged.

Messrs. Morrison and De Soto well say of the Colorado act: "The words of the act require 'a plain sign or notice'; but there has never been any uniformity among prospectors in the details of the notice, or in the mode of posting it. It may be substantially complied with by writing on a blazed tree or on a board nailed at discovery, or by legible carving, or by any other rude, but honest, form of notice, so that it be intelligible and open to observation; but the loose practice of writing

[150] Compare COLUMBIA COPPER MIN. CO. v. DUCHESS MINING, MILLING & SMELTING CO., 13 Wyo. 244, 79 Pac. 385.

[151] ERHARDT v. BOARO, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113; BRAMLETT v. FLICK, 23 Mont. 95, 57 Pac. 869. An attempt to restrict a claimant to 750 feet on one side of discovery, because of loose wording of the notice, failed in Allen v. Dunlap, 24 Or. 229, 33 Pac. 675. See, also, Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723.

[152] Sierra Blanca Mining & Reduction Co. v. Winchell, 35 Colo. 13, 83 Pac. 628.

[153] PHILLPOTTS v. BLASDEL, 8 Nev. 61.

[154] DONAHUE v. MEISTER, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283; GIRD v. OIL CO. (C. C.) 60 Fed. 531.

on a chip or stick thrown into the discovery hole is an attempt to evade or abuse the fair requirement of the law." [155]

The Notice in the Second Group of States.

In Arizona, Idaho, New Mexico, Oregon, and Utah, where a literal or a substantial copy of the posted notice is to be recorded, and in California, where the custom is to that effect, the notice must comply with the federal requirements for record, wherever record is called for, namely, it must contain "the name or names of the locators, the date of location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." [156] In Arizona it must also contain the name of the claim, and the description must contain the length and width of the claim in feet, the distance from the point of discovery to each end of the claim, and the general course of the claim. In Idaho the notice must also contain the name of the claim, the date of discovery, and the description must contain the direction and distance claimed along the ledge from discovery, the distance claimed on each side of the middle of the ledge, "the distance and direction from the discovery monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself the location of the claim," and the name of the mining district, county, and state. In New Mexico the intent to locate the claim must be stated in the notice. In Oregon and Utah the requirements are substantially like those of Arizona.[157]

A notice that would satisfy the requirements of most of these states would be like the location certificate contained in the discussion of record to follow, and reference to that is hereby made. What was said about the posting of the notice required in other states applies to notices in the second group of states.

Messrs. Morrison and De Soto urge the locator, after he has done the discovery work to the full amount, and a little over, and has marked the boundaries of his claim, to measure carefully the depth of the discovery shaft, and "note the exact result of this measurement on the location stake." [158] In New Mexico the fact that the location notice

[155] Morrison's Mining Rights (13th Ed.) 35, 36.

[156] Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426). See Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361.

[157] In Oregon a location was held void for failure of the notice to comply with the statute. SHARKEY v. CANDIANI, 48 Or. 112, 85 Pac. 219, 7 L. R A. (N. S.) 791. The record of a substantial copy of the notice posted on the claim will do. Oregon King Min. Co. v. Brown, 119 Fed. 48, 55 C. C. A. 626.

[158] Morrison's Mining Rights (13th Ed.) 54.

was by mistake posted on a part of the claim overlapping a prior claim was held not to invalidate the location.[159]

Time Allowed for Posting Notice.

Except in California, Idaho, Oregon, New Mexico, and Utah, a reasonable time would seem to be allowed for the posting of the location notice. Of the places not allowing a reasonable time, Idaho, which has a discovery notice posted at the time of discovery, provides for the posting of the location notice at the time of marking boundaries, which latter must take place within 10 days after discovery, and Utah by statute requires it to be at the time of discovery. That California and Oregon will require the posting to be done immediately is evident from their holdings on the marking of boundaries. In New Mexico there is a decision requiring the discovery and the posting of the notice to be practically contemporaneous.[160] A reasonable time should properly be the same time as that allowed for marking boundaries.[161]

Where one notice has been posted, but the location is invalid, because the discovery work has been done on a patented claim, the location may become good by a subsequent valid discovery without the posting of a new notice.[162] It has very properly been decided that a mining claim notice purporting to be posted at the point of discovery as required by statute is not prima facie evidence of discovery, except as between conflicting claimants who post their notices at the same point.[163]

Amendment of Location Notice.

An interesting question is whether a location notice can be amended, before record, by erasing or adding names. In general, it cannot.[164] In one case it is stated that prior to the completion of a location a locator may make a verbal transfer of his right to locate, if no statute requires a writing, and the transferee can complete the location in his own name, or join with the other locators in making the location,[165] or the grantee of an invalid location may make a totally new location in

159 Upton v. Santa Rita Min. Co. (N. M.) 89 Pac. 275.

160 Deeney v. Mineral Creek Milling Co., 11 N. M. 279, 67 Pac. 724.

161 That the notice gives a reasonable time to mark the location and perform the other required acts, see Union Min. & Mill. Co. v. Leitch, 24 Wash. 585, 64 Pac. 829, 85 Am. St. Rep. 961.

162 TREASURY TUNNEL MINING & REDUCTION CO. v. BOSS, 32 Colo. 27, 74 Pac. 888, 105 Am. St. Rep. 60; Haws v. Victoria Copper Min. Co., 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436; Peters v. Tonopah Min. Co. (C. C.) 120 Fed. 587. But see Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054.

163 Fox v. Myers (Nev.) 86 Pac. 793.

164 Morton v. Solambo Copper Min. Co., 26 Cal. 527.

165 Doe v. Waterloo Min. Co., 70 Fed. 455, 459, 17 C. C. A. 190. See, also, Omar v. Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246.

his own name.[166] A location notice may be amended, so long as intervening rights are not prejudiced.[167]

RECORDING.

57. While the federal statute does not require a record, it prescribes the minimum contents, if one is called for by the local rules and statutes. All the mining states and territories seem to require a record with the mining district recorder or the county recorder and some require it with both. The form and contents of the paper to be recorded are prescribed with minuteness in Idaho and Nevada, and everywhere all the statutory requirements must be met. The federal requirement of such reference to natural objects and permanent monuments as will identify the claim should be complied with in good faith.

The time to record varies in the different states and territories. Except in Montana, Nevada, and perhaps in Idaho, a failure to record in time seems to be fatal, unless record takes place before a locator who comes in after the time to record expires makes a peaceable location.

The United States statutes do not require any location papers to be recorded,[168] but provide that, if any are recorded, they "shall contain the name or names of the locators, the date of location and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."[169] This is the minimum requirement as to the contents of a record, if the state or mining district prescribes record, and, in fact, has been added to in many of the states. The more rigorous requirements have been

[166] Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63.

[167] Ware v. White (Ark.) 108 S. W. 831; Ford v. Campbell (Nev.) 92 Pac. 206, 210. See Wiltsee v. King of Arizona Min. & Mill. Co., 7 Ariz. 95, 60 Pac. 896.

[168] HAWS v. VICTORIA COPPER MIN. CO., 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182; Souter v. Maguire, 78 Cal. 543, 21 Pac. 183; Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419; Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522, 6 Sawy. 299; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666, 7 Sawy. 96; Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co., 12 Nev. 312; Southern Cross Gold & Silver Min. Co. v. Europa Min. Co., 15 Nev. 383; Payton v. Burns, 41 Or. 430, 69 Pac. 134.

[169] Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426). For a list of natural objects and permanent monuments see § 55, supra. Under the foregoing section of the federal statute the record need not show that the claim is marked on the ground. McCann v. McMillan, 129 Cal. 350, 62 Pac. 31.

noted in discussing that group of states requiring a copy of the location notice posted on the ground to be recorded as the location certificate, except that Nevada requires and Montana makes optional a statement of the dimensions and location of the discovery shaft, or its equivalent, and of the location and description of each corner and the markings thereon.[170] In Nevada, under the old act, the recording of a location certificate was held not to be essential to the validity of a location, except where the claim was in a district which had a mining district recorder.[171]

The location paper to be recorded seems to be known everywhere to-day as "the location certificate"; but in Montana, until recently, it was known as the "declaratory statement." In Idaho the substantial copy of the location notice must have attached the affidavit of one of the locators that he is a citizen of the United States, or has declared his intention to become such, that he is acquainted with the ground claimed, and that no part has been located, or, if located, that it has been abandoned by failure to perform labor, and that he has done 10 feet of new work.[172] In Montana the certificate of location must be verified by one of the locators, or an authorized agent, or, if the locator is a corporation, by an officer or authorized agent; and when it is verified by an agent the fact of agency must be stated in the affidavit.[173]

[170] For an insufficient declaratory statement, see Hahn v. James, 29 Mont. 1, 73 Pac. 965.

[171] FORD v. CAMPBELL (Nev.) 92 Pac. 206; Zerres v. Vanina (C. C.) 134 Fed. 610; Wailes v. Davies (C. C.) 158 Fed. 667.

[172] The Idaho court has sustained the validity of the affidavit requirement. Van Buren v. McKinley, 8 Idaho, 93, 66 Pac. 936. Compare BUTTE CITY WATER CO. v. BAKER, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409.

[173] Under an earlier Montana statute it was held that the locator might make the verification on information supplied by his agent, and need not personally see the lode. Wenner v. McNulty, 7 Mont. 30, 14 Pac. 643. Under a later statute the fact that the verification was on information only was held not to make it void. MARES v. DILLON, 30 Mont. 117, 75 Pac. 963. The strict Montana requirements were valid. BUTTE CITY WATER CO. v. BAKER, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409; Hickey v. Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806; McBurney v. Berry, 5 Mont. 300, 5 Pac. 867. One compelled to allege a location under the strict Montana statute (now repealed) had to allege that the declaratory statement was verified and that it was put on record in the proper county. Power v. Sla, 24 Mont. 243, 61 Pac. 468. The old declaratory statement had to describe the height of the boundary posts with only substantial accuracy, WALKER v. PENNINGTON, 27 Mont. 369, 71 Pac. 156; but had specifically to describe the dimensions and location of the discovery shaft and the corners and markings thereon, Hahn v. James, 29 Mont. 1, 73 Pac. 965. Unless it showed that the tunnel equivalent of a discovery shaft cut the vein at a depth of ten feet below the surface,

The purpose of a location certificate or declaratory statement is to give notice to the world of the existence and situs of the claim. The Supreme Court of Colorado has pointed out that record, like surface marking, "serves a double purpose. As between the claimant and the government it preserves a memorial of the lands appropriated after monuments in their nature perishable are swept away. It also supplements the surface marking, in giving notice to third persons." [174] It does permanently what the ground markings and the posted notice of location do temporarily. In consequence, if the state statute does not stand in the way, by requiring burdensome details, considerable looseness in the description of the claim may exist, if only subsequent prospectors can reasonably be said to have received from the certificate's contents notice of the situs of the location.[175] But the state statutes may require more specific description, and, if they do, they must be complied with, so far as mandatory provisions are concerned, or the claim is void.[176] Occasionally an additional requirement is held to be only directory.[177]

Where a senior discovery is followed up by the marking of boundaries and the recording of a location certificate, the claim will be given priority in Colorado, although no notice is posted as required by law.[178]

Description of the Claim.

The troublesome part of the location certificate is the description of the claim. Prospectors cannot, of course, be expected to take lawyers

no right was acquired by it. Dolan v. Passmore, 34 Mont. 277, 85 Pac. 1034. But under the Montana act of 1907 "no defect in the posted notice or recorded certificate shall be deemed material except as against one who has located the same ground, or some portion thereof in good faith and without notice." Laws Mont. 1907, pp. 22, 23.

[174] POLLARD v. SHIVELY, 5 Colo. 309, 317. See Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037.

[175] FISSURE MIN. CO. v. OLD SUSAN MIN. CO., 22 Utah, 438, 63 Pac. 587; McCann v. McMillan, 129 Cal. 350, 62 Pac. 31; Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955; Farmington Gold Min. Co. v. Rhymney Gold & Copper Co., 20 Utah, 363, 58 Pac. 832, 77 Am. St. Rep. 913; Talmadge v. St. John, 129 Cal. 430, 62 Pac. 79.

[176] BUTTE CITY WATER CO. v. BAKER, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409; Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153; Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36. See Van Buren v. McKinley, 8 Idaho, 93, 66 Pac. 936.

[177] ZERRES v. VANINA (C. C.) 134 Fed. 610, 616; Ford v. Campbell (Nev.) 92 Pac. 206; Wailes v. Davies (C. C.) 158 Fed. 667.

[178] McMILLEN v. FERRUM MIN. CO., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64.

and surveyors around with them; yet the federal statutory requirement and the state additional requirements as to a description of the property must be met.[179] The location certificate is the first step in the record chain of title, and should be prepared carefully. While many vague references to natural objects or permanent monuments have been sustained,[180] and it has even been held that no other monuments need be referred to than the claim's own corner monuments,[181] the statute evidently contemplates that such a definite reference to natural objects or permanent monuments other than the boundary and other marks of the claim itself shall be given as would enable a person of reasonable intelligence, who went with a copy of the location certificate to search for the claim, to find it without undue trouble.[182] Though some earlier cases which applied a more rigid test have been disapproved or explained away,[183] and though in Bennett v. Harkrader a location certificate for five hill claims of 200 feet frontage by 1,000 feet "running from a stake on the west bank of Ice Gulch to a similar stake 1,000 feet distant, near the mouth of Quartz Gulch," was held good, despite the court's admission that "it is obvious that the descrip-

[179] It is mandatory. Ware v. White (Ark.) 108 S. W. 831. See Fuller v. Harris (D. C.) 29 Fed. 814.

[180] See, for instance, "about 1500 feet south of Vaughn's Little Jennie mine," HAMMER v. GARFIELD MIN. & MILL. CO., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; "a large bowlder at the west end of the Tim lode," there being no Tim lode, but being a large bowlder, GAMER v. GLENN, 8 Mont. 371, 20 Pac. 654; "the nearest known claim is the Wild Bill mine on the west," BONANZA CONSOL. MIN. CO. v. GOLDEN HEAD MIN. CO., 29 Utah, 159, 80 Pac. 736.

[181] HANSEN v. FLETCHER, 10 Utah, 266, 37 Pac. 480; Talmadge v. St. John, 129 Cal. 430, 62 Pac. 79. See Credo Mining & Smelting Co. v. Highland Mining & Milling Co. (C. C.) 95 Fed. 911; Farmington Gold Min. Co. v. Rhymney Gold & Copper Co., 20 Utah, 363, 58 Pac. 832, 77 Am. St. Rep. 913.

[182] BRADY v. HUSBY, 21 Nev. 453, 33 Pac. 801; SMITH v. NEWELL (C. C.) 85 Fed. 56; BRAMLETT v. FLICK, 23 Mont. 95, 57 Pac. 869; Gamer v. Glenn, 8 Mont. 371, 20 Pac. 654; Yreka Min. & Mill. Co. v. Knight, 133 Cal. 544, 65 Pac. 1091; Londonderry Min. Co. v. United Gold Mines Co., 38 Colo. 480, 88 Pac. 455; Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co. (Idaho) 95 Pac. 14. Compare Dillon v. Bayliss, 11 Mont. 171, 27 Pac. 725; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522, 6 Sawy. 299; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666, 7 Sawy. 96. Whether he could ascertain the claim in that way is for the jury to say. BRAMLETT v. FLICK, supra; Eilers v. Boatman, 111 U. S. 356, 4 Sup. Ct. 432, 28 L. Ed. 454. See Fissure Min. Co. v. Old Susan Min. Co., 22 Utah, 438, 63 Pac. 587.

[183] Brown v. Levan, 4 Idaho, 794, 46 Pac. 66, is explained in Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955.

tion is quite imperfect," [184] it still remains true that location certificates may be declared void for indefiniteness of description.[185]

Where the location certificate on its face calls for natural objects or permanent monuments, or a single one,[186] the sufficiency of the reference becomes a question of fact,[187] and parol evidence will be admitted to explain or supply any defect or omission and to identify the objects called for as monuments.[188] Where a call is for a stake, the better opinion is that a stump [189] or tree [190] may be shown to have been intended, and vice versa.[191] Where all the monuments are actually on the ground, the fact that the direction of the closing location line is indefinitely described in the location certificate is immaterial.[192] Where

[184] BENNETT v. HARKRADER, 158 U. S. 441, 443, 15 Sup. Ct. 863, 39 L. Ed. 1046. See, also, Vogel v. Warsing, 146 Fed. 949, 77 C. C. A. 199.

[185] FORD v. CAMPBELL (Nev.) 92 Pac. 206; Darger v. Le Sieur, 8 Utah, 160, 30 Pac. 363 (but see Farmington Gold Min. Co. v. Rhymney Gold & Copper Co., 20 Utah, 363, 58 Pac. 832, 77 Am. St. Rep. 913); Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153; Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1020; Faxon v. Barnard (C. C.) 4 Fed. 702, 2 McCrary, 44; Mutchnor v. McCarty, 149 Cal. 603, 87 Pac. 85; Baxter Mountain Gold Min. Co. v. Patterson, 3 N. M. (Johnson) 179, 3 Pac. 741; Gilpin Co. Min. Co. v. Drake, 8 Colo. 586, 9 Pac. 787; Drummond v. Long, 9 Colo. 538, 13 Pac. 543 (but see Craig v. Thompson, 10 Colo. 517, 16 Pac. 24; Jackson v. Dines, 13 Colo. 90, 21 Pac. 918); Vogel v. Warsing, 146 Fed. 949, 77 C. C. A. 199; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36. See Clearwater Short Line Ry. Co. v. San Garde, 7 Idaho, 106, 61 Pac. 137. For a very loose reference, upheld on the basis of custom, see SMITH v. CASCADEN, 148 Fed. 792, 78 C. C. A. 458.

[186] McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136. What are natural objects and permanent monuments is considered under § 55, supra.

[187] BONANZA CONSOL. MIN. CO. v. GOLDEN HEAD MIN. CO., 29 Utah, 159, 80 Pac. 736. See Brady v. Husby, 21 Nev. 453, 33 Pac. 801.

[188] Metcalf v. Prescott, 10 Mont. 283, 25 Pac. 1037; Seidler v. Maxfield, 4 N. M. 374, 20 Pac. 794; Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361; Dillon v. Bayliss, 11 Mont. 171, 27 Pac. 725; FARMINGTON GOLD MIN. CO. v. RHYMNEY GOLD & COPPER CO., 20 Utah, 363, 58 Pac. 832, 77 Am. St. Rep. 913; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111.

[189] BONANZA CONSOL. MIN. CO. v. GOLDEN HEAD MIN. CO., 29 Utah, 159, 80 Pac. 736. But see POLLARD v. SHIVELY, 5 Colo. 309.

[190] Hansen v. Fletcher, 10 Utah, 266, 37 Pac. 480; Upton v. Larkin, 7 Mont. 449, 17 Pac. 728.

[191] UPTON v. LARKIN, 7 Mont. 449, 17 Pac. 728.

[192] Providence Gold Min. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641. Good faith is the important thing, if only the description used can reasonably be said to impart notice to subsequent locators. Farmington Gold Min. Co. v. Rhymney Gold & Copper Co., 20 Utah, 363, 58 Pac. 832, 77 Am. St. Rep. 913; Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co. (Idaho) 95 Pac. 14. See Talmadge v. St. John, 129 Cal. 430, 62 Pac. 79

a recorded notice of location in its description of the claim erroneously referred to the "southeasterly" end of another claim, when the claim had no such boundary, and described a distance of 400 feet as "4," and gave the courses of a certain boundary line as "northerly" and "southerly," when the courses of such line were not true north and south, yet the notice correctly described the location by reference to a well-established line of another claim, and a person of ordinary intelligence could have ascertained the ground located from the description as applied to the monument on the ground, it was held that the recorded description was sufficient.[193] If all the statutes require is contained in the certificate, the fact that more is there is immaterial, if the surplusage is not misleading.[194] If fraud is properly pleaded, a material date in a location certificate may be contradicted as a deliberate misstatement;[195] and that should be possible without specially pleading the facts. Under the federal statute the date of location is a material part of the record;[196] but, if subsequent locators are not misled by an error in the date, the true date of location may be shown.[197]

The Location Certificate.

With reference to drawing a location certificate, the locator needs to be cautioned to comply with the requirements of the state statute, as well as of the federal statute, in every respect.[198] In describing the claim care should be taken to note the situation of the discovery shaft (in Nevada the dimensions of the shaft must also be given) and to describe the markings on the corner and other posts and monuments. Particular attention should be paid to tying one or more of the corners, and, if practicable, the discovery shaft also, to one or more, preferably more, natural objects or permanent monuments. One should be particular to attach any affidavit or verification required by state statutes,

193 SMITH v. NEWELL (C. C.) 86 Fed. 56. See Book v. Justice Min. Co. (C. C.) 58 Fed. 115. "Northerly" and "southerly" must not be taken to mean "due north" and "due south." WILTSEE v. KING OF ARIZONA MIN. & MILL. CO., 7 Ariz. 95, 60 Pac. 896; Glass v. Basin Mining & Concentrating Co., 22 Mont. 151, 55 Pac. 1047. For a case where "west" was read "east," see Upton v. Santa Rita Min. Co. (N. M.) 89 Pac. 275.

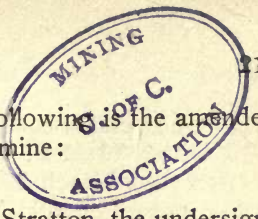
194 Preston v. Hunter, 67 Fed. 996, 15 C. C. A. 148.

195 MULDOON v. BROWN, 21 Utah, 121, 59 Pac. 720.

196 Id. By the Montana statute the date of posting notice of location is made the date of location. Laws Mont. 1907, p. 18.

197 WEBB v. CARLON, 148 Cal. 555, 83 Pac. 998, 113 Am. St. Rep. 305.

198 That one-third of the declaratory statements in a county are not verified as required by statute will not make an unverified statement good. O'Donnell v. Glenn, 9 Mont. 452, 23 Pac. 1018, 8 L. R. A. 629.



such as exist in Idaho and Montana.[199] The following is the amended location certificate of a well-known Colorado mine:

"State of Colorado, County of El Paso—ss.:

"Know all men by these presents, that W. S. Stratton, the undersigned, has this 23d day of March, 1892, amended, located, and claimed, and by these presents does amend, locate, and claim, by right of discovery and amended location, in compliance with the mining acts of Congress approved May 10, 1872, and all subsequent acts, and with section 2409 of the General Laws of Colorado, and with local customs, laws, and regulations, 1,500 linear feet and horizontal measurement on the Independence lode, vein, ledge, or deposit, along the vein thereof, with all its dips, angles, and variations, as allowed by law, together with 150 feet on each side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodges, ledges, or deposits and surface ground within the lines of said claim, 290 feet running southerly from center of discovery shaft and 1,210 feet running northerly from center of discovery shaft; said discovery shaft being situate upon said lode, vein, ledge, or deposit, and within the lines of said claim in Cripple Creek or Womack mining district, county of El Paso, and state of Colorado, described by metes and bounds as follows, to wit: Beginning at corner No. 1, whence a sharp peak in the Sangre de Christo range bears S. 47° 40′ W. Nipple Mountain bears S. 7° 14′ E. Thence N. 2° 10′ E. 1,500 ft. to Cor. No. 2. Thence S. 87° 05′ E. 300 ft. to Cor. No. 3. Thence S. 2° 15′ W. 1,499.96 ft. to Cor. No. 4. Thence S. 87° 05′ W. 297.75 ft. to Cor. No. 1, the place of beginning. Located on west side of Wilson creek north of the Washington lode. This being the same lode originally located on the 4th day of July, 1891, and recorded on the 15th day of September, 1891, in Book 1, page 36, in the office of the recorder of El Paso county. This further and amended certificate of location is made without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original location, description, or record, to secure any abandoned overlapping claims, and to secure all the benefits of section 2409, General Laws of Colorado.

"Said lode was discovered the 4th day of July, A. D. 1891.

"Attest: Of survey,

"E. R. Warren, U. S. Dep. Min. Sur. "W. S. Stratton. [Seal.]

"Date of amended location,

"March 23, A. D. 1892.

[199] Without the required verification, the certificate or declaratory statement is invalid. Russell v. Hoyt, 4 Mont. 412, 2 Pac. 25; McCowan v. Maclay, 16 Mont. 234, 40 Pac. 602; HICKEY v. ANACONDA COPPER MIN. CO., 33 Mont. 46, 81 Pac. 806.

"Date of amended certificate,
"March 26 A. D. 1892.
'Recorded March 29, 1892, in Book 1, p. 22, of the records of El Paso county, Colorado."

But for the word "amended," used throughout, it is substantially the regular location certificate in use in Colorado to-day.

For a Montana declaratory statement, judically approved, see Walker v. Pennington.[200] Since that case, however, the Montana act of 1907 has made a complete change in the Montana mining law.

The Time to Record.

The time to record varies in the different states and territories. Ninety days after discovery are allowed in Alaska,[201] and the same period from the time of location is granted in Arizona. No time is fixed in California. Ninety days after location is fixed in Idaho. In Montana 60 days, in Nevada 90 days, in New Mexico 3 months, in Oregon 60 days, and in Utah 30 days, all from date of posting notice, are given by statute. In Colorado 3 months, in North and South Dakota, each, 60 days, in Washington 90 days, and in Wyoming 60 days from date of discovery is the allowed time. Record is always with the county recorder where there is no mining district recorder. In Nevada record must be made with both, and in Idaho and Utah a method is provided for record with both. Record is had when the paper is filed for record, and the failure of the recorder actually or properly to record will not be allowed to prejudice the locator.[202]

Effect of Failure to Record in the Time Fixed.

A failure to record within the statutory time will not make the location invalid, if it is otherwise valid, and if adverse rights of third parties do not intervene before record is had.[203] The locator risks loss

[200] Walker v. Pennington, 27 Mont. 369, 71 Pac. 156.

[201] See Butler v. Good Enough Min. Co., 1 Alaska, 246.

[202] SHEPARD v. MURPHY, 26 Colo. 350, 58 Pac. 588; WEESE v. BARKER, 7 Colo. 178, 2 Pac. 919; Myers v. Spooner, 55 Cal. 257. Compare Johnson v. McLaughlin, 1 Ariz. 493, 4 Pac. 130. But it is doubtful if an entry made by a mining district recorder in a memorandum book which he carries around with him is a sufficient recording of a claim located by the recorder himself. FULLER v. HARRIS (D. C.) 29 Fed. 814.

[203] PRESTON v. HUNTER, 67 Fed. 996, 15 C. C. A. 148; Faxon v. Barnard (C. C.) 4 Fed. 702. See LOCKHART v. JOHNSON, 181 U. S. 527, 21 Sup. Ct. 665, 45 L. Ed. 979; Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1020; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87; Zerres v. Vanina (C. C.) 134 Fed. 610; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36; Columbia Copper Min. Co. v. Duchess Mining, Milling & Smelting Co., 13 Wyo. 244, 79 Pac. 385. The Montana statute so provides. Laws Mont. 1907, pp. 22, 23. In Nevada under the old act the recording of

of the claim by delay; but, if he records before the rights of third parties attach, his title is good by relation.[204] Moreover, it has been held that if the first locator merely fails to record, and a third person attempts a location before the time for the first locator to record has elapsed, and even records before the first locator does, the first locator by recording gains priority, because the claim was not open to relocation by the third person, and so no rights of his have intervened.[205] But, despite dicta to the contrary,[206] it seems clear that a third person,

a location certificate was held not to be essential to the validity of a location, except in a district where there was a mining district recorder. FORD v. CAMPBELL (Nev.) 92 Pac. 206; Zerres v. Vanina (C. C.) 134 Fed. 618; Wailes v. Davis (C. C.) 158 Fed. 667.

[204] Failure to record may be excused, because the result of a conspiracy between a locator's partner and the relocators. LOCKHART v. LEEDS, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. Ed. 263.

[205] BRAMLETT v. FLICK, 23 Mont. 95, 57 Pac. 869. See Shepard v. Murphy, 26 Colo. 350, 58 Pac. 588. In Omar v. Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246, the Colorado court even held that a third person, who during the time the first locator had to perfect his location made a discovery outside the first locator's claim, and then, after the first locator was in default for failure to record, threw the lines of his location over the first locator's ground, did not thereby gain priority over the first locator as to the overlapping ground. The court said: "No one can therefore lawfully enter the territory so claimed [by the first locator] during the [location] period named for the purpose of instituting a claim thereto, and it necessarily and logically follows, from an application of the same rule and principles, that no one, during this period, can stand outside such appropriated territory and in any manner initiate a claim thereto capable of being made valid in the future by the happening of fortuitous circumstances." Id., 11 Colo. 380, 18 Pac. 446, 7 Am. St. Rep. 246. The court's conclusion would seem, however, to be unsound. Compare Morrison's Mining Rights (13th Ed.) 84, 85. As the Montana court has recently pointed out, the case of LAVAGNINO v. UHLIG, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119, compels us to say that the first attempted location does not withdraw from exploration the whole area which the original locator could choose from, but only precludes the acquisition of rights which would conflict with his right to first choice. HELENA GOLD & IRON CO. v. BAGGALEY, 34 Mont. 464, 475, 476, 87 Pac. 455. And, of course, therefore, the second locator ought to have all rights which he would acquire if the first location were already perfected. What is more, it must be true, since the case of LAVAGNINO v. UHLIG, that "the failure of the claimant to complete his location after posting his preliminary notice [must] inure to the benefit of a junior locator, whose claim is in conflict with such older claim, when the inchoate right acquired by the discovery and the posting of the notice never became fixed by a completion of the location." HELENA GOLD & IRON CO. v. BAGGALEY, 34 Mont. 464, 475, 87 Pac. 455. The case of FARRELL v. LOCKHART, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. 994, in no way negatives the giving of such retroactive effect to the inchoate senior claim's abandonment. See chapter X, § 42, supra.

[206] See Eaton v. Norris, 131 Cal. 561, 63 Pac. 856; Talmadge v. St. John, 129 Cal. 430, 62 Pac. 79.

coming in after the first locator's time for record has expired and peaceably making a location over the first locator's ground, will have priority notwithstanding the fact that the first locator was in possession and the newcomer had notice of the first locator's situation. [207]

What a Location Certificate Evidences.

In conclusion, it may be noticed that a location certificate has been said to be presumptive evidence of discovery;[208] but, in the absence of statutes like those in Idaho, [209] Montana, or Nevada, this statement certainly seems unsound. [210] A location certificate, like the marking of the boundaries, is simply one of the essential acts of location and can prove only itself, [211] except in those cases where the statutes expressly provide otherwise, or where the certificate must contain certain statements of fact and must be under oath.[212] Where the distances and courses set out in the description as recorded vary from the monuments or markings made on the ground, the latter prevail and will determine the locus of the claim.[213]

[207] BROWN v. OREGON KING MIN. CO. (C. C.) 110 Fed. 728; COPPER GLOBE MIN. CO. v. ALLMAN, 23 Utah, 410, 64 Pac. 1020. See Russell v. Hoyt, 4 Mont. 412, 2 Pac. 25; Lockhart v. Wills, 9 N. M. 344, 54 Pac. 336; Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735. But see Omar v. Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246; Zerres v. Vanina (C. C.) 134 Fed. 610; Ford v. Campbell (Nev.) 92 Pac. 206; Wailes v. Davies (C. C.) 158 Fed. 667. Under the Montana statute of 1907 this is, of course, not so. Laws Mont. 1907, pp. 22, 23. The Nevada cases are explainable by the burdensome nature of the Nevada act. See Morrison's Mining Rights (13th Ed.) 71. Similar reasons will explain the dictum contained in the premature relocation case of Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co., 131 Fed. 579, 66 C. C. A. 299, that under the Idaho statute the failure of the locator to record does not justify a location by others.

[208] CHEESMAN v. SHREEVE (C. C.) 40 Fed. 787; Jantzon v. Arizona Copper Co., 3 Ariz. 6, 20 Pac. 93; Cheesman v. Hart (C. C.) 42 Fed. 98; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111. Compare Coleman v. Davis, 13 Colo. 98, 21 Pac. 1018; Vogel v. Warsing, 146 Fed. 949, 77 C. C. A. 199. See, contra, Smith v. Newell (C. C.) 86 Fed. 56.

[209] Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co. (Idaho) 95 Pac. 14.

[210] SMITH v. NEWELL (C. C.) 86 Fed. 56, 60; FLICK v. GOLD HILL & L. M. MIN. CO., 8 Mont. 298, 20 Pac. 807. That the certificates are not conclusive evidence, see Uinta Tunnel Min. & Transp. Co. v. Creede & Cripple Creek Min. & Mill. Co., 119 Fed. 164, 57 C. C. A. 200. In Montana a location certificate, or a certified copy thereof, is prima facie evidence of all facts properly recited therein. Laws Mont. 1907, p. 21. So in Nevada. Laws Nev. 1907, pp. 418–421, c. 194.

[211] Mutchmor v. McCarty, 149 Cal. 603, 87 Pac. 85.

[212] Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co. (Idaho) 95 Pac. 14.

[213] Meydenbauer v. Stevens (D. C.) 78 Fed. 787; Steen v. Wild Goose Min. Co., 1 Alaska, 255; Price v. McIntosh, 1 Alaska, 286; Galbraith v. Shasta Iron

AMENDMENTS OF RECORD.

57a. The recorded papers may be supplemented and made good by the record of additional and amendatory papers; but, if the defective record sought to be cured was so defective that third parties were entitled to disregard it and make locations for themselves, the intervening rights of such third parties cannot be cut out by amendment. For a further discussion of amendments of record, see § 96a, infra.

Because a locator may want to change the boundaries of his claim, so as to make it conform to an unexpected course taken by the vein as disclosed by the development of the property, or so as to take in more ground, where less than the statutory ground has been taken up, or so as to cut off the right of a senior locator, who has abandoned or rendered forfeitable the senior location, to regain the conflict area by resuming work, or may want to change the name of the claim, or to supply defects in the original location certificate, or to validate a premature location or relocation, it is provided by statute in some states, and is a right that exists independently of special statutory provision, that an amended location certificate may be filed to show the real situation.[214] A claim may be swung at right angles, if no intervening rights of third parties are infringed;[215] and it has even been held that, prior to the expiration of the time to record, it may be so swung, though the rights of third parties, acquired with due regard to what the first locator claimed in his location notice, have intervened.[216] So a claim's end lines may be reformed to get or vary extralateral rights.[217]

Co., 143 Cal. 94, 76 Pac. 901; Treadwell v. Marrs (Ariz.) 83 Pac. 350. See Act June 30, 1902, c. 1329, 32 Stat. 545. Compare notes 136 and 143, supra.

[214] See Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833. But in Montana it seems that a locator may not amend so as to change the point of discovery as shown by the discovery shaft, but can make such change only by a complete relocation. Laws Mont. 1907, p. 21.

[215] DUNCAN v. FULTON, 15 Colo. App. 140, 61 Pac. 244.

[216] SANDERS v. NOBLE, 22 Mont. 110, 55 Pac. 1037. While this case would have been all right as a decision under the act of 1866 (Johnson v. Parks, 10 Cal. 446), it cannot be supported as a decision under the act of 1872 (WILTSEE v. KING OF ARIZONA MIN. & MILL. CO., 7 Ariz. 95, 60 Pac. 896). See Morrison's Mining Rights (12th Ed.) 34. The Montana cases approving of Sanders v. Noble overlook the fact that there the original locator defined the situs of his claim. If he had not done so, the case could, of course, have been supported on the doctrine that the location notice "precludes the acquisition of rights within the area which would interfere or conflict with the right of the prior discoverer to swing his claim, so as to lay it along the lead after his explorations demonstrated its strike." Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 476, 87 Pac. 455.

[217] TYLER MIN. CO. v. LAST CHANCE MIN. CO. (C. C.) 71 Fed. 848; Doe

So the name of the claim may be changed.[218] In all such cases the record should be amended to conform to the fact;[219] but no new discovery in land added is necessary.[220]

Where the original location is based on a discovery within the limits of a valid existing location, it is held in one state to be such a nullity that an amended location certificate, filed after the senior location becomes subject to relocation, will not cure it.[221] In view of the decision of the United States Supreme Court in Lavagnino v. Uhlig that senior ground in conflict with a valid junior location accrues to the junior on the abandonment or forfeiture of the senior,[222] and in view of the legitimate consequences which seem to flow from that decision, this doctrine is open to serious question. It, of course, is true that by amendment a void location cannot be made to cut out an intervening location;[223] but there was no intervening location in the case of Sullivan v. Sharp.[224] The Colorado decision that a valid junior location could acquire conflicting senior ground by amendment after the senior ground became subject to relocation[225] would seem to call for a different determination of Sullivan v. Sharp.[226] The case of Lavagnino v. Uhlig, above mentioned, has not made it any less desirable, however, for the junior locator to record an amended location certificate, if he wishes to acquire beyond question conflict area subject to forfeiture, for only by such amendment will he be sure to cut off the senior locator's right to recover the conflict area by resuming work.[227]

v. Sanger, 83 Cal. 203, 23 Pac. 365; Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 131 Fed. 591, 66 C. C. A. 99.

218 Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177; Seymour v. Fisher, 16 Colo. 189, 27 Pac. 240. But care must be taken not to mislead adverse claimants thereby.

219 SEYMOUR v. FISHER, 16 Colo. 189, 27 Pac. 240. But see Wiltsee v. King of Arizona Min. & Mill. Co., 7 Ariz. 95, 60 Pac. 896.

220 TONOPAH & S. L. MIN. CO. v. TONOPAH MIN. CO. OF NEVADA (C. C.) 125 Fed. 389. But see Weed v. Snook, 144 Cal. 439, 77 Pac. 1023. And that it may be necessary, if land claimed by others by possession without discovery is sought to be acquired, see Biglow v. Conradt (C. C. A.) 159 Fed. 868.

221 SULLIVAN v. SHARP, 33 Colo. 346, 80 Pac. 1054. See Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69. But see Frisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109.

222 LAVAGNINO v. UHLIG, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119. But see FARRELL v. LOCKHART, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——, and Moorhead v. Erie Min. & Mill. Co. (Colo.) 96 Pac. 253.

223 Brown v. Gurney, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717.

224 Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054.

225 JOHNSON v. YOUNG, 18 Colo. 625, 34 Pac. 173.

226 33 Colo. 346, 80 Pac. 1054. "Void" might well be defined "voidable." See Kinney v. Lundy (Ariz.) 89 Pac. 496.

227 See Oscamp v. Crystal River Min. Co., 58 Fed. 293, 7 C. C. A. 233, and dictum in Moorhead v. Erie Min. & Mill. Co. (Colo.) 96 Pac. 253.

An amended location certificate takes effect by relation back to the date of the original location.[228] If the location or location certificate was so defective as to enable third parties to disregard it and to locate for themselves, then the intervening vested rights acquired by such third parties cannot be cut out by amendment and relation back,[229] though, if the original location or location certificate is merely irregular, such intervening rights may be cut out by amendment.[230] The amended location certificate should contain a statement that it is an amendment, and that it is made and filed without prejudice. It has been held, however, that it need not specify for what purpose it is filed.[231] It has been held, also, that both the original certificate and the additional certificate are admissible to identify the claim with certainty, where neither could do it alone.[232]

ADDING AND DROPPING NAMES OF LOCATORS.

57b. In some cases locators are allowed to drop the names of old locators and to add the names of new ones by amendment.

Whether the names of old locators may be dropped and new ones added by amendment depends upon the way they happen to be dropped or added. A grantee of an original locator may well take the place

[228] Strepey v. Stark, 7 Colo. 614, 5 Pac. 111; McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652; Craig v. Thompson, 10 Colo. 517, 16 Pac. 24; McEvoy v. Hymman (C. C.) 25 Fed. 596. See Milwaukee Gold Extraction Co. v. Gordon (Mont.) 95 Pac. 995.

[229] BEALS v. CONE, 27 Colo. 493, 62 Pac. 948, 63 Am. St. Rep. 92; Hall v. Arnott, 80 Cal. 348, 22 Pac. 200; Jordan v. Schuerman, 6 Ariz. 79, 53 Pac. 579; Brown v. Oregon King Min. Co. (C. C.) 110 Fed. 728; Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. (C. C.) 134 Fed. 268; Jordan v. Duke, 6 Ariz. 55, 53 Pac. 197; Morrison v. Regan, 8 Idaho, 291, 67 Pac. 956; Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co. (Idaho) 95 Pac. 14; Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177; Deeney v. Mineral Creek Milling Co., 11 N. M. 279, 67 Pac. 724. See Gilbson v. Choteau, 13 Wall. (U. S.) 101, 20 L. Ed. 534. A defective relocation certificate cannot be cured by amendment, so as to destroy the effect of a resumption by the original locator. FIELD v. TANNER, 32 Colo. 278, 75 Pac. 916.

[230] McEvoy v. Hymman (C. C.) 25 Fed. 596; Craig v. Thompson, 10 Colo. 517, 16 Pac. 24; Cheesman v. Shreeve (C. C.) 40 Fed. 787. See Frisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109. The amended location certificate may be filed and become effective after suit brought concerning the claim. Strepey v. Stark, 7 Colo. 614, 5 Pac. 111; Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 304, 90 Pac. 177.

[231] Johnson v. Young, 18 Colo. 625, 34 Pac. 173; TONOPAH & S. L. MIN. CO. v. TONOPAH MIN. CO. OF NEVADA (C. C.) 125 Fed. 389.

[232] DUNCAN v. FULTON, 15 Colo. App. 140, 61 Pac. 244.

of the original locator in the amended certificate. So, if one locator may abandon his interest to his co-owners, it would seem to be proper to omit him in the amended certificate;[233] but the mere fact that he is not named in the second certificate is not proof of abandonment.[234] To save any question, a deed should be obtained from him, or his interest forfeited under the forfeiture to co-owner statute.[235] The taking in of a new locator without the omission of any of the old may well be regarded as estopping the old from denying an interest to exist in the new. In any event, the fact that a second or amended notice or certificate of location of a mining claim contains names other than those set forth in the original cannot be taken advantage of by the other parties; but as to the persons whose names appear therein for the first time it may be treated as an original notice or certificate, and as a supplemental or amended notice or certificate as to those whose names appear on both.[236]

[233] See Strang v. Ryan, 46 Cal. 53.

[234] Thompson v. Spray, 72 Cal. 528, 14 Pac. 182; Doe v. Waterloo Min. Co., 70 Fed. 435. See Weill v. Lucerne Min. Co., 11 Nev. 200.

[235] Query whether a relocation would answer. See Van Valkenburg v. Huff, 1 Nev. 142; and see § 96, infra.

[236] TONOPAH & S. L. MIN. CO. v. TONOPAH MIN. CO. OF NEVADA (C. C.) 125 Fed. 389; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182. See Gleeson v. Martin White Min. Co., 13 Nev. 442.

CHAPTER XIII.

THE LOCATION OF MILL SITES.

THE TWO KINDS OF MILL SITES.

58. Nonmineral unappropriated public land of the United States may be acquired as a mill site (1) where it is not contiguous to the vein or lode with which the claimant wants to use it, and (2) where, without owning a mine in connection therewith, the claimant has put a quartz mill or reduction works on the site.

By section 2337, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1436), mill sites may be acquired in two ways: (1) "Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes"; (2) where, without owning a mine in connection therewith, the claimant has put a quartz mill or reduction works on the site. A mill site acquired in the second way is both technically and actually a mill site; but one acquired in the first way may be devoted to nonmilling purposes, and so may be called a mill site only because that is the name given to it in the statute. Mill sites acquired in these two ways must be nonmineral,[1] must not exceed five acres, and must be located in the manner required by the local statutes.

When it is said that the land must be nonmineral, that means that an affirmative answer must be given to the question: "Has the land greater value for mill purposes, or for surface use in connection with a mining claim, than it has as mineral land?" [2] As between a prior mill site claimant and a subsequent lode claimant, the mill site claimant will be given the benefit of the doubt as to mineral values, if he acted bona fide, and the lode claimant will be defeated if he does not show that the land will pay to work.[3] A bona fide prior location of the land for agri-

[1] Cleary v. Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207.
[2] Id. Compare Tinkham v. McCaffrey, 13 Land Dec. Dep. Int. 517.
[3] CLEARY v. SKIFFICH, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207. If, as seems true, this case stands for the proposition that a mill site located in good faith as nonmineral land is valid, even though before application for

cultural purposes will defeat the mill site;[4] while, of course, a prior mill site location, if it conforms to the statutory requirements, will defeat an agricultural entry of the land.

MILL SITES LOCATED BY THE PROPRIETOR OF A VEIN OR LODE.

59. To acquire a mill site for use with a lode to which it is not contiguous, any mining use to which the land is bona fide put will justify the mill site.

The requirement that the land acquired as a mill site by the proprietor of a vein must not be contiguous to the vein is intended to prevent any increase in the vein-containing area of a mining claim on the pretense that it is wanted as a mill site for those legitimate mining purposes for which the law allows land so acquired to be used. While the land department formerly held that mill sites might abut upon the side lines of the claim,[5] and in cases where it was clear that the vein departed through the side lines of the claim, and that the land abutting the end lines was nonmineral, the latter land might be selected as the mill site,[6] the presumption was against such a mill site's validity,[7] and the department has finally decided against the validity of mill sites adjacent to the lode claims with which they are to be used. The final ruling applied the old doctrine to mill sites made and perfected prior to January 1, 1904, where mill site patents were applied for and either carried to entry before July 1, 1906, or without fault of the applicant prevented from being carried to entry before that date, while it makes the new construction apply to all other mill sites.*

The mining purposes which will be accepted as the equivalent of milling purposes to sustain a mill site located by the proprietor of

patent, it is shown clearly to contain the apex of a very valuable vein, it cannot be supported beyond the point stated in the text. See 1 Lindley on Mines (2d Ed.) § 525. Where land was being graded for a mill site, but the occupants had not complied with any of the requirements of the federal act for acquiring title thereto, the occupants were held not to be entitled to gold found by others beyond the limits of the graded space. BURNS v. CLARK, 133 Cal. 634, 66 Pac. 12, 85 Am. St. Rep. 233.

[4] Hamburg Mining Co. v. Stephenson, 17 Nev. 450, 30 Pac. 1088; Adams v. Simmons, 16 Land Dec. Dep. Int. 181.

[5] In re Freeman, 7 Copp's L. O. 4.

[6] National Mining & Exploration Co., 7 Copp's L. O. 179; In re Long, 9 Copp's L. O. 188.

[7] Id. See Mabel Lode, 26 Land Dec. Dep. Int. 675; Paul Jones Lode, 31 Land Dec. Dep. Int. 359.

* Brick Pomeroy Mill Site, 34 Land Dec. Dep. Int. 320; Alaska Copper Co., 32 Land Dec. Dep. Int. 128.

a vein or lode as such are pretty well settled. Any mining use to which it is bona fide put would comply with the statute,[8] and hence it may be used for the erection of miners' bunk houses and boarding houses and for ore houses,[9] for pumping works to get water to the mining claim,[10] for a dumping place for waste rock from the claim, etc. It has, however, been held by the land department that land cannot be located as a mill site simply to get the timber on it to use in the mine.[11] It would seem unquestionable that, where the ground is located by the proprietor of a lode, its use as a dumping place for waste rock thrown away in excavating and sorting the ore is a proper mill site use.

It has been supposed by some that there is nothing to prevent one who owns several lode claims from acquiring a separate mill site for each claim so long as the ground acquired is actually used for the statutory purposes in connection with the lode for which it was located;[12] but the land department has decided that, where a group of contiguous lode claims are held and worked under a common ownership, only a reasonable number of mill site locations can be made for use therewith.[13] The department says: "Whilst no fixed rule can well be established, it seems plain that ordinarily one mill site affords abundant facility for the promotion of mining operations upon a single body of lode claims." [14]

[8] SILVER PEAK MINES v. VALCALDA (C. C.) 79 Fed. 886; VALCALDA v. SILVER PEAK MINES, 86 Fed. 90, 29 C. C. A. 591; HARTMAN v. SMITH, 7 Mont. 19, 14 Pac. 648.

[9] Charles Lennig, 5 Land Dec. Dep. Int. 190. See Satisfaction Extension Mill Site, 14 Land Dec. Dep. Int. 173. But see Alaska Copper Co. 32 Land Dec. Dep. Int. 128, where it was held that "a boarding house, store, sawmill, and wharf" did not sufficiently evidence mining or milling use or occupation, within the meaning of the mill site statute. So far as the report shows, however, these structures were not used in connection with the mining claim for mining purposes. If they were, they should have been held sufficient to support the mill site. See VALCALDA v. SILVER PEAK MINES, 86 Fed. 90, 29 C. C. A. 591.

[10] Sierra Grande Mining Co. v. Crawford, 11 Land Dec. Dep. Int. 338.

[11] Two Sisters Lode & Mill Site, 7 Land Dec. Dep. Int. 557. But see Tartar v. Spring Creek Water & Mining Co., 5 Cal. 395.

[12] See 1 Lindley on Mines (2d Ed.) § 520.

[13] Alaska Copper Co., 32 Land Dec. Dep. Int. 128; Hard Cash and Other Mill Site Claims, 34 Land Dec. Dep. Int. 325.

[14] Alaska Copper Co., 32 Land Dec. Dep. Int. 130.

SAME—USE NECESSARY TO HOLD SUCH MILL SITES.

59a. A mill site acquired by the proprietor of a lode is retained by its reasonable use in good faith for a mining purpose in connection with the mining claim.

With reference to the use for mining purposes necessary to hold a mill site acquired in connection with a lode, the following language of the Montana court is important: "We cannot say, under this statute, what shall be the extent of the use—whether much or little—or the particular character of the use. The phrase 'mining purposes' is very comprehensive, and may include any reasonable use for mining purposes which the quartz lode mining claim may require for its proper working and development. This may be very little, or it may be a great deal. The locator of the quartz lode mining claim is required to do only $100 worth of work each year until he obtains a patent therefor. But if he does only this amount, and uses the mill site in connection therewith, is not this the use of a mill site for mining purposes in connection with the mine? Who shall prescribe what shall be the kind and extent of the use under this statute, so long as it is used in good faith in connection with the mining claim for a mining purpose?" [15]

[15] HARTMAN v. SMITH, 7 Mont. 19, 28, 14 Pac. 648. That a use which would justify one mill site may be inadequate to sustain four mill sites, and so none be allowed, was held in Hard Cash and Other Mill Site Claims, 34 Land Dec. Dep. Int. 325. In that case the land department said: "The statute clearly contemplates that at the time the application for patent is made the land included in the mill site claim is used or occupied for mining or milling purposes. Some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy, the mill site at the time application for patent is filed. Alaska Copper Company, 32 Land Dec. Dep. Int. 128, 131. So far as the record in this case shows, aside from the digging of three wells, nothing has been done on the mill sites. The design to use all of them for the purpose of a reservoir for water, and the building of a reduction works, is not the present active employment of any mining agency upon the land or the direct use of it for milling purposes. Neither is the storing of ore upon each mill site, under the circumstances of this case, such a use of the land as to warrant the entry and patent of the four mill sites. It was stated in the Alaska Copper Company Case, supra, p. 130, that 'whilst no fixed rule can well be established, it seems plain that ordinarily one mill site affords abundant facility for the promotion of mining operations upon a single body of lode claims.' It follows that, if more than one mill site is applied for in connection with a group of lode claims, a sufficient and satisfactory reason therefor must be shown. The storage of a quantity of ore upon each of the four mill sites in this case, where there is nothing to show but that the area embraced in one of them would be ample for such storage, is but a mere colorable use of the mill sites,

And as showing what is an actual possession and use of a mill site, justifying ejectment because of ouster, the following language of the United States Circuit Court of Appeals, Ninth Circuit, may be quoted: "It would seem that a tract of five acres claimed for a mill site, as this was, may in general be said to be in the possession of the locator when its corners are marked with painted posts, as is the custom and rule in locating such mill sites, and as required by the regulations of the general land office. In a mining country the presence of the boundary posts is as significant of occupation as an inclosure would be of agricultural lands. In the present case there were, in addition to the boundary posts, the house, the stable, and the springs, together with the graded wagon road leading from the mill site to the mines of the plaintiff, all indicating a present and continuous use. * * * Failure to use a mill site for the purposes for which it is located may, indeed, become evidence of abandonment; but there was no evidence, so far as the record goes, tending to show that the locator had failed or ceased to use the property for the purposes for which it was claimed." [16]

Because lode claims in connection with which mill sites are acquired may be patented before the mill sites are,† it must not be supposed that the patented lode claims can be allowed to remain idle and the unpatented mill site remain valid. Reasonable use of the mill site in good faith is always required.

MILL SITES CLAIMED BY MILLS.

60. To acquire a mill site apart from lode ownership, nothing short of a mill or reduction works on the ground will serve.

With reference to those mill sites acquired because quartz mills or reduction works are placed on the ground located for a mill site, it seems clear that as many locations may be made as there are mills erected. Nothing short of mills or reduction works will do,[17] however, and, while both a water right and a mill site may be located on the same

which does not satisfy the requirements of the statute. It thus appearing that the mill site claims are not used or occupied for mining or milling purposes in connection with the lode claim as required by law, the entry must be canceled." Hard Cash and Other Mill Site Claims, 34 Land Dec. Dep. Int. 325, 327, 328. On dumping as a mining use to hold a mill site, see chapter XIV, § 64, infra.

[16] Valcalda v. Silver Peak Mines, 86 Fed. 90, 94, 95, 29 C. C. A. 591.

† See chapter XVIII, § 100.

[17] Le Neve Mill Site, 9 Land Dec. Dep. Int. 460; Brodie Gold Reduction Co., 29 Land Dec. Dep. Int. 143. An attempt to locate and hold two mill sites by

tract of land,[18] still to hold the mill site it is not enough to convey the water in pipes to a smelter two miles away,[19] or to a mill and reduction works owned by claimant on adjoining ground,[20] or to put on the site a dam and pipes to carry the water for use on nearby lodes.[21]

THE ACTS OF LOCATION OF MILL SITES.

61. The federal statute prescribes no method of location of mill sites, and the local rules and statutes must therefore be consulted. Where there are none applicable to mill sites as such, the local requirements as to lode locations should be met, except as regards discovery and discovery work.

The manner of locating mill sites is governed in some states by statute. The federal statute is silent on the subject, and in the absence of specific local legislation as to mill sites the requirements as to lode locations should be fully complied with,[22] except, of course, that a discovery shaft need not be dug or other discovery excavation made. A notice of location should be posted on the ground, the tract should be marked in such a way that the boundaries may readily be traced, and a location certificate or declaratory statement should be recorded. Wherever there is local legislation regulating the location of mill sites as such, a name is required to be given to the mill site. It is important, therefore, to give the mill site a name. The mill site should also be described by reference to natural objects and permament monuments with the same particularity as is used in the case of lode claims. The record should state the number of feet or acres claimed, and, if the mill site is located by the proprietor of a lode, the record should give the name and a brief description of the claim with which the mill site is to be used, or, if it is to be used for a mill by one who does not own a lode in connection with it, the name of the mill or reduction works up-

building one mill on the division line between them will not be allowed. Hecla Consol. M. Co., 14 Land Dec. Dep. Int. 11.

[18] Charles Lennig, 5 Land Dec. Dep. Int. 190. That the water right becomes appurtenant to the mill site, and not to the claim the ores of which are treated, see North American Exploration Co. v. Adams, 104 Fed. 404, 45 C. C. A. 185.

[19] Charles Lennig, 5 Land Dec. Dep. Int. 190.

[20] Brodie Gold Reduction Co., 29 Land Dec. Dep. Int. 143. A mill site cannot be acquired as an addition to an existing mill site. Hecla Consol. M. Co., 12 Land Dec. Dep. Int. 75.

[21] Le Neve Mill Site, 9 Land Dec. Dep. Int. 460. This would seem, however, to be a perfectly proper mining purpose to sustain the location of a mill site by the proprietor of a lode. See Silver Peak Mines v. Valcalda (C. C.) 79 Fed. 886.

[22] Fencing is not required. Silver Peak Mines v. Valcalda (C. C.) 79 Fed. 886, 889.

on the mill site. With these additions, the acts of location are just like those for lode claims, except, of course, that no discovery shaft is required. The building of the mill in the one situation, and the actual user of the land for mining or milling purposes in connection with the lode in the other, takes the place of the discovery shaft and the subsequent annual labor.

A mill site is so far like a mining claim that it has been held to be within the phrase "any mining claim or possession held under existing laws," and hence to be excepted from a town site patent." [23]

[23] **HARTMAN v. SMITH, 7 Mont. 19, 14 Pac. 648. Compare language in Cleary v. Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207.**

CHAPTER XIV.

THE LOCATION OF TUNNEL SITES AND OF BLIND LODES CUT BY TUNNELS.

THE LOCATION OF TUNNEL SITES.

62. By the federal statute the tunnel site owner acquires the right to "all veins or lodes within three thousand feet from the face of such tunnel, on the line thereof, not previously known to exist, discovered in such tunnel." While that statute does not prescribe the method of locating tunnel sites for the discovery of such "blind veins," the land department has a rule which prescribes the posting and recording of notices and the marking of boundary lines, and that rule should be complied with.

By the "face" of the tunnel is meant the first working face when the tunnel enters cover, and by the "line" of the tunnel seems to be meant the space bounded by 1,500 feet on either side of the bore of the tunnel, projected 3,000 feet in from the face of the tunnel; but, because the land department early defined the "line" of the tunnel to mean the bore of the tunnel, a prudent locator of a tunnel site will mark on the surface both the projected bore of the tunnel and the larger area now seemingly known as the line of the tunnel.

The act of Congress provides for the acquisition of tunnel sites for the discovery and location of veins not previously known to exist, but found on the line of the tunnel within 3,000 feet from its face;[1] but the act does not prescribe the method of locating such tunnel sites. Acting under section 2478, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1586), however, the land office has made the rule that the tunnel locators, as soon as their tunnel actually enters cover, shall "give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tun-

[1] Rev. St. U. S. § 2323 (U. S. Comp. St. 1901, p. 1426).

nel right, the actual or proposed course or direction of the tunnel, the height and width thereof, and the course or distance from such face or point of commencement to some permanent well-known objects in the vicinity, by which to fix and determine the locus in manner heretofore set forth applicable to location of veins or lodes; and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof by stakes or monuments placed along such lines at proper intervals, to the terminus of the 3,000 feet from the face or point of commencement of the tunnel; and the lines so marked will define and govern as to specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence." [2] The land office also requires that at the time of posting notice and marking the lines "a full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case, stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon, the extent of the work performed, and that it is bona fide their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines or both as the case may be."[3]

In the foregoing discussion no mention has been made of state provisions, because they are all covered by the land office requirements. For instance, the Colorado statute provides that, "if any person or persons shall locate a tunnel claim for the purpose of discovery, he shall record the same, specifying the place of commencement and termination thereof, with the names of the parties interested therein." [4] But, as we have just seen, that and more is required by the land department.[5]

[2] Land Office Regulations, rule No. 17.

[3] Land Office Regulations, rule No. 18.

[4] Mills' Ann. St. Colo. § 3140..

[5] In CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S. 337, 355, 25 Sup. Ct. 266, 49 L. Ed. 501, there is the following dictum: "Nothing is said in section 2323 as to what must be done to secure a tunnel right. That is left to the miners' customs or the state statutes, and the statutes of Colorado provide for a location and the filing of a certificate of location." The land office rules were overlooked by the court, but they are none the less to be complied with. See 1 Lindley on Mines (2d Ed.) § 472.

The Face of the Tunnel.

The face of the tunnel has been defined by the land department as follows: "The term 'face,' as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover." [6] That seems sound doctrine.

The Line of the Tunnel.

The line of the tunnel has been a matter of controversy. The tunnel locator is given the right of possession of all "blind veins" (that is, veins which do not outcrop)[7] within 3,000 feet of the face of the tunnel "on the line thereof," and the subsequent location by others of blind veins "on the line of such tunnel" is declared to be invalid.[8] The land office rules also require "the boundary lines" of the tunnel to be established; and the question is: What is "the line of the tunnel," and what are these "boundary lines"?

In Corning Tunnel Co. v. Pell[9] the Colorado Supreme Court refused to hold that "the line of the tunnel" meant a space 3,000 feet into the mountain by 1,500 feet wide, but instead declared that in the federal statutory phrase "line of the tunnel" the word "line" "designated a width marked by the exterior lines or sides of the tunnel."[10] The reason why the court took this narrow view was that, under the view that the line of the tunnel embraced 1,500 by 3,000 feet,[11] "the tunnel site would withdraw from the explorations of prospectors over 100 acres of mineral lands. A very limited number of such locations would cover and monopolize in most cases an entire mining district; giving to a few tunnel owners all its mines, not upon the condition of discovery and development, but upon the easy condition of commencement of work on the tunnel, and its prosecution with reasonable diligence." [12]

[6] Land Office Regulations, rule No. 16.

[7] Larkin v. Upton, 144 U. S. 19, 23, 12 Sup. Ct. 614, 36 L. Ed. 330; Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co., 167 U. S. 108, 113, 17 Sup. Ct. 762, 42 L. Ed. 96.

[8] Rev. St. U. S. § 2323 (U. S. Comp. St. 1901, p. 1426). That means invalid as to blind veins and as against the tunnel site owner.

[9] 4 Colo. 507.

[10] See, also, Hope Min. Co. v. Brown, 7 Mont. 550, 557, 19 Pac. 218, 11 Mont. 370, 379, 28 Pac. 732.

[11] This was estimated 1,500 by 3,000 feet on the erroneous idea that the blind lode could be followed only 750 feet on each side of the center of the bore of the tunnel. As it is established that the tunnel owner may take the whole 1,500 feet of the blind vein on one side only of the tunnel, and it is uncertain on which side he will elect to take it, the real figures are 3,000 feet by 3,000 feet.

[12] Corning Tunnel Co. v. Pell, 4 Colo. 511.

This construction placed upon the phrase by the Colorado court in 1878 prevailed until 1897, when the Supreme Court of the United States, in the cases of Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.[13] and Campbell v. Ellet,[14] adopted the broad meaning of the words. In Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co., the court said: "We hold, therefore, that the right to a vein discovered in the tunnel dates by relation back to the time of the location of the tunnel site, and also that the right of locating the claim to the vein arises upon its discovery in the tunnel, and may be exercised by locating that claim the full length of 1,500 feet on either side, as the locator may desire." [15]

A location, therefore, is on the line of the tunnel, so as to make it invalid as against a previous tunnel site, where the location is above the plane bounded by 1,500 feet on either side of the projected bore of the tunnel and within 3,000 feet from the face of the tunnel on the projected extension thereof.*

The Lines of the Tunnel.

What, then, are "the lines of the tunnel," within the meaning of the land office rules? They would seem to be the exterior surface markings to represent the plane within which prospecting for blind lodes is by statute made ineffective as against the tunnel claimant. They are the warnings to the prospector that he locates at his peril, because he is subject to the tunnel site owner's rights. But since the markings are called for only by the land department, and since the land department early defined the line of the tunnel in the way the Colorado court interpreted it,[16] the custom has been to mark on the surface, by parallel lines showing its width, nothing but the projected bore of the tunnel.[17] Since the decision in Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.[18] it would seem as if that is no longer a permissible interpretation of the land department regulations, and as if the area within which prospecting for blind lodes may not be carried on under the statute must also be marked. The land department rule states that the boundary lines of the tunnel, marked at prop-

[13] 167 U. S. 108, 17 Sup. Ct. 762, 42 L. Ed. 96.

[14] 167 U. S. 116, 17 Sup. Ct. 765, 42 L. Ed. 101.

[15] ENTERPRISE MINING CO. v. RICO-ASPEN CONSOL. MIN. CO., 167 U. S. 108, 113, 17 Sup. Ct. 762, 42 L. Ed. 96.

* See Hope Min. Co. v. Brown, 11 Mont. 370, 28 Pac. 732; Ellet v. Campbell, 18 Colo. 510, 33 Pac. 521.

[16] In re David Hunter, 5 Copp's L. O. 130; In re John Hunter, Copp's Min. Lands, 239; In re J. B. Chaffee, Copp's Min. Lands, 119.

[17] 1 Lindley on Mines (2d Ed.) § 475.

[18] 167 U. S. 108, 17 Sup. Ct. 762, 42 L. Ed. 96.

er intervals by stakes or monuments, "will define and govern as to the specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence." [19]

It may, of course, be contended that the lines of the tunnel are so marked by the marking of the projected tunnel bore, since it is easy to ascertain from such marking the area affected by the tunnel, and the federal decisions in regard to placers seem to justify the contention;[20] but in a matter of this kind, where a survey has to be made anyway, and the additional marking is almost as readily made as not, the following advice of Mr. Lindley seems eminently sound: "As a matter of caution the line and width of the projected tunnel bore, as well as the exterior boundaries of the parallelogram [3,000 feet square], should be marked at the surface." [21] Until the "lines of the tunnel," as these words are used in the departmental regulations, receive definition, this is the only wise course.

Excessive Tunnel Site Locations.

The rule about excessive locations applies to tunnel sites. A claim for one 5,000 feet in length, if made in good faith, is void only as to the excess over 3,000 feet.[22] Probably an attempted second tunnel location, made at the end of the first 3,000-foot tunnel location, would be wholly void, so far as the acquisition of any inchoate right to blind veins is concerned;[23] but there seems to be no decision on the point. The question is whether the breast of the old tunnel can be the face of the new, within the meaning of the federal statute.

THE NATURE OF TUNNEL SITES.

63. A tunnel site is not a mining claim, and cannot be patented. It is merely a means for the discovery and location of blind veins, and an inchoate right to the unlocated blind veins on the line of the tunnel attaches upon the location of the tunnel, and is lost by an abandonment of the tunnel site, evidenced by a failure to prosecute the work for six months and in other ways.

A tunnel or tunnel site is a peculiar thing. It is strictly a means provided by statute for the discovery of blind veins in unlocated

[19] Land Office Rules, rule No. 17.

[20] McKINLEY CREEK MIN. CO. v. ALASKA UNITED MIN. CO., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331.

[21] 1 Lindley on Mines (2d Ed.) § 475.

[22] Glacier Mountain Silver Min. Co. v. Willis, 127 U. S. 471, 8 Sup. Ct. 1214, 32 L. Ed. 172.

[23] See Morrison's Mining Rights (13th Ed.) 258.

ground,[24] and the means is made attractive to miners by giving to the tunnel owner, upon the acquisition of the tunnel site, an inchoate right to such blind veins as the bore of the tunnel will cut,[25] and by letting that inchoate right ripen into the full right when the veins actually are cut and appropriated. While the tunnel lines must be marked on the surface under the land department requirements, the tunnel owner as such has no rights on the surface. Moreover, "a tunnel is not a mining claim, though it has sometimes been inaccurately called one," [26] and cannot be patented. "As the claimant of the tunnel, he [the tunnel owner] takes no ground for which he is called upon to pay and is entitled to no patent." [27]

By the express provisions of the federal statute a "failure to prosecute work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel." [28] To retain complete tunnel rights, the tunnel owner must, by the express terms of the statute, prosecute work on the tunnel with "reasonable diligence." If he does not do so, or if for six months he fails to work the tunnel, he loses his right to blind veins, though he may continue the bore of the tunnel to its projected end.[29] Of course, the whole tunnel site may be abandoned; but that is a matter dependent on intention.

[24] CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501. The tunnel owner's right "reached only to blind veins, as they may be called—veins not known to exist, and not discovered from the surface before he commenced his tunnel." ENTERPRISE MIN. CO. v. RICO-ASPEN CONSOL. MIN. CO., 167 U. S. 108, 113, 17 Sup. Ct. 762, 42 L. Ed. 96.

[25] See Hope Min. Co. v. Brown, 11 Mont. 370, 383, 28 Pac. 732.

[26] CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S. 337, 357, 25 Sup. Ct. 266, 49 L. Ed. 501. For a case where it was called a mining claim, see Back v. Sierra Nevada Consol. Min. Co., 2 Idaho, 420, 17 Pac. 83.

[27] Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co., 196 U. S. 358, 25 Sup. Ct. 266, 49 L. Ed. 501.

[28] Rev. St. U. S. § 2323 (U. S. Comp. St. 1901, p. 1426).

[29] FISSURE MIN. CO. v. OLD SUSAN MIN. CO., 22 Utah, 438, 63 Pac. 587. "Any party running a tunnel would probably hold the tunnel itself (i. e., the bore as far as actually run) without any record whatever. This is done every day in the case of cross-cuts, which are simply tunnels on a small scale. But to claim any rights for its line or otherwise under the act of Congress it must be staked and recorded." Morrison's Mining Rights (13th Ed.) 256.

DUMPING GROUND FOR TUNNEL SITES.

64. A reasonable amount of surface ground around the mouth of the tunnel is always claimed for dumping purposes by the tunnel site location notice; the number of feet claimed and the situation of the ground being stated. Wise precaution dictates that the dumping ground be located also as a mill site.

Ground for Dumping Purposes.

It is customary in tunnel site location notices to claim a specified number of feet of ground for dumping purposes. In a Utah case it was assumed that the tunnel site owner was entitled "to a space of surface ground 50 feet on each side of the mouth of the tunnel and 100 feet extending in front thereof for dumping purposes." [30] And the form in Morrison's Mining Rights calls for a tract 250 feet square for dumping purposes.[31] Unless the dumping ground may be regarded as a mill site, there is no express statutory authorization for its acquisition by the tunnel site claimant. The very nature of a tunnel site calls, however, for the acquisition of a reasonable amount of ground around the face of the tunnel for the deposit of waste rock, and no doubt such ground may be acquired. Prior to the tunnel site act the California court declared that, "when a place of deposit for tailings is necessary for the fair working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be reasonably necessary for this purpose, provided he does not interfere with pre-existing rights. His intention, however, should be clearly manifested by outward acts." [32]

Although since then the mill site acts have provided a method for the acquisition of dumping ground for a mining location, this Cal-

[30] Fissure Min. Co. v. Old Susan Min. Co., 22 Utah, 438, 63 Pac. 587.

[31] Morrison's Mining Rights (13th Ed.) 252.

[32] Jones v. Jackson, 9 Cal. 237, 244; Lincoln v. Rodgers, 1 Mont. 217. But see Miser v. O'Shea, 37 Or. 231, 62 Pac. 491, 82 Am. St. Rep. 751. In Hard Cash and Other Mill Site Claims, 34 Land Dec. Dep. Int. 325, the land department said that under the circumstances of that case the storing of ore on four mill site claims would not sustain any on an application to patent the four, because, since one mill site was enough in that case, the use as to all four was "colorable." The department is not to be understood, however, as saying that the storage of ore or the dumping of waste rock on one mill site claim is not a mining use of it. In Charles Lennig, 5 Land Dec. Dep. Int. 190, 192, the Secretary of the Interior said that if the proprietor of a lode should use a mill site "for depositing 'tailings' or storing ores * * * I think it clear that he would be using it for mining or milling purposes." As to ground for tailings, see note 25, chapter XXVIII, infra.

ifornia case's doctrine would doubtless apply to a tunnel site prior to the discovery of a lode in it, unless the tunnel site location would support a mill site location. The safest thing for a tunnel site claimant to do to acquire dumping ground would seem to be to claim the ground in his tunnel site location notice and also to locate the ground as a dumping "mill site" in connection with the lodes to be discovered in the tunnel. In the latter case the cutting of a single blind vein would doubtless make it clear either that the mill site always had been good, because used for mining purposes by the owner of a lode whose ownership was inchoate at the time of the location of the mill site, or that it was good by relation from the moment of the discovery of the blind vein. If all other reasoning failed, the dumping ground could be upheld as necessarily authorized by implication by the tunnel site act itself.[33]

THE LOCATION OF BLIND VEINS.

65. The tunnel owner who discovers a blind vein which he is entitled to claim may make a surface location thereof; but, despite a troublesome dictum in a recent United States Supreme Court opinion, there seems to be no necessity for him to make one. Apparently he need not do more to acquire blind veins than to post at the mouth of the tunnel and to record a notice sufficiently designating the extent and situs of the vein claimed. To get patent, however, a surface location is requisite.

66. Only those blind veins seem to be acquired which are cut by the bore of the tunnel, which do not apex in ground located or patented prior to the acquisition of the tunnel site, and which do apex within the space 1,500 feet on each side of the 3,000-foot projected bore of the tunnel.

[33] Compare the holding that a dumping right is an "appurtenance" of a tunnel right because "necessary for the full and free enjoyment of the tunnel right." Scheel v. Alhambra Min. Co. (C. C.) 79 Fed. 821. Since the mining law acts, and particularly since the provision for the acquisition of dumping ground under the mill site sections of those acts, it seems clear that a mining locator does not acquire priority for dumping purposes by depositing tailings on public land. In a proper case the land used for dumping purposes may be located by others, whose rights then become prior. Miser v. O'Shea, 37 Or. 231, 62 Pac. 491, 82 Am. St. Rep. 751. Even before these acts, the California court stated that "the place of deposit must be claimed as such, or as a mining claim, and the intention of the claimant must be manifested by outward acts." Jones v. Jackson, 9 Cal. 237, 245. By "mining claim" the California court may have meant a mill site. Hartman v. Smith, 7 Mont. 19, 14 Pac. 648. While the Idaho court, in holding that a tunnel site is a mining claim within the meaning of the statute about adversing (Back v. Sierra Nevada Consol. Min. Co., 2 Idaho, 420, 17 Pac. 83), seems to have gone too far (CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S.

The federal tunnel statute is really an incongruous part of the act of 1872. It was based on the old notion that the lode was everything and the surface only a necessary incident, and it clearly contemplated that, as the tunnel owner would not need any surface for his workings, since he would mine through his tunnel, only the blind lodes discovered in the tunnel should be acquired, and that no right outside the blind lodes themselves should be acquired, except the right of way in the country rock, along the dip or along the rise of the vein, needed to follow and work the vein where it was too small for the owner to stay within it. For many years it was supposed, and the case of Campbell v. Ellet,[34] decided in 1897, fully sustained that supposition, that because the blind veins discovered in the tunnel were the only things intended to be given to the tunnel owner, and only 1,500 feet along their strike, surface locations need not be made by the tunnel owner. "Indeed," the Supreme Court of the United States well said in Campbell v. Ellet, "the conditions surrounding a vein or lode discovered in a tunnel are such as to make against the idea or necessity of a surface location. We do not mean to say that there is any impropriety in such a location, the locator marking the point of discovery on the surface at the summit of a line drawn perpendicularly from the place of discovery in the tunnel and about that point locating the lines of his claim in accordance with other provisions of the statute. * * * But, without determining what would be the rights acquired under a surface location based upon a discovery in a tunnel, it is enough to hold, following the plain language of the statute, that the discovery of the vein in the tunnel, worked according to the provisions of the statute, gives a right to the possession of the vein to the same length as if discovered from the surface, and that a location on the surface is not essential to a continuance of that right. We do not mean to hold that such right of possession can be maintained without compliance with the provisions of the local statutes in reference to the record of the claim, or without posting in some suitable place, conveniently near to the place of discovery, a proper notice of the extent of the claim—in other words, without any practical location. For in this case notice was posted at the mouth of the tunnel, and no more suitable place can be suggested, and a proper notice was put on record in the office named in the statute."[35]

337, 25 Sup. Ct. 266, 49 L. Ed. 501), there is every reason to believe that the tunnel site owner, even prior to the discovery of a blind lode in his tunnel, is sufficiently "the proprietor" of a vein or lode to be entitled to locate and hold a mill site. Rev. St. U. S. § 2337 (U. S. Comp. St. 1901, p. 1436).

[34] 167 U. S. 116, 17 Sup. Ct. 765, 42 L. Ed. 101.

[35] CAMPBELL v. ELLET. 167 U. S. 116, 119, 120, 17 Sup. Ct. 765, 42 L. Ed. 101.

Campbell v. Ellet was a clear recognition that a blind lode discovered in a tunnel was given as such to the tunnel owner, if he appropriated it and gave sufficient notice thereof, even though he did not make a surface location.[36] But in Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. the same judge who wrote the opinion in Campbell v. Ellet, and without referring to that case, gave utterance to the following dictum: "The owner [of the tunnel] has a right to run it in the hope of finding a mineral vein. When one is found, he is called upon to make a location of the ground containing that vein, and thus create a mining claim, the protection of which may require adverse proceedings." [37] This dictum, so at variance with the purpose of the tunnel act, and so inexplicably overlooking the previous decision of the court, cannot be regarded as law, if it means that a surface location must be made. The tunnel owner must locate the vein, but not necessarily the ground containing the vein. The tunnel owner, who has discovered a blind vein, may be "called upon to make a location of the ground containing that vein, and thus create a mining claim," without being penalized by the loss of that vein if he does not do so, and the dictum is thus not necessarily in conflict with the earlier case.[38] A surface location is requisite, however, if the locator wishes a patent.

A surface location is, of course, essential if one wishes to acquire title to veins discovered in tunnels not located and run in accordance

[36] The unreasonableness of any other rule is well set forth in the following quotation from the opinion of the Colorado court: "Little encouragement would the act give if the discoverer of a lode in a tunnel were bound also to find the apex and course of such vein, uncover the same from the surface, erect his location shaft thereon, mark the boundaries thereof, and record his certificate of such surface location, the same as if he had made the original discovery from the surface. The location of a lode from the surface is always attended with more or less difficulty and uncertainty. Mistakes occur in the location of boundary lines, even where the apex and course of the vein lie comparatively near the surface. These difficulties and uncertainties are liable to be greatly increased where a lode is discovered by means of a tunnel driven hundreds and thousands of feet into the heart of a great mountain. To require the discoverer of a lode in a tunnel to prospect for the vein upon the surface, and uncover and mark its boundaries so as to include its apex and course within the lines of the surface location, would be to require a work of supererogation, for no surface location is necessary for the convenient working of a lode discovered in a tunnel location already made. Such requirement would unnecessarily burden the tunnel locator and discoverer." Ellet v. Campbell, 18 Colo. 510, 33 Pac. 521, 524.

[37] CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S. 337, 357, 358, 25 Sup. Ct. 266, 49 L. Ed. 501.

[38] Campbell v. Ellet, 167 U. S. 116, 17 Sup. Ct. 765, 42 L. Ed. 101. But see Morrison's Mining Rights (13th Ed.) 253.

with the provisions of the federal statute about tunnel sites; the discovery in the tunnel being as effectual as a discovery by shaft from the surface.[39] A statutory tunnel owner who wishes to make a surface location should so lay out his surface claim as to have some part of it directly above the point of discovery, and should mark that point on the surface.[40]

Blind Veins Apexing Outside of the Tunnel Site Parallelogram.

The tunnel owner does not necessarily get all blind veins in his tunnel not embraced in locations made prior to the tunnel site location. He gets all such blind veins which could be included in locations made within the line of the tunnel in the broad sense of the word, and hence gets all blind veins which apex in that area. Mr. Lindley seems to think that he gets veins cut by the tunnel which apex outside that area.[41] There seems to be no case on the subject; but Mr. Lindley's view would appear to give the statute a far wider application than its framers intended and to be unfair to prospectors. The provisions of section 2323, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1426), should be construed together with reference to the rights of locators under normal conditions; and, so construed, they seem to show that the tunnel owner was not intended to get blind veins apexing outside of the broadly defined line of the tunnel. He gets, moreover, only veins discovered in the tunnel,[42] and the blind veins which he can take he may lose by abandonment, or forfeit for failure to give the requisite notice, or to make the proper record,[43] or to work annually.

Those veins that the tunnel owner does get he has as a whole for the 1,500 feet of their strike, and may work both up to their apexes and down to their lowest depth. His rights on the raise or on the dip are no doubt governed by end line bounding planes extended as in the case of lode locations made under the act of 1866.

[39] BREWSTER v. SHOEMAKER, 28 Colo. 176, 63 Pac. 309, 53 L. R. A. 793, 89 Am. St. Rep. 188.

[40] CAMPBELL v. ELLET, 167 U. S. 116, 119, 17 Sup. Ct. 765, 42 L. Ed. 101. A discovery from the surface in addition to the discovery in the tunnel is, of course, not essential to the validity of the surface location, if in fact it includes the vein. Rico-Aspen Consol. Min. Co. v. Enterprise Min. Co. (C. C.) 53 Fed. 321; Ellet v. Campbell, 18 Colo. 510, 33 Pac. 521.

[41] 1 Lindley on Mines (2d Ed.) § 491. Mr. Shamel, in his recent book, also takes the view that, wherever the vein wanders or apexes, it belongs to the tunnel owner for the 1,500 feet of its length, if only it is cut in the tunnel within 3,000 feet of the face of the tunnel. Shamel's Mining, Mineral and Geological Law, 253.

[42] Corning Tunnel Co. v. Pell, 4 Colo. 507; Rev. St. U. S. § 2323 (U. S. Comp. St. 1901, p. 1426).

[43] See Campbell v. Ellet, 167 U. S. 116, 17 Sup. Ct. 765, 42 L. Ed. 101.

RIGHTS OF WAY THROUGH PRIOR CLAIMS.

67. The tunnel site owner acquires no right to tunnel through claims located prior to the acquisition of the tunnel site, but may acquire such right by condemnation proceedings where the local statutes permit.

The tunnel owner acquires no rights as against prior patented and unpatented mining claims, either as to blind veins or as to a right of way through the claims.[44] A state statute attempting to confer upon a tunnel owner the right to drive his tunnel through prior patented and unpatented mining claims has been held unconstitutional,[45] though it has since been argued that such a statute is "a perfectly lawful exercise of the power granted to the states to regulate easements, under Rev. St. U. S. § 2338 (U. S. Comp. St. 1901, p. 1436), as to all locations made since the date the act went into effect, without regard to the date of the location of the tunnel."[46]

It would seem, however, as if section 2338, Rev. St. U. S., was not intended to enable the states to relieve tunnel claimants from the necessity of condemning rights of way through prior mining locations, nor to deprive mining landowners of their property without just compensation.[47] Condemnation proceedings may be authorized.† Locations are not prior, however, from the mere fact that the acts of location have taken place, but will date in any case only from discovery.[48] Subsequent locations, even if they have gone to patent, must yield up blind veins not yet cut in the tunnel, and must permit the tunnel to go through their ground without charge.[49] The failure of the tunnel owner to adverse the subsequent locations

[44] CALHOUN GOLD MIN. CO. v. AJAX GOLD MIN. CO., 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200; Richards v. Dower, 64 Cal. 62, 28 Pac. 113; Dower v. Richards, 73 Cal. 477, 15 Pac. 105; Amador Queen Min. Co. v. De Witt, 73 Cal. 482, 15 Pac. 74.

[45] Cone v. Roxanna Co., 2 Leg. Adv. 359.

[46] Morrison's Mining Rights (12th Ed.) 235.

[47] BAILLIE v. LARSON (C. C.) 138 Fed. 177.

† Id. Tanner v. Treasury Tunnel, Mining & Reduction Co., 35 Colo. 593, 83 Pac. 464, 4 L. R. A. (N. S.) 106.

[48] Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co., 141 Fed. 563, 73 C. C. A. 35; CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501.

[49] ENTERPRISE MIN. CO. v. RICO-ASPEN CONSOL. MIN. CO., 167 U. S. 108, 17 Sup. Ct. 762, 42 L. Ed. 96; CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501.

does not prejudice his right to veins not yet discovered in the tunnel at the time of such failure.[50]

TUNNELS AND ANNUAL LABOR.

68. In a proper case work on the statutory tunnel will serve for annual labor.

In closing this discussion of tunnel sites, it should be noted that a tunnel may be so planned as to serve the purpose of a tunnel to secure blind lodes, and yet the work on it count as annual labor on claims which it is so run as to cut and develop.[51] It follows, of course, that the tunnel work will count as development work in making up the amount needed to patent a claim, each $500 of labor in running the tunnel thus enabling the tunnel owner to go to patent for one claim cut or to be cut by the tunnel and benefited by said labor.[52]

[50] ENTERPRISE MIN. CO. v. RICO-ASPEN CONSOL. MIN. CO., 167 U. S. 108, 17 Sup. Ct. 762, 49 L. Ed. 96.

[51] Act Feb. 11, 1875, c. 41, 18 Stat. 315 (U. S. Comp. St. 1901, p. 1427), amendment to Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426). See Hain v. Mattes, 34 Colo. 345, 83 Pac. 127; Kirk v. Clark, 17 Land Dec. Dep. Int. 190.

[52] Zephyr and Other Lode Mining Claims, 30 Land Dec. Dep. Int. 510.

CHAPTER XV.

THE LOCATION OF PLACERS AND OF LODES WITHIN PLACERS.

THE LOCATION OF PLACERS.

69. A placer is a mineral deposit, which is not a lode, and yet may be located as mineral ground. The essential acts of location of a placer claim vary in the different jurisdictions, but, as in the case of a lode claim, include (1) a discovery notice; (2) discovery work; (3) marking the location on the ground; (4) the location notice; and (5) record.

A placer, as we have already seen, means, under the United States laws, a mineral deposit, which may be located, and yet is not a vein or lode. Placers were not provided for in the act of 1866, but were by the act of July 9, 1870. They have played an important part in mining operations. What deposits are so mineral as to be possible of location as placers has been a subject of dispute and of conflicting departmental rulings, and sometimes statutes have been needed to settle the matter.

Oil Lands.

Lands containing deposits of petroleum, for instance, were originally treated by the land department and the courts as subject to the placer laws;[1] but finally the land department ruled that oil was not a mineral, and that oil lands could not be taken up as placers.[2] The latter ruling was at once followed by an act of Congress making "lands containing petroleum or other mineral oils and chiefly valuable therefor" subject to entry and patent "under the provisions of the laws relating to placer mineral lands."[3] That act expressly applied to previous as well as to

[1] See Roberts v. Jepson, 4 Land Dec. Dep. Int. 60; Samuel E. Rogers, 4 Land Dec. Dep. Int. 284; GIRD v. CALIFORNIA OIL CO. (C. C.) 60 Fed. 532; Van Horn v. State, 5 Wyo. 501, 40 Pac. 964.

[2] Union Oil Co., 23 Land Dec. Dep. Int. 222. See Dunham v. Kirkpatrick, 101 Pa. 36, 47 Am. Rep. 696. But see Gill v. Weston, 110 Pa. 317, 1 Atl. 921.

[3] Act Feb. 11, 1897, c. 216, 29 Stat. 526 (U. S. Comp. St. 1901, p. 1434).

future locations, and under its influence the land department reversed the ruling which called forth the statute.[4]

Stone Lands.

Building stone lands have also been the subject of controversy;[5] but since the act of August 4, 1892,[6] lands chiefly valuable for building stone may be located either under the timber and stone act of 1878 or under the placer laws. As the timber and stone act applies only to surveyed lands, building stone unsurveyed lands must still be entered under the placer laws.

Salt Lands.

Still another example of diverse usage is found in regard to saline lands. Prior to the act of January 31, 1901,[7] saline lands were disposed of under land grants to states and under the act of January 12, 1877,[8] which authorized in a few states the sale of saline lands at public auction or private sale at not less than $1.25 an acre. While salt deposits might in time have been held locatable under the general placer laws, the act of January 31, 1901, settled the matter by enacting "that all unoccupied lands of the United States containing salt springs or deposits of salt, in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer mining claims; provided that the same person shall not locate or enter more than one claim hereunder." [9] This saline act is applicable to all the public land states and territories, except to states, such as Utah, where all saline lands belonging to the United States were ceded to the state.[10] As the saline act makes subject to location as placers, "deposits of salt in any form," it would seem to be certain that salt rock may be located as a placer, and not as a lode.

The Acts of Location.

In the case of placers, as in the case of lodes, discovery must be followed by the acts of location, if it has not been preceded by them.

[4] Union Oil Co., 25 Land Dec. Dep. Int. 351. See McQuiddy v. State of California, 29 Land Dec. Dep. Int. 181; Kern Oil Co. v. Clotfeter, 30 Land Dec. Dep. Int. 583.

[5] See Conlin v. Kelly, 12 Land Dec. Dep. Int. 1, holding in 1891 that building stone lands are not placers, though as early as 1884 it was held that they were. H. P. Bennet, Jr., 3 Land Dec. Dep. Int. 116. See, also, Wheeler v. Smith, 5 Wash. 704, 32 Pac. 784.

[6] 27 Stat. 348, c. 375, § 1 (U. S. Comp. St. 1901, p. 1434).

[7] 31 Stat. 745, c. 186 (U. S. Comp. St. 1901, p. 1435).

[8] 19 Stat. 221, c. 18, § 1 (U. S. Comp. St. 1901, p. 1547).

[9] 31 Stat. 745, c. 186 (U. S. Comp. St. 1901, p. 1435).

[10] The Utah act is Act July 16, 1894, c. 138, § 8, 28 Stat. 107.

The acts of location for placers are generally fixed by the local statutes, and are in the main the same as those for lodes, though only a few states require discovery work on placers. Where there are no local statutes or rules on the question, the essential acts of location would seem to be: (1) Notice of discovery, either posted on the claim or given to prospectors by the nature of the actual possession; (2) the marking of the location on the ground, so that the boundaries may readily be traced. Where record is called for by the local statute, the federal statute requires the location certificate or declaratory statement to describe the claim by reference to some natural object or permanent monument which will identify it.[11] The acts of location are as mandatory in the case of placers as in the case of lodes, and a notice of discovery is as much a requirement of mining custom in the case of placers as it is in the case of lodes. As Alaska, California, New Mexico, North Dakota, Oregon, and South Dakota seem to have no statutes specifically naming placers and providing for them, the above requirements, including record, would seem to be all that need be complied with in those states and territories, except where district rules and regulations which make additional requirements exist.[12]

THE DISCOVERY NOTICE.

70. The discovery notice required is just like that for lodes, except, of course, that instead of distance along the vein being stated the number of acres should be given.

What has been said as to discovery notices in the case of lode claims applies to placers.[13] A sufficient discovery notice, where the state statute does not require, as the Idaho statute does, the dimensions of the claim to be stated and the distance from the post or monument containing the notice to a natural object or permanent monument that will

[11] Compare instructions quoted and approved in Walton v. Wild Goose Mining & Trading Co., 123 Fed. 209, 60 C. C. A. 155.

[12] Placer claims "have been at all times regulated as to size, labor, mode of location, etc., by the district rules to a much greater extent than lode claims." Morrison's Mining Rights (13th Ed.) 210.

[13] It is interesting to note that Messrs. Morrison and De Soto come out stronger for a discovery notice in the case of placers than of lodes. Of the placer discovery notice they say: "We do not consider that the above notice is essential in all cases, but it is customary. If the claimant was the actual first discoverer of the mineral, it might not be required; but, if the existence of the gold or other deposit had been a matter of common notoriety, we do not see why one person more than another could claim the time allowed to a discoverer without some such notice." Morrison's Mining Rights (13th Ed.) 216.

fix and describe in the notice itself the location of the claim, would be as follows:

"Keystone Placer Claim.

"The undersigned claims the statutory time to complete location of twenty acres for placer mining. Discovery date, February 1, 1908.

"John Smith."

Any stronger notice would have to be like the location notice, discussed later, to which reference is hereby made.

THE DISCOVERY WORK.

71. Discovery work is required in a few states, and its amount and character varies in the different jurisdictions.

In Idaho the discoverer must, within 15 days after making the location, make an excavation on the claim to prospect it, the excavation to be of not less than 100 cubic feet. In Montana the same amount of work has to be done on the claim within 60 days from the date of posting notice of location as has to be done in the case of a lode claim. In Nevada the locator within 90 days after posting notice of location must perform not less than $20 worth of development labor. In Washington, in the case of placers other than oil, gas, and other natural oil products, the locator within 60 days from discovery must perform labor equivalent in the aggregate to at least $10 worth for each 20 acres, and upon the completion of that labor he must file with the county auditor an affidavit showing the nature and kind of work done.

The above four states seem to be the only ones requiring discovery work in the case of placers, probably because the other states have felt that the character of the deposit would either be apparent at the start or require such a large expenditure to ascertain that there would not be any danger of bad faith in placer locations.[14] The relative un-

[14] "A discovery pit or shaft on a vein shows to the eye a mineral formation specifically distinct from the surrounding country. A pit or shaft on placer gravel shows nothing of that sort. A pit or shaft on any of the various minerals claimed as placers might or might not show such indication. Such working is not essential to the disclosure of mineral value on this class of claims. But it is clear from the implied requirements of knowledge or discovery of mineral character that the ground about to be located must have a special value as either placer proper or for some special deposit treated as placer ground under the statute, and that merely surveying [marking] and recording vacant land as and for placer ground, without known value under either class, is a void proceeding, when properly contested or attacked." Morrison's Mining Rights (13th Ed.) 214.

importance of placer claims seems to be partly responsible for the failure of some states to require discovery work for placers, though they require it for lode claims.

MARKING THE LOCATION ON THE GROUND.

72. The federal requirement that the location must be marked on the ground, so that its boundaries may readily be traced, is seemingly complied with by posting a notice on the placer claiming it by proper survey subdivision; but this is wrong in principle, unless the original survey stakes which bound the claim are in place. The local statutes about the placing of boundary stakes, where there are any such statutes, must, of course, be complied with. Where 160 acres is located by an association of persons, it is not necessary to mark the boundaries of each 20-acre tract; but, if the exterior boundaries of the 160-acre tract are marked, that is sufficient.

The federal statutory requirement that a placer mining location shall conform as nearly as practicable to the subdivisions of the public surveys is being given increasingly strict construction by the land department, which insists that even placers located on unsurveyed lands shall in general be rectangular in shape.

The time within which to mark the location and boundaries varies in the different jurisdictions.

As in the case of lode claims, so in placers, the mining claim or location must be so marked upon the ground that its boundaries may readily be traced.[15] This requirement is complicated in the case of placers by the further requirement that placer claims upon surveyed lands "shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys."[16] Because of this latter requirement it has been contended that where a placer claim has been located according to subdivisions of the public surveys, as, for instance, "the N. W. quarter of Sec. No. 1," etc., it is not necessary to mark the boundaries on the ground, but that the description in the posted or in the recorded notice in words such as those used above, giving also the township and range, will dispense with the necessity of marking the boundaries. In the case where the placer claim covers a whole quarter section there is some sense in this argument, since the United States government sets stakes at the quarter section corners, and the locator may properly be said, therefore, to

[15] Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419; Sweet v. Webber, 7 Colo. 443, 4 Pac. 752.

[16] Rev. St. U. S. § 2331 (U. S. Comp. St. 1901, p. 1432).

have adopted those stakes as his own, just as the relocator of a lode claim who goes about the matter properly may adopt as his own the stakes of the previous locator.[17] An adoption of boundary stakes should not be allowed, however, where the stakes adopted do not so mark the boundaries on the ground that the location may readily be identified, and where a subdivision which the United States does not stake (and subdivisions of less than a quarter section are not marked on the ground, but are simply protracted in the surveyor general's office on the township plats)[18] is located or attempted to be located, there is no justification for holding that the requirement of marking the boundaries is dispensed with. Neither is there any justification for holding that it is dispensed with where the government stakes have been obliterated.

The whole object of requiring the location to be staked on the ground is to enable prospectors to find readily the situs and exact area of the claim, and a description in a notice by reference to imaginary lines protracted on the township plats in the surveyor general's office wholly fails to serve that object. While the land department has held that a marking of the boundaries is unnecessary where subdivisions as small as 10 acres are taken,[19] and those are the smallest subdivisions allowed,[20] the contrary doctrine would seem on principle to be the sound one.[21] As the Supreme Court of California said in White v. Lee: "The purpose of the requirement that the claimant shall mark the boundaries of his claim is to inform other miners as to what portion of the ground is already occupied. The men for whose information the boundaries are required to be marked wander over the mountains with a very small outfit. They do not take surveyors with them to ascertain where the section lines run, and ordinarily it would do them no good to be informed that a quarter section of a particular number had been taken up. They would derive no more information from it than they would from a description by metes and bounds, such

[17] Brockbank v. Albion Min. Co., 29 Utah, 367, 81 Pac. 863.

[18] Donaldson, Public Domain, 184, says that sections "are the smallest tracts the outboundaries of which the law requires to be actually surveyed." Quarter sections are, however, actually surveyed and marked on the ground by stakes.

[19] Reins v. Murray, 22 Land Dec. Dep. Int. 409. See Freezer v. Sweeney, 8 Mont. 508, 21 Pac. 20.

[20] Rev. St. U. S. § 2330 (U. S. Comp. St. 1901, p. 1432).

[21] WHITE v. LEE, 78 Cal. 593, 21 Pac. 363, 12 Am. St. Rep. 115; Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419; WORTHEN v. SIDWAY, 72 Ark. 215, 79 S. W. 777; Sweet v. Webber, 7 Colo. 443, 4 Pac. 752. See Temescal Oil Mining & Development Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010.

as would be sufficient in a deed. For the information of these men it is required that the boundaries shall be 'distinctly marked upon the ground.' The section lines may not have been 'distinctly' marked upon the ground, or the marks may have become obliterated by time or accident; and to say that the mere reference to the legal subdivisions is of itself sufficient would, in our opinion, defeat the purpose of the requirement." [22]

While in Kern Oil Co. v. Crawford the California court expressly declared the case of White v. Lee "overruled," because that case proceeded on the theory that the boundaries must be distinctly marked on the ground, whereas the federal statute requires simply that "the location shall be distinctly marked on the ground, so that its boundaries can be readily traced," [23] the reason given for overruling White v. Lee leaves its essential doctrine unimpaired, while the facts of Kern Oil Co. v. Crawford disclosed a staking of the ground which probably apprised the subsequent locator of the exact location of the claim. Kern Oil Co. v. Crawford is inconsistent in reasoning with White v. Lee, of course; for in Kern Oil Co. v. Crawford the court says that, without the stakes put on the ground by the locator, the notice would have been enough. "The notice in this case stated to the world that the N. E. ¼ of section 32 had been located as a placer claim. The notice did not have to further state the boundaries of the quarter section, nor did the locator have to place stakes or marks upon the ground to show to any one the lines of the quarter section. He was no more required to do this than he was to take the defendant around and show her the lines." [24]

It is submitted, however, that the Arkansas court is right in saying: "So much of section 2331, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1432), as provides that, where the lands have been previously surveyed by the United States, all placer mining claims located thereon shall conform to the legal subdivisions of the public lands, is simply a direction as to where the claimant shall run the exterior lines of his claim. It is not inconsistent with the requirement of the statute as to how the lines shall be marked or evidenced; nor does it dispense with, or answer the purpose of, such requirement. The language of the statute is: 'The location must be distinctly marked on the ground so that its boundaries can be readily traced.' The intention of this statute is that the boundaries shall be so designated by marks that they can be as-

[22] WHITE v. LEE, 78 Cal. 593, 596, 21 Pac. 363.

[23] KERN OIL CO. v. CRAWFORD, 143 Cal. 298, 76 Pac. 1111, 1114, 3 L. R. A. (N. S.) 993.

[24] Kern Oil Co. v. Crawford, 143 Cal. 298, 76 Pac. 1111, 1113, 3 L. R. A. (N. S.) 993

certained by an inspection of the ground without the aid of a surveyor, and can be readily traced by such marks." [25]

But, while the Arkansas court's reasoning is in thorough accord with the spirit of the mining statutes, it has to be conceded that the decision in Kern Oil Co. v. Crawford and the language used by the court are both justified by the United States Supreme Court decision in McKinley Creek Min. Co. v. Alaska United Min. Co.[26] Because, however, the Supreme Court of the United States may yet reverse itself on the point, a prudent locator will not fail to stake the boundaries of his placer claim, even though the local statutes or rules do not call for such staking, and even though the claim does conform to surveyed subdivisions of the government lands. Moreover, where the location is upon unsurveyed lands, or upon surveyed land of such a character that the location cannot be made to conform to the subdivision of the public land surveys, no one seems ever to have doubted the need of a proper marking of the boundaries of the location.

Conforming Placer Locations to Survey Subdivisions.

Before the question of a proper marking, in the absence of special state or district rule requirements, is considered in more detail, a word is necessary about the statutory provision that the location shall conform as nearly as practicable to the rectangular subdivisions of the public land surveys. After disregarding this provision for many years, the land department has decided to enforce it. Whether it is practicable to make a location conform to the legal subdivisions of the public surveys is a question of fact, which it is the exclusive province of the land department to determine. "Where the entire placer deposit in a cañon within certain limits is claimed, and where the adjoining land on either side is totally unfit for mining or agriculture, the location need not conform to the subdivisions." [27] That is because as nearly as practicable means "as nearly as reasonably practicable." [28] Yet the fact that a placer mining location, if made to conform as nearly as "practicable to the system of public land surveys and the rectangular subdivisions of such surveys," would embrace small portions of land

[25] WORTHEN v. SIDWAY, 72 Ark. 215, 79 S. W. 777, 780. See Sweet v. Webber, 7 Colo. 443, 4 Pac. 752.

[26] 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331.

[27] William Rablin, 2 Land Dec. Dep. Int. 764, 765; WOOD PLACER MINING CO. (on review) 32 Land Dec. Dep. Int. 363. See Mitchell v. Hutchinson, 142 Cal. 404, 76 Pac. 55. For the evidence required to sustain such a cañon or gulch irregularly shaped placer claim, see Wood Placer Mining Co. (on review) 32 Land Dec. Dep. Int. 401.

[28] Pearsall and Freeman, 6 Land Dec. Dep. Int. 227; MITCHELL v. HUTCHINSON, 142 Cal. 404, 76 Pac. 55.

not valuable for placer mining and found on river slopes which rise from 20 to 30 degrees, constitutes no reason for failure to conform the location to such system and legal subdivisions, "where the lands as a whole are in fact more valuable for placer mining than for agricultural purposes." [29] Nor is it any objection to conforming the placer to surveyed subdivisions that when so conformed it would embrace part of prior mineral locations,[30] though in the case of unsurveyed subdivisions it appears to be an objection.[31]

It should always be remembered that the smallest legal subdivisions of the public surveys provided for by the mining laws is a subdivision of 10 acres, in square form, and that there is no authority "for making entry and obtaining patent for a placer claim composed of tracts as small as 5 acres in area, though in rectangular form." [32] Moreover, the rectangular subdivision must be observed on unsurveyed lands, and as far as possible square 10-acre blocks of unsurveyed lands must be located to make a valid placer claim.[33] As the land department has stated recently: "That under these sections [of the Revised Statutes of the United States] placer claims located since May 10, 1872, whether upon surveyed or unsurveyed lands, are required to conform as nearly as practicable to the United States system of public land surveys, is settled by numerous decisions of this department. There is no difficulty in applying the principle to a claim upon unsurveyed lands. It is done by locating the claim in rectangular form, of lawful dimensions, and with east and west and north and south boundary lines.[34] If the claim be upon surveyed lands, as is the case here, the matter of conforming the same to the public surveys, where not for some sufficient physical or other reason impracticable to do so, is accomplished simply by locating the claim according to the legal subdivisions of such survey." [35]

But while ordinarily 10-acre squares are the smallest separate parts of which the 20 acres of placer location by an individual, or the 160 acres or less of placer locations by an association of persons, may be composed, it should be noticed that section 2330, Rev. St. U. S., spe-

[29] Hogan and Idaho Placer Mining Claims, 34 Land Dec. Dep. Int. 42. The slope of the banks was not precipitous enough. See Wood Placer Mining Co. (on review) 32 Land Dec. Dep. Int. 363.

[30] RIALTO NO. 2 PLACER MINING CLAIM, 34 Land Dec. Dep. Int. 44.

[31] GOLDEN CHIEF A PLACER CLAIM, 35 Land Dec. Dep. Int. 557.

[32] ROMAN PLACER MINING CLAIM, 34 Land Dec. Dep. Int. 260.

[33] Miller Placer Claim, 30 Land Dec. Dep. Int. 225; Wood Placer Mining Co., 32 Land Dec. Dep. Int. 198, on review Id. 363, 401. But that the rule is contrary in Alaska, see Price v. McIntosh, 1 Alaska, 286.

[34] See Laughing Water Placer, 34 Land Dec. Dep. Int. 56.

[35] ROMAN PLACER MINING CLAIM, 34 Land Dec. Dep. Int. 260, 262.

cifically provides for a joint entry by persons "having contiguous claims of any size, although such claims may be less than 10 acres each." The whole matter of size of tracts is well discussed in the following extract from a departmental opinion: "The smallest legal subdivision recognized by the public land laws other than the placer mining laws is a tract of 40 acres—that is, a tract in square form constituting one-fourth of a quarter section, or one-sixteenth of a section of land—except where, by reason of a section being fractional, its subdivision into smaller tracts may result in the formation of lots of irregular shape and dimensions, in which event such lots are considered legal subdivisions, and are known and described with relation to the section by the numbers they respectively bear. By the placer mining laws it is provided that 'legal subdivisions of 40 acres may be subdivided into 10-acre tracts,' and, further, that 'two or more persons, having contiguous claims of any size, although such claims may be less than 10 acres each, may make joint entry thereof.' These provisions are intended to meet conditions, which not infrequently arise, peculiar to the assertion of placer claims, where the claimed placer deposits are limited in extent to tracts of much smaller area than 40 acres. In such case it is provided: (1) That a regular subdivision of 40 acres may be subdivided—that is, reduced by subdivision, according to the system of public land surveys, to form tracts of 10 acres each in square form; and (2) that in the event of contiguous claims of any size, though less than 10 acres each, the persons or associations of persons asserting the same may make joint entry thereof. Whether under the latter provision entry and patent may be obtained for a placer claim or claims aggregating less than 10 acres is a question not now before the department, and no opinion is expressed with respect thereto. It is sufficient for the decision of this case to say that the statute does not contemplate that in the location and entry of placer mining claims rectangular tracts of 5 acres may be recognized and treated as legal subdivisions of the public surveys. The smallest legal subdivision provided for by the statute is a subdivision of 10 acres, and that must be in square form, else it would not be a subdivision according to the system of the public land surveys." [36]

How to Mark Boundaries under the Federal Statute.

We are now ready for the question of a proper marking of boundaries, where only the federal statutes need to be observed. Whether the claim be one of 20 acres located by one person, or one of 160 acres located by an association, it is but a single claim.[37] Accordingly,

[36] Roman Placer Mining Claim, 34 Land Dec. Dep. Int. 262, 263.

[37] MILLER v. CHRISMAN, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63.

where the location is of 160 acres by an association of persons, it is not necessary to mark the boundaries of each 20-acre tract; for the marking is sufficient if the exterior boundaries of the 160-acre tract as such are properly marked.[38] With reference to what is a sufficient marking on the ground, in the absence of special state or territorial requirements, we have the authority of the United States Supreme Court that it may be practically nothing, if only the notice posted will enable the boundaries to be figured out accurately. That court held in the case of McKinley Creek Min. Co. v. Alaska United Min. Co.[39] that two placer claims were properly marked where the notices were written on a stump in a creek and each recited that the locator claimed "a placer mining claim 1,500 feet running with the creek and 300 feet on each side from center of creek known as McKinley Creek," etc., and that the claim located was an extension, in the one case east and in the other west, of the other claim. The statement of the court was: "These notices constituted a sufficient location. The creek was identified, and between it and the stump there was a definite relation which, combined with the measurements, enabled the boundaries of the claim to be readily traced." [40]

In view of the foregoing decision, it seems apparent that in Kern Oil Co. v. Crawford,[41] where the locators posted a notice claiming a quarter section as a placer and set stakes, with several laths between, to mark the lines, the stakes being marked as quarter section corners, the location was marked on the ground, so that its boundaries could readily be traced, within the rule adopted in McKinley Creek Min. Co. v. Alaska United Min. Co., even though the corner stakes were really some distance from the real quarter section corners. As the departmental opinion adopted by the court in bank in that case stated: "The United States had surveyed and marked the quarter section by monuments, and an unintentional mistake in retracing the lines should not be held to be a waiver by the locators of the claim to the whole quarter section." [42]

But it cannot be that the Supreme Court of the United States will adhere to a rule so inconsistent with the object of notice to prospectors

[38] McDONALD v. MONTANA WOOD CO., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616.

[39] 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331.

[40] Id. See, also, Moore v. Steelsmith, 1 Alaska, 121, where, however, it is stated that the notices must be posted where an honest prospector would look, and Loeser v. Gardiner, 1 Alaska, 641, where the side lines of the claim were computed in the manner called for by Alaskan mining custom.

[41] 143 Cal. 298, 76 Pac. 1111, 3 L. R. A. (N. S.) 993.

[42] Id.

which is a basic principle of the mining law. To say, as the court in Kern Oil Co. v. Crawford said, that "any person seeing the notice could, by employing a surveyor or otherwise, find the boundaries as easily as could the locator, and it evidently is the duty of such person to do so, in case he is interested in knowing where they are," [43] is to cast an undue burden on the second locator. The whole spirit of the mining law requires that the locator shall, as nearly as may be practicable and necessary to give notice to other prospectors, approximate the staking used in Temescal Oil Mining & Development Co. v. Salcido, where the section corner was found with the survey monuments still on it, and the other three corners of the quarter section were then marked by stakes two or three inches in diameter and standing a foot above ground.[44]

It has to be admitted, however, that where state or territorial statutes or district rules do not require specific acts, the authorities seem to require practically nothing, except that on a stake on the located ground shall be posted a description from which a surveyor could run the lines. The case of McKinley Creek Min. Co. v. Alaska United Min. Co. goes far enough, indeed, to make it absolutely immaterial whether the land located is surveyed public land or not, so long as it can be said that the lines of the location can be figured out from the notice posted on the ground.[45]

[43] 143 Cal. 298, 76 Pac. 1111, 1113, 3 L. R. A. (N. S.) 993.

[44] TEMESCAL OIL MINING & DEVELOPMENT CO. v. SALCIDO, 137 Cal. 211, 69 Pac. 1010.

[45] McKINLEY CREEK MIN. CO. v. ALASKA UNITED MIN. CO., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331. See Loeser v. Gardiner, 1 Alaska, 641, for an extreme application of that doctrine. In that case, a suit to quiet title to a placer claim, the court said: "I am not without doubt upon the question whether two center stakes, with notices failing to specify the exact width of the claim, even when supported by a custom that it shall be a sufficient width to embrace 20 acres, and when the claim is staked by a number in a regular series, is a sufficiently distinct marking on the ground, so that its boundaries can be readily traced. Where, however, the relocator is an intruder upon another location, as in the case at bar, I am inclined to insist that every reasonable doubt, either of law or fact, shall be resolved in favor of the protection of the claims of the prior locator. Upon the principle of the authorities cited, I am of opinion that the location in question by two center stakes, posted or written notices, and by serial number, is a sufficient marking of the location; that under such circumstances the boundaries of the claim are formed by side lines parallel to the center lines and by end lines at right angles thereto; that the side lines shall be located equidistant from the center line, and far enough to embrace 20 acres, and no more, in the claim." Wickersham, J., in Loeser v. Gardiner, 1 Alaska, 641.

How to Mark Boundaries under the Local Statutes.

The federal requirement about marking boundaries has been added to in some of the states and territories. In Arizona the boundaries must be marked by a post or monument of stones at each angle of the claim, posts to be at least four inches square by four feet six inches in length, set one foot in the ground and surrounded by a mound of earth or stones, or if it is impracticable to sink the posts in the ground they may be placed in piles of stones. If a monument of stones is used in place of posts, it must be at least four feet in diameter at the base and three feet in height. Where it is impossible to put up and keep a post or monument at the proper place, a witness post or monument may be used. In Colorado the boundaries are to be marked by substantial posts sunk in the ground, one at each angle of the claim. In Idaho, Montana, Nevada, and Utah, the same marking is required as in the case of lode claims, except that in Nevada, where the location is on surveyed land taken by legal subdivisions, nothing except the location point need be marked.[46] In Washington the placer claim must be distinctly marked on the ground, so that its boundaries may be readily traced, whether the claim is located by subdivisions of the public survey or not. In Wyoming the marking must be by substantial posts or stone monuments at each corner of the claim. Whether the New Mexico, North Dakota, and South Dakota mining location laws apply to placers is doubtful. If they do, the same marking must be made for placers as for lodes, and wise precaution would dictate such marking. In Alaska, California, and Oregon the question of marking is left to the federal statute, with such additional requirements as district rules and regulations may prescribe.

The time of marking is fixed in Colorado by the time for record, which is within 30 days from the date of discovery. In Idaho the time of marking is fixed "at the time of making the location." In Montana the time for marking is to be within 30 days from the date of posting notice of location. In Washington it is to be within 30 days after discovery. As in the case of lode claims, it seems that, except in California and Oregon, a reasonable time to mark the boundaries may be taken where no specific time is fixed. In California and

[46] If the federal statute requires a marking of corners, this Nevada statute can be sustained only where the survey markings still remain in place at the time of the location of the placer and may readily be found. If applied to other situations, the statute would seem to be repugnant to the federal statute requiring the location to be marked. Yet it must be remembered that the statute requires as much as was furnished in McKINLEY CREEK MIN. CO. v. ALASKA UNITED MIN. CO., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331, if that decision is to stand.

Oregon, unless district rules otherwise provide, the marking in the case of placers, as in the case of lodes, must probably be attended to immediately. In states and territories where a record is called for, it is as essential in marking placers as in marking lode claims that natural objects or permanent monuments be selected to tie the claim to in the recorded description. These objects or monuments should be connected by courses and distances with some of the angles of the claim, and, if a discovery excavation is required, it would be well to connect them with that also.

Excessive Location.

The question of excessive placer locations requires the same treatment as that of excessive lode locations,[47] except, of course, that there is no question of excessive location claimed to arise because of the departure of a vein from a side line.

THE LOCATION NOTICE.

73. The location notice requirements vary in the different jurisdictions, but are much like those in the case of lode claims.

In Arizona the notice of location must contain the name of the claim, the name of the locator, the date of location, the number of acres claimed, and the locality of the claim with reference to natural objects or permanent monuments. In Colorado the notice must contain the same, with the exceptions that the date of discovery, instead of date of location, must be given, and that, instead of the number of acres, the number of feet claimed may be given. In Idaho the notice must contain the name and dimensions of the claim, the name of the locator, the date of the location, the mining district, if any, the county, and the distance and direction from the corner post on which the notice is posted to such natural object or permanent monument as will fix and describe in the notice itself the location of the claim. In Montana and Nevada the requirements are the same as in Colorado, except that, instead of the date of discovery, the date of the location, which in Montana is fixed as the day of posting the notice, is to be given. In Utah the requirement is practically that of Arizona. In Washington the notice must contain the name of the claim, the name of the locator, the date of discovery and posting of notice, which shall be considered the date of location, a description of the claim by reference to legal subdivisions if made on surveyed public lands, and if not a

[47] McINTOSH v. PRICE, 121 Fed. 716, 58 C. C. A. 136; Pratt v. United Alaska Min. Co., 1 Alaska, 95; Zimmerman v. Funchion (C. C. A.) 161 Fed. 859.

description with reference to natural objects or permanent monuments. In Wyoming the notice is like that in Colorado.

Where the statute does not, as in Idaho, direct just where the notice shall be posted, it should be put in a conspicuous place near the discovery workings, if any, and, if none, near the center of the located ground. The placer statutes contemplate the posting of the location notice within a reasonably short time after discovery. Even the statutes requiring the notice to state the date of location are susceptible of the interpretation of date of discovery, though "date of location" normally means "the date when the posting and staking are completed," [48] and marking the location on the ground would therefore seem to be the date of location for location notice purposes, except in Montana, where by statute the date of posting the notice is fixed as the date of location.

A notice of location that would serve, except in Idaho and states requiring a description, would be as follows:

"Laughing Water Placer Claim.

"The undersigned claims 20 acres as staked, 1,320 feet in length along this Willow creek by 660 feet in width, for placer mining purposes. Discovered and located January 2, 1908. Richard Black."

For states and territories where a description is required, the form for a recorded location certificate should be followed.

RECORD.

74. Record requirements for placer claims vary in the different jurisdictions, and are much like those governing the case of lode claims. Prudence dictates the making of a record, even where the local rules or statutes do not require it.

In the case of placer claims, as in the case of lode, the act of Congress does not compel a record; [49] but, if a record is required by a local rule or statute, it must contain the description and details required by Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p, 1426).[50] No record is called for in Oregon, and, unless the lode claim acts apply to placers,[51] no record is required in New Mexico, North

[48] Morrison's Mining Rights (13th Ed.) 217.

[49] McINTOSH v. PRICE, 121 Fed. 716, 58 C. C. A. 136.

[50] If the land is properly designated by reference to adjoining tracts and number of acres, the insertion in the recorded notice of the wrong quarter section number will not invalidate it. Duryea v. Boucher, 67 Cal. 141, 7 Pac. 421.

[51] That they may not do so, see Moxon v. Wilkinson, 2 Mont. 421.

Dakota, and South Dakota. Where a record is required for mining claims, that, of course, includes placers.[52] As a precaution a record should always be made. Where an association of persons locates a 160-acre placer claim, a separate recording for each 20-acre tract included in it is unnecessary.[53]

In Arizona, Idaho, Utah, and Washington the location certificate is substantially a copy of the posted notice. In Colorado and Wyoming it is the same as the posted notice, except that the date of location, instead of the date of discovery, is given in the recorded certificate, and a description of the claim by reference to natural objects or permanent monuments is added. In Montana what is in the posted notice of location must be in the location certificate, and there must be added a description of the claim with reference to natural objects or permanent monuments, and the dimensions or area of the claim and location thereon of the work done. In Nevada the statements in the posted notice must be repeated, with the addition of a description of the claim by reference to natural objects or permanent monuments, and the kind and amount of work done, and the place on the claim where done. In Idaho and Montana the copy of the location notice recorded has to be verified as in the case of lode claims.

Amended Location Certificate.

In Colorado an amended location certificate may be filed for placers, as well as for lodes;[54] and in general it may be expected that rules in regard to lodes will apply to placers, except so far as the essential differences in the two classes of claims necessarily prevent such application.

LODES WITHIN PLACERS.

75. Known lodes within placers, not located as lodes by the placer claimant, may probably be located by third parties prior to the application for placer patent, and clearly may be so located after an application for placer patent in which the known lodes are not claimed by the applicant for a placer patent. But third parties, who enter upon an unpatented placer against the protest of the placer owner to prospect for lodes, cannot make a valid location of the lodes discovered.

76. A known lode is one which, at the time of the application for placer patent, is known to the applicant for placer patent, or to the community generally, to exist and to carry ore in quality and quantity to justify its working, or which would

[52] Sweet v. Webber, 7 Colo. 443, 4 Pac. 752.

[53] McDONALD v. MONTANA WOOD CO., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616.

[54] KIRK v. MELDRUM, 28 Colo. 453, 65 Pac. 633.

have been so known to the applicant if he had made a reasonable and fair inspection of the premises.

77. A "known lode" in a placer is located in the same way as any other lode, except that, if the placer location is valid, third parties cannot claim more of the lode in the placer than 50 feet in width by 1,500 feet in length.

It often happens that land taken up as placer includes a lode; and that is, of course, still more likely to happen under the present ruling of the land department that placers must be composed, if practicable, of not less than 10-acre squares. The possibility of lodes existing in placer ground was recognized in the act of 1872, and by it provision was made whereby the patentee of the placer ground should own all veins or lodes not known to exist at the time of the application for patent, and might acquire at that time if he saw fit those then known, and whereby other persons might acquire known lodes which the patentee of the placer did not make an application to patent.[55] Lodes not known at the date of application for placer patent, of course, pass by that patent.[56]

Definition of "Known Lodes."

A known vein in a placer is "one known to exist at the time of the application for patent for such placer,[57] and to contain minerals in such quantity and quality as to justify expenditure for the purpose of extracting them. Mere outcroppings or other indications of a vein within the limits of a placer, or evidence of the existence of a vein which might be sufficient to support a lode location as against a conflicting lode claim, or sustain a lode location as against a subsequent placer location in an adverse proceeding, are not sufficient to establish the existence of a known vein or lode within the boundaries of a placer prior in point of time and which has been patented." [58] That is because "the burden of proof in such circumstances is upon the

[55] Rev. St. U. S. § 2333 (U. S. Comp. St. 1901, p. 1433).

[56] Montana Copper Co. v. Dahl, 6 Mont. 131, 9 Pac. 894; Raunheim v. Dahl, 6 Mont. 167, 9 Pac. 892.

[57] DAHL v. RAUNHEIM, 132 U. S. 260, 10 Sup. Ct. 74, 33 L. Ed. 324; IRON SILVER MIN. CO. v. MIKE & STARR GOLD & SILVER MIN. CO., 143 U. S. 394, 430, 12 Sup. Ct. 543, 36 L. Ed. 201.

[58] McCONAGHY v. DOYLE, 32 Colo. 92, 96, 97, 75 Pac. 419, 420, 421. To the same effect are MONTANA CENT. RY. CO. v. MIGEON (C. C.) 68 Fed. 811; Migeon v. Montana Cent. Ry. Co., 77 Fed. 249, 23 C. C. A. 156; Brownfield v. Bier, 15 Mont. 403, 39 Pac. 461; Casey v. Thieviege, 19 Mont. 341, 48 Pac. 394, 61 Am. St. Rep. 511; Mutchmor v. McCarty, 149 Cal. 603, 87 Pac. 85. But a recent case takes the peculiar position that any lode which will support a location and was known to be such is a "known lode," within the placer patent exception. Noyes v. Clifford (Mont.) 94 Pac. 842.

lode claimant to establish by clear and convincing testimony that the vein or veins which he claims are exempted from the placer application by operation of law are of the character which will render them known veins as above defined." [59] And the court in the case just quoted from added: "There may be a vein within this tract which shows mineral in appreciable quantities, but it does not appear that it is of such quantity or quality as would justify expenditures for the purpose of extracting it." [60]

For that reason an allegation that lands "never contained, and do not now contain, known minerals in lode deposits of any value sufficient to justify expense of exploitation or expenditure in the effort to extract the same," is a statement of fact that the lands are nonmineral.[61] Where it is proven that land contains a lode of the right size and quality for it to be excepted from the placer patent if it was known to exist, then it is a known vein, within the intent of the statute, if prior to the location of the placer a valid lode location was made on it and the lode location continued to exist as such until after the application for placer patent, although personal knowledge of the vein and of the lode location may not be possessed by the applicant for placer patent.[62] The fact, however, that after a placer patent a lode patent issues for part of the ground patented to the placer is not conclusive evidence that the lode was a known lode at the time of the application for placer patent.[63] Where the lode has not been located,

[59] McCONAGHY v. DOYLE, supra; MONTANA CENT. RY. CO. v. MIGEON, 68 Fed. 811. See United States v. Iron Silver Min. Co., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571.

[60] Id.

[61] O'Keefe v. Cannon (C. C.) 52 Fed. 898.

[62] NOYES v. MANTLE, 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168.

[63] IRON SILVER MIN. CO. v. CAMPBELL, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155. Considering that the land office will not grant a patent for a lode within a placer without a hearing on the question of whether or not it was a known lode within the meaning of the statute (South Star Lode, 20 Land Dec. Dep. Int. 204; Cape May Mining & Leasing Co. v. Wallace, 27 Land Dec. Dep. Int. 676), this case allows the placer patentee to go behind the findings of fact of the land department in the lode patent case. The reason seems to be that, unless the lode was "a known lode," the land department has no jurisdiction to issue the lode patent, since the control of the government over the title to the placer land ceased when the placer patent was issued. The lode patent, however, "may possibly be such prima facie evidence of the facts named as will place the parties in a position to contest the question [of the reservation of the vein as a known lode under the law] in a court." IRON SILVER MIN. CO. v. CAMPBELL, 135 U. S. 286, 293, 10 Sup. Ct. 765, 34 L. Ed. 155. Of the earlier case of DAHL v. RAUNHEIM, 132 U. S. 260, 10 Sup. Ct. 74, 33 L. Ed. 324 and of the case of Butte & B. Min. Co. v. Sloan, 16 Mont. 97, 40 Pac. 217. Messrs Morrison

then, for it to be a known vein or lode, "it must either have been known to the applicant for the placer patent, or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government." [64]

Whether a vein of sufficient value to justify working exists and was known to exist at the time of the application for placer patent is for the jury to say. As the United States Supreme Court has said: "It is, after all, a question of fact for the jury. It cannot be said, as a matter of law in advance, how much of gold or silver must be found in a vein before it will justify exploitation and be properly called a 'known' vein." [65]

The mere fact that a lode location was marked on the ground and location certificate recorded, etc., does not prove that there really was a vein that was known to exist,[66] though no doubt it will have weight with a jury in connection with other facts. Nor does the discovery of a lode 200 or 300 feet outside of the placer boundaries create any

and De Soto say: "There are expressions in both these opinions which, taken by themselves, would read that the [placer] patent was conclusive proof that no lode existed; but to so decide on consideration of the whole case was evidently not the intention of the court." Morrison's Mining Rights (13th Ed.) 227. And it is well to bear in mind the warning which they give, namely: "The practical conclusion from this vexed state of the title, arising from the unwise reservation from a government grant of a piece of land with no defined bounds, and even without acknowledged existence, is that a lode within placer lines should assert itself by adverse against placer application at the outstart, so as to avoid subsequent departmental inquiry. And where the application is by the lode claimant over a prior placer patent, the safe course is for the placer to adverse if the facts exist upon which to contest the title of the lode claimant." Id.

[64] IRON SILVER MIN. CO. v. MIKE & STARR GOLD & SILVER MIN. CO., 143 U. S. 394, 402, 403, 430, 12 Sup. Ct. 543, 36 L. Ed. 201. See Sullivan v. Iron Silver Min. Co., 143 U. S. 431, 12 Sup. Ct. 555, 36 L. Ed. 214; Montana Cent. R. Co. v. Migeon (C. C.) 68 Fed. 811; Brownfield v. Bier, 15 Mont. 403, 39 Pac. 461, "A vein known to exist within the boundaries of a placer claim at the date of the application for patent, and not included in the application, may be located by an adverse claimant after the issuance of the patent; and a vein is known to exist within the meaning of the statute (1) when it is known to the placer claimant; (2) when its existence is generally known; (3) when any examination of the ground sufficient to enable the placer claimant to make oath that it is subject to location as such would necessarily disclose the existence of the vein." MUTCHMOR v. McCARTY, 149 Cal. 603, 87 Pac. 85, 88.

[65] Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 143 U. S. 394, 404, 405, 430, 12 Sup. Ct. 543, 36 L. Ed. 201; Noyes v. Clifford (Mont.) 94 Pac. 842. See Butte & B. Min. Co. v. Sloan, 16 Mont. 97, 40 Pac. 217.

[66] BUTTE & B. MIN. CO. v. SLOAN, supra; McCONAGHY v. DOYLE, 32 Colo. 92, 75 Pac. 419.

presumption of the existence of a vein or lode within the placer.[67] Even where "quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore, which it was argued might be merely parts of a single vein of continuous extension through all that territory," and it was commonly believed that a blanket vein did underlie the whole territory, still as there had been no discovery in the placer tract, and no tracing of the vein or lode "adjacent thereto," it was held that the common belief would not make knowledge within the meaning of the statute.[68]

If a vein is made known by a trespassing prospector, the latter cannot, of course, locate;[69] but the vein, if it be of sufficient value to do so, forthwith becomes a "known lode," with all that the term implies.

Location of Known Lodes by Third Persons Prior to Application for Placer Patent.

There is still room to doubt whether, as against a placer locator who does not consent to a lode location, a known lode in a placer can be located prior to the application for patent on the placer. Certainly a fair construction of Rev. St. U. S. § 2333 (U. S. Comp. St. 1901, p. 1433), would seem to show that Congress intended that the placer owner should have the first right to all lodes within the placer, and that an election to take or leave known lodes should not be forced upon him prior to the application for patent of the placer. The serious thing to be said against a construction of the statute which would give the placer owner the first right to all lodes discovered down to the time of application for patent is the practical one that it would result in too many veins being withdrawn from exploration and purchase.[70] Perhaps, too,

[67] DAHL v. RAUNHEIM, 132 U. S. 260, 263, 10 Sup. Ct. 74, 33 L. Ed. 324. Compare Michael v. Mills, 22 Colo. 439, 45 Pac. 429.

[68] SULLIVAN v. IRON SILVER MIN. CO., 143 U. S. 431, 12 Sup. Ct. 555, 36 L. Ed. 214.

[69] CLIPPER MIN. CO. v. ELI MINING & LAND CO., 194 U. S. 220, 24 Sup. Ct. 632, 48 L. Ed. 944. In REYNOLDS v. IRON SILVER MIN. CO., 116 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774, it was held that placer patentees could not maintain ejectment against adjoining lode claimants who were following the vein on its dip outside that part of the dip belonging to them, because included within their side lines, which for extralateral right purposes were the end lines, as extended. The part of the dip beneath the placer was a known lode in a placer, and so did not belong to the placer patentee, and it was a part to which the lode claimants had no right, since it was beyond their extralateral right boundaries; but since plaintiff could recover only on the strength of his own title, and not on the weakness of defendant's title, the court thought that the facts above did not justify a recovery. But see infra, pp. 408, 409.

[70] See Aurora Lode v. Bulger Hill & Nugget Gulch Placer, 23 Land Dec. Dep. Int. 95, 102.

fraudulent placer locations might be made; but those could be attacked on that ground and may be disregarded.

The practical reason has appealed to the land department, which has announced that a placer location does not operate to give title or right of possession to veins or lodes within its limits, or preclude the right of discovery and location thereof by others.[71] The same reason has also appealed to the Colorado Supreme Court, which in the following language, that was dicta, since the court was dealing with the case of a placer that had been patented without the patentee asking for known lodes, favored the view of the land department: "On the other hand, those provisions of the statute that give the locator of a placer the right to locate and patent all other forms of mineral deposits included within the surface boundaries of his claim expressly excepts therefrom veins of quartz or other rock in place, known to exist within its limits. Rev. St. U. S. §§ 2329, 2333 (U. S. Comp. St. 1901, pp. 1432, 1433). Such lodes, therefore, are not the subject of a placer grant, and a placer location does not operate to confer the title or possession thereof upon the placer claimant, or withdraw them from subsequent location by others. In other words, the placer location gives a qualified possession of the ground located; that is to say, it confers upon the owner the exclusive right of possession of the surface area for all purposes incident to the use and operation of the same as a placer mining claim, and all unknown lodes or veins, but does not give right of possession to known lodes or veins within its limits. The right to the possession of such lodes or veins can be acquired only by locating them as lode claims." [72]

The citation of section 2329, Rev. St. U. S., is immaterial; for that section simply defines placers as including everything except lodes. Unknown lodes concededly pass by placer patents, however, and it is perfectly rational to say that they become part of the placer upon its location. Indeed, in Clipper Min. Co. v. Eli Mining & Land Co.,[73] the Supreme Court of Colorado so recognized; for, while stating as a dictum that known lodes in placer unpatented claims were subject to location by prospectors, it said that, if the lodes were unknown at the time of prospecting, "the placer owner was entitled to their exclusive possession, and entry upon them by others constituted a trespass, and could not initiate title." This recognizes a right in the placer locator to the veins as well as the surface, a right which may, of course, later be divested. Lodes known to exist when the placer is located

[71] Id.

[72] Mt. Rosa Mining, Milling & Land Co. v. Palmer, 26 Colo. 56, 56 Pac. 176, 50 L. R. A. 289, 77 Am. St. Rep. 245.

[73] 29 Colo. 377, 386, 68 Pac. 286, 64 L. R. A. 209, 93 Am. St. Rep. 89.

never become part of the placer, as that would be a fraud on the government; but why do not lodes not then known to exist become part of the location, with the qualification that, if their presence becomes known before application for patent, the placer claimant must either ask to patent them, when he applies for placer patent, or lose them? The placer locator has a qualified possession; but is his possession qualified by the right of a third person to locate a known lode within the limits of the placer? It would seem, on principle, so far as the statutes are concerned, to be qualified only by the fact that his possession ceases as to a lode which becomes known before he applies for placer patent, and which he fails to ask to patent along with the placer.

It is curious that no judicial decision actually decides that prior to the placer claimant's application for placer patent a stranger may locate within a placer a lode unknown when the placer was located, but now known to exist, and thus end the placer locator's right to patent that known lode. All the cases about known lodes concern locations made after placer patent, except Clipper Min. Co. v. Eli Mining & Land Co.,[74] which held that a third party cannot enter the lines of a placer location to prospect for lodes, and that if he does so enter he is a trespasser, and as such cannot make a valid location of any vein he discovers. That case throws little light on the question here, as it was based primarily on the placer locator's right to the surface, and not at all on his right to the unknown lodes. The practical reason above mentioned, however, makes it reasonably certain that the courts will allow a location of a known vein in a placer location, where such location can be accomplished peaceably, and not clandestinely, and perhaps even where clandestinely, if peaceably. Force, of course, could not be used in the making of such a location, any more than in any other. A placer claimant should not, however, be allowed to play the part of a dog in a manger, and for his own protection should take pains to locate any veins within his placer that he wishes to hold.

Whatever may be true of lode locations made in placer location limits without the consent of the placer claimant, it is undoubtedly true that the owner of an unpatented placer claim, or another with his consent, may locate a lode claim within the boundaries of the placer claim.[75] So, though a location of previously unknown veins may not be made on his unpatented placer against his will, he may waive the trespass, or perhaps be estopped to set it up to defeat the lode location. "Perhaps, if the placer owner, with knowledge of what the [tres-

[74] 194 U. S. 220, 24 Sup. Ct. 632, 48 L. Ed. 944.

[75] McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590; Collins v. McKay, 36 Mont. 123, 92 Pac. 295.

passing] prospectors are doing, takes no steps to restrain their work, and certainly if he acquiesces in their action, he cannot, after they have discovered a vein or lode, assert right to it; for generally a vein belongs to him who has discovered it, and a locator, permitting others to search within the limits of his placer, ought not thereafter to appropriate that which they have discovered by such search." [76]

The Location of Known Lodes in Patented Placers.

But it is with reference to patented placers that the question of known lodes has arisen in practice. Since the statute provides that the applicant for placer patent must ask to patent known lodes, or else the application "shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim," [77] that statute must be given full effect; and hence, under patents issued on entries since May 10, 1872, though not on those before that date,[78] the patentee gets no title to lodes known to exist in the placer at the time of his application, and they may be located by others.[79]

How to Locate Known Lodes in Placers.

It remains only to discuss the manner of locating a known lode within a placer and the size of the claim. The manner of locating is just the same as that in the case of any other lode; but the width of the claim is less. No trespass must be committed in making discovery and location, and the location must be made peaceably, and perhaps not clandestinely. Assuming that the placer location is valid, the subsequent location of a known vein in the placer must under the statute be restricted to 50 feet in width.[80] Since a placer patent con-

[76] Clipper Min. Co. v. Eli Mining & Land Co., 194 U. S. 220, 230, 24 Sup. Ct. 632, 48 L. Ed. 944.

[77] Rev. St. U. S. § 2333 (U. S. Comp. St. 1901, p. 1433).

[78] Cranes Gulch Min. Co. v. Scherer, 134 Cal. 350, 66 Pac. 487, 86 Am. St. Rep. 279.

[79] Reynolds v. Iron Silver Min. Co., 116 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774; Iron Silver Min. Co. v. Reynolds, 124 U. S. 374, 8 Sup. Ct. 598, 31 L. Ed. 466; Iron Silver Mining Co. v. Mike & Starr Gold & Silver Min. Co., 143 U. S. 394, 430, 12 Sup. Ct. 543, 36 L. Ed. 201; Sullivan v. Iron Silver Min. Co., 143 U. S. 431, 12 Sup. Ct. 555, 36 L. Ed. 214; Clary v. Hazlitt, 67 Cal. 286, 7 Pac. 701; Noyes v. Clifford (Mont.) 94 Pac. 842. Although two adverse suits brought against a placer applicant by lode claimants were determined in the placer applicant's favor, that fact was not deemed an adjudication that there was "no known lode" within the conflict area affected by those suits, as against third parties who did not claim under the adversers. Butte Land & Investment Co. v. Merriman, 32 Mont. 402, 80 Pac. 675, 108 Am. St. Rep. 590.

[80] MT. ROSA MINING, MILLING & LAND CO. v. PALMER, 26 Colo. 56, 56 Pac. 176, 50 L. R. A. 289, 77 Am. St. Rep. 245; Noyes v. Clifford

fers no title to known lodes within its limits, one who subsequently locates such lodes cannot be deemed a trespasser within the rule that a trespasser on a lawful possession can acquire no rights.[81] But what if he cannot get on the 50-foot excepted strip without a trespass? Is there any way to locate a known vein which cannot be shown to approach any boundary line of the placer? For such a situation see figure No. 11.

FIGURE No. 11.

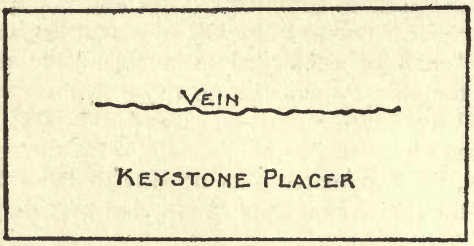
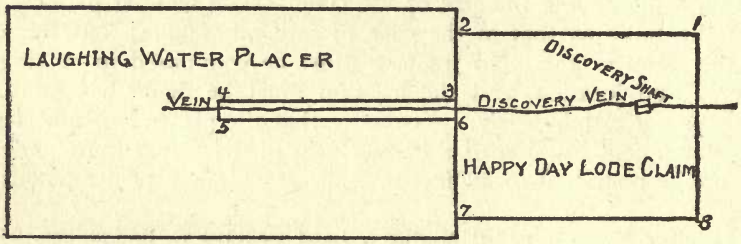


FIGURE No. 12.



If in figure No. 11 the placer patentee posts a notice to all prospectors to keep off his placer, it is difficult to see how a valid location of the vein can be made without a trespass. In Figure No. 12 however, the Happy Day claim, based on a discovery outside of the placer, is valid for the full claim width of 600 feet or less claimed outside the placer and for 50 feet in width claimed in the placer on the

(Mont.) 94 Pac. 842. Mr. Lindley points out that the record in the case of Noyes v. Mantle, 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168, as filed, shows that the lode location in that case preceded the placer, and that therefore the court rightly held that the lode location was entitled to be of the regulation lode location size. See 1 Lindley on Mines (2d Ed.) p. 748.

[81] MT. ROSA MINING, MILLING & LAND CO. v. PALMER, 26 Colo. 56, 56 Pac. 176, 50 L. R. A. 289, 77 Am. St. Rep. 245; MUTCHMOR v. McCARTY, 149 Cal. 603, 87 Pac. 85; Noyes v. Clifford (Mont.) 94 Pac. 842.

"known lode" not patented as such to the placer owner. In that figure the boundaries of the Happy Day lode claim would be beginning at point No. 1, thence to point No. 2, thence to point No. 3, thence to point No. 4, thence to point No. 5, thence to point No. 6, thence to point No. 7, thence to point No. 8 and thence to point No. 1, the place of beginning. The Happy Day lode claim, thus located, can extend of course, only 1,500 feet in length.

CHAPTER XVI.

THE ANNUAL LABOR OR IMPROVEMENTS REQUIREMENTS.

CLAIMS SUBJECT TO ANNUAL LABOR REQUIREMENT.

78. Annual labor is held to be required on placer claims as well as on lode claims. It is required only on unpatented claims.

The federal statute attaches to a lode location an express requirement that each year following the location and prior to the proper stage in patent proceedings a certain amount of labor shall be performed upon the claim or improvements be made upon it. By a process of judicial oversight, or perhaps by traditional error, it has become settled in several states that annual labor must be performed on placers as well as on lodes;[1] and the doctrine has the support of a dictum of the Supreme Court of the United States.[2] The land department has reversed its previous holding to the contrary in favor of the rule "that the annual expenditure to the amount of $100 required by section 2324, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1426), must be made upon placer claims as well as lode claims."[3] The result is that, while probably the act of 1872 did not contemplate annual labor on anything but lode claims, the cases requiring it upon placers will probably always be followed.[4] Mr. Lindley, indeed, argues that they are

[1] CARNEY v. ARIZONA G. M. CO., 65 Cal. 40, 2 Pac. 734; Morgan v. Tillottson, 73 Cal. 520, 15 Pac. 88; Sweet v. Webber, 7 Colo. 443, 4 Pac. 752. See, also, Chapman v. Toy Long, 4 Sawy. (U. S.) 28, Fed. Cas. No. 2,610; Gird v. California Oil Co. (C. C.) 60 Fed. 531. Separate work need not be performed on each 20 acres of a 160-acre tract, however. McDonald v. Montana Wood Co., 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616.

[2] Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990. See St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875.

[3] Land Office Regulations, rule 25. See Circular, 8 Land Dec. Dep. Int. 505.

[4] In the short act of February 12, 1903, passed to change a land department ruling which required annual labor on each oil location, even though sev-

right, because by section 2329, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1432), "claims usually called 'placers' * * * shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims;" but it does not seem that the language of that section means anything more than that $500 worth of labor must be expended or improvements made on placers before they can be patented. Its terms may be fully met without the doing of annual labor. By the settled interpretation of the statutes, however, annual labor on placers is required.

WHAT IS ANNUAL LABOR.

79. Annual labor is otherwise known as "assessment work" and "representation work," and these terms cover the annual expenditure in labor or improvements required to prevent the forfeiture of an unpatented mining claim. Annual labor is required for each year, beginning with the 1st of January succeeding the date of location of the claim. The federal statute requires the expenditure of at least $100 a year in labor or improvements where the claim has been located since the act of 1872.

Annual labor is sometimes known as "assessment work" and sometimes as "representation work." Such labor was required by district rules and regulations prior to the federal legislation, though such rules more often required monthly or quarterly labor. The reason for the miners' rules and regulations as to labor is thus stated: "It was soon discovered that the same person would mark out many claims of discovery and then leave them for an indefinite length of time, without further development and without actual possession, and seek in this manner to exclude others from availing themselves of the abandoned mine. To remedy this evil a mining regulation was adopted that some work should be done on each claim in every year or it would be treated as abandoned." [5] By the lode mining act of 1866 and the placer act of 1870 no attempt was made to legislate about annual labor. It was in the act of 1872, therefore, that the first federal legislation on the subject was enacted, and by that act two different requirements were made, depending on whether the claims were located before or located after the passage of the act.

eral constituted a group, Congress recognizes annual labor as a requisite in oil placer locations. Act Feb. 12, 1903, c. 548, 32 Stat. 825 (U. S. Comp. St. Supp. 1907, p. 478).

[5] Chambers v. Harrington, 111 U. S. 350, 353, 4 Sup. Ct. 428, 28 L. Ed. 452. Annual labor is required of the locator to test his good faith. McCULLOCH v. MURPHY (C. C.) 125 Fed. 147.

Annual Labor Requirement on Claims Located Prior to the Act of 1872.

With regard to previously located claims the act provided that "$10 worth of labor shall be performed or improvements made each year for each 100 feet in length along the vein until a patent shall have been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim." [6] It is apparent that "each year" means here each year after the passage of the act, and that no expenditure prior to the passage of the act could count.[7] That act as it stood would have required the first annual labor to be done by May 10, 1873; but by several amendments it was finally provided that the first annual labor on such claims was to be performed or improvements made by January 1, 1875.[8]

As Mr. Lindley[9] and Messrs. Morrison and De Soto[10] agree that very few claims located prior to May 10, 1872, remain in existence unpatented, such claims either having gone to patent, or been relocated, or else having been entirely abandoned, the subject of annual labor on such claims may be dismissed with the following practical advice by Messrs. Morrison and De Soto: "Where the lode consists of undivided claims of 100 or 200 feet each, as in the case of most locations made before May 10, 1872, any one or more claims may be saved by the expenditure of $10 worth of labor to each 100 feet which the owner desires to segregate and hold, leaving the remainder to forfeiture, or, when the series of claims are held in common, the full amount may be expended on any one claim, whether they were originally recorded as joint or as several locations; but, in all cases where less than the amount required to hold the entire lode is expended, the owner, in his proof of labor, should state the work as done for the purpose of holding only so many feet, designating where they lie upon the lode." [11]

Annual Labor Requirement on Claims Located after the Act of 1872.

With regard to claims located after the act of May 10, 1872, the act provided that "until a patent shall have been issued therefor, not less than $100 worth of labor shall be performed or improvements made

[6] Act May 10, 1872, c. 152, § 5, 17 Stat. 92; Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426).

[7] Thompson v. Jacobs, 3 Utah, 246, 2 Pac. 714.

[8] Id. The compilers of the Revised Statutes of the United States overlooked Act June 6, 1874, c. 220, 18 Stat. 61. So, instead of January 1, 1875, the date printed in section 2324, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1426), appears as June 10, 1874.

[9] 2 Lindley on Mines (2d. Ed.) § 623.

[10] Morrison's Mining Rights (13th Ed.) 96.

[11] Id.

during each year." [12] Because this work was to be done "on each claim located after the passage of this act," the favorite construction of the act seems to have been that the first annual work must be done in the year dating from the location of the claim; but the doubt was set at rest by the act of January 22, 1880, which amended Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426), by providing, as to all claims located since May 10, 1872, that the annual labor should "commence on the 1st day of January succeeding the date of location of such claim." [13] While this statute did not act retrospectively, so as to save a claim from a forfeiture incurred before its passage,[14] nor so as to make a locator perform labor before the act went into effect.[15] nor so as to allow credit for such prior labor,[16] it did make the calendar year the period for the performance of labor on all claims located after May 10, 1872.[17] "The object of the amendment of the law was to render the annual periods uniform as to all mining claims, and the exemption of claims from the performance of labor for a portion of a year in certain cases was a necessary result of the amendment." [18]

Since the passage of the amendment no annual labor has been required during the year in which the location is made,[19] so far as the federal statutes are concerned,[20] though a district rule or state statute, it seems, may require annual labor during the location year.[21] Indeed, it has been contended that a state statute may not only do that, but may also require more annual labor than the federal stat-

[12] Act May 10, 1872, c. 152, § 5, 17 Stat. 92; Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426).

[13] Act Jan. 22, 1880, c. 9, § 2, 21 Stat. 61 (U. S. Comp. St. 1901, p. 1427).

[14] Slavonian Min. Co. v. Perasich (C. C.) 7 Fed. 331.

[15] Hall v. Hale, 8 Colo. 351, 8 Pac. 580.

[16] Thompson v. Jacobs, 3 Utah, 246, 2 Pac. 714.

[17] Id., where it extended the period from June 8, to December 31, 1880. See McGinnis v. Egbert, 8 Colo. 41, 51, 5 Pac. 652.

[18] McGinnis v. Egbert, 8 Colo. 41, 51, 52, 5 Pac. 652.

[19] There may be a question in what year a location really is made. "If a discovery be made in the latter part of the year, but the staking and record are not completed until some time in the early part of the following year, the latter year would be, in our opinion, the location year, and there could be no forfeiture for neglect to do the annual labor during that year; but we find no case where the point has been in terms decided. A location is not complete until all its several parts have been perfected. McKay v. McDougall, 25 Mont. 258, 64 Pac. 669, 87 Am. St. Rep. 395; Hickey v. Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 811." Morrison's Mining Rights (13th Ed.) 99.

[20] MALONE v. JACKSON, 137 Fed. 878, 70 C. C. A. 216.

[21] NORTHMORE v. SIMMONS, 97 Fed. 386, 38 C. C. A. 211. But see ORIGINAL CO. OF THE WILLIAMS & KELLINGER v. WINTHROP MIN. CO., 60 Cal. 631, and 1 Lindley on Mines (2d Ed.) § 250.

ute does, and may fix the time for its completion earlier than the end of the year. In Sisson v. Sommers the Nevada Supreme Court said: "The contention that, although the Legislature may properly require a greater amount of work than Congress has prescribed, it cannot limit the time in which to do it, does not strike us with any great force of reason. Congress has made the $100 worth of labor the minimum amount to be done, and the time named [the year] is the maximum time for the performance of the work without the risk of forfeiture. We think the Legislature may require a reasonable additional amount of work to be done annually, and a reasonable amount of work to complete the location (Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113), or, after location, a reasonable additional amount of work within a reasonable time, less than the time named by Congress for the annual expenditure, as a condition to the continuance of the right acquired by location of the mine." [22]

Annual labor is required in order to keep prospectors from monopolizing the public mineral domain, and its performance is essential to prevent the location from being open to relocation.[23] While, in the absence of local legislation to the contrary, the claimant has the whole of each year to do his $100 worth of work or put on that amount of improvements, the fact that he does more work in any one year than is required for that year will not enable him to count it toward the next year's work. Each year can receive credit for that year's work only. Despite the fact that a year's work came at the first of the year, the work for the succeeding year may come at the end of that year,[24] and hence more than 20 months may intervene between times of working on the property. All that the government cares is that the $100 worth comes each year, or, if it is omitted for any year, that annual work shall be resumed before a relocation is made by third parties.

[22] SISSON v. SOMMERS, 24 Nev. 379, 388, 55 Pac. 829, 77 Am. St. Rep. 815. See NORTHMORE v. SIMMONS, 97 Fed. 387, 38 C. C. A. 211. But, contra, as to time of doing work, see Sweet v. Webber, 7 Colo. 443, 4 Pac. 752, and as to district rules, ORIGINAL CO. OF THE WILLIAMS & KELLINGER v. WINTHROP MIN. CO., 60 Cal. 631, and Johnson v. McLaughlin, 1 Ariz. 493, 500, 4 Pac. 130.

[23] See BEALS v. CONE, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

[24] See MILLS v. FLETCHER, 100 Cal. 142, 34 Pac. 637; Belk v. Meagher, 3 Mont. 65.

PLACE OF PERFORMANCE AND KIND OF ANNUAL LABOR.

80. The work done as annual labor may be done (1) within the boundaries of a single claim; (2) within the boundaries of one or more claims of a group held in common, if the work done is really for the benefit of all; or (3) outside the boundaries of the claim or claims worked, if the work done is really for the benefit of the claim or claims.

81. Work intended to develop the claim will count as annual labor, if it is actually performed within the boundaries of the claim; but work done outside the boundaries cannot count, unless it is found by the jury, or the court sitting as a jury, actually to be of benefit to the claim.

The time when annual labor must be performed having been ascertained, the next question is where it may be performed. The federal statute speaks of annual labor on each claim, meaning thereby on each piece of located mineral ground; and the intent of the statute seems to have been that $100 worth of work must be performed, or that amount of improvements made * on each location, unless several claims are held in common, when the work may be done on one for all, or unless a tunnel is run to develop several lode locations. But a broader interpretation has been given to the act. A claim or location within the act about annual labor consists of a lode mining claim or of a placer located by one or more persons; and under the broad interpretation of the statute, the work claimed as annual labor may be done: (1) Within the boundaries of a single claim; (2) within the boundaries of one or more claims of a group; (3) outside of the boundaries of a single claim, or of the various claims of a group.

Work Done within the Claim's Boundaries.

Work done within the boundaries of a single location, whether upon the surface or below, if only done so as clearly to be intended to develop the claim, will satisfy the statute, and the court will not be allowed to question the wisdom and expediency of the method employed.[25] Excavating on the vein, and putting upon the claim ma-

* "The word 'improvement,' as thus used, evidently means such an artificial change of the physical conditions of the earth in, upon, or so reasonably near a mining claim as to evidence a design to discover mineral thereon or to facilitate its extraction, and in all cases the alteration must reasonably be permanent in character." Fredricks v. Klauser (Or.) 96 Pac. 679, 682.

[25] MANN v. BUDLONG, 129 Cal. 577, 62 Pac. 120; McGarrity v. Byington, 12 Cal. 426; Mt. Diablo Mill & Mining Co. v. Callison, 5 Sawy. (U. S.) 439, Fed. Cas. No. 9,886; Stone v. Bumpus, 46 Cal. 218; Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600. Extracting ore without doing development work is sufficient. Wailes v. Davies (C. C.) 158 Fed. 667.

chinery and other works for mining, will serve to satisfy the statute.[26] It has even been held that work done on placer claims to reveal whether or not there are lodes within them is annual labor,[27] though that may well be doubted, in view of the decision that picking down from a vein samples of rock and assaying them in an attempt to find pay ore will not count as annual labor.[28] It has been said that work done within the common-law boundaries of the claim, though performed on a lode apexing outside, is still work on the claim within the meaning of the federal statute;[29] but that may well be doubted. A building will be an improvement, so as to count toward the $100 expenditure, only if it is, and is intended to be, of benefit to the claim.[30] Services of superintendence will count as annual labor;[31] but it is questionable how far, if at all, the employment of a watchman for an idle mine will count. The earlier cases said that the watchman's services will count as annual labor;[32] but the late California cases and an Oregon case throw doubt upon the proposition.[33] In Hough v. Hunt the court says that the cases must be rare indeed where employing a watchman will serve for annual labor, because only occasionally can such expenditures justly be said to have been made "in prospecting or working the mine. There may be cases where work has been temporarily suspended, and there are structures which are likely to be lost if not cared for, and it appears that the structures will be required when work is resumed, and that the parties do intend to resume work, in which money expended to preserve the structures will be on the same basis as money expended to create them anew. But this could not go on indefinitely. As soon as it should appear that this was done merely to comply with the law and to hold the property, without any intent to make use of such structure within a reasonable period, such expenditure could not be said to have been made

[26] Lockhart v. Rollins, 2 Idaho, 540, 21 Pac. 413. But see Packer v. Heaton, 9 Cal. 568.

[27] United States v. Iron Silver Min. Co. (C. C.) 24 Fed. 568.

[28] BISHOP v. BAISLEY, 28 Or. 119, 41 Pac. 936.

[29] Mt. Diablo Mill & Mining Co. v. Callison, 5 Sawy. (U. S.) 439, Fed. Cas. No. 9,886.

[30] BRYAN v. McCAIG, 10 Colo. 309, 15 Pac. 413. See Remmington v. Baudit, 6 Mont. 138, 9 Pac. 819, and see note *, supra.

[31] Rara Avis G. & S. M. Co. v. Bouscher, 9 Colo. 385, 12 Pac. 433.

[32] Lockhart v. Rollins, 2 Idaho, 540, 21 Pac. 413; Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047; Tripp v. Dumphy, 28 Land Dec. Dep. Int. 14.

[33] HOUGH v. HUNT, 138 Cal. 142, 70 Pac. 1059, 94 Am. St. Rep. 17; Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600; Fredricks v. Klauser (Or.) 96 Pac. 679. Compare New England & Coalinga Oil Co. v. Congdon (Cal.) 92 Pac. 180; Williams v. Hawley, 144 Cal. 97, 77 Pac. 762.

in work upon the mine. Much less could the mine owner bring picks, shovels, and things of that kind upon the claim, and have some one to watch them to prevent their being stolen, and have such cost of watching considered as work upon the mine." [34]

Work done by a stockholder of a corporation for the benefit of the company will count as annual labor.† The cost of sharpening tools on the premises may be a legitimate item of expenditure, or may not, according to circumstances,[35] and so may the expense of unwatering a mine;[36] but the expense of taking tools, lumber, etc., to a mine, and then taking them away after slight or no use, will not count.[37] So depositing waste on a claim from an adjoining claim is not annual labor on the claim used as a dump, nor is the building of a flume over such claim for the carriage of such waste, for they clearly do not tend to develop that claim.[38] For the same reason bath houses and appurtenances at salt springs are not mining improvements.[39] The same is true of storing water on a placer to be used elsewhere.[40] So work done by third parties for themselves and then purchased by the claimant, after suit has been brought to recover possession from the claimant, cannot inure to the benefit of such claim for annual labor purposes,[41] though work performed by the claimant's grantor, of course, will;[42] and so will work done by a corporation, the superintendent of which has a contract to purchase the claim, if the superintendent can be considered to hold the contract in trust for the company.[43] While the value of powder, fuse, candles, etc., used in development work, the value of rails laid on

[34] Hough v. Hunt, 138 Cal. 142, 70 Pac. 1059, 94 Am. St. Rep. 17; Fredricks v. Klauser (Or.) 96 Pac. 679. That payment to a watchman will serve as annual labor expenditure, where the services of the watchman are reasonably necessary to guard ore and valuable improvements on the claim against theft and injury, is held in Kinsley v. New Vulture Min. Co. (Ariz.) 90 Pac. 438.

† Wailes v. Davies (C. C.) 158 Fed. 667.

[35] HIRSCHLER v. McKENDRICKS, 16 Mont. 211, 40 Pac. 290.

[36] See Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036.

[37] HONAKER v. MARTIN, 11 Mont. 91, 27 Pac. 397.

[38] Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990.

[39] Lovely Placer Claim, 35 Land Dec. Dep. Int. 426.

[40] Robert S. Hale, 3 Land Dec. Dep. Int. 536; William S. Chessman, 2 Land Dec. Dep. Int. 774.

[41] LITTLE GUNNEL GOLD MIN. CO. v. KIMBER, 1 Morr. Min. Rep. 536, Fed. Cas. No. 8,402.

[42] Tam v. Story, 21 Land Dec. Dep. Int. 440.

[43] GODFREY v. FAUST, 18 S. D. 567, 101 N. W. 718. So, it seems, will work intended as a present. Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223. Where the same ground has been properly located, and then an invalid relocation made by the same locator, work done by him will count as annual

ties in a tunnel on the claim, and the reasonable value of meals furnished the miners as part of their wages, will count as annual expenditure, it seems that the value of work horses, tools, bedding, kitchen utensils, and cutlery will not, though the reasonable value of the use of such things may be counted.‡

Work Done on One Claim for a Group.

But it may happen that a group of claims may best be worked through work done on one of them, and the statute expressly permits that to be done by providing that, "where such claims are held in common, such expenditure may be upon any one claim." [44] Even in such case, however, the work on one claim cannot count as work on another claim, or the group, unless the work done is really for the benefit of that other as one of the group.[45] "Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development—that is, to facilitate the extraction of the metals it may contain—though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream or the introduction of water, or where the improvement consists in the construction of a flume to carry off the débris or waste material. It would be absurd to require a shaft to be sunk on each location in a consolidated claim, when one shaft would suffice for all the locations." [46]

The question of whether the work done on one claim is really for the benefit of the rest of the group is for the jury.[47] The burden of proof is on the owner to show that the work done or improvment made does in fact develop the claims as a whole.[48] The work done on the group must, of course, aggregate as much as if done on each

labor on the valid location. Temescal Oil Mining & Development Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010.

‡ Fredricks v. Klauser (Or.) 96 Pac. 679.

[44] Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426).

[45] LITTLE DORRIT GOLD MIN. CO. v. ARAPAHOE GOLD MIN. CO., 30 Colo. 431, 71 Pac. 389; McCormick v. Baldwin, 104 Cal. 227, 37 Pac. 903; Axiom Min. Co. v. White, 10 S. D. 198, 72 N. W. 462; Justice Min. Co. v. Barclay (C. C.) 82 Fed. 554; Fissure Min. Co. v. Old Susan Min. Co., 22 Utah, 438, 63 Pac. 587.

[46] ST. LOUIS SMELTING & REFINING CO. v. KEMP, 104 U. S. 636, 655, 26 L. Ed. 875; Klopenstine v. Hays, 20 Utah, 45, 57 Pac. 712.

[47] WILSON v. TRIUMPH CONSOL. MIN. CO., 19 Utah, 66, 56 Pac. 300, 75 Am. St. Rep. 718; Yreka Min. & Mill. Co. v. Knight, 133 Cal. 544, 65 Pac. 1091; Eberle v. Carmichael, 8 N. M. 169, 42 Pac. 95.

[48] HALL v. KEARNY, 18 Colo. 505, 33 Pac. 373; SHERLOCK v. LEIGH-

claim separately, and it seems that where several contiguous claims held in common are given a common improvement the development of each is figured pro rata.[49] So, in a case where the annual expenditure on one claim of a group of four amounted only to $132, it was held that the claim upon which the expenditure was made was safe from forfeiture, but that the other three claims were subject to relocation.**

The statute speaks of claims held in common, which means, of course, common ownership. This does not necessarily mean, however, legal, as distinguished from equitable, ownership. Where three locations were made, each in the name of a different locator, under an oral agreement that they should be owned in common by all three locators, the equitable interest which each locator had in the other locations, together with the legal interest which he had in the location which he perfected, caused the locations to be owned in common within the meaning of the federal statute.[50]

It has been said that several different locators may combine to work their separate locations together under this statute. "It often happens that, for the development of a mine [lode?] upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditures the claim could not be successfully worked. In such case it has always been the practice for the owners of the different locations to combine and to work them as one general claim; and expenditures which may be necessary for the development of all the claims may then be made on one of them." [51]

The statute says nothing about any necessity for the claims to be contiguous, in the sense of having their boundaries touching,[52] for work on one to count for all. While in several cases such contiguity is declared to be essential,[53] the California case which holds contiguity not

TON, 9 Wyo. 297, 63 Pac. 580, 934; Dolles v. Hamberg Consol. Mines, 23 Land Dec. Dep. Int. 267; Copper Glance Lode, 29 Land Dec. Dep. Int. 542.

[49] James Carretto and Other Lode Claims, 35 Land Dec. Dep. Int. 361; Aldebaran Mining Co., 36 Land Dec. Dep. Int. 551.

** Fredricks v. Klauser (Or.) 96 Pac. 679.

[50] EBERLE v. CARMICHAEL, 8 N. M. 169, 42 Pac. 95. See Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123.

[51] JACKSON v. ROBY, 109 U. S. 440, 445, 3 Sup. Ct. 301, 27 L. Ed. 990.

[52] "Contiguous means touching sides, adjoining, adjacent. Two tracts of land touching only at a point are not contiguous." Hidden Treasure Consol. Quartz Mine, 35 Land Dec. Dep. Int. 485, 488.

[53] GIRD v. CALIFORNIA OIL CO. (C. C.) 60 Fed. 531; ROYSTON v. MILLER (C. C.) 76 Fed. 50. See CHAMBERS v. HARRINGTON, 111 U. S. 350, 353, 4 Sup. Ct. 428, 28 L. Ed. 452; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666.

to be necessary would seem to be sound. As the court in that case said: "Mines may be conceived of as so situated that the same work may be, and appear to be, expended in opening or developing both mines, although they are not actually contiguous." [54]

The fact that the act in regard to annual labor on oil placers requires them to be contiguous [55] should not cause the same requirement to be read into the general sections applicable to all kinds of claims, and, if it has any significance, tends rather to show that contiguity is essential only in the case of oil placers.

Work Done Outside of a Claim or of a Group of Claims.

While the statute says that the work shall be done and improvements made on the claim, and specifically authorizes work outside both of the claim and of the group owned in common of which the claim is a part, only where a tunnel is run,[56] the rule is well settled that work done outside of a claim, or of a group of claims, and not in a tunnel, will count as annual labor if it is for the benefit of the claim. "Work done outside of the claim, or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself." [57] Even work done on a patented claim may count as annual labor on an unpatented claim.[58] The test is whether the work done has some direct relation to the claim, or is in reasonable proximity to it,[59] and actually benefits the claim to the extent of the $100 required.

On the kind of work outside of a tunnel which will count there are a number of decisions. Constructing a flume to carry away waste from the claim,[60] though not to bring it to the claim,[61] and building a road

[54] ALTOONA QUICKSILVER MIN. CO. v. INTEGRAL QUICKSILVER MIN. CO., 114 Cal. 100, 107, 45 Pac. 1047. In that case there seems to have been a narrow strip of land between the locations.

[55] Act Feb. 12, 1903, c. 548, 32 Stat. 825 (U. S. Comp. St. Supp. 1907, p. 478).

[56] Act Feb. 11, 1875, c. 41, 18 Stat. 315 (U. S. Comp. St. 1901, p. 1427), amendment to section 2324, Rev. St. U. S. See Godfrey v. Faust (S. D.) 105 N. W. 460; Book v. Justice Min. Co. (C. C.) 58 Fed. 106. Work on a tunnel will count as assessment work, although the claimant does not own a continuous strip of territory from the portal of the tunnel to the boundary of the claim. HAIN v. MATTES, 34 Colo. 345, 83 Pac. 127.

[57] Mt. Diablo Mill & Mining Co. v. Callison, 5 Sawy. (U. S.) 439, 457, Fed. Cas. No. 9,886; Book v. Justice Min. Co. (C. C.) 58 Fed. 106. See Packer v. Heaton, 9 Cal. 568; Kramer v. Settle, 1 Idaho, 485.

[58] HALL v. KEARNY, 18 Colo. 505, 33 Pac. 373; SHERLOCK v. LEIGHTON, 9 Wyo. 297, 63 Pac. 580, 934.

[59] McGarrity v. Byington, 12 Cal. 426, 432.

[60] Packer v. Heaton, 9 Cal. 568.

[61] St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990.

to the claim when that is necessary to its working,[62] will serve as types. It must always be remembered that, where work is done outside the claim or group of claims, the burden of proof is upon the owner to show that the work has actually benefited the claim the required amount.[63] "Where the work is not done within the surface boundaries of the location, the law undoubtedly casts the burden upon the party claiming to have done the work, not only to show that the work done outside of such boundary was intended as the annual assessment work on the claim, but that it was of such a character as that it would inure to the benefit of such claim. But, when such facts are clearly established, then it is wholly immaterial whether the work to accomplish such purpose was performed off the ground upon a patented or unpatented mining claim," [64] or upon an agricultural claim.[65]

Work in a Tunnel as Annual Labor.

With reference to working one or more claims through a tunnel it should be noted that there are two kinds of tunnels, namely: (1) The statutory tunnel site tunnel; and (2) the ordinary crosscut tunnel. The statutory tunnel site tunnel work may be credited as assessment work on claims owned by the tunnel site claimant and benefited thereby, even though as a matter of fact the right to blind veins cut by said tunnel has been lost.[66] The other kind of tunnel was probably a proper means of doing assessment work prior to the amendment of 1875, made to Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426); but that amendment removes all room for controversy over whether the annual labor on a claim or claims can be performed by a tunnel run to develop the claim or claims.[67] Not only may the work be performed through or by such a tunnel, but it seems plain that such a tunnel, owned and worked in common by several claim owners, whose claims

[62] DOHERTY v. MORRIS, 17 Colo. 105, 28 Pac. 85; Mt. Diablo Mill & Mining Co. v. Callison, 5 Sawy. (U. S.) 439, Fed. Cas. No. 9,886.

[63] HALL v. KEARNY, 18 Colo. 505, 33 Pac. 373; SHERLOCK v. LEIGHTON, 9 Wyo. 297, 63 Pac. 580, 934. See DU PRAT v. JAMES, 65 Cal. 555, 4 Pac. 562. In Remmington v. Baudit, 6 Mont. 138, 9 Pac. 819, a building erected outside of the boundaries of the claim was not allowed to count.

[64] JUSTICE MIN. CO. v. BARCLAY (C. C.) 82 Fed. 554, 560. In saying that work done outside the boundaries of the location is done on the claim, the courts are giving a common-sense construction to the statute.

[65] RICHARDS v. WOLFLING, 98 Cal. 195, 32 Pac. 971.

[66] FISSURE MIN. CO. v. OLD SUSAN MIN. CO., 22 Utah, 438, 63 Pac. 587.

[67] Kirk v. Clark, 17 Land Dec. Dep. Int. 190. See HALL v. KEARNY, 18 Colo. 505, 33 Pac. 373; SHERLOCK v. LEIGHTON, 9 Wyo. 297, 63 Pac. 580, 934.

are to be cut thereby, can serve as the assessment work on all the claims, if enough is done each year to make up $100 for each claim.[68]

AMOUNT OF ANNUAL LABOR.

82. The requirement of $100 worth of labor or improvements must be met by work or improvements reasonably worth that amount, and local rules or statutes to the effect that so many days' labor shall be regarded as equivalent to $100 worth of labor must be disregarded.

It being conceded that $100 worth of the right kind of labor within the right time and at the right place is desired, the question arises whether any artificial standard can be fixed by state statute or by district rules to measure the $100 worth of work by. In Penn v. Oldhauber a custom of miners in a given district that 20 days' work should constitute $100 worth of work was not allowed to be proved, because "the value of work done or improvement made is to be measured, not in days, but in dollars." [69] The same argument will render invalid the Nevada and New Mexico statutes of the same kind.[70] It is a question of fact in each case whether the work done or improvements made are reasonably worth $100, and it does not matter what the contract price was, nor whether the value of the claim was enhanced by the work.[71] The contract price is, however, proper evidence, because it bears on the good faith of the claim owner.[72] If $100 worth of labor is actually performed for the claim owner, it is immaterial, so far as compliance with the annual labor statute is concerned, whether he has paid for it,[73] though until the claim owner

[68] JACKSON v. ROBY, 109 U. S. 440, 445, 3 Sup. Ct. 301, 27 L. Ed. 990; FISSURE MIN. CO. v. OLD SUSAN MIN. CO., 22 Utah, 438, 63 Pac. 587.

[69] PENN v. OLDHAUBER, 24 Mont. 287, 61 Pac. 649; Woody v. Bernard, 69 Ark. 579, 65 S. W. 100; Wright v. Killian, 132 Cal. 56, 64 Pac. 98. Compare McKay v. Neussler, 148 Fed. 86, 78 C. C. A. 154.

[70] See Sweet v. Webber, 7 Colo. 443, 4 Pac. 752.

[71] MATTINGLY v. LEWISOHN, 13 Mont. 508, 35 Pac. 111. For decisions where there was conflicting evidence of value of work, see Crown Point Min. Co. v. Crisman, 39 Or. 364, 65 Pac. 87; Wagner v. Dorris, 43 Or. 392, 73 Pac. 318; Wright v. Killian, 132 Cal. 56, 64 Pac. 98; Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123; Stolp v. Treasury Gold Min. Co., 38 Wash. 619, 80 Pac. 817; Dibble v. Castle Chief Gold Min. Co., 9 S. D. 618, 70 N. W. 1055; McGrath v. Bassick, 11 Colo. 528, 19 Pac. 462; Hirschler v. McKendricks, 16 Mont. 211, 40 Pac. 290.

[72] QUIMBY v. BOYD, 8 Colo. 194, 208, 6 Pac. 462; Floyd v. Montgomery, 26 Land Dec. Dep. Int. 122; Whalen Consol. Copper Min. Co. v. Whalen (C. C.) 127 Fed. 611; McCormick v. Parriott, 33 Colo. 382, 80 Pac. 1044.

[73] LOCKHART v. ROLLINS, 2 Idaho, 540, 21 Pac. 413; COLEMAN v.

pays for the annual labor he may be unable to make the statutory affidavit of labor performed.[74] Where the claim owner performs the labor himself, the market value of the labor and materials is its measure of value.[75]

One who relies upon a forfeiture for want of annual labor must negative the expenditure of $100 in improvements, as well as negative its expenditure in work and labor,[76] and where the $100 worth of work has been done on a claim belonging to co-owners, and there is no showing that they did not do it, the presumption is that some of them did it.[77]

EXCUSES FOR ANNUAL LABOR.

83. Congress has several times for special reasons permitted the filing of certificates of intention to hold a mining claim to take the place of annual labor. At all times a forcible adverse possession will excuse the performance of annual labor as against the wrongdoer.

Annual labor has been excused in some years in favor of certain classes of claimants, who in lieu of annual labor filed certain certificates. In 1893 and 1894 Congress, because of business depression, suspended for those years the annual labor requirements in favor of those who filed certificates prescribed by the statutes.[78] The required certificates amounted practically only to a notice of bona fide intention to hold the claims; the act of filing the certificates being the equivalent of the performance of the work.[79] In 1898 a similar act was passed relieving Spanish War volunteers from assessment work during the period of enlistment on filing similar certificates.[80] The filing of the certificate under such acts has been held to be the

CURTIS, 12 Mont. 301, 30 Pac. 266. See Godfrey v. Faust, 18 S. D. 567, 101 N. W. 718.

[74] See COLEMAN v. CURTIS, supra, where the statute required the actual amount paid for the work to be stated.

[75] See QUIMBY v. BOYD, 8 Colo. 194, 6 Pac. 462.

[76] POWER v. SLA, 24 Mont. 243, 61 Pac. 468.

[77] Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123.

[78] Act Nov. 3, 1893, c. 12, 28 Stat. 6; Act July 18, 1894, c. 142, 28 Stat. 114. In 1907 a bill for a similar act passed the United State Senate, but too late in the year for the House to concur in it.

[79] A certificate filed by one who reasonably supposed himself a co-owner, and who acted at the instance of one of the real owners, was upheld in Nesbitt v. De Lamar's Nevada Gold Min. Co., 24 Nev. 273, 52 Pac. 609, 53 Pac. 178, 77 Am. St. Rep. 807. See Dibble v. Castle Chief Gold Min. Co., 9 S. D. 618, 70 N. W. 1055.

[80] Act July 2, 1898, c. 563, § 1, 30 Stat. 651 (U. S. Comp. St. 1901, p. 1428).

equivalent of annual labor, where previous work has been kept up, and also to be sufficiently equivalent to such work to save the claim from forfeiture for previous delinquencies.[81]

Even apart from statute, the nonperformance of annual labor will be excused as against one who wrongfully puts the claim owner out of possession and holds adversely to him.[82] The same is true where another by threats prevents the claim owner or his servant from doing the work on the claim to which the threats applied, provided the threats are made under circumstances making their execution reasonably to be dreaded.[83]

PROOF OF ANNUAL LABOR.

84. The doing of annual labor may be proved in the same way as other overt acts; but in some jurisdictions by statute the filing of an affidavit of annual labor within a given time after the labor is done makes out a prima facie case of its performance. In a few jurisdictions the failure to file the affidavit is prima facie evidence that the work has not been done. In drawing and filing the affidavit, the statutes of the given jurisdiction should be fully complied with.

Most of the mining law states and territories have enacted statutes providing for the filing of affidavits that the annual labor has been done, and making the affidavits prima facie evidence that the work has been performed. Arizona, Arkansas, Colorado, Idaho, Montana, Nevada, New Mexico, Washington, and Wyoming have such statutes, and Congress has provided similar legislation for Alaska. The object of these statutes is to enable a mining claim owner to preserve in convenient form prima facie evidence of the performance of annual labor.[84] A failure to prepare and file the affidavit, or a mistake in the affidavit filed, nowhere precludes other evidence of the fact of the per-

[81] FIELD v. TANNER, 32 Colo. 278, 75 Pac. 916.

[82] Utah Mining & Mfg. Co. v. Dickert & Myers Sulphur Co., 6 Utah, 183, 21 Pac. 1002, 5 L. R. A. 259; FIELD v. TANNER, 32 Colo. 278, 75 Pac. 916; TREVASKIS v. PEARD, 111 Cal. 599, 44 Pac. 246; Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637.

[83] Slavonian Min. Co. v. Perasich (C. C.) 7 Fed. 331; Garvey v. Elder (S. D.) 109 N. W. 508.

[84] Book v. Justice Min. Co. (C. C.) 58 Fed. 106, 118; McCULLOCH v. MURPHY (C. C.) 125 Fed. 147; McGINNIS v. EGBERT, 8 Colo. 41, 5 Pac. 652; COLEMAN v. CURTIS, 12 Mont. 301, 30 Pac. 266; Davidson v. Bordeaux, 15 Mont. 250, 38 Pac. 1075. In Noyes v. Clifford (Mont.) 94 Pac. 842, affidavits of work done from year to year on defendant's location of an alleged "known lode" in plaintiff's patented placer were admitted in evidence to show defendant's good faith and belief that the vein warranted expenditure to develop it.

formance of the annual labor being given,[85] though in Alaska, Idaho, and New Mexico the statute makes such failure prima facie evidence that the required labor has not been performed. The statutes differ as to the time within which the affidavits have to be filed to be effective. In Alaska it must be not later than 90 days after the close of the year in which the work is performed. In Arizona it must be within 3 months after the expiration of the period of time fixed for the performance of the labor. In Arkansas it must be on or before December 31st of the year in which the work must be done. In Colorado it must be within 6 months after any set time or annual period allowed for annual labor.[86] In Idaho and New Mexico the time is 60 days after the period allowed for performance of the labor. In Montana the affidavit may be filed within 20 days after the annual work. In Nevada within 60 days after the performance of labor is the time fixed. In Utah and in Washington the time fixed for filing is within 30 days, and in Wyoming it is within 60 days, after the completion of the work.

It has been held that a single affidavit may well cover the annual labor on several claims, and that if the work has been done the affidavit cannot be prematurely filed;[87] but in jurisdictions where the point has not yet been raised all chance for controversy should be avoided by filing separate affidavits and coming within the letter of the local statute as to time. Where, however, the annual labor is done upon a number of claims by working upon one claim of a group, or by working outside of the group, it certainly would seem as if everywhere one affidavit for the group should suffice, and as if, to have any real evidential value, the affidavit should state just how the work done benefits each claim. Not all of the state statutes permit, as the Colorado statute does, a statement of the mere conclusion of the affiant. For instance, the Utah statute requires the affidavit to state: "(1) The name of the claim and where situated. (2) The number of days' work done and the character and value of the improvements placed thereon. (3) The date or dates of performing said labor and making said improve-

[85] McCULLOCH v. MURPHY (C. C.) 125 Fed. 147; Book v. Justice Min. Co. (C. C.) 58 Fed. 106. A failure to file the affidavit does not render the claim open to relocation. Murray Hill Min. & Mill. Co. v. Havenor, 24 Utah, 73, 66 Pac. 762; Book v. Justice Min. Co. (C. C.) 58 Fed. 106; Davidson v. Bordeaux, 15 Mont. 245, 38 Pac. 1075; COLEMAN v. CURTIS, 12 Mont. 301, 30 Pac. 266; Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co. (Idaho) 95 Pac. 14. The California act of 1891 did provide, however, that a failure to file the affidavit rendered the claim open to relocation. Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708.

[86] Under this statute the affidavit may be made and filed as soon as the work is done, even if it is before the end of the year for the annual labor. McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652.

[87] Id.

ments and number of cubic feet of earth or rock removed. (4) At whose instance or request said work was done or improvements made. (5) The actual amount paid for said labor and improvements, and by whom paid, when the same was not done by the owner or owners of said claim." [88] The statute of the given state should be consulted in each case, and complied with.

ANNUAL LABOR PENDING PATENT PROCEEDINGS.

85. Until entry in patent proceedings annual labor must be kept up. After entry and until patent issues it is wise to perform the annual labor, for fear for some reason the entry may be canceled. After patent no annual or other labor is required.

Considerable confusion of ideas has existed in regard to the effect of patent proceedings on the obligation to perform annual labor. The statute requires the work to be done each year on each claim "until a patent has been issued therefor." [89] After a patent actually issues no work need be done, of course; but will anything short of patent excuse? It seems perfectly clear that after entry in the land office—that is, after the patent proceedings have passed the point where the contract of purchase is complete by the payment of the money for the land by the applicant—the applicant need perform no more actual labor if patent ultimately issues to him, or, more accurately, if the entry is not canceled by the land department.[90] The reason is that in such case all proceedings in the land department after entry are immaterial, and the receiver's receipt makes the applicant the equitable, and for all practical purposes the actual, patentee. But the "if" above noted causes the trouble. If for any reason the receiver's receipt is canceled by the land department, the applicant finds himself governed by the general rule that until entry the annual labor must be kept up,[91] and may therefore find himself without a claim because some third person relocates it on account of the failure to keep up the annual labor.[92] The land department, to be sure, has ruled that it will not

[88] Laws Utah 1899, p. 27, c. 14.

[89] Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426).

[90] BENSON MINING & SMELTING CO. v. ALTA MINING & SMELTING CO., 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; Aurora Hill Consol. Min. Co. v. Eighty-Five Mining Co. (C. C.) 34 Fed. 515; Neilson v. Champaigne Min. & Mill. Co. (C. C.) 111 Fed. 655; Deno v. Griffin, 20 Nev. 249, 20 Pac. 308; Southern Cross Gold Min. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423.

[91] SOUTH END MIN. CO. v. TINNEY, 22 Nev. 19, 35 Pac. 89; Id., 22 Nev. 221, 38 Pac. 401; MURRAY v. POLGLASE, 23 Mont. 401, 59 Pac. 439.

[92] South End Min. Co. v. Tinney, 22 Nev. 19, 35 Pac. 89; Id., 22 Nev. 221, 38 Pac. 401; MURRAY v. POLGLASE, 23 Mont. 401, 59 Pac. 439. See

regard a protest against a patent application based upon the fact that pending an adverse suit the applicant did not keep up the annual labor;[93] but that ruling may well be reversed later. It certainly lacks the sanction of judicial authority,[94] and seems to be altogether too loose a construction of the statute to make one feel safe in following it. This is particularly true because, since the foregoing ruling, the land department has announced that questions "as to the performance of annual expenditure and as to the alleged relocations are not for determination by the land department, but by the courts."[95] The only wise course is to perform the annual labor, not only until the receiver's receipt is issued, but also, for fear of protest on the ground of laches or fraud, to perform that labor until patent actually issues.†† A recent case has held that a cancellation of the receiver's receipt issued on an insufficient published notice of application for patent cannot be made retroactive, because the applicant had a right to rely on the entry to excuse the performance of the annual labor,[96] and that certainly seems sound.

It seems needless to say that the doing of the $500 worth of work which enables one to apply for patent will not dispense with the necessity of annual labor thereafter.

Figg v. Hensley, 52 Cal. 299; Swigart v. Walker, 49 Kan. 100, 30 Pac. 162. The mere mistaken cancellation of an entry does not make the entered ground subject to relocation. Rebecca Gold Min. Co. v. Bryant, 31 Colo. 119, 71 Pac. 1110, 102 Am. St. Rep. 17.

[93] Marburg Lode Min. Claim, 30 Land Dec. Dep. Int. 202; Laughing Water Placer, 34 Land Dec. Dep. Int. 56.

[94] Where the applicant allowed his application to sleep for years without paying the purchase money, a relocation based on the failure to perform annual labor was upheld in GILLIS v. DOWNEY, 85 Fed. 483, 29 C. C. A. 286. The inexcusable delay of an applicant to complete his application for patent within the calendar year in which the publication ended was held fatal to the application in the land department on a protest by a relocator, and a renewed application, with a chance to the relocator to adverse, was ordered in CLEVELAND v. EUREKA NO. 1 GOLD MIN. & MILL. Co., 31 Land Dec. Dep. Int. 69. See Lucky Find Placer Claim, 32 Land Dec. Dep. Int. 200.

[95] Cleveland v. Eureka No. 1 Gold Min. & Mill. Co., 31 Land Dec. Dep. Int. 69; Lucky Find Placer Claim, 32 Land Dec. Dep. Int. 200.

†† Id. In Willitt v. Baker (C. C.) 133 Fed. 937, the rule was laid down that, to entitle either party to an adverse suit to get judgment, he must prove the performance of the annual labor. While that ruling is questionable, it emphasizes the importance of continuing the annual labor until entry, at least.

[96] SOUTHERN CROSS GOLD MIN. CO. v. SEXTON, 147 Cal. 758, 82 Pac. 423.

RESUMPTION OF WORK.

86. After a failure to perform the annual labor the claim owner may restore the claim to its original validity by resuming work on it prior to a relocation by third parties; and this seems to be so, although there was, at the time of the default and afterwards, an overlapping junior location.

87. Resumption must take place before relocation; but the authorities are divided on the question whether a resumption is effective where it comes after the first act, but before the last act, of relocation. Under the modern statutes, it would seem that principle requires such resumption to be held to be too late.

88. Resumption of work is the expenditure with reasonable diligence of the statutory amount in labor and improvements for the year in which the resumed work is finished.

With reference to annual labor the federal statute provides that, "upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." [97] A forfeiture does not result from the mere failure to do the annual labor, but from that failure coupled with a relocation by others before resumption of work by the person whose interest was forfeitable. No matter how many years intervene between the doing of the previous annual labor and the resumption of work, the statute makes the location perfectly valid because of the resumption, provided the claim has not in the meantime been relocated, or, if relocated, the relocation does not still exist.[98] The original locator's "rights after resumption are precisely what they would have been had no default occurred." [99]

If there has been in the meantime a relocation which has itself become forfeitable for failure to do annual labor, it is a question whether the resumption of labor will revive the original claim. The Utah Su-

[97] Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1427).

[98] JUSTICE MIN. CO. v. BARCLAY (C. C.) 82 Fed. 554; Crown Point Mining Co. v. Crismon, 39 Or. 364, 65 Pac. 87; Klopenstine v. Hays, 20 Utah, 45, 57 Pac. 712; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87; Worthen v. Sidway, 72 Ark. 215, 79 S. W. 777; Du Prat v. James, 65 Cal. 555, 4 Pac. 562; Lacey v. Woodward, 5 N. M. 583, 25 Pac. 785; Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co., 30 Colo. 431, 71 Pac. 389.

[99] BELK v. MEAGHER, 104 U. S. 279, 26 L. Ed. 735. See Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036.

preme Court, in a dictum in Klopenstine v. Hays,[100] approves the syllabus of a federal case[101] to the effect that it will revive the original claim; and, while neither case actually decides the point, the view seems reasonable. The difficulty of having the title relate back to the original location, and thus antedate the relocation, seems to be very technical, in view of the fact that the relocation necessarily is forfeited by the entry to resume work. Those who criticise the dicta above approved do so on the ground that relocation renders the original location just "as if no location of the same had ever been made;"[102] but they overlook the fact that this language does not really state the statute properly. The provision is that the land shall be open to relocation as if no location had ever been made. The relocation cannot be attacked on the ground that the previous location existed; but neither need a forfeited relocation stand in the way of resumption of work. The question, however, is an open one.

A much more troublesome question is whether, where there are overlapping locations, and the owner of the senior location omits to do the required annual labor in any year, such owner can restore the senior claim as to the conflict area by resuming work. Until the case of Lavagnino v. Uhlig[103] was decided by the Supreme Court of the United States no one ever doubted that he could. That case, however, laid down the doctrine clearly that where the senior location is abandoned or forfeited the conflict area, as between the junior claimant and an attempted relocator, inures to the junior claimant without any act being done by the latter. The question, then, is: Does the conflict area inure to the junior locator as against the senior locator, so that the latter cannot by resuming work regain it? It would seem as if, between the senior locator and the junior, the right of the senior to resume work cannot be cut off, except by some affirmative act of the junior prior to the resumption of work. The recording of an amended location certificate has always been regarded as a sufficient affirmative act;[104] but nothing short of that should cut off the right to resume. Such record of an amended location certificate is in effect a relocation by the adoption of the former discovery, location markings, etc., and as a relocation stands in the way of resumption

[100] 20 Utah, 45, 57 Pac. 712.

[101] Justice Min. Co. v. Barclay (C. C.) 82 Fed. 554.

[102] See 2 Lindley on Mines (2d Ed.) § 651.

[103] 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119.

[104] See Tonopah & S. L. Min. Co. v. Tonopah Min. Co. (C. C.) 125 Fed. 389. But Colorado refuses to regard it as sufficient, where the junior location is "void" because based on a discovery within the senior claim. Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054.

of work by the senior locator so far as the conflict area is concerned, but nothing short of that should do so. The case of Lavagnino v. Uhlig seems, therefore, to leave undisturbed the decision of the United States Circuit of Appeals, Eighth Circuit, that the mere failure of the owner of a senior location to perform the annual labor for one year does not divest his title to the conflict area in favor of the junior overlapping location, and that a resumption of work by the senior locator prior to a relocation by the junior locator, or to the filing of an amended location certificate by him, is valid.[105]

When Resumption of Work must Take Place.

As between a relocator and one claiming to have resumed work under the statute, a very close question of fact may arise. ‡‡ The Supreme Court of Montana early decided and later reaffirmed the doctrine that the former owner may cut out a relocator by resuming work at any time before the relocator performs all the necessary acts of location,[106] and California and New Mexico have held the same way.[107] The Montana act of 1907 has recently changed the rule in that state. Opposed to the former Montana and to the California view is that of Judge Hallett, who in 1878 announced the doctrine that resumption could come only "before another has taken possession of the property with intent to relocate it." "It is," said Judge Hallett, "the entry of the new claimant with intent to relocate the property, and not mere lapse of time, that determines the right of the original claimant." [108]

There can be little doubt that Judge Hallett's view is the one which accords with the purpose of the mining laws to encourage the loca-

[105] OSCAMP v. CRYSTAL RIVER MIN CO., 58 Fed. 293, 7 C. C. A. 233. Until SULLIVAN v. SHARP, supra, is declared to be bad law, a complete relocation should take place. See, however, dictum in Moorhead v. Erie Min. & Mill. Co. (Colo.) 96 Pac. 253, to the effect that an amended certificate will do.

‡‡ Whether resumption precedes relocation or not is a question of fact for the trial court where the evidence is conflicting, and a decision of the highest court of the state affirming on that ground the trial court's finding that resumption preceded relocation does not amount to a denial of the right of relocation, so as to permit a review in the Supreme Court of the United States on writ of error. Yosemite Gold Min. & Mill. Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. 196, 52 L. Ed. 374.

[106] Gonu v. Russell, 3 Mont. 358; McKAY v. McDOUGALL, 25 Mont. 258, 64 Pac. 669, 87 Am. St. Rep. 395.

[107] PHARIS v. MULDOON, 75 Cal. 284, 17 Pac. 70; Belcher Consol. Gold Min. Co. v. Deferrari, 62 Cal. 160; Lacey v. Woodward, 5 N. M. 583, 25 Pac. 785. See, also, Field v. Tanner, 32 Colo. 278, 75 Pac. 916; Worthen v. Sidway, 72 Ark. 215, 79 S. W. 777.

[108] LITTLE GUNNEL GOLD MINING CO. v. KIMBER, 1 Morr. M. Rep. 536, 539. Compare Pelican & Dives Min. Co. v. Snodgrass, 9 Colo. 339, 12 Pac. 206; Slavonian Min. Co. v. Perasich (C. C.) 7 Fed. 331.

tion of claims by those who will develop them. It is to be noticed, too, that the Montana court at least did not say that Judge Hallett's rule is not the right one where development work requirements exist. In refusing to adopt Mr. Lindley's view,[109] which accorded and still accords with Judge Hallett's, the Montana court, speaking before the statute of 1907 adopted Judge Hallett's view, said: "Whatever may be the rule in other jurisdictions, under local statutes requiring work of considerable amount to be done by the relocator in order to complete his relocation, which is also the case under our present statute, the rule applicable under the statute in force in this state until July 1, 1895, is that resumption of labor in good faith prior to the completion of the acts of relocation defeats the relocation." [110] That was because under the old statute nothing was requisite to a location except to post notice, mark the location on the ground, and record a declaratory statement.[111]

It should frankly be admitted that under the old Montana statute the fact that forfeitures are odious to the law justified the above rule adopted by the Montana court;[112] but, wherever a mining code requires development work as an act of location, the public policy revealed by the statute and contained in the law of estoppel outweighs the objection to forfeiture.[113] Under such a code the correct rule to be followed is that adopted by the Montana act of 1907, namely: "The right of a relocator of any abandoned or forfeited mining claim, hereafter relocated, shall date from the posting of his notice of location thereon, and while he is duly performing the acts required by law to perfect his location his rights shall not be affected by any re-entry or resumption of work by the former locator or claimant." [114]

What Constitutes Resumption.

Doing the full $100 worth of work in any year will be taken to be resumption in good faith, in the absence of any evidence to the con-

[109] 1 Lindley on Mines (2d Ed.) § 408.

[110] McKAY v. McDOUGALL, 25 Mont. 258, 64 Pac. 669, 87 Am. St. Rep. 395.

[111] See Gonu v. Russell, 3 Mont. 358.

[112] The same applies to the California cases. PHARIS v. MULDOON, 75 Cal. 284, 17 Pac. 70.

[113] If relocators have entered and are in actual possession after a forfeiture, although they have not relocated, the original locators have no right to make a forcible entry for the purpose of resuming work. SLAVONIAN MIN. CO. v. PERASICH (C. C.) 7 Fed. 331.

[114] Laws Mont. 1907, p. 21. The possession of the original locator, without the resumption of work by him, will not prevent a relocation, if it is made peaceably. GOLDBERG v. BRUSCHI, 146 Cal. 708. 81 Pac. 23.

trary.[115] This is the rule as against those who seek to relocate after the work is done; but as against a relocator, who comes in before the year is over and finds that the resumer has not proceeded with reasonable diligence to complete the $100 worth of work, but instead has acted as if resuming and doing some work permitted a postponement of the rest, no presumption of good faith should be indulged. As the Montana court said: "The resumption of work by the original locator, whose rights are subject to forfeiture, without the expenditure, with reasonable diligence, during the year, of the sum of $100 for labor or improvements upon the mine, is an evasion of the statute." [116] And that court very properly declared that the case of Belcher Consol. Gold Min. Co. v. Deferrari,[117] which decided that the expenditure of $24 on two claims in January was such a resumption of work as would defeat a relocation in August following, is unsound. The Montana court also quoted with approval the often repeated declaration of Messrs. Morrison and De Soto that "such a decision" as the California one just mentioned "is only trifling with the law and the rights of parties based on the law." [118]

The California court has since modified its views, expressed in Belcher Consol. Gold Min. Co. v. Deferrari, supra, to the extent of declaring that "to 'resume work,' within the meaning of said section 2324, is to actually begin work anew, with a bona fide intention of prosecuting it as required by said section." [119] There is every reason to believe that it will yet hold that resuming work does not mean regaining a year's time to do the work of the year of resumption by making a slight expenditure, but instead means beginning in good faith and finishing with reasonable diligence $100 worth of work as a condition precedent to the rehabilitation of the claim. The prosecution of the work to a finish with reasonable diligence is an essential element of a bona fide resumption.[120]

Further consideration of the subject of resumption is deferred to the next chapter.

[115] TEMESCAL OIL MINING & DEVELOPMENT CO. v. SALCIDO, 137 Cal. 211, 69 Pac. 1010.

[116] HONAKER v. MARTIN, 11 Mont. 91, 97, 27 Pac. 397. See HIRSCHLER v. McKENDRICKS, 16 Mont. 211, 40 Pac. 290.

[117] 62 Cal. 160. See, also, Klopenstine v. Hays, 20 Utah, 45, 57 Pac. 712.

[118] Quoted in Honaker v. Martin, 11 Mont. 91, 96, 27 Pac. 397. Repeated in Morrison's Mining Rights (12th Ed.) 97.

[119] McCORMICK v. BALDWIN, 104 Cal. 227, 229, 37 Pac. 903.

[120] HIRSCHLER v. McKENDRICKS, 16 Mont. 211, 40 Pac. 290; Honaker v. Martin, supra. See Bishop v. Baisley, 28 Or. 119, 41 Pac. 936.

FORFEITURE TO CO-OWNER.

89. The federal statute authorizes one co-owner, who has had to bear the whole or a disproportionately large part of the annual labor expenditure, to acquire by forfeiture the interest of the delinquent co-owner. The forfeiture takes place by notice given by the diligent co-owner to the delinquent personally or by publication, and by the failure of the delinquent co-owner to contribute his proportion of the expenditure within 90 days after such notice. The local statutes in some jurisdictions supplement the federal statute by requiring a copy of the notice and an affidavit of service to be recorded, and by giving them evidential quality when so recorded.

90. Whether the owner of one partitioned or granted piece of a mining claim is a "co-owner," within the meaning of the statute, with the owner of another partitioned or granted piece of the same mining claim, query?

The failure of one of several co-owners of an unpatented mining claim to perform his share of the annual labor requisite to hold the claim throws the whole burden of performing that labor on his co-owners. Annual labor only partially performed gives no right,[121] and since, therefore, a performance by one co-owner of his proportionate share of the annual labor will not save his interest, the delinquent co-owner really compels the diligent one to work for both. In the absence of statute, therefore, the delinquent co-owner would have his interest preserved by the diligent co-owner's labor.[122] To overcome the injustice of that situation Congress enacted in 1872 the following provision: "Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if, at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures." [123]

The foregoing statute relates, of course, only to the $100 of necessary annual labor or annual improvement. If any co-owner fails to contribute, and then his other co-owners expend more than $100, the

[121] Saunders v. Mackey, 5 Mont. 523, 6 Pac. 361.
[122] FAUBEL v. McFARLAND, 144 Cal. 717, 78 Pac. 261.
[123] Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1427).

delinquent co-owner may save his interest from forfeiture by paying his proportionate part of the $100. For anything beyond the $100 the co-owner who has made the expenditures must rely upon other legal rights, if any.[124] The remedy given by the statute is extrajudicial, and is confined, therefore, to the exact situation legislated about. The statute is one of forfeiture, and should be strictly construed.[125]

Constitutionality of the Forfeiture Statute.

Originally doubts about the constitutionality of this statute were expressed; but they have been set at rest by a decision of the United States Supreme Court.[126] The co-tenant who is "advertised out" is not deprived of property without due process of law; but instead the United States, the real owner of the mining ground at the outset, has provided this as an additional "rule of the game" of acquiring title from the United States. On forfeiture under the act, a statutory proceeding in rem, analogous in some respects to patent proceedings, takes place, and the defaulting co-owner receives all the consideration he is entitled to. The mining claimant holds only a conditional title, and the right which the United States has to provide for a relocation of the whole claim if the annual labor is not performed is no more unquestionable than is its right to forfeit the delinquent co-owner's interest for his failure to contribute his share of the necessary labor or expenditure.[127]

Forfeiture may be by Personal Service or by Publication of Notice.

The statute gives the diligent co-owners the right to resort either to personal service or to publication at their option, and there is no saving of the rights of minor heirs.[128] Moreover, the diligent co-owners may group in one notice the delinquencies of more than one year.[129] If the delinquent co-owner has died, then, even though the estate has vested in minor heirs, it is not necessary to name them; but a notice addressed to the co-owner by name, "his heirs administrators, and to whom it may concern," is sufficient, if it contains the proper recitation of facts.[130]

[124] See Holbrooke v. Harrington (Cal.) 36 Pac. 365.

[125] TURNER v. SAWYER, 150 U. S. 578, 14 Sup. Ct. 192, 37 L. Ed. 1189. Whether or not the one seeking to forfeit made a bona fide attempt to comply with the law is immaterial. McKAY v. NEUSSLER, 148 Fed. 86, 78 C. C. A. 154.

[126] ELDER v. HORSESHOE MIN. & MILL. CO., 194 U. S. 248, 24 Sup. Ct. 643, 48 L. Ed. 960.

[127] Id. [128] Id. [129] Id.

[130] Id. In other cases, however, the co-owner must be named in the notice, for the forfeiture to take place. BALLARD v. GOLOB, 34 Colo. 417,

Where publication is resorted to, it is not turned into personal service by showing that copies of the paper containing the published notice were sent to and received by the party in default.[131] And, when the statute says that the notice must be published "in the newspaper published nearest the claim," that means the nearest in a direct line, and not by the usually traveled route.[132] The requirement of publication for at least once a week for 90 days is fully met by publication for 13 weeks, although there may be only 85 days between the first and the last publication.[134] Since, however, the forfeiture is not complete until 90 days after notice in writing or by publication, it would seem as if forfeiture by publication would not be complete until 180 days after the first insertion of the printed notice.[135] In the case of personal notice in writing, the delinquent co-owner would be divested of all interest at the end of 90 days from date of service.

Where several claims are owned by the same co-tenants, and there is delinquency as to the work on several or all of the claims, there is nothing in the statute to prevent all the delinquencies from being covered by one notice; but in such case it seems that the notice is void if it does not show the amount of money spent upon each claim, or, if it was spent on one or more of a group for all, or outside the boundaries of the claim or group, does not state the facts showing that the work done related directly to the claims and obviously tended to their development.[136]

The notice of forfeiture held good by the Supreme Court of the United States in Elder v. Horseshoe Min. & Mill. Co.[137] was as follows:

"Notice of Forfeiture.

"To Rufus Wilsey, His Heirs, Administrators, and to All Whom It may Concern:

"You are hereby notified that I have expended $800 in labor and improvements upon the Golden Sand lode,[138] * * * as will ap-

83 Pac. 376. To cover the case of a co-tenant dying while notice by publication is being served on him, it would seem well to address the notice to him by name and to add the clause approved in ELDER v. HORSESHOE MIN. & MILL. CO., 194 U. S. 248, 24 Sup. Ct. 643, 48 L. Ed. 960.

131 HAYNES v. BRISCOE, 29 Colo. 137, 67 Pac. 156.

132 Id.

134 ELDER v. HORSESHOE MIN. & MILL. CO., 194 U. S. 248, 24 Sup. Ct. 643, 48 L. Ed. 960.

135 See Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co. (C. C.) 139 Fed. 838.

136 HAYNES v. BRISCOE, 29 Colo. 137, 67 Pac. 156.

137 194 U. S. 248, 24 Sup. Ct. 643, 48 L. Ed. 960.

138 Here was inserted evidently a description of the claim, with a state-

pear by certificate filed on January 2, 1889, in the office of the register of deeds of said Lawrence county, in order to hold said premises under the provisions of the laws of the United States and of this territory;[139] that being $100 per year, the amount required to hold the claim for the years ending December 31, 1880, December 31, 1881, December 31, 1882, December 31, 1883, December 31, 1884, December 31, 1885, December 31, 1886, and December 31, 1887. And if, within ninety days after this notice by publication, you fail or refuse to contribute your proportion ($400, being $50 for each of said years), your interests in said claim will become the property of the subscriber under section 2324, Revised Statutes of the United States.

"Charles H. Havens."[140]

Which Co-Owners Acquire the Delinquent Co-Owner's Interest.

The statute says that the interest of the delinquent co-owner, when forfeited, "shall become the property of his co-owners who may have made the required expenditures." That would seem unquestionably to mean that if one of several co-owners either performs, or has performed for him, all the annual labor, and one co-tenant is delinquent, the other co-tenants cannot compel the diligent co-tenant to let them share in the forfeited interest, unless the American doctrine of the fiduciary relation between tenants in common is consistent with this particular statute and prevents the diligent co-tenant from getting this advantage. It would seem, however, that the same reasoning which makes the statute constitutional justifies us in saying that the forfeiture gives the interest forfeited to those only who performed the labor, or had it performed, in place of the delinquent co-owner.

Forfeitures Not Favored.

With reference to this forfeiture statute it should always be borne in mind that the proceeding is so summary, and forfeitures are so odious to the law, that the exact situation contemplated must exist before the statute can apply, and that the burden of proof is upon the forfeiting party to establish all necessary facts.[141] For instance, a purchaser at execution sale, who has not received a sheriff's deed, and therefore is not a co-owner at the time of the delinquency, cannot forfeit an owner's undivided part interest under the statute.[142]

ment of the mining district and county in which it was situated. There was probably a reference to the recorded location certificate by date of record, book, and page.

[139] Now, of course, a state.

[140] Quoted in Elder v. Horseshoe Min. & Mill. Co., 9 S. D. 636, 70 N. W. 1060, 1061, 62 Am. St. Rep. 895.

[141] TURNER v. SAWYER, 150 U. S. 578, 14 Sup. Ct. 192, 37 L. Ed. 1189.

[142] TURNER v. SAWYER, 150 U. S. 578, 14 Sup. Ct. 192, 37 L. Ed.

Again, a stockholder in a corporation is not such a co-owner with the corporation or the other stockholders as to entitle him to forfeit the corporation's interest for failure to do or contribute to the doing of assessment work.[143] So, of course, there can be no forfeiture if the party is in fact not delinquent,[144] or if the party seeking to forfeit did no work,[145] or not the required work.*** So a co-owner, who did the assessment work before the act of 1893, suspending the annual labor requirement for that year, was passed, could not forfeit the interest of the previously delinquent co-owner, who filed the certificate called for by that act.[146]

Whether a co-owner who performs labor and acquires a right to forfeit the delinquent co-owner's interest loses that right by conveying away his own undivided interest in the mining claim, and whether his grantee gets the right to forfeit, are undecided questions, though it has been decided that where both join in the notice there is a forfeiture.[147] The case of Turner v. Sawyer is opposed in reasoning to allowing the grantee to have the right, as he was not co-owner at the time the labor was performed, and that would seem to be sound.[148] Whether the grantor, after he ceases to be co-owner,

1189, where, though the forfeiting party got patent in his own name, he was held in equity a trustee for the delinquent party. The fact that the parties having a right to forfeit purport to convey full title to the claim to a corporation in payment for substantially all its capital stock will not it seems prevent a forfeiture, if they and the corporation join in the notice. BADGER GOLD MIN. & MILL. CO. v. STOCKTON GOLD & COPPER MIN. CO. (C. C.) 139 Fed. 838.

[143] Repeater and Other Lode Claims, 35 Land Dec. Dep. Int. 54.

[144] Brundy v. Mayfield, 15 Mont. 201, 38 Pac. 1067. Whether or not one claimed to be delinquent has in fact performed or contributed his share is held to be a question for the jury in Knickerbocker v. Halla (C. C. A.) 162 Fed. 318. Where one who purchases at a void judicial sale the interest of a delinquent co-owner pays the portion of the assessment work due from the latter, there can be no forfeiture against the previously delinquent co-owner, and the purchaser at the void sale is not subrogated to the right to forfeit, Dye v. Crary (N. M.) 85 Pac. 1038, 9 L. R. A. (N. S.) 1136, affirmed in Crary v. Dye, 208 U. S. 515, 28 Sup. Ct. 360, 52 L. Ed. 595. An unauthorized tender by a friend of the delinquent of the amount due was held, after ratification by the delinquent, to defeat forfeiture, in Forderer v. Schmidt, 154 Fed. 475, 84 C. C. A. 426. There can be no forfeiture after issuance of receiver's receipt in patent proceedings. Southern Cross Gold Min. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423. Nor after patent. See Stephens v. Golob, 34 Colo. 429, 83 Pac. 381.

[145] Delmoe v. Long, 35 Mont. 139, 88 Pac. 778.

*** Golden & Cord Lode Mining Co., 31 Land Dec. Dep. Int. 178.

[146] ROYSTON v. MILLER (C. C.) 76 Fed. 50.

[147] BADGER GOLD MIN. & MILL. CO. v. STOCKTON GOLD & COPPER MIN. CO. (C. C.) 139 Fed. 838.

[148] See Golden & Cord Lode Mining Co., 31 Land Dec. Dep. Int. 178.

could forfeit, depends upon the nature of the right. Treating it as analogous to a right of entry for condition broken retained by the grantor of a fee, there would seem to be no reason why the one who was co-owner when he performed the labor should not forfeit, despite the conveyance of his undivided interest.[149] For the same reason Messrs. Morrison and De Soto would seem to be right in saying that "when a co-owner is delinquent, but the party who has made the expenditure afterwards associates with him in developing the claim, it would probably be considered a waiver of the forfeiture." [150]

State Statutes on Forfeitures to Co-Owners.

There are a few state statutes on forfeitures to co-owners. The Colorado statute seems to apply only to placer claims, and has no provisions about recording papers, or designating what shall be evidence of forfeiture.[151] The statutes of Arizona, California, and Nevada, however, call for the recording of the notice of forfeiture, or a copy, accompanied by affidavit of service, and provide that the recorded papers shall be evidence of the acquisition of title by the co-owners.[152] However ineffectual the main parts of the state forfeiture to co-owner statutes may be, because they cover the same ground as the federal statute, and the latter must control, it seems as if the provisions calling for record of the notice and affidavit, and giving evidential force to the recorded papers, are perfectly valid.

It need only be added that in order to keep the record title in proper shape, and to give notice of forfeiture that will bind parties subsequently dealing with the delinquent co-owner, the notice served and affidavit of personal service or service by publication should everywhere be recorded.[153]

Partitioned Claims.

The courts some day will have to pass on the question of the effect of this forfeiture statute on claims voluntarily or involuntarily partitioned. No matter into how many smaller pieces an unpatented mining claim is cut by conveyances of the owners or court decrees, the annual labor for the claims as located must be performed. Unless it is, the whole claim and the parts of each grantee carved out

149 See Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co. (C. C.) 139 Fed. 838.

150 Morrison's Mining Rights (13th Ed.) 116.

151 Mills' Ann. St. Colo. § 3137.

152 Rev. St. Ariz. 1901, §§ 3245–3249; St. Cal. 1891, p. 219, c. 155; Comp. Laws Nev. 1900, § 218.

153 In the absence of local legislation calling for one, no record of the forfeiture proceedings need be made or kept. Riste v. Morton, 20 Mont. 139, 49 Pac. 656.

of it are open to relocation.[154] The grantee, therefore, of a 100x300-foot piece, say, must see that $100 worth of work is done on the claim annually, or his own piece can be relocated. Suppose that his grantors and the grantees of other pieces of the claim lie back and make him perform the labor; can he forfeit their interests in the claim? Are his grantors, the other grantees, and himself "co-owners" within the meaning of this forfeiture to co-owner statute? It certainly seems as if they should be held to be co-owners within the statutes, but the matter has never been litigated. One New Mexico case[155] has been supposed to bear on this question;[156] but a careful scrutiny of that case seems to show merely a decision that under the New Mexico statutes of the time a locator who granted away parts of his located ground before he sunk his discovery shaft gave his grantees nothing but the right to perfect locations of their own within the original claim's boundary lines, and hence gave them nothing that would avail them without the sinking of discovery shafts of their own.[157] There would seem to be nothing in reason or authority in the way of construing the word "co-owners" in the forfeiture statute to cover grantors and grantees of subdivisions of the original claim, and their case is certainly within the mischief sought to be remedied by the act.[158]

[154] See CONN v. OBERTO, 32 Colo. 313, 76 Pac. 369, where a grantee of part of a claim was held to be cut out by the abandonment of the rest by the grantors. See, also, Oberto v. Smith, 37 Colo. 21, 86 Pac. 86.

[155] Zeckendorf v. Hutchison, 1 N. M. 476.

[156] See 1 Snyder on Mines, § 484.

[157] The proposition of Mr. Snyder, supra, that "where several persons, who have located a claim jointly, afterwards partition it, each taking a portion thereof, work done thereafter upon one of the segregated pieces will not be considered as work done upon any of the other pieces," is not supported by the New Mexico case, the only one he cites, and must be wholly wrong. Since the partitioned part of each will be forfeited unless $100 worth of work is done on the claim as located, the forfeiture, so far as relocation is concerned, will naturally be avoided if $100 worth of work is done anywhere on the original location. But compare Merced Oil Min. Co. v. Patterson (Cal.) 96 Pac. 90.

[158] See Morrison's Mining Rights (13th Ed.) 97. A recent case relating to discovery (Merced Oil Min. Co. v. Patterson [Cal.] 96 Pac. 90) suggests a query whether annual work done by the grantee of part of a claim will inure to the benefit of the whole claim. The implication of that case is that it would not, but it is believed that the better doctrine is that it would.

CHAPTER XVII.

THE ABANDONMENT, FORFEITURE, AND RELOCATION OF LODE AND PLACER MINING CLAIMS.

So closely connected with the subject of annual labor as practically to be part of it is the subject of the relocation of mining claims. But as relocation may follow an abandonment of a claim, as well as follow a forfeiture of it, and as the locator may himself desire to relocate his own claim, so as to take in ground not forfeited to anybody else, the subject of relocation deserves a chapter to itself.

THE DISTINCTION BETWEEN ABANDONMENT AND FORFEITURE.

91. An "abandonment" of a mining claim is the voluntary giving up of the possessory title with the intention not to reclaim it, while a "forfeiture" of a mining claim is the loss of the possessory title because some third person has located the land for failure of the forfeiting owner to perform the condition of annual labor required for its retention.

92. While abandonment is essentially instantaneous, and may take place despite the performance of the annual labor, abandonment, like forfeiture, requires relocation by a third person to make it final. Abandonment may not be made a means to evade the annual labor requirement.

The first thing to do is to distinguish between abandonment and forfeiture. The words are often used in the mining cases and statutes as synonyms,[1] but there is a clear distinction between them. The

[1] In BLACK v. ELKHORN MIN. CO., 163 U. S. 445, 450, 16 Sup. Ct. 1101, 41 L. Ed. 221, for instance, the court says that a locator's interest in the claim may also be "forfeited by his abandonment." In another case in which the trial judge, in instructing the jury, used the word "abandonment," where he meant "forfeiture," it was held not to be prejudicial error. LITTLE DORRIT GOLD MINING CO. v. ARAPAHOE GOLD MIN. CO., 30 Colo. 431, 71 Pac. 389.

following statement of the California court expresses that distinction: "The term 'forfeiture,' as used in our mining customs and codes, means the loss of a right to mine a particular piece of ground, previously acquired, by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situated, prescribing the acts which must be done in order to continue and keep alive that right after it has been once acquired. As a defense it is entirely distinct and separate from that of abandonment. It involves no question of intent, but rests entirely upon the mining rules and regulations, and involves only the question whether, in point of fact, those rules and regulations have been observed by the party seeking to maintain or perpetuate the right, regardless of what his intentions may have been; whereas the principal question involved in the defense of abandonment is one of intention. Was the ground left by the locator without any intention of returning, or making any future use of it? If so, an abandonment has taken place upon common-law principles, independent of any mining rule or regulation, and the ground has become once more publici juris and open to the occupation of the next comer." [2]

The same distinction is noted in the following language from a Montana case: " 'Abandonment,' as applied to mining claims held by location merely, takes place only when the locator voluntarily leaves his claim to be appropriated by the next comer, without any intention to retake or claim it again, and regardless of what may become of it in the future. A 'forfeiture' takes place by operation of law, without regard to the intention of the appropriator, whenever he neglects to preserve his rights by complying with the conditions imposed by law; that is, to make the required annual expenditure upon the claim within the time allowed. The former involves an inquiry of fact as to the intention as well as the act. In regard to the latter the inquiry is: Has the required expenditure been made as the law commands?" [3]

The reason why a mining claim can be abandoned is that the title is possessory. It is only the legal title that technically may not be abandoned.[4] "The doctrine of abandonment only applies where there

[2] St. John v. Kidd, 26 Cal. 263, 271, 272.

[3] McKAY v. McDOUGALL, 25 Mont. 258, 262, 64 Pac. 669, 670, 87 Am. St. Rep. 395.

[4] The notion that a patented claim may be abandoned in such a way as to make the land unappropriated public domain seems to exist in Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791, but cannot be supported. For a case where coal excepted from a deed was held not abandoned, see Huss v. Jacobs, 210 Pa. 145, 59 Atl. 991. It seems that a relocation by the original locator may be abandoned by him without his necessarily abandoning the original location. See WETZSTEIN v. LARGEY, 27 Mont.

has been a mere naked possession without title. The right of the occupant originating in mere possession may, as a matter of course, be lost by abandonment. Where there is title, to preserve it there need be no continuance of possession, and the abandonment of the latter cannot affect the rights held by virtue of the former." [5]

It may be well to repeat here that the reason why a mining claim may be forfeited for failure to do annual labor rests on a different basis. Forfeiture takes place because the United States has a right to impose what conditions it sees fit upon the disposition of its own property to purchasers. It has even been held that the United States, unlike private persons, may pass the legal fee in land to its grantee, and yet provide that, while he may devise it, he may not sell or convey it, except for the term of two years from time to time.[6] In the case so holding the court said: "The counsel of defendants further insist that the condition of nonalienation imposed upon the fee simple contained in the donative act is repugnant to the nature of the estate and is therefore void. That old and well-settled rule of the common law does not apply to this legislative grant. The sovereign power of the Legislature is superior to the immemorial rules and usages of the common law. The legislative power of the state is restricted only by the state and federal Constitutions, and it may change the rules of the common law whenever such alterations are deemed best for the general welfare and do not conflict with the constitutional rights of citizens." [7]

While abandonment is not as common as forfeiture, it is important to find out what it is. Mr. Lindley is inclined to believe that the Supreme Court of the United States never ought to have recognized such a thing as abandonment, because a mining location has become vested with so many attributes as to be too like the legal title to real property for the doctrine to be desirable.[8] The fact remains, however, that the Supreme Court of the United States has recognized the doctrine, and has declared that "it cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would

212, 70 Pac. 717. A locator may abandon part of his location without forfeiting his right to the balance of the claim. TYLER MINING CO. v. SWEENEY, 54 Fed. 284, 4 C. C. A. 329. See Murley v. Ennis, 2 Colo. 300. To patent the part of one's claim containing the discovery shaft is not to abandon the unpatented part. MILLER v. HAMLEY, 31 Colo. 495, 74 Pac. 980. But see BROWN v. GURNEY, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717.

[5] Ferris v. Coover, 10 Cal. 589, 631.

[6] Smythe v. Henry (C. C.) 41 Fed. 705.

[7] Smythe v. Henry (C. C.) 41 Fed. 707. See Farrington v. Wilson, 29 Wis. 383.

[8] 2 Lindley on Mines, p. 1196, § 642.

work an abandonment of any other easement, would terminate all the right of possession which the locator then had." [9]

Abandonment a Question of Ascertained Intention.

The first thing to notice about abandonment is that whether or not it has taken place is a question of fact for the jury.[10] Where abandonment occurs, it is because of an ascertained intention to abandon, and the abandonment is instantaneous.[11] "Abandonment is a matter of intention, and takes place whenever the claimant of a mining claim goes away with no intention of returning to it, and with the intention of leaving it open for the next applicant." [12] It may take place even though the annual labor has been done, or the period for doing it has not expired,[13] and does not depend upon entry by anybody else, though such entry and a relocation are necessary to prevent revival of the claim by resumption of work. "The question of abandonment can never arise, except where there has been possession, and then the animus revertendi is the simple test." [14]

Forfeiture, on the other hand, is not dependent upon the intent of the locator, who loses his interest. It is not complete until there has been an entry by some one else with intent to relocate the property,[15] and under some state decisions is not complete even then, if the locator resumes work before the relocation is finished.[16]

[9] BLACK v. ELKHORN MIN. CO., 163 U. S. 445, 450, 16 Sup. Ct. 1101, 1103, 41 L. Ed. 221.

[10] TAYLOR v. MIDDLETON, 67 Cal. 656, 8 Pac. 594; Weill v. Lucerne Min. Co., 11 Nev. 200; MARSHALL v. HARNEY PEAK TIN MINING, MILLING & MFG. CO., 1 S. D. 350, 47 N. W. 290; Davis v. Dennis, 43 Wash. 54, 85 Pac. 1079.

[11] Davis v. Butler, 6 Cal. 510; Waring v. Crow, 11 Cal. 366; Derry v. Ross, 5 Colo. 295. See St. John v. Kidd, 26 Cal. 263; Oreamuno v. Uncle Sam Gold & Silver Min. Co., 1 Nev. 215.

[12] MOFFAT v. BLUE RIVER GOLD EXCAVATING CO., 33 Colo. 142, 148, 80 Pac. 139, 141. See Conn v. Oberto, 32 Colo. 313, 76 Pac. 369; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87. Abandonment can be found only on clear and convincing proof of intent to abandon. Loeser v. Gardiner, 1 Alaska, 641. It is negatived by continuing work after an ineffectual attempt to patent the claim. PEORIA & COLORADO MILL. & MIN. CO. v. TURNER, 20 Colo. App. 474, 79 Pac. 915. An abandoned claim becomes part of the public domain, subject to sale and disposition by the government. Migeon v. Montana Cent. R. Co., 77 Fed. 249, 23 C. C. A. 156.

[13] Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——.

[14] Stone v. Geyser Quicksilver Min. Co., 52 Cal. 315, 318; Davis v. Dennis, 43 Wash. 54, 85 Pac. 1079.

[15] LITTLE GUNNELL MINING CO. v. KIMBER, 1 Morr. Min. Rep. (U. S.) 536, 539, Fed. Cas. No. 8,402.

[16] See PHARIS v. MULDOON, 75 Cal. 284, 17 Pac. 70; Lacey v. Woodward, 5 N. M. 583, 25 Pac. 785. The doctrine of McKAY v. McDOUGALL,

The close connection between abandonment and intention is shown in a Colorado case. There the defendant purchased a mining claim December 26, 1890, and shortly afterwards abandoned it, because he could not perform within the year the necessary assessment work. The defendant's son thereupon, on January 31, 1891, relocated the claim as an abandoned lode; but the relocation was invalid, because he gave the date of discovery as December 20, 1890. Thereafter defendant's son conveyed to defendant, and still later plaintiff located the ground. It was held that the defendant could not recall his abandonment by claiming that the relocation was to protect his rights under the original claim, and thus defeat plaintiff's location.[17]

The question of abandonment is thus one of intent, to be determined as a fact from the conduct of the mining claim owner. It may be proved by the testimony of the locator that he abandoned the claim at the time of the subsequent location,[18] and one of several locators may ratify an abandonment made to a third person by the others.[19] The fact is that, "in order to sustain an allegation of abandonment, it must appear that there was a leaving of the claim without any intention of making any further use of it." [20] That is why an abandonment cannot be predicated upon the mere fact of a relocation being attempted.[21] Accordingly, where the plaintiffs were driven away from their claims by hostile Indians, but left their tools at another mine in the vicinity, and did not return prior to the location by the defendants, partly because of the supposed continuance of Indian hostilities, and partly because of the required expenditure of money, and because they thought they had performed sufficient work upon the claims to entitle them to hold them, it was held that these facts negatived that intent on the part of the plaintiffs necessary to constitute an abandonment.[22]

25 Mont. 258, 64 Pac. 669, 87 Am. St. Rep. 395, has been negatived by the Montana act of 1907. Laws Mont. 1907, p. 21.

[17] NILES v. KENNAN, 27 Colo. 502, 62 Pac. 360. See Davis v. Butler, 6 Cal. 510. Where a locator went away to be gone some years, and gave up all hope of returning to the claim, and did not arrange for the performance of the annual labor, there was held to be a proper showing of abandonment. Harkrader v. Carroll (D. C.) 76 Fed. 474.

[18] Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 361.

[19] Conn v. Oberto, 32 Colo. 313, 76 Pac. 369; Oberto v. Smith, 37 Colo. 21, 86 Pac. 86.

[20] Bell v. Bed Rock Tunnel & Mining Co., 36 Cal. 214. See note 12, supra.

[21] Weill v. Lucerne Min. Co., 11 Nev. 200.

[22] MORENHAUT v. WILSON, 52 Cal. 263. So abandonment cannot be charged where a locator in possession is disseised. Lockhart v. Wills, 9 N. M. 263, 50 Pac. 318. See Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87. On the other hand, a co-owner who attempts to

Where the authority and intention to abandon are clear, one locator may abandon for all the locators. For instance, in an Arizona case a mining claim was located in the name of four persons. The one who located it, and who was the only one who had anything to do with it, testified that after working it awhile he decided that it was no good, destroyed the location notice monument, and went away, with the intention of having nothing further to do with the claim. That was held to be an abandonment for all the locators, and to authorize a relocation prior to the time a forfeiture could have been made.[23]

Abandonment, like forfeiture, seems to require some act of a third party to make it final; for unless there is a relocation by a third party or a conclusive acceptance of an abandonment to a co-owner, it seems that the one who has abandoned may revive his claim by resuming work.[24] At least, it never has been decided that he may not do so. The chief difference to-day, therefore, between forfeiture and abandonment, would seem to lie in the fact that abandonment may take place even though the annual labor has been performed.

Abandonment must be Bona Fide.

An abandonment, to be effective, must not be a subterfuge to enable those abandoning to get around the annual labor requirement. Where, to evade the annual labor requirement, and to save competing with others for a relocation on January 1st, the locators, prior to January 1st, announced to each other that they abandoned the claims, and then within ten minutes, and without leaving the ground, went through the form of locating the ground in the name of an absent friend in New York, the court refused to recognize that as an abandonment, said that the old claim continued, and held that since the work on the old claim had not been done the claim could be relocated by others on January 1st.[25] The court was probably unconsciously influenced by the notion put forth by the South Dakota court in deciding that one co-owner attempting to exclude another co-owner from a mining claim by a relocation, does not thereby abandon the land,

exclude his co-owner by a relocation does not thereby make an abandonment. Hulst v. Doerstler, 11 S. D. 14, 75 N. W. 270. And an invalid attempted relocation is not an abandonment of a prior valid location, and so far as subsequent locators are concerned is immaterial. TEMESCAL OIL MINING & DEVELOPMENT CO. v. SALCIDO, 137 Cal. 211, 69 Pac. 1010.

[23] KINNEY v. FLEMING, 6 Ariz. 263, 56 Pac. 723. See, also, Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791.

[24] Compare OSCAMP v. CRYSTAL RIVER MIN. CO., 58 Fed. 293, 7 C. C. A. 233.

[25] McCANN v. McMILLAN, 129 Cal. 350, 62 Pac. 31. For a bona fide abandonment, see Roberts v. Date, 123 Fed. 238, 59 C. C. A. 242.

namely, that "It is necessary to distinguish between a manifest intention to abandon one's rights under any particular location and an intention to abandon the property itself." [26]

On the other hand, a conditional abandonment will be treated as an absolute one, where the one abandoning had the secret intent to claim a mining location erroneously included in a sale under decree of court only if development work by the purchaser should render it profitable to do so.[27]

Abandonment of Part of a Location.

It has been held that a locator may abandon part of his claim without losing his right to the rest,[28] and that if he patents even the part of the claim which includes the discovery shaft he does not thereby abandon the rest, if he continues to possess and work it.[29]

Abandonment by Co-Tenants.

It has been declared that one co-tenant may abandon his interest in favor of his co-tenants, to whom it will inure,[30] but that the bare lapse of time, short of the statute of limitations in cases of adverse possession, and unaccompanied by other circumstances, would be no evidence of such abandonment.[31] Such lapse of time, with other circumstances tending to show abandonment, might, of course, go to

[26] HULST v. DOERSTLER, 11 S. D. 14, 75 N. W. 270. See Weill v. Lucerne Min. Co., 11 Nev. 200; Ford v. Campbell (Nev.) 92 Pac. 206. Compare Omar v. Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246. Where a surveyor omitted a portion of the claim from the survey by mistake, and the survey was corrected in a few days by a resurvey, the ground omitted from the first survey was not abandoned. Basin Mining & Concentrating Co. v. White, 22 Mont. 147, 55 Pac. 1049.

[27] TREVASKIS v. PEARD, 111 Cal. 599, 44 Pac. 246. See Stone v. Geyser Quicksilver Min. Co., 52 Cal. 315. But where the purchaser of a mining claim at a judicial sale has equal means of information with the judgment debtor as to the invalidity of the sale, the acquiescence of the judgment debtor in the invalid sale of his interest in the claim cannot be regarded as an abandonment of the claim and an election to accept the sale as a disposition of his property. Crary v. Dye, 208 U. S. 515, 28 Sup. Ct. 360, 52 L. Ed. 595, affirming Dye v. Crary (N. M.) 85 Pac. 1038, 9 L. R. A. (N. S.) 1136.

[28] Tyler Mining Co. v. Sweeney, 54 Fed. 284, 4 C. C. A. 329.

[29] MILLER v. HAMLEY, 31 Colo. 495, 74 Pac. 980.

[30] WORTHEN v. SIDWAY, 72 Ark. 215, 79 S. W. 777. But see, contra, Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co. (C. C.) 139 Fed. 838.

[31] Mallett v. Uncle Sam Gold & Silver Min. Co., 1 Nev. 188, 90 Am. Dec. 484. The interest of a tenant in common cannot be deemed abandoned, and subject to appropriation by strangers, because he refuses to pay his part of the annual expenditures. Waring v. Crow, 11 Cal. 366; Faubel v. McFarland, 144 Cal. 717, 78 Pac. 261.

the jury to establish it.[32] The same is true of failure to contribute the proportionate share of assessment work.[33] In all cases the safest course is not to claim abandonment, but to proceed under the federal statute to forfeit the co-owner's interest.[34]

THE BURDEN OF PROOF IN CASES OF ABANDONMENT AND FORFEITURE.

93. The burden of proof in reference both to abandonment and to forfeiture is upon the one asserting that the abandonment or the forfeiture has taken place.

With reference to abandonment and forfeiture it should be noticed that the burden of proof is upon the one asserting that the abandonment or forfeiture has taken place.[35] "A forfeiture cannot be estab-

[32] Mallett v. Uncle Sam Gold & Silver Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

[33] Oreamuno v. Uncle Sam Gold & Silver Min. Co., 1 Nev. 215, where the court calls abandonment a mixed question of law and fact. The refusal of a co-tenant to pay his part is not an abandonment per se. Waring v. Crow, 11 Cal. 366.

[34] A recent case holds that, where one co-tenant abandons his interest, the other co-tenants do not get it. Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co. (C. C.) 139 Fed. 838. But query? See Worthen v. Sidway, 72 Ark. 215, 79 S. W. 777.

[35] HAMMER v. GARFIELD MIN. & MILL. CO., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; McCULLOCH v. MURPHY (C. C.) 125 Fed. 147; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87; Quigley v. Gillett, 101 Cal. 462, 35 Pac. 1040; HARRIS v. KELLOGG, 117 Cal. 484, 49 Pac. 708; Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036; Callahan v. James, 141 Cal. 291, 74 Pac. 853; Goldberg v. Bruschi, 146 Cal. 708, 81 Pac. 23; Johnson v. Young, 18 Colo. 625, 34 Pac. 173; Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92; LITTLE DORRIT GOLD MIN. CO. v. ARAPAHOE GOLD MIN. CO., 30 Colo. 431, 71 Pac. 389; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 934; Axiom Min. Co. v. White, 10 S. D. 198, 72 N. W. 462; South End Min. Co. v. Tinney, 22 Nev. 19, 35 Pac. 89; Wills v. Blain, 5 N. M. 238, 20 Pac. 798; Providence Gold Min. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641; Dibble v. Castle Chief Gold Min. Co., 9 S. D. 618, 70 N. W. 1055. See Zerres v. Vanina (C. C.) 134 Fed. 610. That this is true, even though the relocation is put upon the ground that the first location was invalid, is held in CUNNINGHAM v. PIRRUNG (Ariz.) 80 Pac. 329. See Moffat v. Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139.

Proof that for two years work was not done on the claim itself shifts the burden of going forward with the evidence. SHERLOCK v. LEIGHTON, 9 Wyo. 297, 63 Pac. 580, 934. But, if the work be shown to have been done on the claim, the presumption, in the absence of evidence to the contrary, is that it was done by the owners or some of them. Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123. Where defendant was in possession under a location the validity of which was attacked by the plaintiff only on the ground of a previous location by plaintiff, the burden was thrown on the plaintiff to establish

lished, except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law." [36] "After a valid location has been made, the locator need not keep an actual possession of the claim. His right of possession will continue until he has in fact abandoned it, or has forfeited it by failure to do the requisite amount of work within the prescribed time; and the burden of proving such forfeiture or abandonment is on him who would attack this right." [37]

The burden of proof thus being on the one relying on abandonment or forfeiture, it would seem on principle that such person should be required to plead it. The cases, however, are not uniform. In California the rule seems to be that an abandonment by plaintiff may be shown by defendant under a general denial, but that a forfeiture must specially be pleaded.[38] It hardly seems desirable, however, to discriminate in that way between an abandonment and a forfeiture, in view of the fact that each question becomes material only when a relocation has taken place. That a forfeiture must be specially pleaded where it is relied on as a defense, in all cases except in an adverse suit,[39] seems clear.[40] "The plea of forfeiture is in the nature of a confession and avoidance. It admits a prior right in the plaintiff which would have continued but for the entry and location by the defendant, which under the mining law has terminated it. One who relies upon such a plea must set forth the facts upon which he relies to overturn the prior right of his adversary, and establish them by clear and convincing proof. He assumes the burden of pleading and proving that the prior owner has done none of the acts which, under the statute, he may do to preserve his right." [41]

the perfection of his location under the state as well as federal statutes, in COPPER GLOBE MIN. CO. v. ALLMAN, 23 Utah, 410, 64 Pac. 1019.

[36] HAMMER v. GARFIELD MIN. & MILL. CO., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; Wailes v. Davies (C. C.) 158 Fed. 667; Goldberg v. Bruschi, 146 Cal. 708, 81 Pac. 23; Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600. See Thomson v. Allen, 1 Alaska, 636; Loeser v. Gardiner, 1 Alaska, 641; Strasburger v. Beecher, 20 Mont. 143, 49 Pac. 740.

[37] HARRIS v. KELLOGG, 117 Cal. 484, 489, 49 Pac. 708, 709. See Quigley v. Gillett, 101 Cal. 462, 35 Pac. 1040.

[38] MORENHAUT v. WILSON, 52 Cal. 263; Willson v. Cleaveland, 30 Cal. 192; Bell v. Bed Rock Tunnel & Mining Co., 36 Cal. 214; TREVASKIS v. PEARD, 111 Cal. 599, 44 Pac. 246.

[39] As to the rule in adverse suits, see STEEL v. GOLD LEAD M. CO., 13 Nev. 80, 1 Pac. 448; Bryan v. McCaig, 10 Colo. 309, 15 Pac. 413; Campbell v. Taylor, 3 Utah, 325, 3 Pac. 445.

[40] BISHOP v. BAISLEY, 28 Or. 119, 41 Pac. 936; Renshaw v. Switzer, 6 Mont. 464, 13 Pac. 127; Wulf v. Manuel, 9 Mont. 276, 279, 286, 23 Pac. 723; Mattingly v. Lewisohn, 13 Mont. 508, 35 Pac. 111.

[41] POWER v. SLA, 24 Mont. 243, 251, 252, 61 Pac. 468, 471. Where a for

The foregoing language from Power v. Sla was used in a case where the defendants were asking in a "cross-complaint" to have plaintiffs declared trustees of a patented claim because, pending the patent proceedings, the defendants relocated it. The nature of the relief asked called for specific allegations; but the language of the court would seem to suggest the right rule to be applied in all cases. An adverse suit ought to be made to comply with the same rules of pleading as other suits; but whether it has to do so, or not, is not clear.[42] In a recent adverse suit a plaintiff, who was relying on an attempted relocation, was nonsuited because he did not show that the claim was on unoccupied and vacant public domain at the time subject to location.[43]

While the burden of proof is on the one asserting a forfeiture, he makes out a prima facie case by showing that no work was done within the limits of the claim, or that $100 worth of work was not done there, during the year preceding relocation; and the burden then shifts to the prior locator to show that the required amount of work entitled to count as annual labor was performed outside of the claim.[44]

THE KINDS OF RELOCATION.

94. Relocations may be made (1) by third persons; (2) by the original locators.

Now we are ready for the relocation cases. We may group them under two heads, namely, relocations by third persons and relocations by the original locators. In each case there can be a relocation only after the rights based upon the original location either have been extinguished by abandonment or have become forfeitable by a new entry and a new location.[45] "Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has

feiture for failure to make annual expenditure is claimed, it is necessary to negative the expenditure of $100 in improvements, as well as to negative its expenditure in work. Id.

[42] See note 39, supra.

[43] McWilliams v. Winslow, 34 Colo. 341, 82 Pac. 538. But see Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——.

[44] LITTLE DORRIT GOLD MIN. CO. v. ARAPAHOE GOLD MIN. CO., 30 Colo. 431, 71 Pac. 389; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 934.

[45] See McCann v. McMillam, 129 Cal. 350, 62 Pac. 31; Lockhart v. Rollins, 2 Idaho (Hasb.) 540, 21 Pac. 413; Lockhart v. Wills, 9 N. M. 344, 54 Pac 336.

in law abandoned [or forfeited] his claim and left the property open for another to take up." [46]

RELOCATIONS BY THIRD PERSONS.

95. Relocations, made as such by third persons, seem to admit the validity of the prior location. A new discovery is not necessary, if only the old be adopted and appropriated, and probably the same is everywhere true of location markings; but the regular discovery work must be performed, and notices posted and recorded, as in the case of original locations. In jurisdictions having relocation statutes those must be followed in all details.

The first thing to notice with reference to a relocation by a third person is that a relocation, made distinctly as such, admits the validity of the prior location.[47] Where the location notice states that the claim is a relocation of a former claim, it impliedly admits that the original location was valid,[48] and, of course, puts upon the relocator the burden of proving the acts of forfeiture of the original location.[49] "A relocator of a mining claim stands in a different attitude from that of an original locator. The original locator of mining ground is a discoverer of the mineral therein contained. A relocator is not a discoverer of the mineral, but an appropriator thereof, and cannot hold the ground, except upon making proof that the original locator had abandoned or forfeited his right by failure to comply with the mining laws. All the authorities agree that a relocation impliedly admits that there has been a valid prior location because there can be no relocation unless there has been a prior valid location, or something equivalent thereto.[50] There can be no relocation until there has been an abandonment or forfeiture of the ground by the first locator. In this class of cases the burden of proving

[46] Belk v. Meagher, 104 U. S. 279, 284, 26 L. Ed. 735.

[47] Compare Yosemite Gold Min. & Mill. Co. v. Emerson, 208 U. S. 25, 28 Sup. Ct. 196, 52 L. Ed. 374.

[48] Wills v. Blain, 4 N. M. (Johns.) 378, 20 Pac. 798; Jackson v. Prior Hill Min. Co. (S. D.) 104 N. W. 207; Providence Gold Min. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641. See Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36.

[49] PROVIDENCE GOLD MIN. CO. v. BURKE, 6 Ariz. 323, 57 Pac. 641.

[50] On this view the word "relocation" was erroneously used in Lauman v. Hoofer, 37 Wash. 382, 79 Pac. 953, where there was an adjudication that no valid location had been made, and yet the new location was called a "relocation."

a forfeiture rests upon the party claiming it, whether it be by the plaintiff or defendant." [51]

While the cases so far decided have not allowed one who called his claim a relocation to deny the validity of the prior claim, it is not believed that he would be estopped thereby to show that the previous location was absolutely void for want of a discovery or of one of the necessary acts of location. Indeed, it is hard to see on principle why calling the relocation by that name should ever imply more than that an attempted location preceded it. Unless the local statute compels the relocation notice and certificate, or either, to state that it is a relocation, it would be better not to state it. In Arizona, and perhaps in Montana and Nevada, the fact that the relocation was such was once required to be stated, or the relocation was void; but in Arizona and Montana, at least, this requirement has been repealed by the legislation of 1907.

Where third persons relocate, it is not necessary to have a new discovery, so long as the relocator has actual knowledge of the existence of the mineral and adopts the discovery,[52] provided, of course, the discovery or discovery shaft has not been patented to a junior locator, or otherwise lost, without a new discovery elsewhere on the claim being made.[53]

Relocations as Affected by Lavagnino v. Uhlig and Farrell v. Lockhart.

Where a relocation is made without a discovery, a subsequent discovery will doubtless validate the relocation as effectually as a subsequent discovery validates an original location. Moreover, where the lines of a junior location are thrown over a senior location, and the discovery for the junior is on the conflict area, a logical extension of the doctrine of Farrell v. Lockhart‡ would seem to show that an *abandonment* of the senior location, and a logical extension of the doctrine of Lavagnino v. Uhlig[54] would seem to show equally that

[51] ZERRES v. VANINA (C. C.) 134 Fed. 610, 614.

[52] HAYES v. LAVAGNINO, 17 Utah, 185, 53 Pac. 1029; Armstrong v. Lower, 6 Colo. 393, 395; Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673. That the relocator has a reasonable time to verify discovery and complete location, see Murley v. Ennis, 2 Colo. 300.

[53] Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; Miller v. Girard, 3 Colo. App. 278, 33 Pac. 69; SILVER CITY GOLD & SILVER MIN. CO. v. LOWRY, 19 Utah, 334, 57 Pac. 11.

‡FARRELL v. LOCKHART, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——.

[54] LAVAGNINO v. UHLIG, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119. But see Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——, which throws doubt on this proposition. And see Moorhead v. Erie Min. & Mill. Co. (Colo.) 96 Pac. 253.

a *forfeiture* of the senior location, will perfect the junior claim as against a third person who later attempts to relocate. The reason is that on principle the conflict area inures in each case to the junior claim, and thus the junior claim acquires a valid discovery. The only troublesome question is whether under the cases the conflict area inures to the junior claim without action by the junior claimant, or whether it will so inure only if he amends his location certificate.

While the decision of Lavagnino v. Uhlig apparently made the subject of amendment of location certificates unimportant, except where the original certificates failed to comply with the statute, or it was sought to cut off the right of the senior to resume work, or the amendment was needed because the claim's boundaries as stated therein had been changed by swinging the claim[55] or making the end lines parallel,[56] it still left it possible, though certainly not probable, that in extreme cases a failure to amend would be construed as an abandonment, or at least evidence of abandonment, of the conflict area by the junior locator. Apart from the language of Lavagnino v. Uhlig itself, what makes an abandonment by the junior locator improbable is a decision, such as that of the Colorado case, where, after a junior locator had patented the senior discovery shaft, the senior claim was held to be validated by the sinking of a new discovery shaft on unaffected senior ground, although no amended location notice was posted at the new discovery and no amended location certificate was recorded.[57] The junior locators in the conflict area ought similarly to be protected as against relocators coming in after abandonment by the senior locator without the need of an amendment of the record. We have already seen, however, that the failure of the junior locator to file an amended location certificate or to make an actual relocation probably enables the senior locator to resume work at any time.[58] And since the case of Farrell v. Lockhart [59] it looks as if the failure of the junior locator to file an amended location certificate, or to make an actual relocation after abandonment by the senior locator, may yet be held by the federal Supreme Court to leave the junior claimant's ground subject to relocation.[60]

[55] Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244.

[56] Tyler Min. Co. v. Last Chance Min. Co. (C. C.) 71 Fed. 848.

[57] TREASURY TUNNEL MINING & REDUCTION CO. v. BOSS, 32 Colo. 27, 74 Pac. 888, 105 Am. St. Rep. 60; McMillen v. Terrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64.

[58] See previous chapter. As to the right of the senior locator to resume work on the conflict area, if the rest of the claim has been relocated by third parties on a discovery outside the conflict area, query?

[59] 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——.

[60] See Moorhead v. Erie Min. & Mill. Co. (Colo.) 96 Pac. 253. It has been

Until, however, the federal Supreme Court shall hold that abandonment by the senior locator of the ground covering the junior's discovery cannot be deemed to validate the junior claim either by the abandonment being given retroactive effect or by the junior locator's past acts of location, continuously relied on by him, being given full force without the need of repetition, the matter will be in doubt.

supposed by many (see, for instance, Morrison's Mining Rights [13th Ed.] 38, 108) that LAVAGNINO v. UHLIG, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119, is inconsistent with BELK v. MEAGHER, 104 U. S. 285, 26 L. Ed. 735, and BROWN v. GURNEY, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717; and in FARRELL v. LOCKHART, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——, the United States Supreme Court itself seemed disturbed at the apparent conflict. That LAVAGNINO v. UHLIG is inconsistent with BELK v. MEAGHER cannot be doubted, but that BELK v. MEAGHER was wrongly decided would seem to be clear. While it is true, as is pointed out in BELK v. MEAGHER, that "a relocation on lands actually covered at the time by another valid and subsisting location is void, and this, not only against the prior locator, but all the world, because the law allows no such thing to be done" (BELK v. MEAGHER, 104 U. S. 279, at page 284, 26 L. Ed. 735), this is just as true of an attempted location on unoccupied land, where there has actually been no discovery; and yet, as we have noticed (chapter X, § 42, supra), the latter becomes perfected on discovery without a reperformance of the acts of location. In overruling the misapplication of correct principle by BELK v. MEAGHER, the case of LAVAGNINO v. UHLIG did much for sound mining law doctrine. That BROWN v. GURNEY, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717, is inconsistent with LAVAGNINO v. UHLIG cannot be conceded, for BROWN v. GURNEY was concerned merely with the right rule to apply to the attempted relocation of mining claims covered by applications for patent pending in the land department (see statement of the case in § 95, infra). Such mining claims, while affected by the quasi judicial proceedings in the land department, may well be governed by a special rule. It is to be regretted that in FARRELL v. LOCKHART, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——, the doctrine of LAVAGNINO v. UHLIG was not vigorously reaffirmed. While "not doubting the correctness of the decision in the Lavagnino case," the Supreme Court in the Farrell Case said that it did "not pause to particularly re-examine the reasoning expressed in LAVAGNINO v. UHLIG as an original proposition," and then proceeded to qualify LAVAGNINO v. UHLIG for supposed reasons of expediency. It is believed that expediency does not call for a rule which will give priority to a second relocator, who enters with knowledge of the bona fide attempts of the first relocator, and who relies on a technicality to get that mining property, which true principle, as expounded in LAVAGNINO v. UHLIG, shows should be held to belong to the first relocator. It is to be hoped that the Supreme Court of the United States will reaffirm LAVAGNINO v. UHLIG, and thereby support the land department ruling that a location based on a discovery within an existing valid location is only voidable if attacked in time, and is far from being absolutely void. Gowdy v. Kismet Gold Mining Co., 22 Land Dec. Dep. Int. 624; American Consol. Mining & Milling Co. v. De Witt, 26 Land Dec. Dep. Int. 580; MUTUAL MINING & MILLING CO. v. CURRENCY CO., 27 Land Dec. Dep. Int. 191; Burnside v. O'Connor, 30 Land Dec. Dep. Int. 67.

The Acts of Relocation.

While a new discovery is not requisite to a relocation, the statutes make it necessary for the relocator to do the regular discovery work by sinking a new discovery shaft, or by sinking the old one 10 feet deeper.[61] Then, too, under the statutes it is necessary to mark the location on the ground, so that its boundaries may readily be traced, and to comply with the state statutes in regard to staking the claim. A relocator, in "jumping" a claim, is required to do practically all that the original locator did except make a new discovery; but, under the state statutes, and by virtue of decisions in California [62] and Utah,[63] he may adopt the old boundary markings of the first locator, so far as they still exist, and still comply with the state statutory requirements.[64] The location stake should, of course, be replaced, if lost, and the proper notice posted. The fact of the matter is that while the statutes specifically relating to relocation are not as precise in their requirements as they might be, the relocator must locate and record in substantially the same manner as the original locator had to do,[65] except that he may adopt the stakes and monuments of the original location,[66] and may sink the old discovery shaft 10 feet deeper, instead of sinking a new one.[67]

It seems to be assumed, although the relocation statutes do not always so specify, that the location requirements as to the time of posting notice, the time of staking the location, the size, placing and marking of stakes and monuments, and the necessity and time for record, apply to relocations. That this assumption requires much to be read into the statute is apparent from an inspection of the Colorado statute, which reads: "The relocation of abandoned lode

[61] A statutory provision that the relocator "may" sink the old shaft ten feet deeper does not mean that he "must" do so. The discovery work on relocation may be performed elsewhere on the claim. Carlin v. Freeman, 19 Colo. App. 334, 75 Pac. 26.

[62] CONWAY v. HART, 129 Cal. 480, 62 Pac. 44.

[63] BROCKBANK v. ALBION MIN. CO., 29 Utah, 367, 81 Pac. 863.

[64] See Miller v. Taylor, 6 Colo. 41.

[65] Armstrong v. Lower, 6 Colo. 393. Under the old Montana statute a declaratory statement was held invalid where it did not show the depth of the old shaft at the date of relocation and that it was sunk 10 feet deeper. Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833.

[66] Pelican & Dives Min. Co. v. Snodgrass, 9 Colo. 339, 12 Pac. 206.

[67] Armstrong v. Lower, 6 Colo. 393. In LITTLE GUNNELL CO. v. KIMBER, 1 Morr. Min. Rep. (U. S.) 536, Fed. Cas. No. 8,402, it is said to be insufficient relocation discovery work to run a tunnel into the claim from an old shaft upon an adjoining claim, even though ordinarily a tunnel will answer under the state statute for discovery work. Compare Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177.

claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or any part of the new location is located as abandoned property." [68]

In this statute the words "in the same manner" fix the kind of boundary stakes sufficiently by reference to the location statute, and perhaps the time for doing the staking is also imported. The erection of a new location stake, however, does not necessarily show what the contents of a location notice must be. Indeed, as the Colorado location statute does not require a location stake as such to be erected, but simply requires an act of location "by posting at the point of discovery on the surface a plain sign or notice containing the name of the lode, the name of the locator, and the date of discovery," [69] a location stake is in fact a new requirement under the relocation statute, based on the well-known custom followed in making locations. So, too, the fact that the location certificate may state that a part or all of the new location is located as abandoned property clearly permits a record to be made; but the relocation statute does not specifically require one, nor fix the time for the acts to be done. The fact of the matter is that time in the relocation statute is treated by the courts all the way through as governed by the location statute, because all matters should be governed by that statute, except where explicitly otherwise provided for in the relocation statute. The relocator of an abandoned mining claim has the same length of time to perform each of the acts of location subsequent to discovery as the original locator.[70]

The legislature proceeded upon the theory, which the courts, in recognition of the very nature of relocation, are bound to follow, that a relocator, in making his relocation on land which under the federal statute is "open to relocation in the same manner as if no location of the same had ever been made," must do all that the original locator had to do, except in so far as the Legislature permits the relocator to take advantage of and utilize the stakes on the ground and the workings already started. Because of the foregoing assumption, growing out of the very nature of relocation, it is necessary to

[68] Mills' Ann. St. Colo. § 3162.
[69] Mills' Ann. St. Colo. § 3152.
[70] Pelican & Dives Min. Co. v. Snodgrass, 9 Colo. 339, 12 Pac. 206.

notice particularly those relocation statutes which make requirements not also prescribed for original locations.

In Arizona until recently the statute provided that the location notice on a relocation should state if the whole or any part of the new location was located as abandoned property, or otherwise it should be void. The courts of Arizona, of course, recognized the right of the Legislature to make that requirement fundamental;[71] but the Legislature itself wisely changed it.[72] Washington seems to have a statute similar to the early Arizona statute.[73] In Colorado, Nevada, North Dakota, South Dakota, Washington, and Wyoming the statute reads that the location certificate or declaratory statement "may" state that abandoned property is included in the relocation. It seems clear that in these statutes such "may" does not mean "shall," or "must," and that therefore the insertion of the statement that abandoned property is included is merely permissive, and not mandatory.[74] So, too, it seems certain that here "abandoned property" includes forfeited as well as technically abandoned property.[75] In Nevada, if the relocator sees fit to perform discovery shaft work by sinking the old discovery shaft 10 feet deeper, he must give the depth and dimensions of the original discovery shaft at the date of relocation, and in doing so,

[71] CUNNINGHAM v. PIRRUNG (Ariz.) 80 Pac. 329; Matko v. Daley (Ariz.) 85 Pac. 721. In Cunningham v. Pirrung the Arizona statute was held not to apply where the previous attempted location was invalid, and the relocation was made for that reason. To the same effect is Paragon Mining & Development Co. v. Stevens County Exploration Co., 45 Wash. 59, 87 Pac. 1068. In Kinney v. Lundy (Ariz.) 89 Pac. 496, it was held that the word "void" in the statute meant "voidable," and the relocation might be cured by amendment.

[72] Laws Ariz. 1907, p. 27.

[73] Paragon Mining & Development Co. v. Stevens County Exploration Co., 45 Wash. 59, 87 Pac. 1068. In that case it was held that locators who at an early morning hour posted a notice of location and set two corner stakes, and immediately left the claim, and never did any thing more, never proceeded far enough to acquire any rights to be lost by abandonment or otherwise, and hence a subsequent locator need not state in his location certificate that he was relocating an abandoned claim.

[74] Query, however, in Nevada, where the relocator knows that he is locating abandoned or forfeited ground? The clause in the relocation act in that state to the effect that, "if it is not known to the locator that his location is on an abandoned claim, then the provisions of this section do not apply," cannot refer to the case of sinking an old discovery shaft 10 feet deeper; for, where there is an old discovery shaft, the relocator must know that the ground is abandoned or forfeited. Unless the word "may," in the clause authorizing the statement in the recorded paper that the property, or part of it, is located as abandoned property, does really mean "must," where the relocator knows that he is locating abandoned or forfeited property, the clause about the statute not applying if he does not know would seem to be meaningless.

[75] See note 1, supra.

of course, necessarily implies that the property is an abandoned or forfeited mining claim.

Some of the state relocation statutes specifically allow the relocator to do his discovery work by an adit, open cut, or tunnel, and by driving the original adit, open cut, or tunnel 10 feet further along the course of the vein. Instances of these are the Idaho, New Mexico, North Dakota, and South Dakota statutes. In Wyoming, on the other hand, the relocation must be perfected by sinking a new discovery shaft and by fixing new boundaries in the same manner as is provided for the location of a new claim. By the Oregon statute "abandoned claims shall be deemed unappropriated mineral lands, and titles thereto shall be obtained as in this act specified without reference to any work previously done thereon." [76] In Oregon, in other words, there is no distinction between the manner of making an original location and that of making a relocation. And everywhere it may be said that the relocator runs all the risks that the original locator does in failing to comply on time with essential requirements, such as that about marking the location on the ground, so that its boundaries can readily be traced,[77] etc. In one case a person who attempted to relocate failed to sink his discovery shaft deep enough, and was cut out by a resumption of work on the part of the previous locator.[78]

Unless the trespass is waived, or an estoppel is shown, a relocation based upon a trespass is invalid [79] A relocation must be tested by the rules which govern an original location, and when it is valid confers no greater rights than an original location confers.[80]

SAME—RESUMPTIONS OF WORK.

95a. Relocations by third persons are often complicated by attempted resumptions of work by the delinquent owners. In some jurisdictions resumption may take place at any time before the last act of relocation is completed, and everywhere a resumption begun in good faith the last day of the year, when it is too late to complete the $100 required expenditure for that

[76] Sp. Laws Or. 1898, p. 17, § 4.

[77] BROCKBANK v. ALBION MIN. CO., 29 Utah, 367, 81 Pac. 863.

[78] Field v. Tanner, 32 Colo. 278, 75 Pac. 916.

[79] Moffat v. Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139. That there can be no relocation where the claim is in the actual possession of persons who have done the requisite amount of assessment work under an insufficient location is asserted in Ware v. White, 81 Ark. 220, 108 S. W. 831. But query? Compare Goldberg v. Bruschi, 146 Cal. 708, 81 Pac. 23.

[80] Malone v. Jackson, 137 Fed. 878, 70 C. C. A. 216; Van Valkenburg v. Huff, 1 Nev. 142.

year, and continued in regular working hours the first and subsequent days of the new year, seems to give the resumer a title superior to that of one who attempts to relocate in the early morning hours of the first day of the new year and prior to any work by the resumer that morning. But query?

The troublesome questions in regard to relocation are usually those involving a claim of resumption of work by the original locators. We have already discussed the cases which hold that resumption may take place at any time prior to the completion of all the requisite acts of relocation; the resumer's work, if prosecuted to the statutory amount with reasonable diligence, being all credited to him as of the time when he did the first work, but the relocator's steps being credited to him only as of the time when he does the last requisite location act.[81] Such a doctrine, of course, makes relocation practically impossible, except in cases of genuine abandonment, and runs counter to the prevailing idea of the federal statutes that a locator must periodically manifest the good faith of his holding by doing annual labor, or else give way to some other locator, who will live up to the requirements of the law.[82]

But short of such a case is the troublesome one where a locator neglects doing the annual labor until the end of the year in which it must be performed, and then, when it is too late to do the work for that year, starts to do it, and an attempted relocation is made January 1st. In the case of Fee v. Durham,[83] for instance, locators commenced their annual assessment work on December 26th, and their employés worked until the night of December 30th, which was Saturday, when they quit until Monday morning, January 1st. They left their tools on the claim, intending to return to work January 1st, and did return to work at the usual hour on January 1st. Sunday night, between 12 and 1 o'clock, the plaintiffs went upon the claim and relocated it. (This seems to have been in Arkansas, where discovery work is not an essential act of location or of relocation). The original locators continued their work on Monday morning, and

[81] McKay v. McDougall, 25 Mont. 258, 64 Pac. 669, 87 Am. St. Rep. 395; Lacey v. Woodward, 5 N. M. 583, 25 Pac. 785; Pharis v. Muldoon, 75 Cal. 284, 17 Pac. 70. See, also, Field v. Tanner, 32 Colo. 278, 75 Pac. 916; Worthen v. Sidway, 72 Ark. 215, 79 S. W. 777. The Montana rule has been changed by statute, making the relocation date from the posting of notice of location, and making resumption thereafter ineffective against the relocation. Laws Mont. 1907, p. 21.

[82] Even in California a relocation may take place, despite the fact that the original locator has remained in possession. Goldberg v. Bruschi, 146 Cal. 708, 81 Pac. 23.

[83] 121 Fed. 468, 57 C. C. A. 584.

thereafter, with diligence, until the annual labor for the new year was completed. It was admitted that when work stopped on Saturday night the $100 worth of work for the year then ending had not been done. The United States Circuit Court of Appeals for the Eighth Circuit held that the resumption of work in December renewed the original locator's title so thoroughly that the diligent prosecution of work over into the next year until that next year's work was done rendered the plaintiff's relocation void ab initio. The court said: "The defendant's grantors were in the actual possession of the claim, actively engaged in doing the annual assessment work thereon, when the plaintiffs entered upon the claim and made their location. The entry and location, under these circumstances, was a trespass, and no rights were acquired thereby. Inchoate rights to the public lands cannot in any case be acquired by trespass or by violence. An entry upon the prior possession of another is a trespass, and tends to provoke violence, homicides, and other crimes, and one making such entry gains nothing by it. The original locators must be held to have been in the actual possession of the claim at the time the plaintiffs made their location. The suspension of work Saturday night, intending to resume it Monday morning, and leaving their tools on the ground for that purpose, was not, in any sense, an abandonment of their possession for the time between Saturday night and Monday morning. In contemplation of the law, their possession was as complete and actual during that time as if they had remained at work during the night and on the Lord's day. * * * The original locators in this case had not abandoned their claim, but were actually and continuously at work from the 26th of December until an early day in January, when they had done $500 worth of work. There was no suspension of the work during this time, and there was no period during which the plaintiffs could enter and make a valid location. The continuity of the work and possession was not broken by the cessation of labor at night and on the Lord's day. It must be conceded that, if the original locators had 'resumed work' after the clock struck 12 on Saturday [Sunday] night, December 31st, that the plaintiff's location would have been invalid. We think, upon the facts in this case, for all legal purposes, the original locators must be held to have been prosecuting the work for the whole of that night, and that the plaintiffs could not rightfully enter upon the claim and make a valid location between midnight and the usual hour of resuming work on Monday morning." [84]

[84] FEE v. DURHAM, 121 Fed. 468, 469–470, 57 C. C. A. 584, 585.

The foregoing argument is not, however, as strong as at first sight it seems. The question, to begin with, is not one of abandonment, but one of forfeiture. Yet the court treats it as if it were one of technical abandonment, as distinguished from forfeiture. Moreover, it is not a question of trespass. If the original locators had not resumed work, constructively, at least, before plaintiffs attempted relocation, the relocation would have been valid, because the claim would then have been "open to relocation in the same manner as if no location of the same had ever been made," [85] and the entry by plaintiffs was certainly peaceable.[86] Moreover, in view of the custom and practice of miners to make most of their relocations between 12 and 1 o'clock on the last night of the year, such a relocation cannot be deemed clandestine,[87] even if the fact that a relocation is clandestine should be deemed to vitiate it. It was the original locator's business to expect and know of the relocation. The sole question in the case was whether, when the original locators and their men were asleep in their cabins, they should be deemed in law to be at work because they began work some days before, and were in good faith intending to go on with the work at the usual hour in the morning. Considering that the original locators could have gone up at 12 o'clock that night and resumed, and that, as the dissenting opinion points out,[88] a refusal to recognize the relocation as valid encourages fictitious resumptions of work just to defeat relocations, the decision in Fee v. Durham that a constructive resumption in the new year can be based on the actual resumption in the preceding year, so as to defeat a forfeiture, would seem to be of doubtful soundness. The only thing in its favor is the general doctrine that forfeitures are odious to the law. The decision has since been followed by another case in the same circuit,[89] and is in accord with previous holdings in Arizona [90] and in the land department.[91] As it furnishes a fair working rule, it probably will be followed.

[85] Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426). A peaceable entry for relocation will be supported, after failure to do annual labor, even though the claim is occupied by the original locator. Du Prat v. James, 65 Cal. 555, 4 Pac. 562; Goldberg v. Bruschi, 146 Cal. 708, 81 Pac. 23.

[86] Dissenting opinion by Sanborn, J., in FEE v. DURHAM, 121 Fed. 468, 472, 473, 57 C. C. A. 584. See DU PRAT v. JAMES, 65 Cal. 555, 4 Pac. 562; Brown v. Oregon King Mining Co. (C. C.) 110 Fed. 728.

[87] Dissenting opinion by Sanborn, J., in FEE v. DURHAM, 121 Fed. 468, 473, 57 C. C. A. 584, 589.

[88] 121 Fed. 476, 57 C. C. A. 592.

[89] WILLITT v. BAKER (C. C.) 133 Fed. 937.

[90] JORDAN v. DUKE, 6 Ariz. 55, 53 Pac. 197. In this case, however, the relocators found some of the owners on the ground when the attempt to relocate was made.

[91] McNEIL v. PACE, 3 Land Dec. Dep. Int. 267.

SAME—PREMATURE RELOCATIONS.

95b. A relocation is premature (1) if it is attempted before the original and perfected location is subject to forfeiture, and (2) if it is attempted after a prior prospector has made discovery and begun the acts of location, but before the time allowed him to finish the acts of location has expired. In case (2) the relocation is premature, even though the original prospector does not do discovery work, or record, in time.

Premature relocations have been regarded as void, but Lavagnino v. Uhlig has thrown doubt upon that doctrine.

A word is necessary about premature relocations. They consist of two kinds: (1) Those where a perfected location is not yet forfeitable; and (2) those where a prior locator has not yet exhausted his statutory time to complete his uncompleted location.

Premature Relocations of Perfected Mining Claims.

It is perfectly well settled that a relocation, which is attempted before the original locator or his grantee is in default under his existing valid location, is void.[92] But why should "void" mean there that if the end of the year comes, and the original location is subject to relocation, the previously attempted relocation must be disregarded? The question is somewhat like that discussed when we considered whether under the holding in Lavagnino v. Uhlig,[93] a location that would be validated by the abandonment of a previous and then existing location might not be permitted on a discovery within the limits of the previous and existing location. The answer to the question seems to turn wholly on whether the second location, if it applied for patent, could be attacked by a protest by third persons, or only by an adverse claim made by the senior locator. Since Lavagnino v. Uhlig the use of protest in other ways than to question the mineral or nonmineral

[92] BELK v. MEAGHER, 3 Mont. 65; Id., 104 U. S. 279, 26 L. Ed. 735; Garthe v. Hart, 73 Cal. 541, 15 Pac. 93; Moffat v. Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139. See Slavonian Min. Co. v. Perasich (C. C.) 7 Fed. 331; Aurora Hill Con. Min. Co. v. Eighty-Five Mining Co. (C. C.) 34 Fed. 515; Book v. Justice Min. Co. (C. C.) 58 Fed. 106; Lockhart v. Rollins, 2 Idaho, (Hasb.) 540, 21 Pac. 413; Renshaw v. Switzer, 6 Mont. 464, 13 Pac. 127. That a forfeited or abandoned claim is still staked off, of course, will not prevent a relocation. GOLDEN FLEECE GOLD & SILVER MIN. CO. v. CABLE CONSOL. GOLD & SILVER MIN. CO., 12 Nev. 312. A relocator was refused a decree quieting title against a purchaser at an execution sale which took place prior to relocation, where work had actually been done on some of the claims, and the attempted relocation of all was to hinder, delay, and defeat the judgment and execution sale. Wailes v. Davies (C. C.) 158 Fed. 667.

[93] Lavagnino v. Uhlig, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119.

character of the land, the citizenship of the applicant, the posting an publication of the notices of application for patent, and matters o that kind, may well be doubted.

Messrs. Morrison and De Soto were inclined in the twelfth edi tion of their book to support the premature relocation on grounds o laches or estoppel, for they said of the decision in Belk v. Meagher [94] that a relocation begun before the year expires is void: "The cas cited so decides; but it would certainly seem that, if the party whos claim was taken did not either resume work or take steps to recove by law until after the expiration of the ensuing annual period, hi laches would operate to validate such a relocation, although begu before the proper time." [95] The laches theory has received a sever blow in a recent case,[96] and it is believed that Lavagnino v. Uhlig [97] furnishes a simpler way out than that of claiming that laches vali dates an absolutely void relocation. Under a logical extension o Lavagnino v. Uhlig the premature location is ineffective only whil the original location continues in unabated vigor; but, when tha location is abandoned or becomes forfeitable, the relocation spring into life, subject to the same right of the original owner to resum work and oust the relocation that exists in a senior locator to resum work and oust a junior locator from the area in conflict between th senior and junior claims, and subject, of course, to relocation b others if the annual labor has not been done on the relocation.* I is upon the right to resume, therefore, that laches and estoppel hav a bearing. The same rule, however, should apply to the relocato that applies between the junior and the senior locators of conflictin mining claims.

It is frankly admitted that the foregoing doctrines are novel, an are opposed to some earlier cases, as well as to the late case of Malon v. Jackson, where the continued failure of the original locators t do the work was held not to validate the relocation; [98] but the doc

[94] 3 Mont. 65, 1 Morr. Min. Rep. 522.

[95] Morrison's Mining Rights (12th Ed.) 98.

[96] Malone v. Jackson, 137 Fed. 878, 70 C. C. A. 216. There a claim was l cated for one Baker December 6, 1898. The annual labor was not done, bu the claim was not subject to relocation on that account until after Decembe 31, 1899. July 10, 1899, Jackson attempted to relocate, and was in the actua possession of the claim in 1900, 1901, and 1902. Yet January 1, 1902, Malon relocated, and the court upheld Malone's relocation as against Jackson's.

[97] Lavagnino v. Uhlig, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119.

* The locator of the void junior claim may of course treat it as absolutel void and make a new location on a discovery in unappropriated ground. Wa son v. Mayberry, 15 Utah, 265, 49 Pac. 479, 482.

[98] See Slavonian Mining Co. v. Perasich (C. C.) 7 Fed. 331; MALONE

trine of Lavagnino v. Uhlig is itself novel and inevitably involves novel consequences. A late Montana case recognizes this fact.[99] While novel, the decision in Lavagnino v. Uhlig and its logical consequences seem sensible enough. The only difficulty about insisting upon those consequences is that in Farrell v. Lockhart [100] the federal Supreme Court has so modified Lavagnino v. Uhlig as to leave it doubtful how much of that decision remains.[101]

Not only may a relocation be premature because it comes before the end of the year in which the annual labor may be done, but it may also be premature because, though the locator did not complete the required work during the year and the relocation was attempted promptly at 2 a. m. on the following January 1st, the locator has resumed work December 31st, and continued his work at the regular hour on January 1st. In such case it has been held that the relocation is invalid, although the one who has resumed work abandons the claim five or six days later.[102] It is believed that, since the case of Lavagnino v. Uhlig, the case just cited cannot be supported. It is always to be borne in mind, however, that the state of the authorities will not justify any relocator who has made a premature relocation in failing to renew his relocation after the original location either is abandoned or becomes forfeitable. Such renewal of relocation should take place, not only to cut off all right of the original locator to resume work and defeat the premature relocation, but also to save all possibility of the relocation being held invalid as to third persons who also come in to relocate. Out of excessive caution the renewal of relocation should be by a complete statutory relocation, though on principle a relocation by amendment should suffice. In view of the decision in Farrell v. Lockhart,[103] which is believed to be a backward step, a prudent miner should take no chances.

Premature Relocation of Unperfected Mining Claims.

Another kind of premature relocation is where one is attempted during the performance of the acts of location other than record, and before the time for discovery work or for record has expired. Such a location remains ineffective as against the original locator,

JACKSON, 137 Fed. 878, 70 C. C. A. 216. The latter case was decided 21 days before LAVAGNINO v. UHLIG, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119. A case since is SIERRA BLANCA MINING & REDUCTION CO. v. WINCHELL, 35 Colo. 13, 83 Pac. 628.

[99] HELENA GOLD & IRON CO. v. BAGGALEY, 34 Mont. 464, 87 Pac. 455.

[100] 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——.

[101] See note 60, supra.

[102] Jordan v. Duke, 6 Ariz. 55, 53 Pac. 197.

[103] 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——.

although the discovery work is not done,[104] and although the record does not come in the time fixed by the statute,[105] and seemingly although the failure to record works a forfeiture in favor of a third person relocating later.[106] The facts that the original locator is in possession at the time of the attempted relocation, and continues so, and that the relocation is premature, combine to create a situation which keeps the relocation in the state of suspended animation in which it started until it is ended by the original locator's recording, or by the relocator renewing his relocation and thus ending the original location.[107] This suspended animation of the relocation does not constitute an intervening vested right, which will prevent the original locator from correcting a defective location certificate by an additional one. As the attempted relocation does not stand in the way of record by the original locator, it does not stand in the way of an amendment of record.[108] It has been supposed that such a premature relocation does not stand in the way of a relocation by others; but since the case of Lavagnino v. Uhlig that hardly seems sound. It is believed that the premature relocation if diligently looked after by the relocator† should have priority over any other relocation, and that ultimately the courts will so decide.[109]

[104] Sierra Blanca Mining & Reduction Co. v. Winchell, 35 Colo. 13, 83 Pac. 628. That merely posting a notice of location and setting two stakes, if followed by immediate abandonment, may not initiate a location, see Paragon Mining & Development Co. v. Stevens County Exploration Co., 45 Wash. 59, 87 Pac. 1068.

[105] BRAMLETT v. FLICK, 23 Mont. 95, 57 Pac. 869; Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co., 131 Fed. 579, 66 C. C. A. 299. See Craig v. Thompson, 10 Colo. 517, 16 Pac. 24; Omar v. Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246; Sanders v. Noble, 22 Mont. 110, 55 Pac. 1037.

[106] LOCKHART v. JOHNSON, 181 U. S. 516, 21 Sup. Ct. 665, 45 L. Ed. 979. In that case there was a failure to sink a discovery shaft, as well as a failure to record.

[107] Where the original location is abandoned before being completed, such abandonment, as distinguished from forfeiture, seems to keep the relocation from being premature. KINNEY v. FLEMING, 6 Ariz. 263, 56 Pac. 723. If not abandoned, and the time to record has not expired when suit is brought, the claim may be shown by acts of location without record. Id.

[108] CRAIG v. THOMPSON, 10 Colo. 517, 16 Pac. 24.

† Adams v. Polglase, 32 Land Dec. Dep. Int. 477, 33 Land Dec. Dep. Int. 30.

[109] Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455. But see, contra, Nash v. McNamara (Nev.) 93 Pac. 405. The recent case of FARRELL v. LOCKHART, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——, of course, throws doubt upon the proposition; but LAVAGNINO v. UHLIG, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119, seems so essentially sound on principle that its rehabilitation ought reasonably to be expected.

Another claim of premature relocation has been raised where the previous location was completed at the time of relocation except for record, but at the time of attempted relocation the statutory time for record of the original location had elapsed. In Zerres v. Vanina,[110] indeed, it was held that the fact that the original locator, who had performed the necessary assessment work for the preceding year, never had recorded his location certificate, did not render the claim subject to relocation. In that case it further appeared that the original locator was absent from the ground at the time of the attempted relocation, and during his absence some of the boundary stakes had fallen down. The real proposition seems to be that record, though required, by the Nevada statute under consideration, to be within 90 days after the date of posting the location notice on the claim, was not a necessary act of location, but was merely a discretionary act, for the failure to perform which no forfeiture was imposed. This decision, so contrary both to the authorities elsewhere and to the necessities of the mining law, has been followed by the state courts in Nevada.[111] It certainly seems to be an erroneous decision. A relocation made under the circumstances of that case cannot be premature, despite the hardship which doubtless influenced the court to decide as it did; for record notice is so fundamental a requirement that without it the location is not complete.[112] While the time of record is directory, in the sense that it need only precede the vesting of intervening rights,[113] a relocation made after the time the original locator is given to record, and before he does record, is clearly valid, if made peaceably and in good faith. Unless completed within the time prescribed, an attempted location must give way to a relocation,[114] even though the latter is made with full notice of the prior asserted claim.[115] Record in the mining law is not merely notice. It is a prerequisite to the genuine existence of the mining claim which it describes. That is why actual notice is not equivalent to record notice. The relocation, once started, comes in ahead of the original location, if its requisite acts of relocation are performed in

[110] (C. C.) 134 Fed. 610; Wailes v. Davies (C. C.) 158 Fed. 667.

[111] FORD v. CAMPBELL (Nev.) 92 Pac. 206.

[112] But see the Montana statute of 1907. Laws 1907, p. 18.

[113] McGINNIS v. EGBERT, 8 Colo. 41, 5 Pac. 652; Preston v. Hunter, 67 Fed. 996, 15 C. C. A. 148.

[114] LOCKHART v. JOHNSON, 181 U. S. 527, 21 Sup. Ct. 665, 45 L. Ed. 979; Pelican & Dives Min. Co. v. Snodgrass, 9 Colo. 339, 12 Pac. 206; Lockhart v. Wills, 9 N. M. 344, 54 Pac. 336; Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019; Thallmann v. Thomas, 111 Fed. 277, 49 C. C. A. 317. But see Omar v. Soper, 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246.

[115] BROWN v. OREGON KING MIN. CO. (C. C.) 110 Fed. 728.

regular course, even though the record of the original location is perfected meantime.[116]

Too Tardy Relocations.

Analogous to the case of a premature relocation is that of a relocation made too late. It is well settled that, after entry of the original claim in patent proceedings, a relocation for previous default, made while the entry remains uncanceled, comes too late. The general rule is that entry cures any failure to keep up the annual labor prior to entry, where that failure has not been taken advantage of before entry. Where before entry the annual labor is neglected, and a relocation takes place, and the entry still is made in the name of applicant for patent, it has been held that the patentee takes the patent in trust for the relocator.[117] That would certainly seem to be the right rule where the applicant for patent, after the publication of his notice of application for patent, voluntarily delays the entry.[118] But in such case a protest would secure the cancellation of the application, with a right on the part of the protestant to adverse on a renewed application, or to make application for patent himself, and would seem the most appropriate remedy.[119] Where the entry is delayed by a protest or an adverse, and the applicant is therefore not at fault, the land department has held that the annual labor need not be kept up;[120] but, as the courts are not bound by that departmental ruling, it is unsafe to neglect the annual labor in reliance upon it. There is, moreover, a risk in neglecting the annual labor, even after entry; for the entry may for some reason or other be canceled.

The Case of Brown v. Gurney.

The Supreme Court of the United States has recently decided a case which involves three attempted relocations of abandoned, not forfeited, property affected by patent proceedings. The first was held to be premature, the second just in time, and the third too late. The facts were that, under an application to patent a lode claim, the land department refused to issue patent for the whole claim, because two portions of the claim were separated by a patented placer, and the department, therefore, required the applicant to elect which tract he would patent. He elected to take and patent the north end of the claim as originally laid out. Three different people tried to

[116] See note 114, supra.

[117] SOUTH END MINING CO. v. TINNEY, 22 Nev. 19, 35 Pac. 89. Compare Power v. Sla, 24 Mont. 243, 61 Pac. 468.

[118] GILLIS v. DOWNEY, 85 Fed. 483, 29 C. C. A. 286.

[119] Cleveland v. Eureka No. 1 Gold Mining & Milling Co., 31 Land Dec. Dep Int. 69; Lucky Find Placer Claim, 32 Land Dec. Dep. Int. 200.

[120] Marburg Lode Mining Claim, 30 Land Dec. Dep. Int. 202.

locate the other piece. The first prospector (Brown) located immediately after the land office refused patent; the second (Gurney) located after the applicant had filed written election to take the north part; and the third (Small) located immediately after the subsequent final order of cancellation of entry for the other piece was entered in the land office. It was held that the refusal of a patent did not restore the land to the public domain, that the formal order of cancellation merely recorded a pre-existing fact, and that the first prospector to locate after the original entryman had relinquished had the prior right. The election to retain the north end of the claim took effect eo instanti as an abandonment of the south end.[121]

RELOCATIONS BY THE FORFEITING OWNERS.

96. Relocations by the original locators or their grantees, based on the relocators' own defaults, are justified by the Utah Supreme Court; but where the same ground is relocated by the same parties, the discovery work is less than the annual labor requirement, and relocation is resorted to in order to escape annual labor, that doctrine seems unsound.

Relocations to cut out delinquent co-owners are questionable, and the only safe plan is to get rid of the co-owner by forfeiture under the forfeiture to co-owner statute.

But the relocation may not be made by a third person. It may be attempted by the claim's owner himself. Such relocations by the claim's owner may be attempted by (1) the same kind of a relocation that a third person would make, or by (2) a practical relocation by way of amendment, though without the substitution of discovery work for the annual labor requirement. Where the claim's owner attempts to relocate in the same way others would do, it is usually merely an effort on his part to avoid the doing of annual labor. That very effort shows that the locator is not in good faith in retaining his claim; for the right way to show good faith in that re-

[121] BROWN v. GURNEY, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717. A relocation, attempted after entry in the land office and while the entry stands, cannot sustain a suit to compel a conveyance of the legal title. Neilson v. Champaigne Min. & Mill. Co. (C. C.) 111 Fed. 655. The mere cancellation of an entry does not render the ground open to relocation. Rebecca Gold Min. Co. v. Bryant, 31 Colo. 119, 71 Pac. 1110, 102 Am. St. Rep. 17; Peoria & Colorado Mill. & Min. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915. Where the cancellation of entry was without notice and unauthorized, the issuance of a patent excluding the land as to which entry was canceled did not render the excluded land subject to a relocation, which would defeat the applicant's right to patent that land. Rebecca Gold Min. Co. v. Bryant, supra.

gard is to resume work and to prosecute the resumption work with vigor. Nothing, then, but the clearest kind of language in the statutes should justify a court in deciding that a man may relocate his own claim, so as to defeat the real object of the mining laws.[122] That position is further strengthened by the fact that the common law knows nothing of any right in a man to forfeit his own property in favor of himself. "Forfeiture is not complete until some one else has appropriated the property." [123]

But, despite this natural attitude of hostility toward a locator who seeks to avoid the reasonable requirements about annual labor, made in the mining statutes, the Supreme Court of Utah has decided that the words of the statute that the mining claim on which the requisite annual expenditure has not been made "shall be open to location in the same manner as if no location of the same had ever been made" require the recognition of the same right in the original locator to relocate that a third person has.[124] That decision seems to be based upon the idea that forfeiture under the statute is self-executing, and, without entry, makes the land as much unoccupied land of the United States as if it had never been occupied; yet that idea is clearly unsound. "It is the entry of a new claimant, with intent to relocate the property, and not mere lapse of time, that determines the right of the original claimant." [125] That the locator can enter upon himself for no other purpose than to hold the claim by living up to a smaller development work requirement than the federal requirement of $100 annual expenditure amounts to is certainly an unnecessary conclusion and therefore not to be supported.

The only authorities cited by the Utah court are Hunt v. Patchin [126] and a land department ex parte ruling,[127] in both of which decisions the question was whether, where several locators owned a mining claim and all were delinquent as to annual labor, one could relocate in his own name and cut out the others. In Hunt v. Patchin the relocation was in the relocator's name, though with the consent of all interested in the original claim and to be held for the benefit of all; but in the land department matter it was seemingly against the protest

[122] Where the relocation is made for fear the prior location was defective, as was the case in Wetzstein v. Largey, 27 Mont. 212, 70 Pac. 717, and the annual labor is kept up, no objection to the relocation can be made. It is only an attempt to evade the annual labor requirement that is reprehensible.

[123] McCarthy v. Speed, 11 S. D. 362, 370, 77 N. W. 590, 593.

[124] WARNOCK v. DE WITT, 11 Utah, 324, 40 Pac. 205.

[125] LITTLE GUNNELL CO. v. KIMBER, 1 Morr. Min. Rep. (U. S.) 536, 539, Fed. Cas. No. 8,402.

[126] 35 Fed. 816.

[127] Copp, Min. Lands, 300.

of the other owners. The land department proceeding was not a litigated matter and may be disregarded, while in the case of Hunt v. Patchin no third person was interested to upset the relocation, but all the parties to the suit were interested in upholding it. The excluded co-owners in the original location sought in Hunt v. Patchin, and sought successfully, to have the relocator held a trustee for them as to their proportionate shares in the relocation. The case is of no authority on the question of the validity of the relocation, or against one whose interest demands that it be declared invalid. This explanation is preliminary to a quotation of all the language in the Utah case relating to this point. After stating the question as follows: "First, can the locator of a quartz mining claim, who has allowed his location to lapse by a failure to perform the necessary work, make a relocation, or new location covering the same ground?"—and after quoting the relocation provision of the federal statute, the court says: "We have been referred to no decision of any court that has decided the question here presented. The right of a locator to make a new location upon mining ground, after his first location has lapsed, is recognized in Hunt v. Patchin, 35 Fed. 816; and in Copp, U. S. Min. Laws, p. 300, it is declared that a prior locator has such right. See, also, 15 Am. & Eng. Enc. Law, p. 551. We fail to see any reason why such right should be denied. The fact that a prior locator, after his right has lapsed, may renew it by resuming work, would appear to be a favor or right granted to such prior locator; but to give the proviso [about resumption] above quoted the effect claimed by appellant, would be to deny to such prior locator a substantial right allowed to strangers. In other words, such a construction, while it would allow to a prior locator the right to resume work, would destroy his right to make a new location. We do not think the proviso to the act should be construed to mean anything more than that a prior locator, in addition to the rights of a stranger, should also have the right to resume work, and thus relieve himself from the forfeiture incurred. This was the view taken by the court below, and we think it correct." [128]

Considering that this language was used in a state where, at the time of the decision and since, discovery work need not be done by a locator, except where district rules so require, it seems as if it gives a delinquent locator or his grantee altogether too much latitude to be supported. In a state where discovery work on a relocation would amount to $100 or more, it is, of course, immaterial whether the new work (which, if discovery work, must be done within a period which

[128] WARNOCK v. DE WITT, 11 Utah, 324, 40 Pac. 205.

practically requires diligence, or, if resumption, must be done in about the same time) is called "discovery work" or "resumption of labor," and no real harm is done, or violation of the federal statute takes place, by letting the locator regard his performance either as relocation or resumption, if it pleases his fancy to view it as the one rather than the other; but in a state where no discovery work is required on a location or relocation it is a very different matter. In Alaska, California, and Utah such is the case, except as changed by district rules, and almost everywhere some mining claims may be found where, owing to the nature of the ground, new discovery work will not amount to $100.

Wherever new discovery work will not equal or exceed the $100 annual expenditure for labor or improvements required on each location by the federal statute, the true rule would seem to be not to allow the delinquent locator to take advantage of his own delinquency. A method to redeem his delinquency is pointed out by the statute, namely, by resuming work and diligently prosecuting it until $100 worth of work is completed for the year in which the last part of the work of resumption has to be done. If he does not wish to redeem his delinquency in the way so pointed out by the statute, then, since the expression of one thing in a statute is the exclusion of others, and since a penalty put upon a locator to be enforced against him by others cannot properly be regarded as a privilege of his, his claim should remain subject to relocation by others.[129] This view finds support in an Arizona case, where a mortgagor locator had a third person relocate for him, and then took a deed from the third person, and the court quieted the title against him in favor of the grantee of the purchaser at foreclosure sale.[130] While the case was put on the express ground of breach of trust duty on the part of the mortgagor, it has been held that a suit to quiet title could lie only on the theory of the invalidity of the relocation.[131] The true doctrine would seem to be that of the recent Montana statute that "a locator or claimant may, at

[129] Mr. Lindley (1 Lindley on Mines [2d Ed.] § 405) and Messrs. Morrison and De Soto (Morrison's Mining Rights [13th Ed.] pp. 124, 125) have already announced this view; but Mr. Snyder (1 Snyder on Mines, §§ 584, 585) supports the Utah doctrine.

[130] ALEXANDER v. SHERMAN, 2 Ariz. 326, 16 Pac. 45.

[131] Saunders v. Mackey, 5 Mont. 523, 6 Pac. 361. But see Duluth & I. R. R. Co. v. Roy, 173 U. S. 587, 19 Sup. Ct. 549, 43 L. Ed. 820. The case of ALEXANDER v. SHERMAN, supra, is opposed to Mr. Snyder's notion (1 Snyder on Mines, § 585) that the original locator can evade the statute by getting a third person to relocate for him and then deed the property back. A subsequent relocator seemingly could quiet title against such an evasive relocation.

any time, relocate his own claim for any purpose except to avoid the performance of annual labor." [132]

Attempted Relocations by Co-Tenants.

Closely connected with the matter just discussed, as the reference to Hunt v. Patchin shows, is the case of an attempted relocation by one of several co-tenants of an abandoned or forfeited mining claim. If the claim has been technically and in good faith abandoned by all, it would seem as if one could relocate with safety. The only question would be whether an abandonment in good faith really took place.[133] But with reference to forfeiture the situation is different. The whole question, in case of forfeiting for failure to do assessment work, depends upon the duties owed by one co-tenant to another. "It is well settled that co-tenants stand in a certain relation to each other in reference to the joint estate, and that a distinct title acquired by one will inure to the benefit of all. This principle arises from the privity subsisting between parties having a common possession of the same land and a common interest in the safety of the possession of each, and it only inculcates that good faith which seems appropriate to their relative position. It has been applied to mining property by the federal Supreme Court." [134]

That being so, the co-tenant has no more right to take in the claim for himself by relocation than he would have to get it by buying in a tax title arising from the failure of his co-tenants and himself to pay the taxes.[135] The relocation is purely a forfeiture, and, as the South Dakota court points out, "forfeiture is not complete until some one else has appropriated the property. Plaintiff and Franklin continued to be co-tenants so long as the Tin Bar claims continued to exist. They continued to exist until the ground was relocated, and during every instant of that time the latter was, in law, incapable of performing any act in hostility to his co-tenant in reference to the joint estate. Franklin was plaintiff's co-tenant at the time he entered the boundaries of either Tin Bar claim for the purpose of relocating the ground. His entry for that purpose was hostile to his co-tenants, unless he intended to relocate for the benefit of all the owners of the Tin Bar claims. It may be that he owed no duty to his co-tenants to represent the claims. It may be that he was at liberty to refrain from

[132] Laws Mont. 1907, p. 22.

[133] The interest of a tenant in common connot be deemed abandoned and subject to appropriation by strangers because he refuses to pay his part of the annual expenditures. Waring v. Crow, 11 Cal. 366.

[134] McCarthy v. Speed, 11 S. D. 362, 369, 77 N. W. 590, 592.

[135] But see Strang v. Ryan, 46 Cal. 33.

performing any act in reference thereto. But, if he elected to act at all, he was bound to act for the benefit of all the owners. His acts of relocation did not terminate the fiduciary relation between himself and plaintiff, because they were, if done for the purpose of defeating the rights of his co-tenants, in hostility to his interests, and if they were not done for that purpose they of course operated to the benefit of all the owners. We think the circuit court should have adjudged the defendants to be trustees and have enforced the trust."[136]

The above language, taken literally, would go to show that the relocation was absolutely void;[137] but the relief granted in the case was merely to declare the relocator a trustee. The cases seem to justify the conclusion that one tenant in common may relocate to cut out the interests of his co-tenants at law, though in equity he will in a proper case hold in trust for them. The conclusion that the relocation is good at law seems sound.[138]

It is impossible to agree with Mr. Lindley's statement that, "if we are right in the conclusion reached in the preceding section that the original locator cannot treat his failure to perform or resume work as the basis of a valid relocation, it must necessarily follow that one of several locators, seeking to obtain the entire title by reason of the failure of any of them to fulfill the requirements of the law, is likewise prohibited from making such relocation."[139] Take the case of one of several locators, who notifies his co-tenants in advance that, unless they unite with him in the performance of the annual labor, he will forfeit their interests by relocation. While it is true that the proper course for him to pursue, to be absolutely safe, is to perform the whole labor himself and "advertise the others out" under the forfeiture to co-owner statute, still, if he wants to take the risk involved in the matter of relocation, why is it inconsistent to say that the legal title of the interests of the others vests in him by the relocation? As to his own undivided interest, the same rule ought to be applied as applies to the case of a locator, who attempts to relocate a claim owned by him in severalty; but as to the interest of his co-tenants a different rule may well be applied. A man is not delinquent as to the part of the annual labor due from his co-tenants in any sense that should stand in the way of a relocation of their interests by him-

[136] McCarthy v. Speed, 11 S. D. 362, 370–371, 77 N. W. 590, 593. See Speed v. McCarthy, 181 U. S. 269, 21 Sup. Ct. 613, 45 L. Ed. 855.

[137] Compare, also, Royston v. Miller (C. C.) 76 Fed. 50.

[138] Doherty v. Morris, 11 Colo. 12, 16 Pac. 911; Saunders v. Mackey, 5 Mont. 523, 6 Pac. 361. See Lockhart v. Johnson, 181 U. S. 516, 21 Sup. Ct. 665, 45 L. Ed. 979.

[139] 1 Lindley on Mines (2d Ed.) § 406.

self after a full and fair warning given by him to them in plenty of time for them to protect themselves fully. It may be that we shall yet come to the notion of a relocation good in part and bad in part;[140] but, since we have not done so, is there any real reason why the good part here should not outweigh the bad, and make the whole relocation good? Certainly the public policy is not as clearly opposed to the validity of the relocation in the case of co-tenancy as it is in the case where the relocator owns the entire interest in the claim he attempts to relocate. In any event, the cases which hold that a relocation by one of several tenants in common, on default by all, is valid at law, though subject to equities,[141] cannot be deemed wrong just because the Utah case, which permits a single locator to relocate his own claims, must be deemed erroneous.

It is well settled, however, that one co-tenant, who has made a relocation which his co-tenants had no reason to expect he would make, will be held a trustee for his co-tenants.[142] And even if the theory should be adopted that after an attempted relocation by a co-tenant the original location still exists, the co-tenant attempting to relocate, so as to oust his co-owners from title, cannot be deemed to have abandoned or forfeited his undivided interest in the original claim.[143]

Attempted Relocation of Other Fiduciaries.

The cases of relocation by other fiduciaries than co-tenants[144] have some slight bearing on the question of relocation by a co-tenant, and

[140] We have reached that stage with reference to the relocation back of amended location certificates. In the amended certificates there may be relation back as to the names of old locators, yet not as to those of new locators. Tonopah & S. L. Min. Co. v. Tonopah Min. Co. of Nevada (C. C.) 125 Fed. 389. Under the last Montana statute, moreover, a relocation by the original locator is no waiver of the right acquired under the original location, except as to ground omitted from the relocation, and with that exception the locator may rely upon either location or upon both locations. Laws Mont. 1907, p. 22.

[141] Saunders v. Mackey, 5 Mont. 527, 6 Pac. 361; Doherty v. Morris, 11 Colo. 12, 16 Pac. 911. Strang v. Ryan, 46 Cal. 33. Where all co-owners abandon locations, one co-owner may afterwards relocate for himself free from equities. ROBERTS v. DATE, 123 Fed. 238, 59 C. C. A. 242.

[142] McCARTHY v. SPEED, 11 S. D. 362, 77 N. W. 590; Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123. See Turner v. Sawyer, 150 U. S. 578, 14 Sup. Ct. 192, 37 L. Ed. 1189; Lockhart v. Leeds, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. Ed. 263; Lockhart v. Wills, 9 N. M. 344, 54 Pac. 336. So will his grantees, who take with knowledge of the facts. See Stephens v. Golob, 34 Colo. 429, 83 Pac. 381.

[143] HULST v. DOERSTLER, 11 S. D. 14, 75 N. W. 270.

[144] The absurdity of calling the relation between tenants in common one of mutual confidence, where the facts do not show that such confidence really exists, has been pointed out. 9 Harv. Law Rev. 427.

should be noted. Take, for instance, the case of an agent or of a servant. One who had been employed for several years as watchman and custodian of a mining claim, and who, after the termination of that employment, undertook to find a purchaser for the claim, was held not to have properly relocated the claim, because of the fiduciary relationship.[145] So an agent will not be permitted to acquire title by adverse possession unknown to the principal, or be allowed to claim an abandonment by the principal, because of the failure of the principal to do assessment work for a number of years.[146] So a lessee in possession will not be allowed during the lease to locate the part of a claim left by the patenting of the discovery of the leased claim by a junior location;[147] but, as the case so deciding goes clearly on the ground of the estoppel of a tenant to deny the landlord's title, it is uncertain whether the court regards the new location as invalid, as the suit to quiet title may perhaps imply,[148] or regards it as valid except that defendant will not be heard to say that it is so. One who has been a lessee would seem, however, to be as free to relocate after the termination of the lease for a cause of forfeiture thereafter happening as the grantor of a mining claim is free to locate for a subsequent delinquency by the grantee,[149] but not, of course, where the lessee agreed to do the very assessment work which is delinquent.[150]

A vendor of mining property, who unlawfully dispossesses his vendee, attempts a relocation when the property is not open to relocation and then extracts and disposes of a material portion of the ore, has even been denied a vendor's lien because of his wrongdoing.[151] On the other hand, one who sold a claim to a corporation, and afterward became a director in the corporation, was allowed to buy the claim from a third person, who in good faith and for himself had relocated

[145] Lockhart v. Rollins, 2 Idaho (Hasb.) 540, 21 Pac. 413. See, also, Thompson v. Burk, 2 Alaska, 249. In Lockhart v. Rollins the court treated the relocation as invalid; but on principle it was valid at law, and the relocator was a trustee for the original locators. LOCKHART v. LEEDS, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. Ed. 263.

[146] Utah Mining & Mfg. Co. v. Dickert & Myers Sulphur Co., 6 Utah, 183, 21 Pac. 1002, 5 L. R. A. 259.

[147] Lowry v. Silver City Gold & Silver Min. Co., 179 U. S. 196, 21 Sup. Ct. 104, 45 L. Ed. 151.

[148] Saunders v. Mackey, 5 Mont. 523, 6 Pac. 361. But see Duluth & D. R. R. Co. v. Roy, 173 U. S. 587, 19 Sup. Ct. 549, 43 L. Ed. 820.

[149] For a case of grant, see BLAKE v. THORNE, 2 Ariz. 347, 16 Pac. 270. But see Drake v. Gilpin Min. Co., 16 Colo. 231, 27 Pac. 708. Compare Alexander v. Sherman, 2 Ariz. 326, 16 Pac. 45.

[150] Stewart v. Westlake, 148 Fed. 349, 78 C. C. A. 341.

[151] MINAH CONSOL. MIN. CO. v. BRISCOE, 89 Fed. 891, 32 C. C. A. 390.

the claim.[152] One who had been a miner and shift boss for another, and in the course of his employment had learned that the employer was taking ore from unappropriated land adjoining the employer's land, was allowed, after his employment ceased, to make a valid location of such adjoining land.[153] A relocation is legal, where made by one who conspired with a working partner to have the latter omit to do the necessary annual work, and the only remedy of the defrauded partner is in equity.[154]

SAME—RELOCATION BY AMENDMENT.

96a. Since the boundaries of the claim may be changed whenever intervening rights of third persons are not injured, and the name of the claim may be varied so long as third persons are not misled, the original locators may amend the location notices and the record to show such changes. Relocations by amendment may be made, therefore, by the original locators; but they in no way avoid the annual labor requirement.

The term "relocation" has also been applied to the case of such a change by the locator of the boundaries or name of the claim as requires the recording of an amended location certificate, and in the case of changed boundaries a remarking of the location on the ground. By the express terms of the Colorado statute this change by amendment is called a "relocation"; the act, after defining the proper cases for amendment of the location certificate, adding: "Provided that such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under such previous location." [155]

The Colorado statute is simply declaratory of that right to vary the boundaries and the name of the claim which exists in the absence of statute. As was said by the United States Circuit Court for the District of Nevada: "It has always been the policy of the government to encourage its citizens in searching for, discovering, and developing the mineral resources of the country; and this policy can always be best subserved by permitting the discoverer to rectify and readjust

[152] McDermott Min. Co. v. McDermott, 27 Mont. 143, 69 Pac. 715.

[153] Thallmann v. Thomas, 111 Fed. 277, 49 C. C. A. 317.

[154] LOCKHART v. JOHNSON, 181 U. S. 516, 21 Sup. Ct. 665, 45 L. Ed 979; Lockhart v. Wills, 9 N. M. 344, 54 Pac. 336; Doherty v. Morris, 11 Colo. 12, 16 Pac. 911.

[155] Mills' Ann. St. Colo. § 3160.

his lines, whenever from any cause he desires to do so, provided he does not interfere with or impair 'the intervening rights of others.' There is no statute, law, rule, or regulation, state or national, which denies this right. The amended certificate of location, when made, becomes the completed location of the discoverer, and is just as valid as if it had been made in the first instance. It necessarily follows that parties coming upon the mining claim and ground described in the amended certificate of location, subsequent to the perfection of such amended location in compliance with the mining laws, can acquire no rights, because they have not been injured and have no right to complain." [156] The above was said with reference to the Nevada statute, expressly permitting relocation and amendment; but it is just as applicable where there is no state statute.[157] As a matter of fact, however, nearly all the mining law states have express statutes upon the subject.

In a sense the amendment statute covers things which do not amount to a relocation, as well as things which do. As was said by Judge Hallett: "It is, perhaps, unfortunate that the question of amending a certificate and of changing the boundaries of a claim, which amounts to a relocation, should be expressed in general terms relating to both subjects and in one section of the law. But the confusion resulting from such an attempt should not obscure the purposes of the law." [158] This confusion, however, is more apparent than real. As a matter of fact the Colorado statute calls the new certificate "an additional certificate," [159] and we simply term it an amendment of the old because the doctrine of relation applies. An amendment constitutes a relocation, as contrasted with the completion of the original location,[160] only where the boundaries of the claim are changed; but that is too highly technical a distinction to deserve to be emphasized. "It is to the end that the prospector may cure any defects in his location and conserve and protect the results of his industry that the authority [to file an additional certificate] is given." [161] Naturally all kinds of cases were grouped in the statute under the name "relocation." It is to be regretted that new names were not evolved to

[156] TONOPAH & S. L. MIN. CO. v. TONOPAH MIN. CO. OF NEVADA (C. C.) 125 Fed. 389, 396. To the same effect is McEvoy v. Hyman (C. C.) 25 Fed. 596, 600.

[157] Thompson v. Spray, 72 Cal. 528, 14 Pac. 182.

[158] McEVOY v. HYMAN (C. C.) 25 Fed. 596, 599, 600.

[159] Duncan v. Fulton, 15 Colo. App. 140, 147, 61 Pac. 244.

[160] See Strepey v. Stark, 7 Colo. 614, 5 Pac. 111.

[161] Duncan v. Fulton, 15 Colo. App. 140, 148, 61 Pac. 244, 246.

cover the two classes of cases of amendment, and the term "relocation" kept for cases of forfeiture for failure to perform annual labor.

It has been urged that "amended certificate" is not a proper term by which to refer to the new location certificate filed, and that an "additional certificate," as the paper is called in the Colorado statute, is more accurate.[162] That was urged in a case where it was also said of the original and the additional certificate that "we believe the law to be that, though neither one as a whole may be absolutely correct and in perfect conformity to the statute, yet if in both and from both there may be found and deduced all that the law requires, the statute being otherwise complied with, the miner's record is complete, and his title is perfect." [163] The latter doctrine would seem to be just as consistent, however, with the view that the new certificate is an amended certificate while the doctrine of relation seems to justify fully the designation of the new certificate as an amendment of the old. It has been held, for instance, that the new certificate always relates back to and takes effect from the filing of the first, if there are no intervening adverse rights to be affected by such relation back.[164] It thus performs the very function of an amendment. "This is the function and proper office of an amendment—to put the original in perfect condition as if it had been complete in the first instance." [165]

Accordingly, although made and filed after suit has been begun, an amended certificate is admissible in evidence when accompanied or followed by an instruction to the jury to disregard it if the other party to the suit acquired adverse rights prior to the filing of the new certificate for record.[166] That decision is defensible, in the absence of supplemental pleadings, only upon the theory of amendment and relation back.

Relation Back on Amendment.

Despite the express wording of the statutes that relocation by amendment shall not interfere with the rights of others which exist

[162] 15 Colo. App. 147, 61 Pac. 246.

[163] 15 Colo. App. 148, 61 Pac. 246. Compare Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36.

[164] McGINNIS v. EGBERT, 8 Colo. 41, 5 Pac. 652; Jordan v. Schuerman, 6 Ariz. 79, 53 Pac. 579; BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. v. EMPIRE STATE-IDAHO MINING & DEVELOPING CO. (C. C.) 134 Fed. 268; TONOPAH & S. L. MIN. CO. v. TONOPAH MIN. CO. OF NEVADA (C. C.) 125 Fed. 389.

[165] McEVOY v. HYMAN (C. C.) 25 Fed. 596, 600.

[166] Strepey v. Stark, 7 Colo. 614, 5 Pac. 111; Milwaukee Gold Extraction Co. v. Gordon (Mont.) 95 Pac. 995. See Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177.

at the time of the filing of the new certificate, and despite the property right doctrine to that effect which exists in the absence of statute, there have been cases where the relation back was allowed despite the intervention of adverse rights of one kind or another.[167] With the exception of those which go upon the theory that a premature relocation by a third party is not a vested intervening right,[168] these cases seem to go upon an artificial reasoning about the difference between a void and a defective location certificate. On principle the sole question should be whether the record in the one case of amendment, or the boundaries and record in the other case of amendment, created a situation where third persons could locate, and whether the additional certificate, or the changed boundaries of the original claim and the additional certificate together, will injuriously affect the new locators if relation back is allowed. The fact remains, however, that the courts in general insist in broad language that the intervening rights of others may be cut out, where there is no change of boundaries, and where the additional certificate corrects a certificate which is not void.[169] If all those certificates which admit of a relocation by third persons are called void, there can be no objection to this way of stating the matter; but in Colorado, at least, a certificate so void as to permit of relocation by others has been allowed to be amended after relocation by others, so as to cut out, by relation back, the interests of those others.[170] The Colorado law is probably more correctly represented by a

[167] McEVOY v. HYMAN (C. C.) 25 Fed. 596; Cheesman v. Shreeve (C. C.) 40 Fed. 787.

[168] In CRAIG v. THOMPSON, 10 Colo. 517, 16 Pac. 24, a relocation by a third person was attempted prematurely, coming before the previous locator's time to record was up. Later, and after the time for record had passed, the original locator recorded a defective location certificate. Fourteen months after that he filed an additional location certificate, and the relocator was held not to have acquired intervening rights which would prevent relation back.

[169] Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955; McEvoy v. Hyman (C. C.) 25 Fed. 596; Frisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109.

[170] In FRISHOLM v. FITZGERALD, supra, the record was void under both the federal statutes and the state statutes, and yet, because the boundaries of the claim were not changed, the amendment was upheld, though it cut out an intervening relocation by others. Whether that case will be followed in Colorado, since SULLIVAN v. SHARP, 33 Colo. 346, 80 Pac. 1054, has held that a location, void because based upon a discovery within the limits of a valid existing location, cannot be perfected by amendment, query? In regard to FRISHOLM v. FITZGERALD, Messrs. Morrison and De Soto say: "The opinion in the case is peculiar in this: That it is the personal view of one judge, and both of his associates refused to concur. It is not the opinion of a court, and therefore has no obligation as a precedent binding the nisi prius courts of that state. * * * We consider untenable the proposition

case in the Colorado Court of Appeals, which court has since been merged in the Supreme Court. The doctrine of the latter case is that if a location certificate is so defective as to fail absolutely to comply with statutory requirements and define the claim it is void, and a second certificate cannot be considered as amendatory of it, so as to relate back to the date of the first, but that if the first certificate is not void, but is only lacking in technical detail, a second certificate may be deemed amendatory, and the doctrine of relation may be deemed to apply.[171] The Colorado Supreme Court, however, is in the apparent situation of denying amendment where the location itself is void for some reason other than defective record,[172] and allowing it where the location is void only because the location certificate is void.[173] If the federal Supreme Court ever has the question before it, surely such a distinction will be deemed by it to be untenable.

Whether the location is subject to relocation by others because of no discovery prior to the relocation,[174] or because only a void location certificate has been recorded,[175] an amendment of the record should not be allowed to cure the old location, so as to cut out intervening rights,[176] though there would seem to be no objection whatever to allowing it to cure the old location, or, more exactly, to perfect it, where no rights of third persons intervene prior to the new certificate. That is because the order in which the acts of location occur is immaterial, and by supposition the new certificate completes them.[177] It needs to be repeated that, whatever the party calls

that any amendment can cure a void record as against an intervening location." Morrison's Min. Rights (13th Ed.) 134.

171 Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69.

172 SULLIVAN v. SHARP, 33 Colo. 346, 80 Pac. 1054.

173 FRISHOLM v. FITZGERALD, 25 Colo. 290, 53 Pac. 1109.

174 Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

175 Tombstone Town Site Cases, 2 Ariz. 272, 15 Pac. 26.

176 BROWN v. GURNEY, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717. In SULLIVAN v. SHARP, 33 Colo. 346, 80 Pac. 1054, the question was whether a junior location, void because of a discovery within senior ground, could be validated by amendment after the senior was forfeitable for failure to perform annual labor. The case does not disclose the fact; but it seems a fair inference that the claimants of the senior location resumed work after the attempted amendment by the junior and before any other acts of location by the junior. If so, the case, which was an adverse suit by the senior against the junior in patent proceedings, might possibly be supported upon the ground that the amendment was not a sufficient renewal of the old location to amount to the kind of a relocation that will prevent resumption. Principle seems to require, however, that the amendment be deemed to perfect the old location as a new one, and that, when so perfected, it be held to be a complete relocation.

177 SULLIVAN v. SHARP, supra, is contra. See preceding note.

the paper he files, it is a question of fact whether what has been accomplished is an amendment, or is a relocation in a strict sense. The difficulty arises in part because an additional certificate need not state the purpose for which it is filed.[178] "If ground once included within the location of a lode mining claim be abandoned, and a new location made thereon as abandoned ground, said location dates only from the relocation thereof as abandoned ground, and does not relate back to or obtain any rights on account of the location which has been abandoned, and that the law makes a distinction between a relocation and an amended location certificate, although both may be designated as amendments in such location certificates." [179]

Accordingly a relocation "right over the top" of the old location, made in order to take in more ground, and in order to change the name of the claim, is practically nothing but an amendment of the old.[180] Not every amendment to change the name of a claim is certain to be valid, however; for if the new name is adopted to deceive the co-owner whose interest is being forfeited for his failure to contribute to annual labor, or to deceive one who would otherwise adverse in patent proceedings, that is fraud for which appropriate relief will doubtless be given.[181] So where one locator gets conveyances from his fellow locators for the purpose of obtaining a patent for the benefit of all, then files an additional location certificate taking in further ground in his own name, and afterwards obtains a patent to the claim as described in the amended certificate, it is held that the additional ground is acquired by him in trust for all.[182] The court said that "the amended location certificate presupposes and is based upon an original. Halleck was only able to file an amended location certificate by reason of the fact that the original had been filed by his grantors," [183] and accordingly he was seeking to reap a profit out of trust property. So an amended location of the major portions of the original location, made by one who

[178] JOHNSON v. YOUNG, 18 Colo. 625, 628, 629, 34 Pac. 173.

[179] Cheesman v. Shreeve (C. C.) 40 Fed. 787. In BEALS v. CONE, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92, a so-called amendment was called a relocation, and the location dated only from the new certificate. Prior to that time the ground had been located by others, so the relocation was ineffective.

[180] SHOSHONE MIN. CO. v. RUTTER, 87 Fed. 801, 31 C. C. A. 223. See Richards v. Wolfling, 98 Cal. 195, 32 P. 971; Johnson v. Young, 18 Colo. 625, 34 Pac. 173.

[181] Morrison's Mining Rights (13th Ed.) 135, 136. See Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240.

[182] HALLACK v. TRABER, 23 Colo. 14, 46 Pac. 110.

[183] 23 Colo. 15, 16, 46 Pac. 110.

has parted with title to the claim, cannot be recognized as securing any right to him, but may secure a benefit for his grantee, if he acted as the grantee's agent for the purpose.[184]

Acts Accompanying Relocation by Amendment.

With reference to relocation by amendment, just as with reference to relocation on forfeiture of the previous location, whatever is necessary to the success of the relocation must be done. If the boundaries are changed, then the location notice and markings should be changed to conform thereto, and all posts and monuments, as well as discovery workings, etc., made to comply with the local statutory requirements. As the amendment takes effect by relation, the discovery shaft, if already the required depth, need not be deepened, and in general, so far as the original location conformed to the law and is not necessarily altered by the amendment, no change need be made. Then the new location certificate must, of course, be executed with the same particularity in every detail that was required in the original.

THE FORFEITURE OF IMPROVEMENTS.

97. The relocator of a forfeited claim is held to be entitled to all improvements made by the original locator which have actually become a part of the land.

With reference to mining claims relocated in such a way as to forfeit the right of previous locators, it will often be of considerable importance to ascertain whether improvements are forfeited with the land. While the cases on the point are not numerous, the question is treated by the courts as one of whether the improvements have actually become a part of the land.‡ Ever since the early California case, in which it was held that "an engine and pump became a part of the realty, although located upon public land," [185] the identity of the improvement with the realty has seemed to be the test. The one who makes an agricultural land entry and the locator of a mining claim both know, when they annex personalty to the realty, that the outstanding legal title is in the United States, and consequently they are to be judged by the same rule of fixtures as is applied against the mortgagor in a state where the mortgagee has the legal title to the land. In such a state the secret intent of the mortgagor in putting

[184] Gray Copper Lode, 18 Land Dec. Dep. Int. 536.

‡ Compare the water right case of De Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001.

[185] MERRITT v. JUDD, 14 Cal. 59.

personalty on the land cuts no figure, and the sole question is whether, if there had been no mortgage, the courts would presume that they were improvements on the land.[186] For instance, an engine house with a 15 horse power engine, with boiler and attachments, fastened to the realty and used for the development of the mining claim, were held to be real property, belonging to a relocator, and not personalty, subject to execution for the previous locator's debts.[187] On the other hand, a cabin set on blocks, unattached to the soil, and a portable fence, resting wholly on the surface of the land, were held not to be part of the realty.[188]

The land department has ruled that old improvements obtained by relocation do not count as part of the $500 expenditure required before patent can be obtained.[189] Whether those old improvements will count for such purpose if the relocator actually pays the old locator for them, query? One who buys a mining claim may have the benefit of all expenditures made by his grantor;[190] but a relocator is not a grantee of the forfeiting locator, and it is difficult to see why paying the old locator for the improvements should enable them to count towards the $500, when paying a third person for work which he did on the claim for his own benefit does not count as part of the required annual expenditure.[191]

[186] Southbridge Savings Bank v. Mason, 147 Mass. 500, 18 N. E. 406, 1 L. R. A. 350; McConnell v. Blood, 123 Mass. 47, 25 Am. Rep. 12.

[187] ROSEVILLE ALTA MIN. CO. v. IOWA GULCH MIN. CO., 15 Colo. 29, 24 Pac. 920, 22 Am. St. Rep. 373. See accord as to fixtures on nonmineral public lands. Treadway v. Sharon, 7 Nev. 37; McKiernan v. Hesse, 51 Cal. 594; Collins v. Bartlett, 44 Cal. 371.

[188] Pennybecker v. McDougal, 48 Cal. 160.

[189] Yankee Lode Claim, 30 Land Dec. Dep. Int. 289; Russell v. Wilson Creek Milling Co., 30 Land Dec. Dep. Int. 322. See cases infra, p. 343, note 2.

[190] Tam v. Story, 21 Land Dec. Dep. Int. 440.

[191] LITTLE GUNNELL CO. v. KIMBER, 1 Morr. Min. Rep. (U. S.) 536, Fed. Cas. No. 8,402.

CHAPTER XVIII.

UNCONTESTED APPLICATION TO PATENT MINING CLAIMS.

THE FIVE HUNDRED DOLLARS EXPENDITURE.

98. Any qualified owner of a mining claim upon which he and his grantors have expended $500 worth of labor or have made $500 worth of improvements, of a kind that meets the requirements of annual labor or annual improvements, may apply for a patent for such claim.

By the express terms of the federal statute any qualified owner of a mining claim upon which $500 worth of labor has been expended or $500 worth of improvements has been made by himself or his grantors may apply for a patent therefor.[1] The first thing for an intending applicant for patent for a mining claim to do is to make sure that the required expenditure on the claim has taken place, or can be completed during the period of the publication of notice of the application for patent. He must bear in mind that improvements made by a former locator who has abandoned or forfeited the claim cannot be included in the amount,[2] though it seems that the applicant may count toward the $500 any work performed by himself in good faith on a placer prior to its location.[3] By the express terms of the statute a grantee applicant may count expenditures made by his grantor;[4] and

[1] Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429).

[2] Land Office Regulations, rule 158; Yankee Lode Claim, 30 Land Dec. Dep. Int. 289; Russell v. Wilson Creek Consolidated Mining & Milling Co., 30 Land Dec. Dep. Int. 322; Tough Nut No. 2 and Other Lode Mining Claims, 36 Land Dec. Dep. Int. 9; Aldeberan Mining Co., 36 Land Dec Dep. Int. 551.

[3] Clark v. Taylor, 20 Land Dec. Dep. Int. 455.

[4] Rev. St. U. S. § 2325 (U. S. Comp. St 1901, p. 1429).

he may do this even though he amends the location certificate so as to change the name of the claim.[5]

Although the federal statute seems by its terms to contemplate a separate application for patent for each claim, the land department has exercised its discretion by permitting one application to embrace several contiguous locations held in common; * and in the case of the application for patent for such a group or consolidation of claims the land department, reversing earlier rulings that $500 in improvements as a total for the so-called consolidated claim was enough, now requires proof that an amount equal to $500 for each location has been expended upon and for the benefit of the entire group.[6] Whatever work may be counted as part of the annual labor and improvements will count as part of the $500 expenditure required of an applicant for patent,[7] and discovery work will also count. "The expenditures required may be made from the surface, or in running a tunnel, drifts, or cross-cuts for the development of the claim. Improvements of any other character, such as buildings, machinery, or road ways, must be excluded from the estimate unless it is shown clearly that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., are essential to the practical development of, and actually facilitate the extraction of mineral from, the claim." [8] A stamp mill, used exclusively in connection with the claim, does not, however, meet this test in the eyes of the land department.[9]

The $500 expenditure should be complete before the application for patent; but a completion before the expiration of the period of publication of the application for patent will do.[10]

[5] Tam v. Story, 21 Land Dec. Dep. Int. 440.

* A group of contiguous claims may be included in one application, even though some are lodes and some are placers. Mayflower Gold Mining Co., 29 Land Dec. Dep. Int. 7. Claims which merely corner on one another are not contiguous. HIDDEN TREASURE CONSOL. QUARTZ MINE, 35 Land Dec. Dep. Int. 485.

[6] Land Office Regulations, rule 48. See opinion, 27 Land Dec. Dep. Int. 91. The expenditure of $500 claimed for each location must come after such location is made. Aldeberan Mining Co., 36 Land Dec. Dep. Int. 551.

[7] Copper Glance Lode, 29 Land Dec. Dep. Int. 542.

[8] Land Office Regulations, rule 157.

[9] Monster Lode Mining Claim, 35 Land Dec. Dep. Int. 493. In case of a lode claim and of a mill site claim in the same survey, the expenditure of $500 upon the lode claim must be shown. Land Office Regulations, rule 159.

[10] NIELSON v. CHAMPAGNE MINING & MILLING CO., 29 Land Dec. Dep. Int. 491. Whether $500 has been expended in work or improvements is for the land department to decide, and cannot be considered in an adverse suit. Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833; Stolp v. Treasury Gold Min. Co., 38 Wash. 619, 80 Pac. 817.

THE PATENTING OF LODE CLAIMS.

99. The steps in the patenting of lode claims are: (a) The survey; (b) the filing of the application papers; (c) the filing of the final papers; (d) the issuance of patent.

SAME—THE SURVEY REQUIREMENTS.

99a. The order of proceeding for survey consists of (1) the selection by the applicant of a deputy mineral surveyor, whose appointment to make the survey the applicant will request; (2) the application to the surveyor general for an order of survey: (3) the order of the surveyor general that a survey be made by the deputy mineral surveyor selected by the applicant; (4) the survey by the deputy, including the preparation by him of the field notes and of a preliminary plat of the property; and (5) the approval of the survey by the surveyor general, including the preparation and delivery to the deputy mineral surveyor for the applicant, or to the applicant himself of the approved field notes and copies of the final plat.

Selection of Deputy Mineral Surveyor.

The next thing for an applicant for patent to do in the case of lode claims, after finding that the $500 has been expended on the claim, or will be so expended in the proper time, is to select a deputy mineral surveyor of his district to make the necessary survey when ordered to do so by the surveyor general. The applicant and the deputy mineral surveyor make their own bargain about charges, and the United States assumes no responsibility for the payment of the charges.

As the deputy mineral surveyor will be ordered to survey according to the recorded location certificate, he should be consulted as to the desirability of recording an amended location certificate. Some expense and considerable delay in the application, and some possibly serious results in adverse suits, may thus be avoided.†

Application for Order for Survey.

Having arranged with a deputy mineral surveyor, and put the record in the right shape by amendment, the claimant makes application to the surveyor general of his district for an order of survey.[11] This application must state the name of the claimant in full, the name of each location for which patent is to be asked, the name of the land and mining districts in which the claim is located, and the name of the United States deputy mineral surveyor to whom the order of survey is to is-

† Golden Rule, etc., Co., 37 Land Dec. Dep. Int. 95.

[11] Applications for survey of claims in Arkansas must be made to the Commissioner of the General Land Office. Land Office Regulations, rule 34.

sue. The application must be accompanied by a certified copy of the recorded location certificate or amended location certificate. The signature to this application must be in the hand-writing of the claimant, his agent, or attorney.[12] In the application, the applicant should also notify the surveyor general that he has deposited, for office fees of the surveyor general, the amount estimated by the latter in the circular issued by him to applicants.[13] This amount of fees must be deposited to the credit of the treasurer of the United States with an assistant United States treasurer or with some designated depository among the national banks in the district. On making the deposit of fees the claimant receives triplicate certificates of deposit. He sends the original of these certificates to the Secretary of the Treasury in Washington, and the duplicate to the surveyor general to whom he has applied for a survey, but retains the triplicate himself as a receipt. The land department for a long time held that the fees would in no case be refunded, but that, if not expended on the application, they might be applied on other surveys for the applicant.[14] Recently, however, the land department has in part overruled that holding, and has announced that section 2402, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1478), authorizes repayment to the depositors of the unearned portion of a mining survey deposit.‡

The Order for Survey.

Upon the application, after proof of the deposit of fees, the surveyor general gives the claim a survey number, and thereafter, unless events compel its abandonment, the survey is known in his office by that survey number. Thereupon he issues an order of survey to the United States deputy mineral surveyor designated by the applicant. This order of survey is accompanied by a copy of the location or amended location certificate in conformity with which the survey is to be made, and issues as a matter of course. The remedy for a refusal to issue it is by appeal to the Commissioner of the General Land Office, and from him to the Secretary of the Interior.

The first applicant for survey of the ground has priority of survey. An order to survey the same ground will not issue until the first sur-

[12] Tipton Gold Mining Co., 29 Land Dec. Dep. Int. 718.

[13] In the case of group applications, one location pays the regular deposit fee, and each of the other locations pays a slightly smaller deposit. The surveyor general's circular of estimated fees will state the amounts.

[14] Elijah M. Dunphy, 8 Land Dec. Dep. Int. 102.

‡ GOLDEN EMPIRE MIN. CO., 36 Land Dec. Dep. Int. 561. In that case however the land department, impelled thereto by another statute, refused a request of the depositor to have the unearned portion of a mining deposit credited to another applicant for an order of survey.

vey is perfected and the plats delivered, unless the first applicant is shown, after notice to him, to have abandoned the survey or to be deferring it for vexatious purposes.

The Survey.

The United States deputy mineral surveyor must go on the ground personally and make the survey in accordance with the survey instructions of the land department.** He is expected to survey according to the lines of the original survey, and no serious departure from those lines will be allowed by the surveyor general, unless an amended location certificate is recorded and an amended order of survey, based on a certified copy of the amended certificate, is issued. For such amended survey order and the additional work in the office an extra charge is made by the surveyor general, and if new ground is included by the amended location certificate, a new survey number will be given in the amended survey. It is the business of the surveyor to make the end lines of the claim parallel, to conform the claim to the legal limits, and, where the rights of third persons are not injuriously affected thereby, to swing the claim so that it will lie lengthwise along the vein. It is for the surveyor general to determine whether the changes so made are important enough to require an amended location certificate. Where a group of claims is included in one application, the boundary lines of each location must be run.[15]

The Surveyor's Field Notes.

The United States deputy mineral surveyor takes notes of his survey, giving the description of the claim by courses and distances, tying it to natural objects and permanent monuments, showing its conflict with other claims, and stating the nature and value of the work done and improvements made upon the claim. These notes, called his "field notes," contain a certificate that the value of the work done and improvements made on the claim, or on each claim in the case of a group, is not less than $500, and are sworn to by the United States deputy mineral surveyor. These field notes, and a plat of the property which helps to explain them, are sent by the deputy surveyor to the surveyor general.

The Approval of Survey.

The surveyor general reviews the field notes, and compares the deputy surveyor's plat with the surveyor general's official connected plat.[16]

** The deputy mineral surveyor must execute all surveys in his own proper person under penalty of having the surveys rejected if he does not do so. Homer Santee, 36 Land Dec. Dep. Int. 286.

[15] ARGILLITE ORNAMENTAL STONE CO., 29 Land Dec. Dep. Int. 585.

[16] "The United States surveyor general for each state keeps what is called

If any error is found, the field notes and the surveyor's plat are returned to the deputy mineral surveyor for correction.[17] When, at last, the field notes and the surveyor's plat are found to be correct, the final plat is made up by the surveyor general, and the survey is approved in writing by him.

The surveyor general prepares four copies of the plat and one copy of the original field notes.[18] He retains in his office one plat and the original field notes,[19] sends one copy of the final plat to the register of the local land office in which the patent application must be filed, and sends two other copies of the plat, with a copy of the approved field notes, to the deputy surveyor for the claimant, or to the claimant himself. Attached to each copy of the final plat is the surveyor general's certificate that the requisite $500 worth of expenditure for labor and improvements has taken place on each location.[20] The latter certificate is not binding on the land department, but establishes prima facie the

the 'connected plat,' importing to show every approved survey in relation to each other on its proper section. Where the first survey on any section made an erroneous call for a government corner, say 1,300 feet, when the proper measurement was 1,600 feet, it was platted as 1,300 feet distant. A second survey, correctly measured, would show a certain distance from the corner, but, of course, would not tie to the first survey as traced on the connected plat. Instead of recognizing the error as soon as discovered, the department persistently for years compelled each successive applicant to treat the first survey as correct and tie to it accordingly. This resulted in the issue of patents which really overlapped prior surveys; but the field notes appeared clear of any overlap. Conversely, an overlap and consequent exclusion would appear where there was in fact no conflict with any prior survey. It was to remedy this state of affairs that Rev. St. U. S. § 2327 (U. S. Comp. St. 1901, p. 1431), was amended in 1904." Morrison's Mining Rights (13th Ed.) 56, 57.

[17] The applicant cannot be prejudiced by the failure of the surveyor to include all the land called for by the location notice, if, on the discovery of the mistake, a resurvey promptly takes place. Basin Mining & Concentrating Co. v. White, 22 Mont. 147, 55 Pac. 1049. For the procedure in case a mineral surveyor makes an inaccurate survey and after due notice fails to rectify it, see Golden Rule, etc., Co., 37 Land Dec. Dep. Int. 95.

[18] Land Office Regulations, rule 34.

[19] Land Office Regulations, rule 34.

[20] This certificate may be made within the 60 days' publication of notice of application for patent (Land Office Regulations, rule 48; Rev. St. U. S. § 2325 [U. S. Comp. St. 1901, p. 1429]), and will be accepted in the patent proceedings, even though not filed until after the expiration of the publication period (NIELSON v. CHAMPAGNE MINING & MILLING CO., 29 Land Dec. Dep. Int. 491). Accordingly the improvements may be completed within the period. Id The surveyor general may obtain his information as to the value of labor and improvements from his own observations, or those of his deputy, or from the testimony of persons having knowledge of the subject. United States v. King, 83 Fed. 188, 27 C. C. A. 509.

mineral character of the land, the amount of the work, and the correctness of the survey.[21]

The transcript of the field notes, which, with the two copies of the final plat, is sent to the deputy surveyor for the claimant, or to the claimant himself, is known as the "approved field notes." These copies of plats and approved field notes the deputy surveyor, who is forbidden by statute and by land-office rule from acting as attorney in mineral claims,[22] turns over to the applicant's attorney, who is to take charge of the actual application for a patent.

Promptly upon the approval of this survey the surveyor general must advise the land department at Washington and the appropriate local land office of the fact of survey.[23]

SAME—THE FIRST SET OF APPLICATION PAPERS.

99b. The first set of papers filed by the applicant includes (6) three copies of the notice of application for patent posted on the claim, one copy having attached an affidavit showing that the notice and a copy of the final plat were posted in a conspicuous place on the claim; (7) a copy of the final plat; (8) a copy of the approved field notes; (9) the application for patent; (10) the proof of citizenship by affidavit of the applicant, and, if the applicant is a corporation, by a certified copy of the corporation's charter or certificate of incorporation; (11) the publisher's agreement, which is the contract of the proper newspaper publisher to publish the notice of application for patent and to hold the applicant alone responsible for the charges of publication; (12) a certified copy of each location notice; and (13) the abstract of title of each claim or equivalent evidence of title in the applicant.

The filing of these papers is at once followed by the posting of the notice and plat in the local land office and by the publication of the notice of application for patent. The notice of application for patent must remain posted on the claim and in the land office, and must be published for the full period of 60 days, and within that period adverse claims may be filed.

The Notice of Application for Patent.

The first step in the land office proceedings is to prepare and post on the mining location sought to be patented a notice of the intention

[21] UNITED STATES v. IRON SILVER MIN CO., 128 U. S. 673, 685, 9 Sup. Ct. 195, 32 L. Ed. 571; Russell v. Maxwell Land Grant Co., 158 U. S. 253, 15 Sup. Ct. 827, 39 L. Ed. 971. See United States v. King, 83 Fed. 188, 27 C. C. A. 509; United States v. King, 9 Mont. 75, 22 Pac. 498.

[22] Rev. St. U. S. § 452 (U. S. Comp. St. 1901, p. 257); Land Office Regulations, rule 128. See Lavagnino v. Uhlig, 26 Utah, 1, 71 Pac. 1046, 99 Am. St. Rep. 808. But see Hand v. Cook (Nev.) 92 Pac. 12.

[23] Land Office Regulations, rule 37.

to apply for a patent.‡ This notice, of which at least four copies are prepared, must give the date of posting, the name of the claimant, the name of the claim, the number of the survey, the mining district and county,[24] and the names of adjoining and conflicting claims as shown by the plat survey.[25] Though the rules do not expressly call for it, because one of the certified final plats must be posted on the claim with the notice of application for patent, a description of the claim by metes and bounds will naturally be added.

The posting must be in some conspicuous place upon the claim,** and must be done in the presence of at least two disinterested credible witnesses, who make affidavit to the fact. This affidavit constitutes the proof of posting the notice and plat, and attached to it and made a part of it is a second copy of the posted notice of application for patent. The third copy is signed by the applicant, to be posted later in the land office. The fourth copy is to go to the publisher.

The Application for Patent.

The next thing prepared is the application for patent itself. This is "the sworn statement of the claimant that he has the possessory right to the premises therein described in virtue of compliance by himself (and by his grantors if he claims by purchase) with the mining rules, regulations, and customs of the mining district, state, or territory in which the claim lies, and with the mining laws of Congress, such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent." [26]

That statement would call for everything contained in the notice of application for patent, and, in addition, a short history of the claim, a description of the improvements thereon, a reference to the approved field notes for a fuller description of the claim and the improvements, and a statement that the notice and plat were posted.[27] Where

‡ Because all the copies of the notice are prepared at one time, and because the one to be published must state that the application for patent has been made (Rev. St. U. S. § 2325 [U. S Comp. St. 1901, p. 1429]), all the notices usually read "has applied for patent." For the notice posted on the claim "is applying for patent" would seem to be the proper wording.

[24] A mistake as to county has been held to be fatal. Wright v. Sioux Consolidated Mining Co., 29 Land Dec. Dep. Int. 154, 289.

[25] Land Office Regulations, rule 39. Only those shown by the plat need be given. Lizzie Elison et al., 29 Land Dec. Dep. Int. 250.

** The statute contemplates that the notice and the plat shall be prominently and openly displayed in such a position that they can, without being removed, be conveniently inspected and read by the public. Tom Moore consolidated Mining Co. v. Nesmith, 36 Land Dec. Dep. Int. 199.

[26] Land Office Regulations, rule 41.

[27] Unless the notice and plat are posted before the application for patent

several contiguous claims are covered by one application, the land department should be fully advised in the application of the total number of claims, their relative situations, and, where a common improvement is claimed, the place of that improvement. These things should all be delineated properly on an authenticated map or diagram.[28]

Proof of Citizenship.

The application should also state the citizenship of the applicant,[29] though it is usual to furnish a separate affidavit about that. "In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed," [30] to prove citizenship. If the applicant is a corporation of a state other than that where the mining claim is situated, it must prove that it has complied with the laws of the latter state as to foreign corporations.[31] In the case of an individual, his own affidavit of citizenship is enough.[32] "In case an applicant has declared his intention to become a citizen, or has been naturalized, his affidavit must show the date, place, and court before which he declared his intention, or from which his certificate of citizenship issued, and present residence." [33]

By Whom and before Whom the Oath to the Application may be Taken.

The application for patent and affidavits required of the applicant must be verified under oath before an officer authorized to administer oaths in the land district where the claim is situated. If the application is not sworn to before such an officer, the local officers do not get jurisdiction of the proceedings [34] unless the case is one under the amendment of 1882. By the amendment of 1880 to Rev. St. U. S. § 2325 (U.

is filed, the application is held by the land department to be void ab initio. DE LONG v. HINE, 9 Copp's L. O. 114.

[28] James Carretto and Other Lode Claims, 35 Land Dec. Dep. Int. 361. Claims which merely corner on one another are not contiguous, and hence not entitled to be included in one application. HIDDEN TREASURE CONSOL. QUARTZ MINE, 35 Land Dec. Dep. Int. 485.

[29] A corporation's notice of application for patent need not, however, designate the state or territory where it is incorporated. Holman v. Central Montana Mines Co., 34 Land Dec. Dep. Int. 568.

[30] Land Office Regulations, rule 66.

[31] Alta Mill Site, 8 Land Dec. Dep. Int. 195, 197. The land department regards a corporation as a citizen of the State in which it is created. Louisville Gold M. Co. v. Hayman Min. & T. Co., 33 Land Dec. Dep. Int. 680.

[32] Rev. St. U. S. § 2321 (U. S. Comp. St. 1901, p. 1425)

[33] Land Office Regulations, rule 68.

[34] North Clyde Quartz Mining Claim and Mill Site, 35 Land Dec. Dep. Int. 455. The fact that the application is sworn to before a notary who is secretary of the corporation applicant is not enough to require a new application and affidavit, unless the notary is also a stockholder or otherwise beneficial-

S. Comp. St. 1901, p. 1429), it is provided that, where the claimant for a patent is not a resident of or within the land district, the application and the affidavits may be made by his authorized agent conversant with the facts.[35] Also by the amendment of 1882 to Rev. St. U. S. § 2321, it is provided that applicants for mineral patents residing out of the district may make oath of citizenship before the clerk of any court of record, or before any notary public of any state or territory.[36] Within the district the statute permits affidavits to be verified before any officer authorized to administer oaths.[37] If they are verified before a justice of the peace, a county clerk's certificate of the justice's official character should be attached.

Where the application is verified by an agent, his written power of attorney, reciting the reason for his appointment, should be filed with the first set of papers.[38] Where a corporation applies for patent, the safest practice is to have it execute a power of attorney to some resident agent; for the affidavit of its president or other officer authorized to make the application may be invalid for various reasons.[39] If, however, an officer acts, a resolution authorizing him to do so should be passed by the board of directors, and a copy, certified by the proper corporate officers under the corporate seal, should be sent in with the first set of application papers.

Where several co-owners are making application for patent, the application and all affidavits, except that of citizenship, may be sworn to by one in behalf of all.[40] Each must make his own affidavit of citizen-

ly interested in the corporation. MILFORD METAL MINES INV. CO., 35 Land Dec. Dep. Int. 174. No effect will be given to the subsequent filing of a properly verified affidavit. El Paso Brick Co., 37 Land Dec. Dep. Int. 155.

[35] 21 Stat. 61, c. 9, § 1. This has been held to apply to a case of temporary absence. W. B. Frue et al., on the Topsey Mine, 7 Copp's L. O. 20. But if the resident applicant is within the land district he cannot have the affidavits executed by an agent, and if he does it is fatal to the application. Rico Lode, 8 Land Dec. Dep. Int. 223; CROSBY AND OTHER LODE CLAIMS, 35 Land Dec. Dep. Int. 434.

[36] 22 Stat. 49, c. 106, § 2 (U. S. Comp. St. 1901, p. 1425).

[37] Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429).

[38] Every affidavit by the agent should recite the nonresidence of the claimant, the residence of the agent, and the fact that the agent is conversant with the facts.

[39] For instance, the land department refuses to receive an affidavit sworn to by the corporation's president outside of the state which incorporated the corporation. LOUISVILLE GOLD MINING CO. v. HAYMAN MINING & TUNNEL CO., 33 Land Dec. Dep. Int. 680.

[40] Ayers v. Daly, 3 Copp's L. O. 196. "When a claim is owned in common, it is sometimes convenient to have a quitclaim executed by the others to one of their number, placing the title for the time being in his name; the grantors securing themselves by title bond or otherwise." Morrison's Mining Rights (13th Ed.) 449.

ship, unless as an association of persons unincorporated they appear by their duly authorized agent.[41] "Any party applying for patent as trustee must disclose fully the nature of the trust and the name of the cestui que trust; and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry."[42]

The Publisher's Agreement.

In addition to the proof of citizenship, an agreement with the publisher of the newspaper, to be designated by the register of the local land office as published nearest the claim,[43] that he will hold the applicant alone responsible for the charges of publication, must be furnished.[44] The maximum newspaper charges are fixed by rule,[45] and enforced by requiring a newspaper to be a reputable newspaper before it can be selected, and by declaring that a newspaper charging excessive prices is not reputable.[46]

The selection of the newspaper being in some instances discretionary with the register,[47] the applicant, in case of doubt, finds out in advance what paper to get an agreement with. Where there are several in the same town, the register usually selects the one the attorney suggests. The nearest newspaper by the most usually traveled route seems the land office rule; but the nearest in a direct line is probably what was intended,[48] and, as the register's discretion is subject to review on appeal, should, it seems, be insisted upon in case of doubt.[49]

[41] Land Office Regulations, rules 66, 67.

[42] Land Office Regulations, rule 54. A citizen of the United States, acting as trustee for an alien corporation, cannot make a mineral entry for the benefit of such corporation. CAPRICORN PLACER, 10 Land Dec. Dep. Int. 641. And if an entry is canceled for that reason, where the fact that the corporation was alien was suppressed, repayment will not be allowed. MARY McM. LATHAM, 20 Land Dec. Dep. Int. 379.

[43] Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429); Condon v. Mammoth Mining Co., 14 Land Dec. Dep. Int. 138.

[44] Land Office Regulations, rule 45.

[45] Land Office Regulations, rule 89.

[46] CHAS. W. STEELE, 3 Land Dec. Dep. Int. 115.

[47] Bretell v. Swift, 17 Land Dec. Dep. Int. 558; Instructions, 26 Land Dec. Dep. Int. 145.

[48] See HAYNES v. BRISCOE, 29 Colo. 137, 67 Pac. 156, holding similar language in the forfeiture to co-owner statute to mean the nearest in a direct line.

[49] Tough Nut and Other Lode Claims, 32 Land Dec. Dep. Int. 359; Northern Pac. R. Co., 32 Land Dec. Dep. Int. 611.

Abstracts of Title.

The last things to furnish are a certified copy of each location notice and an abstract of title of each claim. The legal custodian of the records of transfers or the duly authorized abstracter of titles must certify to the abstract, and must state that no conveyances affecting the title to the claim or claims in question appear of record other than those set forth.[50] Abstracters must attach to each abstract certified by them the certificate of authority called for by rule 42.[51]

The land office requirement that the abstract of title shall be brought down to the date of filing the application for patent [52] has been taken to mean to include the date of application, and to meet that situation it was formerly the practice to furnish certified copies of the location certificates at the time the application for patent is filed, and a few days later to send on the abstract of title certified to a date after the date of the application for patent.[53] Under rule 42 of the Land Office Mining Regulations, as amended December 28, 1907, that practice would now seem to be compulsory.

The record title shown in the abstract starts, of course, with the original location certificate, and the object of requiring the abstract is that the government may be assured that the applicant for patent is in lawful possession of the claim.[54] It should be borne in mind that "each member of an association of persons seeking to acquire the legal title to lands under the mining laws must own an interest in the claim, or in each claim of a group embraced in the joint application for patent." [55]

Titles Based on Adverse Possession.

In those cases coming under Rev. St. U. S. § 2332 (U. S. Comp. St. 1901, p. 1433), which statute permits evidence of adverse possession for the local limitation period to establish a right to a patent, a location certificate, copies of conveyances, or abstracts of title need not be furnished; but instead the applicant "will be required to furnish a duly certified copy of the statute of limitation of mining claims for the state or territory, together with his sworn statement, giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuance of his possession of the mining ground covered by his application, the area thereof, the nature and extent of the mining

[50] Land Office Regulations, rule 42, as amended December 28, 1907.

[51] Id. [52] Id.

[53] Morrison's Mining Rights (13th Ed.) 435.

[54] Daniel Cameron, 4 Land Dec. Dep. Int. 515, 516. The statutes contemplate that applicants for mineral patent shall have, at the date of filing the application, full possessory right or title to the claim for which patent is sought. Lackawanna Placer Claim, 36 Land Dec. Dep. Int. 36.

[55] GOLDEN CROWN LODE, 32 Land Dec. Dep. Int. 217, 219.

that has been done thereon, whether there has been any opposition to his possession, or litigation with regard to his claim, and, if so, when the same ceased, whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides which he may desire to submit in support of his claim." [56]

He must also file certificates from the courts having jurisdiction of mining cases in his judicial district to the effect that no litigation is pending, or during the limitation period has been pending, affecting the title to the claim, or any part thereof, other than such litigation as has finally been decided in favor of the claimant.[57] He must further support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of disinterested persons.[58]

Filing the Application.

The application papers having been prepared as above, they are forwarded, with the filing fee, to the local land office.[59] They consist of the application for patent; a copy of the final plat; the approved field notes; the proof of posting the notice of application and the copy of the final plat on the claim, the proof being attached to a copy of the notice; a copy of the notice of application for patent, to be posted in the land office; the proof of applicant's citizenship; the publisher's agreement; a copy of the notice of application for patent, to be given the application number and returned by the register to be published in the newspaper designated by him; and a certified copy of the location certificate, to serve for a few days until the abstract of title can be brought down to include the date of the filing of the application in the land office,†† and be sent to the land office.[60]

[56] Land Office Regulations, rule 75.

[57] Land Office Regulations, rule 76.

[58] Land Office Regulations, rule 77. While the statute and the rule do not dispense with the annual labor requirement, they do dispense with the need of record evidence of location and with the need of explaining the absence of such evidence. Capital No. 5 Placer Mining Claim, 34 Land Dec. Dep. Int. 462.

[59] If the wrong local land office is resorted to, steps taken there are absolutely ineffective, as that office has no jurisdiction. FREDERICK A. WILLIAMS, 17 Land Dec. Dep. Int. 282. Where land sought to be patented lies in two land districts, entry will be allowed only for the land in the district where the patent proceedings are taken. ALASKA PLACER CLAIM, 34 Land Dec. Dep. Int. 40. In such case an application for patent should be made in each district.

†† A new system of numbering went into effect July 1, 1908. Methods of keeping Records and Accounts Relating to the Public Lands, 37 Land Dec. Dep. Int. 45–60.

[60] While one application for patent is pending, another for the same ground,

Jurisdictional Matters.

By the federal statute it is made the duty of the register, upon the filing of the foregoing first set of papers, to "publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period." [61] These two notices and the one posted on the claim constitute together that notice to the world which the land department regards as essential to its jurisdiction, and if any one of these notices is insufficient they are all rendered valueless.[62] The application for patent prevents any other application for patent for the ground affected while the application is pending,[63] except that a successful adverse claimant may patent the conflict area awarded to him by the court. The patent proceeding is in the nature of a proceeding in rem and is binding upon all the world.[64]

The publication of the notice of application for patent must be, as we have seen, for 60 days. That means 61 consecutive insertions in a daily newspaper and 9 in a weekly.[65] Within the 60 days' publication,

or part thereof, will not be received. STEMMONS v. HESS, 32 Land Dec. Dep. Int. 220. But where the applicant negligently delays making entry, and an adverse relocation is made, the department will cancel the application. CLEVELAND v. EUREKA NO. 1 GOLD MINING & MILLING CO., 31 Land Dec. Dep. Int. 69.

[61] Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429).

[62] GROSS v. HUGHES, 29 Land Dec. Dep. Int. 467. Southern Cross Gold Min. Co. v. Sexton, 31 Land Dec. Dep. Int. 415. If the notice posted in the land office is interrupted by the closing of the office for purposes of the removal of the office, the time to file adverse is simply extended the number of days the office is closed. Tilden v. Intervener Mining Co., 1 Land Dec. Dep. Int. 584.

[63] Land Office Regulations, rule 44. See note 60, supra.

[64] HAMILTON v. SOUTHERN NEV. GOLD & SILVER MIN. CO. (C. C.) 33 Fed. 562. "The proceedings before the land department are judicial, or quasi judicial, at least. The publication is process. It brings all adverse claimants into court, and, failing to assert their claims, they stand, at the expiration of the notice, in default. True, no adverse claimant or supposed claimant may be named in the notice, and no process may be served personally upon him; but that does not avoid the notice, or weaken its sufficiency to bring such party into court. This is not the only case known to the law in which parties not named in a notice are by it brought into court and their rights adjudicated. Unknown heirs are often thus brought in by a published notice. Tax proceedings, condemnations of rights of way, admiralty cases, and many others present familiar illustrations." Brewer, J., in WIGHT v. DUBOIS (C. C.) 21 Fed. 693–695. See Kannaugh v. Quartette Min. Co., 16 Colo. 341, 27 Pac. 245; Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015.

[65] Land Office Regulations, rule 45.

all adverse claims must be filed, or they are barred.[66] That means that they must be filed within the 60 days, computed by excluding the first day of publication of the notice merely.[67] The time for filing adverse cannot be extended,[68] though protest may be made at any time prior to the issuance of patent.[69] Both adverse claims and protests, and their effect on patent proceedings, are considered in the next chapter; but here it will be assumed that none is filed.

SAME—THE FINAL SET OF APPLICATION PAPERS.

99c. The second and final set of papers filed by the applicant for patent in an uncontested application includes: (14) Proof by affidavit that the plat and notice of application remained conspicuously posted during the publication period; (15) proof by the publisher's affidavit that the notice was duly published; (16) proof by affidavit of the items of the application expenses; and (17) the application to purchase the land, accompanied by the purchase money.

SAME—ENTRY AND PATENT.

99d. Upon the filing of the final application papers the register and receiver of the local land office at once forward a copy of (17) supra to the chiefs of field division of special agents, and the register makes (18) his certificate that the notice of application and the plat remained posted in the land office during the publication period. Upon a favorable report from the chiefs of field division, the register makes (19) his certificate of entry. The receiver of the local land office thereupon issues (20) his duplicate receiver's receipts.

The complete record is then forwarded to the Commissioner of the General Land Office, and, if everything is regular, (21) a patent issues in due course.

The publication period being complete, and no adverse or protest being filed, the second set of application papers is made up. If too great

[66] The adverse claimant, who has not filed an adverse claim, can attack the patent only for reasons which a court of equity might allow to be urged against a judgment at law. Golden Reward Min. Co. v. Buxton Min. Co. (C. C.) 79 Fed. 868.

[67] Bonesell v. McNider, 13 Land Dec. Dep. Int. 286; Waterhouse v. Scott, 13 Land Dec. Dep. Int. 718.

[68] DAVIDSON v. ELIZA GOLD MINING CO., 28 Land Dec. Dep. Int. 224; Gross v. Hughes, 29 Land Dec. Dep. Int. 467. No adverse claim being filed, it will conclusively be presumed that none exists. Lily Min. Co. v. Kellogg, 27 Utah, 111, 74 Pac. 518; Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429).

[69] Land Office Regulations, rule 53.

delay takes place in filing them, entry will be refused.[70] This set consists of the affidavit of the claimant that the plat and the notice posted on the claim remained conspicuously posted thereon during the 60 days of publication, the affidavit giving the dates;[71] the publisher's sworn statement that the notice was published for the statutory period, the statement giving the first and last days of such publication;[72] the claimant's sworn statement of all charges and fees paid by him for publication and surveys, and of all fees and money paid the register and receiver of the land office; and the application to purchase, describing the claim and excluded areas, and accompanied by the purchase money, which in lode claims is $5 for each acre or fractional part of an acre.

Entry.

These papers being received, the register at once forwards a copy of the application to purchase to the chiefs of field division of special agents. He then satisfies himself that the law has been complied with, and makes his certificate that the plat and the notice of application were posted and remained posted conspicuously in the land office during the period of publication. If the chiefs of field division of special agents report favorably, the register then makes his final certificate of entry in favor of the applicant. The receiver thereupon issues his duplicate receipts for the purchase money, filing the original with the papers and sending the duplicate to the claimant, and the claim is thereupon regularly entered. The duplicate receiver's receipt must be given back before the patent is delivered, and it is customary to record it at once. The proceedings after entry being merely ministerial, the receiver's receipt in most cases is the equivalent of patent.[73]

After entry, or before entry if the chiefs of field division of special

[70] Copper Bullion and Morning Star Lode Mining Claims, 35 Land Dec. Dep. Int. 27, where entry was denied even after the withdrawal of protest, because more than two years elapsed between end of publication period and attempt by applicant to complete proceedings.

[71] Land Office Regulations, rule 51. Personal observations at various times and such information as a reasonably cautious man would accept are sufficient knowledge to justify the affidavit. Bright v. Elkhorn Mining Co., 9 Land Dec. Dep. Int. 503.

[72] Land Office Regulations, rule 51.

[73] Aurora Hill Con. Min. Co. v. Eighty-Five Mining Co. (C. C.) 34 Fed. 515. Its possession is evidence of the claimant's good faith, where that is material. Valcalda v. Silver Peak Mines, 86 Fed. 90, 29 C. C. A. 591. It gives a vested right to a patent, which right can be divested only on proper notice. REBECCA GOLD MIN. CO. v. BRYANT, 31 Colo. 119, 71 Pac. 1110, 102 Am. St. Rep. 17. The receiver's receipt is so far the equivalent of patent that it has been held that a vendee of a mining claim for which a receiver's receipt has been issued to the vendor cannot refuse the

agents report unfavorably, the complete record is forwarded by the local land officers to the Commissioner of the General Land Office, who may have a special agent go upon the land and report, and if everything is regular a patent issues in due course. If irregularities are discovered, the applicant is given notice to correct them. Occasionally the receiver's receipt is recalled and the entry canceled. This may be done any time before patent issues,[74] after notice to the applicant and opportunity to him to be heard.[75] Matters adjudicated by the final entry are as conclusive from collateral attack as though patent had issued.[76]

Names Inserted in Patent.

Where an applicant conveys away his interest after application, the land department refuses to consider the transfer and issues patent in the name of the applicant, on the theory that the title inures to the transferee.[77] If, however, the land department has knowledge of a transferee's or mortgagee's conveyance from an entryman, however that knowledge is acquired, the transferee or mortgagee is entitled to notice of any action by the government looking to a cancellation of the entry and if the notice is not given the entry will be reinstated.[78]

Where an applicant dies before entry, the land office, on proof of that fact, will issue the receiver's receipt to "the heirs of" the applicant, or correct it if issued in the name of the applicant.[79] Where he dies after entry, he is regarded as having title, and the patent issues in his name. After the entry the government holds the legal title in trust for the entryman,[80] and that equitable interest of the entryman passes to his heir.

vendor's deed merely because the vendor has not received his patent. Bash v. Cascade Min. Co., 29 Wash. 50, 69 Pac. 402, 70 Pac. 487.

[74] Orchard v. Alexander, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737.

[75] REBECCA GOLD MIN. CO. v. BRYANT, 31 Colo. 119, 71 Pac. 1110, 102 Am. St. Rep. 17; Mineral Farm Min. Co. v. Barrick, 33 Colo. 410, 80 Pac. 1055.

[76] BROWN v. GURNEY, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717.

[77] Land Office Regulations, rule 71; Liddia Lode Mining Claim, 33 Land Dec. Dep. Int. 127. See Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36.

[78] ROMANCE LODE MINING CLAIM, 31 Land Dec. Dep. Int. 51.

[79] TRIPP v. DUMPHY, 28 Land Dec. Dep. Int. 14.

[80] Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; Hamilton v. Southern Nev. Gold & Silver Min. Co. (C. C.) 33 Fed. 562. An entry and certificate of purchase, while outstanding, are equivalent to patent. Aurora Hill Con. Min. Co. v. Eighty-Five Mining Co. (C. C.) 34 Fed. 515.

THE PATENTING OF MILL SITES.

100. Mill sites patented with lodes are included in the same survey and in the various lode application papers. The mill site must be carefully described in the papers, and a copy of the notice and one of the plats must be posted on the mill site, as well as upon the lode claim. Proof by affidavit must be furnished of the nonmineral character of the ground.

Mill sites patented separately from lode claims are patented in exactly the same way as lode claims, except that proof by affidavit must be furnished of the nonmineral character of the ground and of the mill site use to which the ground is being put.

When a mill site patent is applied for in connection with a lode, the application may be at the time of the application for patent of the lode or after such patent.[81] Where both are applied for at the same time, a survey of both is called for at the same time, and a certified copy of the mill site location certificate, as well as of the lode location certificate, is furnished. The mill site is described in the plat and field notes by the same survey number as the claim; but the claim then has the letter "A" after the survey number and the mill site has the letter "B." For instance, if the survey number is "37," the claim is "Sur. No. 37A," and the mill site "Sur. No. 37B." [82] In the posted and published notices of the application for patent, as much care must be taken to describe the mill site as to describe the lode claim, the plat and field notes must give the course and distance from a corner of the mill site to a corner of the lode claim, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill site, as well as upon the lode claim, for the statutory period.[83]

Where a mill site used in connection with a lode for mining or milling purposes is sought to be patented after the lode claim has gone to patent,[84] or where a mill site claim, independent of any lode ownership, is sought to be patented, the applicant for patent must proceed precisely in the way required for lode mining patents.

The purchase price for mill sites is the same per acre as for lode

81 Eclipse Mill Site, 22 Land Dec. Dep. Int. 496.

82 Land Office Regulations, rule 63.

83 Id. If posting on the mill site is neglected, republication will be required. Silver Star Mill Site, 25 Land Dec. Dep. Int. 165; Peacock Mill Site, 27 Land Dec. Dep. Int. 373.

84 "It is generally advisable to apply for a mill site in connection with a lode claim, and in applying for a lode patent a mill site can be included, and surface for building purposes readily acquired, at a cost of $50 less than if separate applications are made." Morrison's Mining Rights (13th Ed.) 453.

claims. "In every case there must be satisfactory proof that the land claimed as a mill site is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of two or more persons capable, from acquaintance with the land, to testify understandingly." [85] The application for patent should also show the class of mill site claimed, and proof by the affidavit of two disinterested persons should support the statement in the application that a mill site use is being made of the ground. This proof should be furnished with the first set of papers. The applicant for a mill site patent must make his application in good faith for himself.[86]

THE PATENTING OF PLACER CLAIMS.

101. With the exception that no survey need be made for placers conforming to government survey subdivisions, and that a special kind of descriptive report by the deputy mineral surveyor is called for by the land department, the proceedings to obtain a patent for a placer claim are the same as those for a lode claim.

Applications to patent placers differ slightly from applications to patent lodes. If the placer claim is located on surveyed land, and conforms to the 10-acre or larger subdivisions of the government survey, no new survey need be made; but application for patent may be made at once in the land office. In such case the proof of $500 worth of improvements must be furnished by the affidavit of two or more disinterested witnesses.[87] The application for patent must state specifically what 10-acre or other lots are sought to be patented. If the claim is on unsurveyed land, or, being on surveyed land, does not exactly conform to the surveyed subdivisions, an official survey is required,[88] unless in the case of surveyed land the failure to conform is due to excluding patented land.[89]

With the exception just noted, and with the further exception of the descriptive report called for by the land department, the proceedings to obtain a patent for a placer are the same as those to obtain a patent for a lode claim.[90]

[85] Land Office Regulations, rule 65.
[86] Hamburg Min. Co. v. Stephenson, 17 Nev. 449, 30 Pac. 1088.
[87] Land Office Regulations, rule 25.
[88] G. A. KHERN, 6 Land Dec. Dep. Int. 580.
[89] MARY DARLING PLACER CLAIM, 31 Land Dec. Dep. Int. 64.
[90] Land Office Regulations, rules 58, 59.

The Descriptive Report.

The descriptive report is called for by the following provisions of the land office rules, viz.:

"Mineral surveyors shall at the expense of the parties make full examination of all placer claims surveyed by them and duly note the facts as specified in the law, stating the quality and composition of the soil, the kind and amount of timber and other vegetation, the locus and size of streams, and such other matters as may appear upon the surface of the claim. This examination should include the character and extent of all surface and underground workings, whether placer or lode, for mining purposes.

"In addition to these data, which the law requires to be shown in all cases, the deputy should report with reference to the proximity of centers of trade or residence; also of well-known systems of lode deposits or of individual lodes. He should also report as to the use or adaptability of the claim for placer mining, whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose, and, finally, what works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

"This examination should be reported by the mineral surveyor under oath to the surveyor general, and duly corroborated,[91] and a copy of the same should be furnished with the application for patent to the claim, constituting a part thereof, and included in the oath of the claimant." [92]

This descriptive report must receive the approval of the surveyor general, who thereupon certifies a transcript of that report, as well as a transcript of the field notes. Whenever a survey of a placer is required this descriptive report must be obtained, and the deputy mineral surveyor therefore makes it out without special instructions. If, however, no survey is required, because the claim conforms to surveyed subdivisions, a descriptive report need not be made until required by the land department.[93]

[91] This corroboration should be by affidavit of one or more disinterested persons (see Land Office Regulations, rule 167 [i]), who know the facts, and who swear that they have read the descriptive report, and that it is true in every particular.

[92] Land Office Regulations, rules 60, 167. In rule 167 it is further required that the descriptive report shall describe "the true situation of all mines, salt licks, salt springs, and mill sites which come to the surveyor's knowledge, or a report by him that none exist on the claim, as the facts may warrant."

[93] Rosina T. Gerbauser, 7 Land Dec. Dep. Int. 390. See Morrison's Mining Rights (13th Ed.) 459.

SAME—KNOWN LODES WITHIN PLACERS.

101a. Known lodes in placers must be located as such by the applicant for placer patent if he intends to claim them in his placer application. Known lodes not claimed by the applicant for placer patent may be patented by third parties after a departmental inquiry establishes that they are known lodes.

The application for patent must state that the claim is all placer, and be corroborated by accompanying proofs,[94] or, if the claim contains some known lodes, the application should contain a description of them and a declaration of the intention of the applicant to claim such as he may want. A failure to disclose known lodes in the application will not make the patent cover them, nor prevent the issuance of a subsequent lode patent;[95] for by the express provisions of the statute such failure must "be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim."[96]

A placer applicant will not be allowed to amend his application, so as to embrace therein veins or lodes discovered by others after the location of the placer claim, but prior to the application therefor.[97] After placer patent the patentee will not be allowed to patent lodes in the placer which were not known lodes.‡ Where the placer applicant claims the known lodes, he must locate them as lodes and furnish the evidence of title usual on patent applications. Survey is, of course, required; but a survey number separate from the placer survey number seems not to be necessary. In the survey the known lodes are designated simply by their names.[98] The posting of notice of the application for patent must be done on each known lode, as well as on the placer ground.

Where, after a placer patent, a third person wants to apply to patent a lode in the placer as a "known" lode, he must first get a departmental inquiry to establish that the lode was known to exist at the date of the application for placer patent.[99] Because "known lodes" are reserved and excepted from placer patents, the lode claimant does not have to

[94] "Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses." Land Office Regulations, rule 26.

[95] South Star Lode, 20 Land Dec. Dep. Int. 204; Cape May Mining & Leasing Co. v. Wallace, 27 Land Dec. Dep. Int. 676.

[96] Rev. St. U. S. § 2333 (U. S. Comp. St. 1901, p. 1433).

[97] AURORA LODE v. BULGER HILL & NUGGET GULCH PLACER CO., 23 Land Dec. Dep. Int. 95.

‡ Alice Mining Co., 27 Land Dec. Dep. Int. 661.

[98] See Morrison's Mining Rights (13th Ed.) 460.

[99] BUTTE & BOSTON MIN. CO., 21 Land Dec. Dep. Int. 125; Cape May Mining & Leasing Co. v. Wallace, 27 Land Dec. Dep. Int. 676.

adverse the placer patent;[100] and because other than known lodes pass by the placer patent, and cannot be taken away from the patentee by departmental proceedings,[101] the placer patentee does not have to adverse the "known lode" claimant.[102] The issue between the two, if not actually litigated between them in adverse proceedings, may be settled in a suit to quiet title or in an ejectment action after the issuance of the lode patent. It is only where the lode patent is applied for first that adverse proceedings are absolutely required. If, however, the lode claimant does not adverse the placer application, he may find that the land department will not entertain his application, because he does not overcome the presumption in the department against him.[103] He really must undergo two trials, one in the department and one before the courts, where one before the courts in adverse proceedings would do. The "known lode" claimant, therefore, ought to adverse the placer application, and to get more than 50 feet in width of surface ground he probably must do so.[104]

The lodes claimed in a placer application as "known lodes" must be paid for at $5 per acre; but the purchase price of placer ground proper is only $2.50 per acre or fractional part of an acre.[105]

CONFLICTS OF LODES AND PLACERS WITH OLDER LOCATIONS.

102. The area in conflict between the claim being patented and previously patented claims is excepted from the area applied for, but otherwise does not affect the application for patent, unless the claim sought to be patented is cut in two by the senior and no discovery has been made in one part. In the latter case patent will issue only for the part on which discovery has been made.

It sometimes happens that a lode location is intersected by an already patented mill site or placer. In such case the department formerly held that the lode claim could be patented only to the point where the other claim intersected it, giving the applicant his option which segre-

[100] Elda Mining & Milling Co. v. Mayflower Gold Mining Co., 26 Land Dec. Dep. Int. 573; Cape May Mining & Leasing Co. v. Wallace, 27 Land Dec. Dep. Int. 676, 679.

[101] Alice Mining Co., 27 Land Dec. Dep. Int. 661.

[102] Messrs. Morrison and De Soto advise him to do so, however. Morrison's Mining Rights (13th Ed.) 227.

[103] The burden of proof is on the lode claimant in the land department. Cripple Creek Gold Mining Co. v. Mt. Rosa Mining, Milling & Land Co., 26 Land Dec. Dep. Int. 622.

[104] A protest will not avail. ELDA MINING & MILLING CO. v. MAYFLOWER MINING CO., 26 Land Dec. Dep. Int. 573.

[105] Rev. St. U. S. § 2333 (U. S. Comp. St. 1901, p. 1433).

gated tract to patent;[106] but now patent will issue for both tracts, provided that the lode or vein upon which the location is based has been discovered in both parts of the lode claim.[107]

A corresponding ruling would doubtless be made as to a placer intersected by a lode or by a mill site. An attempted mill site location, cut in two by a prior lode or placer location, would probably be governed by the same ruling also, if the claimant could overcome the presumption that the land is mineral.

[106] The tract not selected became in such case subject to location as abandoned. BROWN v. GURNEY, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717.

[107] PAUL JONES LODE, 31 Land Dec. Dep. Int. 359.

CHAPTER XIX.

ADVERSE PROCEEDINGS AND PROTESTS AGAINST PATENT APPLICATIONS.

There are two methods of opposing a patent application, namely: (1) Adverse; and (2) protest. An adverse claim is an assertion by the adverse claimant of the ownership of some part of the surface of the ground sought to be patented. A protest, on the other hand, will generally not lie where an adverse is proper,[1] and is essentially an assertion by the protestant that the patent applied for should not issue because of jurisdictional defects. An adverse claim must be filed within the statutory time, or it will not be considered. A protest may be filed any time before patent actually issues.

ADVERSE CLAIMS.

103. An adverse claim is one of title to part or all of the surface sought to be patented. It must be filed during the 60-day period of publication of the notice of application for patent, must show fully the nature, boundaries, and extent of the adverse claim, and must be followed, within 30 days after it is filed, by the commencement of the proper court proceedings.

The federal statute provides that an adverse claim must be filed during the 60 days' publication of notice of application for patent,[2] and that means within the 60 days computed by excluding the first day of publication.[3] This time cannot be extended.[4] If, for any

[1] MUTUAL MINING & MILLING CO. v. CURRENCY CO., 27 Land Dec. Dep. Int. 191.

[2] Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429). See Hunt v. Eureka Gulch Min. Co., 14 Colo. 451, 24 Pac. 550; Hamilton v. Southern Nev. Gold & Silver Min. Co. (C. C.) 33 Fed. 562.

[3] Bonesell v. McNider, 13 Land Dec. Dep. Int. 286; Waterhouse v. Scott, 13 Land Dec. Dep. Int. 718. Where the last day of the 60 falls on Sunday or on a holiday, the land department will not any longer allow the filing on the next day. HOLMAN v. CENTRAL MINES CO., 34 Land Dec. Dep. Int. 568.

[4] Davidson v. Eliza Gold Mining Co., 28 Land Dec. Dep. Int. 224; Gross v. Hughes, 29 Land Dec. Dep. Int. 467. One who has not filed an adverse

reason, republication takes place, the adverse must, of course, be refiled during the new publication. An adverse claim is ordinarily not filed until the fees for filing are paid; but, if the officers of the land office choose to become chargeable to the government for them by the acceptance of the adverse, the applicant for patent cannot question the validity of the filing on the ground that the fees have not been paid.[5]

The statute further provides that the adverse claim "shall show the nature, boundaries, and extent of such adverse claim." [6] "The adverse claim as filed must fully set forth the nature and extent of the interference or conflict, whether the adverse party claims as a purchaser for valuable consideration or as a locator. If the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder, should be furnished, or, if the transaction was a merely verbal one, he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time; and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder." [7]

An adverse claim must be filed in every pending patent proceeding which conflicts with the ground owned by the adverse claimant; but, if several pieces of mining ground owned by the adverse claimant are affected by only one patent proceeding, one adverse claim will do to specify the various conflicts. "An adverse claim must be filed with the register and receiver of the land office where the application for patent is filed, or with the register and receiver of the district in which the land is situated at the time of filing the adverse claim. It must be on the oath of the adverse claimant,[8] or it may be verified by

claim under the statute cannot intervene in an adverse suit brought by another adverse claimant, even though he claims an interest adverse to both plaintiff and defendant. MURRAY v. POLGLASE, 23 Mont. 401, 59 Pac. 439. Where an applicant for patent allowed his application to sleep for years and a relocation for failure to do the annual labor took place, the relocator was allowed to adverse on the ground that the 60-day statute did not apply to adverse claims subsequently arising. GILLIS v. DOWNEY, 85 Fed. 483, 29 C. C. A. 286.

[5] BLAKE v. TOLL, 29 Land Dec. Dep. Int. 413.

[6] Rev. St. U. S. § 2326 (U. S. Comp. St. 1901, p. 1430). A land department rule requiring an adverse plat to be made by a deputy United States mineral surveyor from an actual survey on the ground was held to be unreasonable and void in Anchor v. Howe (C. C.) 50 Fed. 366. Except where the applicant and the adverse claimant both claim by survey subdivisions, a plat showing both claims and the extent of conflict must be filed by the adverse claimant. Land Office Regulations, rule 82.

[7] Land Office Regulations, rule 81.

[8] He may take the oath out of the district. Amendment by Act April 26,

the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated." [9] It must be accompanied by a plat showing both claims and the conflict areas, except in those cases where the applicant and the adverse claimant both describe their locations by legal survey subdivisions.[10] The rights of an adverse claimant are limited to those existing at the time of the filing of his adverse.[11]

It is for the land office to determine the sufficiency of the adverse,[12] and an appeal will properly lie from the rejection of it.* Despite the rejection of the adverse, and the consequent appeal, the proper court proceedings must begin within the 30 days from the filing of the adverse.[13] Where an adverse has been rejected by the land office, and no appeal taken, yet suit has been begun within the 30 days, and certificate thereof filed, the land department will suspend action until the suit is terminated.[14] The suit, however, unlike a genuine adverse suit, is not binding on the department, though the department will give it great respect.[15]

An adverse claim may be amended before the expiration of the publication period; but after that period expires it may not be so amended as to embrace a larger conflict area, nor to set up a subse-

1882, c. 106, 22 Stat. 49, of Rev. St. U. S. § 2326 (U. S. Comp. St. 1901, p. 1431).

[9] Land Office Regulations, rule 78. The agent or attorney in fact must distinctly swear that he is such, and accompany his affidavit by proof thereof (Id. rule 79), and must make the affidavit in the district where the claim is situated (Id. rule 80).

[10] Land Office Regulations, rule 82. The plat should, of course, be prepared from an actual survey by a deputy mineral surveyor. Id. But it need not be so prepared. KINNEY v. VAN BOKERN, 29 Land Dec. Dep. Int. 460; Anchor v. Howe (C. C.) 50 Fed. 366. If the adverse claimant cannot make the plat exact, because a survey could not be taken on account of the snow, etc., his adverse should allege that fact. J. S. Wallace, 1 Land Dec. Dep. Int. (Rev. Ed.) 582. The land department will not in any case be technical if only the adverse shows with reasonable certainty the nature, boundaries, and extent of the alleged adverse right. McFADDEN v. MOUNTAIN VIEW MINING & MILLING CO., 27 Land Dec. Dep. Int. 358.

[11] HEALEY v. RUPP, 37 Colo. 25, 86 Pac. 1015.

[12] Waterhouse v. Scott, 13 Land Dec. Dep. Int. 718. "A paper prepared as an adverse, when not properly in the land office as such, is often received and accepted as a protest, and is permitted to serve that purpose." Behrends v. Goldsteen, 1 Alaska, 518, 522. For an instance, see Grand Canyon Ry. Co. v. Cameron, 35 Land Dec. Dep. Int. 495.

* QUIGLEY v. GILLETT, 101 Cal. 462, 35 Pac. 1040; Ross v. Richmond Mining Co., 17 Nev. 25, 27 Pac. 1105.

[13] SCOTT v. MALONEY, 22 Land Dec. Dep. Int. 274.

[14] Samuel McMaster, 2 Land Dec. Dep. Int. 706. This is not true, however, where the adverse is not filed in time. HOLMAN v. CENTRAL MONTANA MINES CO., 34 Land Dec. Dep. Int. 568.

[15] NORTH STAR LODE, 28 Land Dec. Dep. Int. 41, 43, 44. So, where there has been a relocation after the expiration of the publication period

quently acquired right.[16] An adverse claimant does not waive his adverse by obtaining patent, pending the adverse proceedings, for that part of his location not in conflict with the applicant's location.[17]

Who must Adverse.

A lode claimant must adverse a conflicting lode application, of course; a mill site claimant, a conflicting mill site application; and a placer claimant, a conflicting placer application. But the owner of an already patented lode, mill site, or placer need not adverse any application, because the statutory provisions relative to adverse proceedings apply only to cases where there are adverse claims to the same unpatented ground.[18] So the owner of a claim which has passed the entry stage in patent proceedings need not adverse a subsequent patent application.[19] The owner of a "known lode" in a placer need not, perhaps, adverse a placer. Certainly as to 25 feet on each side of the lode he need not, unless the placer applicant is asking for a patent to the known lode; but he ought to do so, to avoid all questions as to surface area.[20] The owner of an unpatented placer must adverse a "known" lode application in order to confine the lode to the 25 feet on each side of the vein, which is all it is entitled to if it was not located until after the placer, just as he must do so to defeat a lode application entirely as to conflicting ground.[21] In general, lode claims must adverse placers and the latter must adverse lodes.

and before entry and the courts uphold the relocation, the department will cancel the patent application. Cain v. Addenda Mining Co., 29 Land Dec. Dep. Int. 62. The court's judgment in such case has the effect of a protest.

[16] "The notices required to be given of an application for patent are in effect a summons to all adverse claimants. The latter must assert their rights by filing an adverse within the 60 days' publication of notice of application for patent. Unless filed within that period, it will be conclusively presumed that none existed. So far, then, as an adverse claimant is concerned, it must necessarily follow that his rights to the premises in controversy must be limited to those existing at the time of filing his adverse. If he had no claim then, he will not be heard to assert a right to the premises in dispute by virtue of one brought into existence thereafter; otherwise, he would be permitted to assert title to the disputed premises by virtue of rights other than those upon which his adverse is based." HEALEY v. RUPP, 37 Colo. 25, 86 Pac. 1015.

[17] MACKAY v. FOX, 121 Fed. 487, 57 C. C. A. 439.

[18] North Star Lode, 28 Land Dec. Dep. Int. 41; Iron Silver Min. Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155.

[19] Owers v. Killoran, 29 Land Dec. Dep. Int. 160. See Murray v. Montana Lumber & Mfg. Co., 25 Mont. 14, 63 Pac. 719.

[20] See DAHL v. RAUMHEIM, 132 U. S. 260, 10 Sup. Ct. 74, 33 L. Ed. 324. But see NOYES v. MANTLE, 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168.

[21] CLIPPER MIN. CO. v. ELI MINING & LAND CO., 194 U. S. 220, 24 Sup. Ct. 632, 48 L. Ed. 944.

Who May Not Adverse.

With reference to mill sites the land department has held conflicting views, but the present view accords with that held in regard to those townsites which do not come under the act of 1891, namely, that the case is not one for adverse at all; but, since the inquiry simply is as to the mineral or nonmineral character of the land, the real controversy must be determined on a protest.[22] This view has the support of a recent judicial decision that a townsite claimant cannot adverse;[23] but that decision is of no real value on this question, because in that case the lode location was known at the time of town site entry, and so did not pass by the townsite patent.[24] The owner of a town lot in an unpatented townsite has been allowed to adverse a lode claim application.[25] Messrs. Morrison and De Soto point out that there have been frequent instances where adverses by mill sites have been filed and sustained,[26] and think that "it is advisable to file both adverse and protest, as there is no certainty that the land office will maintain its present position as to the right of a mill site to adverse a mining application and vice versa." [27]

A tunnel claimant has nothing which he can patent until he discovers a blind vein or other lode in his tunnel and appropriates it in the way the law requires. Hence the tunnel claimant as such need not ad-

[22] Snyder v. Wallace, 25 Land Dec. Dep. Int. 7; Helena, etc., Co. v. Dailey, 36 Land Dec. Dep. Int. 144. See Ryan v. Granite Hill Mining & Development Co., 29 Land Dec. Dep. Int. 522; Powell v. Ferguson, 23 Land Dec. Dep. Int. 173. But see Butte City Smoke House Lode Cases, 6 Mont. 397, 12 Pac. 858. The land department would confine adverse to conflicts between mining claims merely. Grand Canyon R. Co. v. Cameron, 35 Land Dec. Dep. Int. 495.

[23] WRIGHT v. TOWN OF HARTVILLE, 13 Wyo. 497, 81 Pac. 649, 82 Pac. 450. Compare Davidson v. Fraser, 36 Colo. 1, 84 Pac. 695, 4 L. R. A. (N. S.) 1126. But see Hamilton v. Southern Nevada Gold & Silver Min. Co. (C. C.) 33 Fed. 562.

[24] See Lalande v. Townsite of Saltese, 32 Land Dec. Dep. Int. 211.

[25] YOUNG v. GOLSTEEN (D. C.) 97 Fed. 303; BONNER v. MEIKLE (C. C.) 82 Fed. 697. But see WRIGHT v. TOWN OF HARTVILLE, 13 Wyo. 497, 81 Pac. 649, 82 Pac. 450; Behrends v. Goldsteen, 1 Alaska, 518. Compare Nome-Sinook Co. v. Simpson, 1 Alaska, 578.

[26] Morrison's Mining Rights (13th Ed.) 477, citing Shafer v. Constans, 3 Mont. 369, Durgan v. Redding (C. C.) 103 Fed. 914, and Cleary v. Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207.

[27] Morrison's Mining Rights (13th Ed.) 478. Of course, the recent decision of Helena, etc., Co. v. Dailey, 36 Land Dec. Dep. Int. 144, makes it more certain than it was when they wrote, but whether it is yet absolutely certain, query. Where a lode claimant adverses a mill site, he must show that the land contains minerals which can be extracted at a profit. CLEARY v. SKIFFICH, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207.

verse,[28] and probably may not do so;[29] but as the owner of lode claims already acquired through tunnel discovery and appropriation he must adverse.* Blind veins yet to be discovered by him in his tunnel are protected from appropriation by others and from all necessity of adverse on his part by the terms of the tunnel site statute as interpreted by the United States Supreme Court.[30]

Where two adjoining locations divide between them the width of a broad vein, one may not adverse the other to determine extralateral rights, because an adverse must relate to the surface ground sought to be patented. Certainly, in the absence of a record of an adverse suit, there is no presumption that subterranean rights under lode mining locations were considered and determined in such suit.[31]

By a rule of the land office, based by the department expressly on a United States Supreme Court decision,[32] it is declared that a co-owner, whose co-tenants have excluded him from an application for patent, does not have an adverse claim, but may protest the application.[33] It is held, however, that, if the co-owner does attempt an adverse, the land department will stay proceedings pending the determination of the judicial proceedings;[34] and since the case of Turner v. Sawyer[35] does not deny the right of the co-owner to adverse, but simply makes the other owners hold his share of the legal title in trust for him, the better course would seem to be to adverse.[36]

What is said above as to a co-owner would seem to apply, also, to

[28] CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501. But see Back v. Sierra Nevada Consol. Min. Co., 2 Idaho, 420, 17 Pac. 83. Compare Hope Min. Co. of St. Louis v. Brown, 11 Mont. 370, 28 Pac. 732.

[29] Id.

*This is true where he makes a surface location; but where he claims the blind vein without doing so, query whether he has to adverse?

[30] ENTERPRISE MIN. CO. v. RICO-ASPEN CONSOL. MIN. CO., 167 U. S. 108, 17 Sup. Ct. 762, 42 L. Ed. 96; CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501.

[31] LAWSON v. UNITED STATES MIN. CO., 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65. See New York Hill Co. v. Rocky Bar Co., 6 Land Dec. Dep. Int. 318.

[32] TURNER v. SAWYER, 150 U. S. 578, 14 Sup. Ct. 192, 37 L. Ed. 1189. See Stevens v. Grand Central Min. Co., 133 Fed. 28, 67 C. C. A. 284.

[33] Land Office Regulations, rule 53.

[34] THOMAS v. ELLING, 25 Land Dec. Dep. Int. 495; Id., 26 Land Dec. Dep. Int. 220; Coleman v. Homestake Min. Co., 30 Land Dec. Dep. Int. 364.

[35] 150 U. S. 578, 14 Sup. Ct. 192, 37 L. Ed. 1189.

[36] See Davidson v. Fraser, 36 Colo. 1, 84 Pac. 695, 4 L. R. A. (N. S.) 1126; Malaby v. Rice, 15 Colo. App. 364, 62 Pac. 228. Compare Hamilton v. Southern Nev. Gold & Silver Min. Co. (C. C.) 33 Fed. 562. A co-owner who has been omitted from the application for patent, and who pending the application attempts to forfeit the interest of the applicant co-owner for failure to

the mortgagee or judgment lien holder claiming under him, or the grantee claiming from him.[37] It has also been held that an adverse suit will lie against an applicant who is seeking to patent the claim he relocated after fraudulently failing to do the assessment work he was employed to do.[38]

One who merely has an easement over a mining claim by virtue of the federal statutes cannot adverse.[39] This applies to an easement for a railroad right of way.[40] So one who has no surface conflict, but simply claims extralateral rights under the ground sought to be patented, cannot adverse.[41] So, of course, one who, after the expiration of the publication period, relocates for failure of applicant to do the annual labor, cannot adverse, but must resort to protest.[42]

So a mortgagee of the applicant for patent may not adverse the application for patent, because he is protected by the statutory provision that "nothing in this chapter shall be deemed to impair any lien which may have attached to any mining claim or property thereto attached prior to the issuance of a patent."[43] The same is true of judgment creditors.[44]

Who may Adverse, but Need Not.

Despite the land department rule to the contrary, it is believed that a co-owner excluded from the patent application and those in privity of title with him may adverse, though they need not do so.[45] Where an applicant for patent for a placer does not ask to patent the known lodes within it, the owner of the known lodes probably need not adverse; but he ought to do so.[46] It has been held that a known mining claim included in a townsite need not adverse the townsite.[47]

perform the annual labor, cannot thereby acquire any right in himself to make entry under the application. Surprise Fraction and Other Lode Claims, 32 Land Dec. Dep. Int. 93.

[37] As to grantees, see Suessenbach v. First Nat. Bank, 5 Dak. 477, 41 N. W. 662.

[38] Argentine Min. Co. v. Benedict, 18 Utah, 183, 55 Pac. 559.

[39] Rockwell v. Graham, 9 Colo. 36, 10 Pac. 284.

[40] Grand Canyon R. Co. v. Cameron, 35 Land Dec. Dep. Int. 495.

[41] New York Hill Co. v. Rocky Bar Co., 6 Land Dec. Dep. Int. 318. See Lawson v. United States Min. Co., 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65.

[42] Cleveland v. Eureka No. 1 Gold Mining & Milling Co., 31 Land Dec. Dep. Int. 69; Gillis v. Downey, 85 Fed. 483, 29 C. C. A. 286.

[43] Rev. St. U. S. § 2332 (U. S. Comp. St. 1901, p. 1433).

[44] Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1.

[45] Butte Hardware Co. v. Cobban, 13 Mont. 351, 34 Pac. 24; Davidson v. Fraser, 36 Colo. 1, 84 Pac. 695, 4 L. R. A. (N. S.) 1126. But see Malaby v. Rice, 15 Colo. App. 364, 62 Pac. 228. See note 36, supra.

[46] See Dahl v. Raunheim, 132 U. S. 260, 10 Sup. Ct. 74, 33 L. Ed. 324. But see Noyes v. Mantle, 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168. See note 20, supra.

[47] Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 5 Pac. 570; Talbott v.

By the express provisions of the federal statute no locations made prior to May 10, 1872, need adverse any location made under the act of 1872.[48] An applicant for patent need not adverse a subsequent application made while his application is pending.[49] Whether a prior patentee may adverse is uncertain, but it is clear that he need not.[50]

The fact that the senior locator has agreed to purchase the junior claim if a patent is obtained therefor has been held not to deprive the senior locator of the right to contest the allowance of a patent to the junior claim for conflicting area.[51]

A lien claimant need not adverse the application to patent the claim to which the lien attaches.[52]

Effect of Failure to Adverse.

Where an adverse claim is required, but is not interposed, the failure to interpose it bars it, except where protest is proper.[53] It may not be interposed, however, because of an agreement not to adverse. Such an agreement is not against public policy.†

King, 6 Mont. 76, 9 Pac. 434; Butte City Smoke House Lode Cases, 6 Mont. 397, 12 Pac. 858.

[48] Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426); Eclipse Gold & Silver Min. Co. v. Spring, 59 Cal. 304; Blake v. Butte Silver Min. Co., 2 Utah, 54. "Locations made prior to 1872 have, for the most part, either been patented, or, if not abandoned, been readjusted to conform to existing laws. The question is relatively unimportant." 2 Lindley on Mines (2d Ed.) § 726.

[49] STEEL v. GOLD LEAD M. CO., 18 Nev. 80, 1 Pac. 448; Owers v. Killoran, 29 Land Dec. Dep. Int. 160.

[50] North Star Lode, 28 Land Dec. Dep. Int. 41; IRON SILVER MIN. CO. v. CAMPBELL, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155; Mantle v. Noyes, 5 Mont. 274, 5 Pac. 856.

[51] Griffin v. American Gold Min. Co., 114 Fed. 887, 52 C. C. A. 507.

[52] Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1.

[53] Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429); Richmond Min. Co. of Nevada v. Eureka Consolidated Min. Co., 103 U. S. 839, 26 L. Ed. 557; Wight v. Dubois (C. C.) 21 Fed. 693; Lily Mining Co. v. Kellogg, 27 Utah. 111, 74 Pac. 518; Jefferson Min. Co. v. Anchorea Leland Min. & Mill. Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925; Nesbitt v. De Lamar's Nevada Gold Min. Co., 24 Nev. 273, 52 Pac. 609, 53 Pac. 178, 77 Am. St. Rep. 807.

† St. Louis Min. & Mill Co. v. Montana Min. Co., 171 U. S. 650, 19 Sup. Ct. 61, 43 L. Ed. 320. Of Ducie v. Ford, 138 U. S. 587, 11 Sup. Ct. 417, 34 L. Ed. 1091, where the court refused to enforce a trust under such a contract because the contract was not in writing, and so did not comply with the Statute of Frauds, Messrs. Morrison and De Soto say: "The decision, however, is largely based on asserted defects in the pleadings, and can hardly be considered as holding that so gross an instance of wrong would be in all cases shielded by that statute." Morrison's Mining Rights (13th Ed.) 495.

COURT PROCEEDINGS ON ADVERSE CLAIMS.

104. The court proceeding is, according as the situation calls for one or the other, an action in ejectment or a suit in equity. If it is an action in ejectment, there is a right to a jury trial. If it is a suit in equity, there is in most jurisdictions no such right. The adverse claimant is plaintiff in the proceedings, and the particularity of allegations required in the pleadings varies in the different jurisdictions. The trial is much like the ordinary trial where the ownership of real property is litigated; but the citizenship of the parties is involved, and judgment may be entered that neither party is entitled to the conflict area.

The federal statutes make it the duty of the adverse claimant, "within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the rights of possession, and to prosecute the same with reasonable diligence to final judgment; and a failure to do so shall be a waiver of his adverse claim." [54] The purpose of an adverse suit is to determine for the information of the officers of the land department which, if either, of the parties has the possessory title to the premises in dispute.[55] The question whether the land is mineral or nonmineral is ordinarily not to be litigated in such suit, but is for the land department to determine.[56]

By a court of competent jurisdiction is not meant a United States court, unless such court would have jurisdiction for reasons other than the nature of the property involved. A suit brought in support of an adverse claim is not necessarily a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a federal

[54] Rev. St. U. S. § 2326 (U. S. Comp. St. 1901, p. 1430). The local land officers are required to give notice to both parties of the filing of the adverse and of the requirement about court proceedings. Land Office Regulations, rule 83.

[55] Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015. A decree adjudging that the defendant is entitled to purchase a claim from the United States and receive a patent therefor is in excess of the jurisdiction of the state court. Grunwell v. Rocca, 141 Cal. 417, 74 Pac. 1028. The court has no right to determine whether the $500 expenditure in labor or improvements required for patent has been made. Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833; Stolp v. Treasury Gold Min. Co., 38 Wash. 619, 80 Pac. 817. Nor to determine whether the land is mineral or nonmineral. Wright v. Town of Hartville, 13 Wyo. 497, 81 Pac. 649, 82 Pac. 450; Behrends v. Goldsteen, 1 Alaska, 518.

[56] Wright v. Town of Hartville, 13 Wyo. 497, 81 Pac. 649, 82 Pac. 450; LE FEVRE v. AMONSON, 11 Idaho, 45, 81 Pac. 71; Behrends v. Goldsteen, 1 Alaska, 518.

court regardless of the citizenship of the parties, "but may present simply a question of fact as to the time of the discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district or the effect of state statutes." [57]

Congress meant to have the adverse claimant bring suit in any court having jurisdiction to determine, as between himself and the applicant for patent, the question of the right of possession.[58] It is certainly doubtful whether an adverse suit could be brought in a federal court for any other reason than the diversity of citizenship.[59] The ordinary place to bring such suits is in state courts of general jurisdiction, and those courts have full jurisdiction, subject only to removal of the cause to the federal courts in cases where the latter have jurisdiction.

The Nature of the Court Proceedings.

While the word "suit" was used above in speaking of the court proceedings, it was without any intention of prejudicing the question of whether the court proceedings on an adverse claim are actions at law or suits in equity. The determination of that question settles the matter of the right to jury trial.[60]

The Supreme Court of the United States has taken the sensible ground that where the plaintiff is out of possession the proper action is ejectment, but that where the plaintiff is in possession the proper suit is one in equity to quiet title.[61] Under this view a jury trial could be demanded of right in ejectment, but need not be granted in the suit to quiet title.[62] While the state statute may permit a person

[57] SHOSHONE MINING CO. v. RUTTER, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864. See Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276; Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 533, 21 Sup. Ct. 488, 45 L. Ed. 656.

[58] Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276.

[59] See 2 Lindley on Mines (2d Ed.) § 747.

[60] Where the suit is in equity, there need be no jury (PEREGO v. DODGE, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963), unless, of course, the state statutes or Constitutions give the right to one.

[61] PEREGO v. DODGE, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113; Allen v. Myers, 1 Alaska, 114. See Davidson v. Calkins (C. C.) 92 Fed. 230; Young v. Golsteen (D. C.) 97 Fed. 303; Wolverton v. Nichols, 5 Mont. 89, 2 Pac. 308; Milligan v. Savery, 6 Mont. 129, 9 Pac. 894. For a case where living in a tent and working a shaft on one of several claims for the benefit of all was held to constitute actual possession of all the claims, see Lange v. Robinson, 148 Fed. 799, 79 C. C. A. 1.

[62] PEREGO v. DODGE, supra. In so holding the court declared that the amendment of 1881 to Rev. St. U. S. § 2326 (U. S. Comp. St. 1901, p.

out of possession to bring a suit in the nature of a suit to quiet title, the fact that the plaintiff is out of possession would seem to make the action so far the equivalent of ejectment as to give either party the right to demand a jury trial.[63]

In a jurisdiction authorizing such a verdict, the right to a jury trial is satisfied by a jury which renders a three-fourths verdict.[64]

Time in Which to Commence Court Proceedings.

By the federal statute the court proceedings must be commenced within 30 days after the filing of the adverse claim,[65] and the land department construes this to mean within 30 days after the adverse claim is filed, even though it is rejected and an appeal from the rejection has to be taken.[66] The statute is mandatory. "There is no exception as to the claimant who may be beyond the seas, or under disability of any kind, or who may fail to act from inadvertence or other cause. The suit must be brought within the time specified, and it must be prosecuted with reasonable diligence. The act says: 'And a failure so to do shall be a waiver of this adverse claim.' This act admits of no addition or modification from the statute of the state; and where, as in this instance, the claimant commences suit in due time and is cast in his suit, he is without remedy, except such as may be obtained in the same suit on appeal or writ of error." [67]

While the statute is mandatory, the objection that the action was not brought within 30 days after the filing of the adverse claim cannot be raised by motion for judgment or by a motion to strike the complaint from the files, but may be presented by answer or special plea.[68] This includes demurrer.[69] Moreover, when the defendant has demurred, answered, and gone to trial, it is too late to raise the ob-

1430), that if neither party established title "the jury shall so find," does not require a jury in the suit to quiet title. See Mares v. Dillon, 30 Mont. 117, 75 Pac. 963; Rutter v. Shoshone Min. Co. (C. C.) 75 Fed. 37.

[63] Donahue v. Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283; Landregan v. Peppin, 94 Cal. 465, 29 Pac. 771. But see Mares v. Dillon, 30 Mont. 117, 75 Pac. 963.

[64] PROVIDENCE GOLD MIN. CO. v. BURKE, 6 Ariz. 323, 57 Pac. 641.

[65] Rev St. U. S. § 2326 (U. S. Comp. St. 1901, p. 1430).

[66] Scott v. Maloney, 22 Land Dec. Dep. Int. 274; DENISS v. SINNOTT, 35 Land Dec. Dep. Int. 304.

[67] STEVES v. CARSON (C. C.) 42 Fed. 821. A suit begun on the 31st day is too late. Madison Placer Claim, 35 Land Dec. Dep. Int. 551. It will not do to try to avail one's self of a suit started before the publication period. Selma Oil Claim, 33 Land Dec. Dep. Int. 187.

[68] PROVIDENCE GOLD MIN. CO. v. MARKS, 7 Ariz. 74, 60 Pac. 938.

[69] STEVES v. CARSON (C. C.) 42 Fed. 821; Hopkins v. Butte Copper Co., 29 Mont. 390, 74 Pac. 1081.

jection that the adverse or the complaint was not filed within the time required by the statute.[70]

The time when the court proceeding will be deemed commenced will depend upon the rule governing in the court where it is started;[71] and it may be so commenced although the adverse claim is set up by supplemental complaint in an adverse suit already begun on a different adverse claim.[72]

The Parties and Pleadings.

The adverse claimant brings the suit against the applicant for patent, even though the latter has sold his interest before the suit is brought.[73] Probably he would be allowed to join as a defendant with the applicant for patent the applicant's grantee. Where several adverse claimants conveyed to one of their number, it was held that the latter could bring the adverse proceeding without joining the grantor adverse claimants.[74] Only those who have filed adverse claims can be made parties or intervene.[75]

With reference to the pleadings it may be stated that the particularity of allegation required varies in the different jurisdictions. The plaintiff out of abundant caution should aver his citizenship or declaration of intention to become a citizen,[76] should name and describe the

[70] RICHMOND MIN. CO. v. ROSE, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273; Pennsylvania Min. Co. v. Bales, 18 Colo. App. 108, 70 Pac. 444; Hain v. Mattes, 34 Colo. 345, 83 Pac. 127.

[71] HARRIS v. HELENA GOLD MIN. CO. (Nev.) 92 Pac. 1. See Mars v. Oro Fino Min. Co., 7 S. D. 605, 65 N. W. 19; Rose v. Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105.

[72] Marshall Silver Min. Co. v. Kirtley, 12 Colo. 410, 21 Pac. 492; Jones v. Pacific Dredging Co., 9 Idaho, 186, 72 Pac. 956.

[73] BLACKBURN v. PORTLAND GOLD MIN. CO., 175 U. S. 571, 20 Sup Ct. 222, 44 L. Ed. 276. Compare Mackay v. Fox, 121 Fed. 487, 57 C. C. A. 439.

[74] WILLITT v. BAKER (C. C.) 133 Fed. 937.

[75] Mont Blanc Consol. Gravel Min. Co. v. Debour, 61 Cal. 364; Murray v. Polglase, 23 Mont. 401, 59 Pac. 439.

[76] See SHERLOCK v. LEIGHTON, 9 Wyo. 297, 63 Pac. 580, 934; ALLYN v. SCHULTZ, 5 Ariz. 152, 48 Pac. 960; Lee Doon v Tesh, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621; Thomas v. Chisholm, 13 Colo. 105, 21 Pac. 1019; Keeler v. Trueman, 15 Colo. 143, 25 Pac. 311; Rosenthal v. Ives, 2 Idaho. 265, 12 Pac. 904; Matlock v. Stone, 77 Ark. 195, 91 S. W. 553. But see ALTOONA QUICKSILVER MIN. CO. v. INTEGRAL QUICKSILVER MIN. CO., 114 Cal. 100, 45 Pac. 1047; McCarthy v. Speed, 11 S. D. 362, 27 N. W. 590. While the absence of proof of citizenship justifies the court in refusing a judgment to one party to an adverse suit, the other party does not thereby become entitled to judgment. SHERLOCK v. LEIGHTON, supra; SCHULTZ v. ALLYN, supra; Girard v. Carson, 22 Colo. 345, 44 Pac. 508.

mining claim which he asserts to be his and the conflict area,[77] should assert the defendant's wrongful claim to or possession of the conflict area, should allege the filing of the adverse within the 60 days' publication[78] and the bringing of the suit within the 30 days after the filing,[79] and should set out the special damage alleged by the plaintiff. Anything else required by the local statutes or decisions should be stated.[80] In Arizona the plaintiffs must even allege and prove that the ground in controversy is mineral land, and everything else required in the land department, and amendment to supply any material allegation will not be allowed after the expiration of the 30-day period.[81] In California, on the other hand, a complaint simply alleging the ownership by plaintiff of his mining location and the claim by defendant without right of an adverse interest has been held to allege enough,[82] while several jurisdictions have held that the complaint may be amended after the expiration of the 30-day period.[83] Any complaint which under the state laws will enable the state court to determine the title to the conflict area ought to be held sufficient, even if, as in the case of Rough v. Simmons,[84] it contains the least possible essential

[77] The complaint must contain such a description of the property as will enable the court to determine to what extent, if at all, the claim of plaintiff conflicts with that of defendant. Cronin v. Bear Creek Gold Min. Co., 3 Idaho, 614, 32 Pac. 204; Smith v. Imperial Copper Co. (Ariz.) 89 Pac. 510.

[78] THORNTON v. KAUFMAN, 35 Mont. 181, 88 Pac. 796. See Mattingly v. Lewisohn, 13 Mont. 508, 33 Pac. 111; Cronin v. Bear Creek Gold Min. Co., 3 Idaho, 614, 32 Pac. 204. But, contra, that this allegation is unnecessary, see Rawlings v. Casey, 19 Colo. App. 152, 73 Pac. 1090; HAIN v. MATTES, 34 Colo. 345, 83 Pac. 127; Helbert v. Tatem, 34 Mont. 3, 85 Pac. 733.

[79] A failure of plaintiff to allege that the suit was begun within the time fixed by the United States statute is not jurisdictional, but can be taken advantage of only by demurrer. Hopkins v. Butte Copper Co., 29 Mont. 390, 74 Pac. 1081. Or by answer or special plea. Providence Gold Min. Co. v. Marks, 7 Ariz. 74, 60 Pac. 938. See Pennsylvania Min. Co. v. Bales, 18 Colo. App. 108, 70 Pac. 444.

[80] See Jackson v. McFall, 36 Colo. 119, 85 Pac. 638.

[81] KEPPLER v. BECKER (Ariz.) 80 Pac. 334. See Phillips v. Smith (Ariz.) 95 Pac. 91.

[82] ROUGH v. SIMMONS, 65 Cal. 227, 3 Pac. 804. See Contreras v. Merck, 131 Cal. 211, 63 Pac. 336; Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047; Parley's Park Silver Mining Co. v. Kerr, 130 U. S. 256, 9 Sup. Ct. 511, 32 L. Ed. 906; Bennett v. Harkrader, 158 U. S. 441, 15 Sup. Ct. 863, 39 L. Ed. 1046; Durgan v. Redding (C. C.) 103 Fed. 914; Tonopah Fraction Min. Co. v. Douglass (C. C.) 123 Fed. 936. See, also, Rose v. Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105, where a state statute dispensed with further allegations.

[83] DEENEY v. MINERAL CREEK MILLING CO., 11 N. M. 279, 67 Pac. 724; WOODY v. HINDS, 30 Mont. 189, 76 Pac. 1.

[84] 65 Cal. 227, 3 Pac. 804.

allegations;[85] because all that Congress intended, namely, that the right to the ground should actually be litigated in the proper court in a proceeding begun in proper time and the result reported to the land department, can be accomplished as well by such pleading as by the more detailed. A careful lawyer will take no chances, however, and in view of the confused state of the cases the only thing to do in a jurisdiction which has not announced a rule is to conform to the most rigid requirement adopted outside of Arizona. The Arizona rule is too extreme to be followed in any jurisdiction where the matter is not concluded by statute.

The answer of defendants, in addition to containing a denial of the disputed allegation of the plaintiff's complaint,[86] must set up affirmatively the allegations showing his citizenship and title in him to the conflict area. That is because by the statute, if neither party establishes title to the ground in controversy, judgment to that effect must be entered.[87] Because of that statute the defendant is also in a way a plaintiff.[88]

The plaintiff in strictness should reply to defendant's affirmative allegations of ownership,[89] and to his allegation of citizenship, if he wants to controvert those allegations; but in one case, at least, it has been held to be unnecessary to reply to the defendant's allegations of ownership.[90] In any event, no reply will be necessary where by

[85] Durell v. Abbott, 6 Wyo. 265, 44 Pac. 647; Gillis v. Downey, 85 Fed. 483, 29 C. C. A. 286. See Bennett v. Harkrader, 158 U. S. 441, 15 Sup. Ct. 863, 39 L. Ed. 1046. For a complaint held sufficient in Colorado, see Jackson v. McFall, 36 Colo. 119, 85 Pac. 638.

[86] For what may be proven, under a general denial, see Holmes v. Salamanca Gold Min. & Mill. Co., 5 Cal. App. 659, 91 Pac. 160. A showing that plaintiff's location was made on ground embraced within a prior valid subsisting location is held to be a bar to his recovery in HOBAN v. BOYER, 37 Colo. 185, 85 Pac. 837. But query, under LAVAGNINO v. UHLIG, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119.

[87] Act March 3, 1881, c. 140, 21 Stat. 505, amending Rev. St. U. S. § 2326 (U. S. Comp. St. 1901, p. 1430). In Montana, under the old statute, a locator of a mining claim, who had not filed a proper declaratory statement and who had not actual possession, could not have judgment in an adverse suit, even though the defendants had made no valid location. Hahn v. James, 29 Mont. 1, 73 Pac. 965.

[88] BROWN v. GURNEY, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717; Schroder v. Aden Gold Min. Co., 144 Cal. 628, 78 Pac. 20. In the code states the failure to file a counterclaim or cross-complaint will not prevent a judgment that defendant is entitled to the conflict area, if only the answer alleges facts showing that defendant should have affirmative relief. PEREGO v. DODGE, 9 Utah, 3, 33 Pac. 221.

[89] Newman v. Newton (C. C.) 14 Fed. 634. But see Quimby v. Boyd, 8 Colo. 194, 6 Pac. 462.

[90] IBA v. CENTRAL ASS'N OF WYOMING, 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

the state statute affirmative allegations in the answer are deemed to be denied.

Where it appeared in an adverse suit that the adverse claimant agreed before suit to convey the disputed premises to a third person, who was in actual possession when the adverse suit was begun and at the time of trial, it was nevertheless held that the adverse claimant could prosecute the adverse suit to judgment, for the reason that he was bound to quiet title for the third person, and the latter's possession was a part of, and in subordination to, the claimant's title.[91]

One who has not filed an adverse claim cannot intervene in the adverse suit.[92]

If either party is relying on an abandonment, or forfeiture, and a relocation, the pleading must be governed by the rules heretofore discussed in the chapter on abandonment, forfeiture, and relocation.

The Trial.

The federal statute requires that the suit shall be prosecuted with reasonable diligence to final judgment. What is reasonable diligence is for the court where the adverse suit is pending to decide in that suit, and is not for the land department to pass upon.[93] The trial is governed by the same rules as any other trial affecting real property, except that the citizenship of the parties is involved and that judgment may be entered that neither party is entitled to the conflict area.[94]

The rights of the adverse claimant have been held to be limited to those existing at the time of the filing of his adverse.[95] This would seem, however, to include all rights acquired during the 60-day period of publication of the patent application notice and capable of proof under the adverse claim filed, but would not include a discovery subsequent to that period.[96]

On the trial the court is not concerned with defects in the adverse

[91] WOLVERTON v. NICHOLS, 119 U. S. 485, 7 Sup. Ct. 289, 30 L. Ed. 474.

[92] MURRAY v. POLGLASE, 23 Mont. 401, 59 Pac. 439; Mont Blanc Consol. Gravel Min. Co. v. Debour, 61 Cal. 364.

[93] Richmond Min. Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273; Bernard v. Parmelee (Cal. App.) 92 Pac. 658; Davis v. McDonald, 33 Land Dec. Dep. Int. 641. A dismissal of an adverse suit for failure to prosecute it is as fatal to the suit as if the suit had never been started. KANNAUGH v. QUARTETTE MIN. CO., 16 Colo. 341, 27 Pac. 245. See Bernard v. Parmelee, supra.

[94] Proof of citizenship must be by competent evidence, and not by affidavit. Strickley v. Hill, 22 Utah, 257, 62 Pac. 893, 83 Am. St. Rep. 786. Each party must rely on the strength of his own title, and not on the weakness of that of his adversary. MURRAY HILL MIN. & MILL. CO. v. HAVENOR, 24 Utah, 73, 66 Pac. 762.

[95] HEALEY v. RUPP, 37 Colo. 25, 86 Pac. 1015. [96] Id.

claim itself, as these are for the land department to pass upon.[97] The same is true of the question of the $500 expenditure on each claim.[98] Where the defendant's location is prior in time to the plaintiff's, the court may cast on the plaintiff the burden of rebutting the prima facie presumption that the location prior in time has the better right.[99]

The court may grant a nonsuit just as in any other case;[100] but the defendant must nevertheless make an affirmative showing, unless he is willing to have the judgment show that title is in neither party.[101] After the nonsuit the proceedings become ex parte, and the plaintiff is not prejudiced by court rulings and instructions, if the nonsuit has properly been granted.[102] The court, having obtained jurisdiction of all parties, may grant full relief and restore possession to the party entitled thereto.[103] It is no objection to a judgment in the adverse suit that it was based upon a stipulation of the parties, as it is for the courts to determine the manner of ascertaining the facts.[104]

The Verdict.

The form of verdict depends wholly upon the local statutes and decisions. Even under a state statute requiring the jury to find that the party recovering the verdict was entitled to the possession of the prop-

[97] QUIGLEY v. GILLETT, 101 Cal. 462, 35 Pac. 1040; ROSE v. RICHMOND MIN. CO., 17 Nev. 25, 27 Pac. 1105.

[98] Stolp v. Treasury Gold Min. Co., 38 Wash. 619, 80 Pac. 817; WILSON v. FREEMAN, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833.

[99] LOCKHART v. FARRELL, 31 Utah, 155, 86 Pac. 1077, 1080.

[100] McWILLIAMS v. WINSLOW, 34 Colo. 341, 82 Pac. 538; Lozar v. Neill (Mont.) 96 Pac. 343. But see Iba v. Central Ass'n of Wyoming, 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20. Unless plaintiff establishes that at the time of his location the ground in controversy was unoccupied and unappropriated land open to location, he runs the risk of a nonsuit. Lozar v. Neill, supra; Moffatt v. Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139. For a complaint held to contain a sufficient allegation of the matter even under the strict Arizona rule, see Phillips v. Smith (Ariz.) 95 Pac. 91.

[101] KIRK v. MELDRUM, 28 Colo. 453, 65 Pac. 633. See Willitt v. Baker (C. C.) 133 Fed. 937; Moffatt v. Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139; McWilliams v. Winslow, 34 Colo. 341, 82 Pac. 538; Lozar v. Neill (Mont.) 96 Pac. 343.

[102] MOFFATT v. BLUE RIVER GOLD EXCAVATING CO., 33 Colo. 142, 80 Pac. 139; Lozar v. Neill (Mont.) 96 Pac. 343. Where the adverse claimant has waived his claim by failing to introduce any evidence, he is not entitled to insist on a view of the premises by the jury. CONNOLLY v. HUGHES, 18 Colo. App. 372, 71 Pac. 681. Where he does not show that he has any right whatever to the ground in question, he is not entitled to insist that the applicant's declaratory statement is insufficient. Milwaukee Gold Extraction Co. v. Gordon (Mont.) 95 Pac. 995.

[103] Silver City Gold & Silver Min. Co. v. Lowry, 19 Utah, 334, 57 Pac. 11.

[104] Barney v. Conway, 29 Land Dec. Dep. Int. 388.

erty, or some part of it, or of some undivided share or interest in either, and to find the nature and duration of the interest, a general verdict for plaintiff on a complaint which alleges that the plaintiff is entitled to the possession of certain described property, which is unlawfully detained by the defendant, and the possession of which the plaintiff prays to recover, is held by the United States Supreme Court to be sufficient.[105] It is, however, the general practice in adverse cases to get a special verdict in jury trials, and specific findings of fact in trials to the court, and various state decisions, still unreversed, declare special verdicts to be necessary.[106] The argument of these state decisions is that the act of March 3, 1881, requiring the jury to find that neither party was entitled, if such should be the fact, compels the finding of a special verdict, so as to make sure that the jury did not regard the contest as simply one of the better right between the litigants, rather than, what it really is, one of the better right both between the litigants and as against the United States.[107] The argument does not seem to be sound, however, since, if the verdict does not state that neither party is entitled and does find for one party, the necessary conclusion is that such party is entitled.[108] Nevertheless the safe thing to do is to take in each case a special verdict. In a proper case the jury may apportion the disputed ground between the parties.[109]

Final Judgment.

Judgment follows upon verdict as in other cases. At what time the judgment becomes final for land office purposes is in some doubt, as is also the question of the effect of an appeal without a stay of proceedings. By the terms of the statute the judgment must be "final" to justify further land office proceedings, and "it is probably true that the filing of the judgment roll would not entitle the claimant to a patent under the United States statute, in the face of evidence that an ap-

105 BENNETT v. HARKRADER, 158 U. S. 441, 15 Sup. Ct. 863, 39 L. Ed. 1046. See Colorado Cent. Consol. Min. Co. v. Turck, 50 Fed. 888, 2 C. C. A. 67.

106 Burke v. McDonald, 2 Idaho, 679, 33 Pac. 49; Manning v. Strehlow, 11 Colo. 451, 18 Pac. 625.

107 BURKE v. McDONALD, supra. The United States is a quasi party, of course, to every adverse suit. WILSON v. FREEMAN, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833. But only so far that it has agreed to accept the judgment rendered in such suit as conclusive of the right of possession as between the contending claimants. Butte Land & Investment Co. v. Merriman, 32 Mont. 402, 80 Pac. 675, 108 Am. St. Rep. 590.

108 But see McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652.

109 Currency Min. Co. v. Bentley, 10 Colo. App. 271, 50 Pac. 920.

peal had been taken, or was being taken, or that proceedings for a new trial were pending." [110]

When the time for appeal has passed, and none has been taken, it would seem that the judgment is unquestionably final; but it would also seem as if the taking of an appeal without a stay of proceedings should keep the land office from taking action pending the appeal.

The final judgment may be entered by consent in compromise of the parties' rights.[111]

THE RELATION OF THE LAND DEPARTMENT TO THE COURT ADVERSE PROCEEDINGS.

105. Pending the determination of the court proceedings the land department stays all steps in the application for patent, except the completion of the posting and publication of notices, the posting of plats, and the filing of the necessary proofs of both.

If the court proceedings are not begun, a certificate to that effect is obtained, and the patent application proceeds as in the case of no adverse.

If the court proceedings are begun, and end by giving the whole conflict area to the applicant for patent, he simply files in the land office a certified copy of the judgment roll, and the patent application proceeds as if no adverse had been filed.

If, however, part or all of the conflict area is awarded to the adverse claimant, that part is excluded from the application and will be patented to the adverse claimant without the necessity of posting and publication on his part, if he complies with the land department's rules.

Where the court's judgment is that neither party is entitled, the filing of the certified copy of the judgment roll ends the application.

[110] See DOON v. TESCH, 131 Cal. 406, 408, 63 Pac. 764. There the motion for new trial was pending 12 years.

[111] "Where the suit is compromised, if there is only one adverse, it is more convenient to dismiss the suit, taking deed or bond for deed from the applicant. In such case, upon filing certificate of dismissal, the original survey goes to patent without further complications, and the defendant can convey after entry according to the terms of settlement. But in all this class of cases, and especially where there are two or more adverses, legal counsel should be taken. A settlement between the applicant and one adverser cannot bind a second adverser. There may be questions of retaining end lines, or the discovery shaft, or patent improvements; and it may be very material, as affecting extralateral rights or on the issue of priority, as to which lode had best take the patented title." Morrison's Mining Rights (13th Ed.) 494. For an instance of difficulties arising from such a compromise, see St. Louis Min. & Mill. Co. v. Montana Min. Co., 171 U. S. 650,

Upon the filing of the adverse claim in the land office the register or receiver indorses upon the same the precise date of filing.[112] He also notifies both parties of the filing of the adverse, and preserves a record of such notifications.[113] Thereafter, so far as the land affected by the adverse is concerned, all proceedings on the application for patent, with the exception of the completion of the publication, the posting of notices, and of the posting of plats and the filing of the necessary proofs thereof, are suspended until the controversy is adjudicated in court or the adverse claim is waived or withdrawn.[114] It is customary for the adverse claimant to obtain from the clerk of the court where the adverse suit is started, and to file in the land office, a certificate that the suit has been commenced; but that seems not to be needed, because, unless, after the 30 days allowed the adverse claimant, the applicant gets a certificate from the clerk that no suit has been begun,[115] or that one begun has been dismissed,[116] the patent proceedings remain stayed.

The land office, as we have seen, cannot pass on the question whether the suit is being prosecuted with reasonable diligence.[117] It must act upon certificates from the clerk of the court, and if a certificate of no suit pending is furnished because of a default, and the court later sets aside the default and reinstates the cause, a new certificate to that effect will bind the land office.[118] A receiver's receipt issued pending the adverse suit is issued without jurisdiction and is void;[119] but one whose adverse suit has been dismissed cannot be allowed to contend that the patent issued after such a void receipt is also void.[120]

19 Sup. Ct. 61, 43 L. Ed. 320; Montana Min. Co. v. St. Louis Mining & Milling Co., 204 U. S. 204, 27 Sup. Ct. 254, 51 L. Ed. 444.

112 Land Office Regulations, rule 84.

113 Land Office Regulations, rules 83 and 84.

114 Land Office Regulations, rule 84. If, pending the adverse suit, the applicant obtains a patent for the part of the location not in dispute, he does not waive his rights as to the part in litigation. Fox v. Mackay, 1 Alaska, 329; MACKAY v. FOX, 121 Fed. 487, 57 C. C. A. 439. Permitting him to do so was questioned in LAST CHANCE MIN. CO. v. TYLER MIN. CO., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859.

115 Land Office Regulations, rule 88.

116 Land Office Regulations, rule 86.

117 RICHMOND MIN. CO. v. ROSE, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273; Davis v. McDonald, 33 Land Dec. Dep. Int. 641.

118 Iola Lode Case, 1 Land Dec. Dep. Int. (Rev. Ed.) 530; McEvoy v. Hyman (C. C.) 25 Fed. 539.

119 Deeney v. Mineral Creek Milling Co., 11 N. M. 279, 67 Pac. 724.

120 DENO v. GRIFFIN, 20 Nev. 249, 20 Pac. 308. But see Rose v. Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105.

When the adverse suit reaches final judgment, it will not be sufficient to file with the register a certificate of the clerk of the court, setting forth the facts as to such judgment; but before the successful party will be allowed to make entry he must file a certified copy of the judgment roll.[121] If the judgment is in favor of the applicant for patent (the defendant in the adverse suit) for the whole conflict area, he need file, in addition to the papers regularly required of an applicant, nothing but the copy of the judgment roll. If the judgment is in favor of the adverse claimant as to all or part of the conflict area, he may rest content with filing the certified copy of the judgment roll and getting the conflict area awarded to him excluded from the patent, or he may ask that it be patented to him. If he seeks to patent the conflict area, he may do so without posting or publishing a notice of application, and hence without the risk of an adverse;‡ but to do so he must "file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended, or improvements made thereon, and the description required in all other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees." [122]

Where the adverse claimant seeks to patent, also, ground not in conflict, and that is the usual case, he must proceed as to other than the conflict area in precisely the same way as any other original applicant.[123]

Where the judgment is that neither party has established a right of possession, the adverse claimant files the certified copy of the judgment roll in the land office and ends the patent application. The land thereupon is subject to relocation by either party or by others.[124] By such a judgment the patent proceedings are ended, and entry cannot be had, except on the prosecution by a qualified applicant of a new patent proceeding.[125]

[121] Land Office Regulations, rule 85; Silver King Lode, 14 Land Dec. Dep. Int. 308.

‡That is, without the risk of adverse claims not already filed.

[122] Rev. St. U. S. § 2326 (U. S. Comp. St. 1901, p. 1430); Woods v. Holden, 27 Land Dec. Dep. Int. 375.

[123] Where pending the adverse proceedings, the adverse claimant patents all of his location except the part in conflict, he does not thereby waive his adverse claim. MACKAY v. FOX, 121 Fed. 487, 57 C. C. A. 439. If successful in the adverse proceedings, he simply proceeds to patent the conflict area by itself.

[124] LAUMAN v. HOOFER, 37 Wash. 382, 79 Pac. 953.

[125] Brien v. Moffitt, 35 Land Dec. Dep. Int. 32.

PROTESTS.

106. A protest, unlike an adverse, is an objection made, not to acquire title for the objector, but to prevent the applicant for patent from getting title because of some fatal defect, and a protest will not lie where an adverse claim was proper. A protestant is in the nature of an amicus curiæ.

By the express provision of the federal statutes the fact that no adverse claim is filed carries with it the assumption that none exists, "and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter";[126] the chapter being the collected mining law provisions of the Revised Statutes.

Who may Protest.

A protest may be filed, at any time prior to the issuance of patent, by any person who alleges a state of facts which should prevent the issuance of a patent.[127] A protestant who makes no claim to the property sought to be patented, nor to any part of it, is in the position of an amicus curiæ.[128] Such a one does not have the right of appeal,[129] however, and in consequence, if the protestant does claim an interest in the property, it is desirable that he should state in his protest what that interest is, so as to get all possible rights of appeal.[130] The protestant can acquire no title through the protest, unless the protest is based on the ground that he is a co-owner excluded from the patent application; for a judgment of the land department rejecting an application for patent as a result of a protest "is in effect one of nonsuit, and therefore not upon the merits," where "the rights of the protestants were neither involved nor adjudicated."[131] But, if the

[126] Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429).

[127] Land Office Regulations, rule 53.

[128] BEALS v. CONE, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92. See WIGHT v. DUBOIS (C. C.) 21 Fed. 693, 696.

[129] BRIGHT v. ELKHORN MIN. CO., 8 Land Dec. Dep. Int. 122; Dotson v. Arnold, 8 Land Dec. Dep. Int. 439.

[130] Nevada Lode, 16 Land Dec. Dep. Int. 532; Opie v. Auburn Milling Co., 29 Land Dec. Dep. Int. 230. The protestant cannot appeal, if his location was made only after protest filed, nor unless his interest is in a surface conflict. SMUGGLER MINING CO. v. TRUEWORTHY, 19 Land Dec. Dep. Int. 356; New York Hill Co. v. Rocky Bar Co., 6 Land Dec. Dep. Int. 318.

[131] BEALS v. CONE, 27 Colo. 473, 62 Pac. 948, 951, 83 Am. St. Rep. 92. "The fair inference from these rulings [of the Secretary of the Interior] is that the judgment of the department rejecting the application for patent, and nothing more, leaves the applicant with the same right as though no application had been made." Id.

protest is sustained on some ground which compels the applicant to post and publish anew, the protestant will then be entitled to file and prosecute any adverse claim he may have. One who should have adversed, but who has lost his rights by failure to do so in time, may protest, in the hope thereby of getting another chance to adverse, or of defeating the application altogether.[132]

A co-owner excluded from the application for patent may protest under the land office rules;[133] but that is because the land department believes that he cannot adverse, and the co-owner case furnishes the one exception to the rule that by protest one cannot affect or share in the title actually issued in the patent proceedings. Except in the case of an excluded co-owner, the office of a protest is to show that the land claimed is not the kind it is represented to be, or that the applicant has failed to comply with the law in a matter which would avoid the claim. Protest would be proper where the applicant is an alien, or is applying for a patent for a mill site which is in fact on mineral land, or is seeking to patent as mineral ground which is nonmineral,[134] or has failed in a substantial particular in the perfection of his location, or has failed to make the $500 expenditure required for patent, or has neglected to comply with the statutes and departmental rules in regard to posting or publishing the notices of application for patent, or has been guilty of inexcusable delay in prosecuting his application to completion, or is seeking to acquire title to mineral ground for purposes or uses foreign to those of mining or the development of minerals.†

[132] "Such an objector appears as an amicus curiæ—a friend of the court—to suggest that there has been error and that the proceedings be stayed until further examination can be had. Such a protest does not bring the protestant into court for the assertion of his own title or rights—does not revivify rights lost by a failure to adverse. True, if the protest or objection is sustained, the proceedings will be set aside, new ones must be commenced, and then the objector may be in a position to assert his rights; but, if the protest or objection be not sustained, the objector, like an amicus curiæ, has nothing more to say in the matter. In other words, the right to protest is not the right to contest. The latter is lost by the failure to adverse. The former remains open to every one, holders of adverse claims as well as others." Brewer, J., in WIGHT v. DUBOIS (C. C.) 21 Fed. 693, 696.

[133] Land Office Regulations, rule 53. See Thomas v. Elling, 25 Land Dec. Dep. Int. 495. In the Golden and Cord Lode Mining Claims, 31 Land Dec. Dep. Int. 178, where the co-owner was deemed improperly excluded, the applicant was given his election to amend his application to include the co-owner or to have his entry canceled.

[134] German Ins. Co. v. Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206; LE FEVRE v. AMONSAN, 11 Idaho, 45, 81 Pac. 71.

†Grand Canyon Ry. Co. v. Cameron, 36 Land Dec. Dep. Int. 66.

No Protest Where Adverse Proper.

In the case of a protest the first question asked is, was this properly the subject of an adverse? If it was, then no protest will lie; for the departmental rule provides that "such protest cannot, however, be made the means of preserving a surface conflict lost by failure to adverse, or lost by the judgment of the court in an adverse suit." [135] It is because of the last rule that the significance of the doctrine of protest has apparently been greatly increased by the case of Lavagnino v. Uhlig.[136] It has long been a departmental holding that a protest by a senior locator against a junior cannot be maintained, even though the protestant alleges and can prove that the sole discovery of the junior claim was within the senior boundaries,[137] yet the uniform holding of the courts has been that such a second location is void. Lavagnino v. Uhlig decided that where a valid junior location overlaps a senior, and the senior is abandoned or forfeited, the conflict area inures to the junior location without the necessity of any further acts by the junior locator. We have heretofore noticed that this does not necessarily mean that the senior locator cannot "resume work" under the statute, but that it is possible that it does mean that, if the junior ground is not located by others prior to the abandonment or forfeiture of the senior location, the senior ground would inure to a junior location, even where there is no discovery to support the junior other than that found on the conflict area.[138]

Unless, therefore, the land department changes its ruling as to protest in such cases, or is forced by the United States Supreme Court to change it, the logical outcome of Lavagnino v. Uhlig would seem to be to validate locations based on a discovery within the limits of an existing claim; such locations to become invalid only upon the location of junior ground by other locators prior to the abandonment or forfeiture of the senior, or upon the patenting by the senior location of the discovery of the junior.[139] The reason why that is the logical outcome of Lavagnino v. Uhlig is that the latter case is based expressly upon the fact that, unless the senior locator adverses the junior locator's application, the junior will get patent. Under the present land de-

[135] Land Office Regulations, rule 53.

[136] 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119.

[137] Goudy v. Kismet Gold Min. Co., 22 Land Dec. Dep. Int. 624; American Consol. Min. & Mill. Co. v. De Witt, 26 Land Dec. Dep. Int. 580; MUTUAL MINING & MILLING CO. v. CURRENCY CO., 27 Land Dec. Dep. Int. 191; BURNSIDE v. O'CONNOR, 30 Land Dec. Dep. Int. 67.

[138] But see LOCKHART v. FARRELL, 31 Utah, 155, 86 Pac. 1077 (reversed on other grounds in Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——).

[139] Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348.

partment rulings that is no more certain in the situation presented by Lavagnino v. Uhlig than it is in the situation of a junior location based upon a discovery wholly within a senior location's boundaries.[140]

Despite Lavagnino v. Uhlig, the United States Supreme Court may yet say (if it has not already done so in Farrell v. Lockhart‡) that where a junior location is based solely upon a discovery within senior ground a relocator of ground embraced in the junior location is entitled to adverse the junior's application for patent. The Utah Supreme Court did declare that doctrine,[141] and the Supreme Court of the United States seems to recognize its validity in the absence of an abandonment by the senior locator prior to the junior location.** But it is believed that Lavagnino v. Uhlig holds to the sounder doctrine. With the qualifications that prior to the abandonment or forfeiture

[140] The brief of counsel for the plaintiff in error in the case of Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——, points out that the record in Lavagnino v. Uhlig, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119, discloses that the junior location in that case was based on a discovery in the senior locator's ground.

‡ 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——.

[141] LOCKHART v. FARRELL, 31 Utah, 155, 86 Pac. 1077. With all deference, the argument of the Utah court that the decision is controlled by the Indian reservation case of Kendall v. San Juan Silver Min. Co., 144 U. S. 658, 12 Sup. Ct. 779, 36 L. Ed. 583, cannot be accepted. The reasoning in LAVAGNINO v. UHLIG could by no possibility extend to the Indian reservation case. The Utah case is, however, to be supported under Messrs. Morrison and De Soto's test, namely: "That where a defect exists which is a matter of public interest, and which shows that the applicant has not proceeded regularly as to the United States, or as to the entire body of prospectors, who are entitled to see that all are required to proceed under like restrictions, a protest will be considered; but where the point is one of interest only as between the applicant and the protestant, or as between the applicant and a third party, who is not complaining, the protestant cannot by his protest claim the right to litigate in this form what he should have contested by adverse." Morrison's Mining Rights (13th Ed.) 497. But Messrs. Morrison and De Soto's test is not the one which the land department applies. See cases cited in note 137, supra. The Utah court would also seem to be mistaken in regarding BROWN v. GURNEY, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717, as controlling the decision of LOCKHART v. FARRELL. See the discussion of BROWN v. GURNEY in chapter XVII, supra.

** Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——. In Montague v. Labay, 2 Alaska, 575, the court declared that the doctrine of LAVAGNINO v. UHLIG, 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119, must be restricted to the case of an adverse proceeding contest between a locator and the junior of two prior locators; and in Dufresne v. Northern Light Mining Co., 2 Alaska, 592, the court apparently repudiated LAVAGNINO v. UHLIG entirely—a repudiation which the case of FARRELL v. LOCKHART, supra, unfortunately seems to justify. It is to be hoped that the Supreme Court of the United States will return to the sound doctrine of LAVAGNINO v. UHLIG.

of the senior claim the nonconflicting ground embraced in an attempted location which is based on a discovery within the limits of the senior claim may be taken by valid locations by others, and that the junior locator must diligently look after his claim†† or be deemed to have abandoned it, there seems to be no rational reason why the junior location may not be validated by the abandonment or forfeiture of the senior. That is because by such abandonment or forfeiture the junior discovery becomes a discovery on land not any longer embraced in a prior location and perfects the junior location by relation. It is believed that if no rights of third persons intervene before the abandonment or forfeiture of the senior location, and the junior locator diligently keeps up his annual labor, the so-called void junior location should be validated by such abandonment or forfeiture of the senior, and that ultimately the Supreme Court of the United States will so hold.

In view of the case of Farrell v. Lockhart,[142] however, a cautious miner will make in every case a complete relocation of ground which he has attempted to locate on a discovery within a prior claim, and which, because the prior claim has been abandoned or is subject to forfeiture, he can now acquire. He should do so anyhow, because even under Lavagnino v. Uhlig the right of the senior claimant to priority over the junior claim could probably be restored by resumption of work prior to relocation by amendment or otherwise,[143] and a prudent miner would want to end that possibility.

Even in a case where neither adverse nor protest is filed, the Commissioner of the General Land Office may of his own motion cancel an entry for failure of the applicant to comply with some statute or with some rule of the department.[144] An unsuccessful protest made after entry does not, however, give the protestants any basis for a suit in equity to annul the patent issued, nor any ground to charge the patentee as trustee.[145]

†† Diligence on his part is a land department test. Adams v. Polglase, 32 Land Dec. Dep. Int. 477, 33 Land Dec. Dep. Int. 30.

[142] 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. ——.

[143] See OSCAMP v. CRYSTAL RIVER MIN. CO., 58 Fed. 293, 7 C. C. A. 233.

[144] MINERAL FARM MIN. CO. v. BARRICK, 33 Colo. 410, 80 Pac. 1055. The rejection of an application for patent for a placer because the applicant failed to show that the ground was valuable for mining purposes or that he made the requisite improvements is not a decision that the ground is not placer ground, and is not res judicata in action between the applicant for placer patent and a subsequent lode claim locator. Clipper Min. Co. v. Eli Mining & Land Co., 29 Colo. 377, 68 Pac. 286, 64 L. R. A. 209, 93 Am. St. Rep. 89.

[145] Neilson v. Champaign Min. & Mill. Co., 119 Fed. 123, 55 C. C. A. 576.

With reference to protest it should be remembered that the dismissal of an application for patent because of a protest leaves the applicant with his possessory title unimpaired if he has kept up his annual labor.[146] If he has not kept up the annual labor, and the application is dismissed for his laches, the applicant, on renewing his application, may be confronted by an adverse claim made by a relocator.[147]

But where the applicant for patent delayed entry, and a relocation for failure to do the annual labor took place, the patentee was held a trustee for the relocator, in South End Mining Co. v. Tinney, 22 Nev. 19, 35 Pac. 89.

[146] McGowan v. Alps Consol. Min. Co., 23 Land Dec. Dep. Int. 113; Clipper Min. Co. 22 Land Dec. Dep. Int. 527.

[147] P. Wolenberg, 29 Land Dec. Dep. Int. 302; Barklage v. Russell, 29 Land Dec. Dep. Int. 401; Cleveland v. Eureka No. 1 Gold Mining & Milling Co., 31 Land Dec. Dep. Int. 69; Lucky Find Placer Claim, 32 Land Dec. Dep. Int. 200.

CHAPTER XX.

PATENTS.

NATURE OF A PATENT.

107. A patent is both a judgment in rem of the quasi judicial land department and a conveyance of title by the United States to the patentee. If within the jurisdiction of the land department to issue and valid on its face, a patent is not subject to collateral attack.

A patent is the conveyance executed by the United States which passes to the applicant the legal fee-simple title to the land.[1] In still another aspect, however, because it is the culmination of the patent proceedings, it is a final judgment in rem rendered by that quasi judicial tribunal, the land department. The exact way to state it seems to be that it is a judgment which is self-executing as respects title, and therefore is both a judgment and a conveyance.[2]

Conclusiveness of Patent.

Because of the patent's character as a judgment in rem rendered on the default, or after the judicial defeat, of all adverse claimants, the patentee takes free from the claims of all who are not specifically protected under the public land acts. All adverse claimants who must

[1] STEEL v. ST. LOUIS SMELTING & REFINING CO., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226. A patent of land from the United States passes to the patentee all the interest of the United States, whatever it may be, in everything connected with the soil, in everything forming any portion of its bed or fixed to its surface, and, in general, in everything which is embraced within the signification of the term "land." MOORE v. SMAW, 17 Cal. 199, 79 Am. Dec. 123; Fremont v. Flower, 17 Cal. 199, 224; Johnson v. Johnson (Idaho) 95 Pac. 499.

[2] "The land department is a quasi judicial tribunal, and a patent is the judgment of that tribunal upon the questions presented and a conveyance in execution of the judgment." United States v. Northern Pac. R. Co., 95 Fed. 864, 869, 37 C. C. A. 290; JAMES v. GERMANIA IRON CO., 107 Fed. 597, 600, 46 C. C. A. 476; Le Marchel v. Teagarden (C. C.) 152 Fed. 662. See United States v. Winona & St. P. R. Co., 67 Fed. 948, 15 C. C. A. 96.

adverse are barred by the patent, if all jurisdictional facts for its issue existed, and those who might have protested have no recourse except in a proper case to persuade the United States to file a bill in equity to vacate the patent for fraud. So conclusive is a patent that even on direct attack by the government the presumption that the patent was correctly issued can be overcome only by clear and convincing proof of the false representations whereby it was secured.[3]

A patent issued without authority of law, as well as one issued in spite of a law forbidding its issuance, is invalid;[4] and so, it seems, is one purporting to convey a claim in excess of the legal size,[5] as well as one containing so inaccurate a description as to render the identity of the property wholly uncertain;[6] and, of course, such absolutely void patents are subject to collateral attack.[7] A patent which is within the jurisdiction of the land department to issue and is valid on its face is not, however, subject to collateral attack.[8] Except on direct attack

[3] UNITED STATES v. IRON SILVER MIN. CO., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; United States v. King, 83 Fed. 188, 27 C. C. A. 509.

[4] BURFENNING v. CHICAGO, ST. P., M. & O. R. CO., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; GARRARD v. SILVER PEAK MINES (C. C.) 82 Fed. 578; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844; United States v. Winona & St. P. R. Co., 67 Fed. 948, 15 C. C. A. 96; Ledbetter v. Borland, 128 Ala. 418, 29 So. 579; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113. A patent for land previously granted to other parties is in this class. FRANCŒUR v. NEWHOUSE (C. C.) 40 Fed. 618. A patent issued while an adverse suit is pending is void as against the adverse claimant. ROSE v. RICHMOND MIN. CO., 17 Nev. 25, 27 Pac. 1105, affirmed Richmond Mining Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273. Except, of course, where his adverse suit is dismissed. Deno v. Griffin, 20 Nev. 249, 20 Pac. 308.

[5] Lakin v. Dolly (C. C.) 53 Fed. 333; Lakin v. Roberts, 54 Fed. 461, 4 C. C. A. 438. But, to make the patent invalid, it must be clear that several claims could not have been included in the one patent as a consolidated claim. PEABODY GOLD MIN. CO. v. GOLD HILL MIN. CO. (C. C.) 97 Fed. 657; Id., 111 Fed. 817, 49 C. C. A. 637; CARSON CITY GOLD & SILVER MIN. CO. v. NORTH STAR MIN. CO., 83 Fed. 658, 28 C. C. A. 333; Tucker v. Masser, 113 U. S. 203, 5 Sup. Ct. 420, 28 L. Ed. 979; Poire v. Wells, 6 Colo. 406; Poire v. Leadville Improvement Co., 6 Colo. 413. In TUCKER v. MASSER, 113 U. S. 203, 5 Sup. Ct. 420, 28 L. Ed. 979, a patent for a placer was held to be valid, although it covered more than 160 acres, since it included several placer locations, all owned by the same applicant.

[6] Cullacott v. Cash G. & S. M. Co., 8 Colo. 179, 6 Pac. 211.

[7] GARRARD v. SILVER PEAK MINES (C. C.) 82 Fed. 578.

[8] ST. LOUIS SMELTING & REFINING CO. v. KEMP, 104 U. S. 636, 26 L. Ed. 875; STEEL v. ST. LOUIS SMELTING & REFINING CO., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226. See CALHOUN GOLD MIN. CO. v. AJAX GOLD MIN. CO., 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200.

on a patent, it is conclusively presumed that everything has been done that should have been done.[9]

Not all questions are settled by a patent, however. The patent necessarily contains various conditions and exceptions, and even if these are not expressed they are implied. While conditions and exceptions put in the patent by the land department without authority of law are absolutely void, and for that reason are disregarded,[10] the law itself fixes certain ones. A patentee, for instance, takes subject to pre-existing easements for ditches and reservoirs used in connection with water rights acquired under the federal statutes[11] and to easements for highways.[12] So a placer patent does not convey lodes known to exist at the time of the application for placer patent.[13] A lode patented across a tunnel site, where the lode was located after the tunnel site, does not get blind veins cut later by the tunnel and claimed properly by the tunnel owner.[14] So a townsite patent is not conclusive as against a known lode.[15] But in all these respects a patented claim is at no disadvantage as contrasted with an unpatented one.

[9] GALBRAITH v. SHASTA IRON CO., 143 Cal. 94, 76 Pac. 901. See United States v. Marshall Silver Min. Co., 129 U. S. 579, 9 Sup. Ct. 343, 32 L. Ed. 734. The patent is conclusive of all facts necessary to establish the validity thereof. SHARKEY v. CANDIANI, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791. But it does not by relation make valid a void declaratory statement. Hickey v. Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806. But see Laws Mont. 1907, p. 23, where it is enacted that patent shall be conclusive that the Montana statute has been complied with, but that where questions of priority are involved, and the date of location is claimed to have been prior to the date of record, the date of location shall be an issuable fact.

[10] "The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and those rights can neither be enlarged nor diminished by any reservations of the officers of the land department." DAVIS v. WIEBBOLD, 139 U. S. 507, 528, 11 Sup. Ct. 628, 35 L. Ed. 238; DEFFEBACK v. HAWKE, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; Clary v. Hazlitt, 67 Cal. 286, 7 Pac. 701; Talbott v. King, 6 Mont. 76, 9 Pac. 434; Butte City Smoke House Lode Cases, 6 Mont. 397, 12 Pac. 858.

[11] Rev. St. U. S. § 2340 (U. S. Comp. St. 1901, p. 1437). See Act Jan. 21, 1895, c. 37, 28 Stat. 635; Act May 14, 1896, c. 179, § 2, 29 Stat. 120; Act May 11, 1898, c. 292, 30 Stat. 404.

[12] Rev. St. U. S. § 2477 (U. S. Comp. St. 1901, p. 1567).

[13] A placer patent will, of course, pass to the patentee all lodes other than "known lodes." CRANE'S GULCH MIN. CO. v. SCHERRER, 134 Cal. 350, 66 Pac. 487, 86 Am. St. Rep. 279. And under the federal act of 1866 even "known lodes" passed. Id.

[14] CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501.

[15] See chapter VII, § 29, supra.

ADVANTAGES OF PATENT.

108. It is in the conclusiveness of title to the land conveyed that a patent excels a location.

The first question to be considered is wherein a patent gives the patentee an advantage that he did not possess as a locator. Upon the surface it would seem as if the total gain by patent was the conversion of a possessory title, retained on condition of the continued performance of annual labor, into the legal title in fee simple. "A valid and subsisting location of mineral lands," said the United States Supreme Court in 1884, "made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located." [16] And that dictum expresses what has been the general conception of the dignity and importance of a mining claim.[17]

[16] GWILLIM v. DONNELLAN, 115 U. S. 45, 49, 5 Sup. Ct. 1110, 29 L. Ed. 348. See Butte City Smoke House Lode Cases, 6 Mont. 397, 12 Pac. 858.

[17] "It has therefore been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States, and that, when a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession." MANUEL v. WULFF, 152 U. S. 505, 510, 511, 14 Sup. Ct. 651, 38 L. Ed. 532; O'CONNELL v. PINNACLE GOLD MINES CO. (C. C.) 131 Fed. 106; Id., 140 Fed. 854, 72 C. C. A. 645, 4 L. R. A. (N. S.) 919; Oscamp v. Crystal River Min. Co., 58 Fed. 293, 7 C. C. A. 233. See Moore v. Steelsmith, 1 Alaska, 121; Worthen v. Sidway, 72 Ark. 215, 79 S. W. 777; Harris v. Equator Min. & S. Co. (C. C.) 8 Fed. 863; McFeters v. Pierson, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388; Hughes v. Devlin, 23 Cal. 501; Suessenbach v. First Nat. Bank, 5 Dak. 477, 41 N. W. 662. Compare White Star Min. Co. v. Hultberg, 220 Ill. 578, 77 N. E. 327. The possessory right to a mining claim is properly assessed as real estate. Bakersfield & Fresno Oil Co. v. Kern County, 144 Cal. 148, 77 Pac. 892. It is within a statute abolishing joint tenancy in real property. Binswanger v. Henninger, 1 Alaska, 509. It is subject to a judgment lien upon real property. Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1; Bradford v. Morrison (Ariz.) 86 Pac. 6. But see, contra, Phœnix Min. & Mill. Co. v. Scott, 20 Wash. 48, 54 Pac. 777. It descends to the intestate owner's heirs. KEELER v. TRUEMAN, 15 Colo. 143, 25 Pac. 311; Lohman v. Helmer (C. C.) 104 Fed. 178. That unpatented mining claims belonging to an intestate owner pass to his heirs by descent, instead of going to them as purchasers, and therefore an administrator's sale of the claims in the manner fixed by the state statute passes title to the purchaser at such sale, is held in O'CONNELL v. PINNACLE GOLD MINES CO. (C. C.) 131 Fed. 106; Id., 140 Fed. 854, 72 C. C. A. 645, 4 L. R. A. (N. S.) 919. A mining claim may be taken and sold under execution. McKeon v. Bisbee, 9 Cal. 137, 70 Am. Dec. 642. Compare Roseville Alta Min. Co. v. Iowa Gulch Min. Co., 15 Colo. 29, 24 Pac. 920, 22 Am. St. Rep. 373. Where the claim is used as a place of residence for the owner and his family, it may even

But, while a mining location is a grant by the United States, it is far from being as satisfactory a grant as a patent is. In the first place, the location has the condition of annual labor attached to it, while a patent has not. Then a location has no presumptions in its favor, except as against an express relocation, and must be proved by showing both the mineral nature of the land revealed in a discovery and the acts of location duly performed, while a mining patent establishes once for all, except on direct attack by the government for fraud, the mineral character of the land,[18] the fact of a valid discovery,[19] and the legal existence of the location merged in the patent as prior to any other conflicting surface location not excepted from it.[20] Not only so, but

be claimed as a homestead exemption. GAYLORD v. PLACE, 98 Cal. 472, 33 Pac. 484. Its validity is not affected by the lapse of many years without an attempt to patent it. CLIPPER MIN. CO. v. ELI MINING & LAND CO., 194 U. S. 220, 24 Sup. Ct. 632, 48 L. Ed. 944. See Chapman v. Toy Long, 4 Sawy. (U. S.) 28 Fed. Cas. No. 2,610.

[18] DAVIS v. SHEPHERD, 31 Colo. 141, 72 Pac. 57. See Tombstone Townsite Cases, 2 Ariz. 272, 15 Pac. 26; Gale v. Best, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44.

[19] CALHOUN GOLD MIN. CO. v. AJAX GOLD MIN. CO., 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200; Carson City Gold & Silver Min. Co. v. North Star Min. Co., 83 Fed. 658, 28 C. C. A. 333; Bunker Hill & S. Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co., 109 Fed. 538, 48 C. C. A. 665. The patent does not necessarily assert a discovery prior to the date of entry for patent, however. CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501. While the patent raises a conclusive presumption that there is an apex of a vein within the ground patented, there is no presumption that it is the vein in dispute, nor that it dips beyond the side lines. GRAND CENTRAL MIN. CO. v. MAMMOTH MIN. CO., 29 Utah, 490, 83 Pac. 648. See, also, United States Min. Co. v. Lawson, 134 Fed. 769, 67 C. C. A. 587; LAWSON v. UNITED STATES MIN. CO., 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65; DAVIS v. SHEPHERD, 31 Colo. 141, 72 Pac. 57.

[20] EMPIRE STATE-IDAHO MINING & DEVELOPING CO. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO., 114 Fed. 420, 52 C. C. A. 222; Fox v. Mackay, 1 Alaska, 329; Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co., 131 Fed. 579, 66 C. C. A. 299. After patent it is conclusively presumed that all the preliminary requirements have been properly carried out. GALBRAITH v. SHASTA IRON CO., 143 Cal. 94, xviii, 76 Pac. 901, 1127; Talbott v. King, 6 Mont. 76, 9 Pac. 434; Chambers v. Jones, 17 Mont. 156, 42 Pac. 758; SHARKEY v. CANDIANI, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791. As to surface not in conflict with the senior location the patented junior ground will not be deemed the senior; and hence, where a broad vein is bisected in its course by the side lines of the two locations as they lie after the patenting of the junior, the one first located will have the extralateral rights. United States Min. Co. v. Lawson, 134 Fed. 769, 67 C. C. A. 587; LAWSON v. UNITED STATES MIN. CO., 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65. By a California statute a statement of the date of

while two out of three states hold—erroneously it is believed [21]—that a location which does not exceed the legal limits for a single claim is nevertheless excessive to the extent that, because of the irregular course of the vein, more than the legal number of feet on each side of the vein is embraced in it, they so hold only as regards unpatented claims; for, once a patent is issued for that kind of a location, it is no longer open to attack as excessive.[22]

Patent also confers certain advantages in a contest for extralateral rights.[23] Extralatral rights are discussed in the next chapter. But it may be well to note, as a corollary to the doctrine about excessive locations just stated, that a patent establishes that any secondary known or blind vein apexing within the patented ground belongs to the patentee, even though it may be more than 300 feet away from the discovery vein.[24] Still another advantage of a patent in the case of a placer is that all lodes discovered after application for placer patent belong to the patentee.

With the delivery of a patent the title which the United States had in the patented property vests in the patentee. He takes a new start

location of a claim or claims contained in a United States mineral land patent is made prima facie evidence of the date of location. St. Cal. 1905, p. 78, c. 81.

[21] WATERVALE MIN. CO. v. LEACH, 4 Ariz. 34, 33 Pac. 418. See chapter XII, § 55a (2), supra.

[22] PEABODY GOLD MIN. CO. v. GOLD HILL MIN. CO. (C. C.) 97 Fed. 657; Id., 111 Fed. 818, 49 C. C. A. 637; ARGONAUT CONSOLIDATED MINING & MILLING CO. v. TURNER, 23 Colo. 400, 48 Pac. 685, 58 Am. St. Rep. 245. The patent is conclusive as to the limits of the claim. WATERLOO MIN. CO. v. DOE (C. C.) 56 Fed. 685; Id., 82 Fed. 45, 27 C. C. A. 50. It sometimes happens that the calls in a patent do not agree with the monuments on the ground, and Congress has therefore enacted that the monuments shall govern. Act April 28, 1904, c. 1796, 33 Stat. 545 (U. S. Comp. St. Supp. 1907, p. 477), amending Rev. St. U. S. § 2327 (U. S. Comp. St. 1901, p. 1431). Compare Galbraith v. Shasta Iron Co., 143 Cal. 94, xviii, 76 Pac. 901, 1127; Alaska Gold Min. Co. v. Barbridge, 1 Alaska, 311; Meydenbauer v. Stevens (D. C.) 78 Fed. 787.

[23] See Carson City Gold & Silver Min. Co. v. North Star Min. Co., 83 Fed. 658, 28 C. C. A. 333. In determining priority as to surface conflicts, the patent determines priority as to incidental extralateral rights. EMPIRE STATE-IDAHO MINING & DEVELOPING CO. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO., 114 Fed. 420, 52 C. C. A. 222. But not priority as to extralateral rights dependent on the question of which location containing only part of the width of a broad vein is senior. LAWSON v. UNITED STATES MIN. CO., 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65.

[24] See note 22, supra. All blind veins apexing in the patented ground belong to the patentee. CALHOUN GOLD MIN. CO. v. AJAX GOLD MIN. CO., 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200. With the exception, of course, of those covered by a prior tunnel site. CREEDE & C. C. MIN. & MILL. CO. v.

in the world as a fee-simple owner.[25] Even the running of the statute of limitations against him is stopped by the patent, and its running must now date from the patent.[26] The United States was not subject to the statute of limitations, and its grantee gets all the right it had. What is more, once the government has parted with title, all right to recall it, except by resort to a suit in equity, is gone.[27] It is in the conclusiveness of title to the land owned, and to every part thereof, that a patent excels a location,[28] while the disadvantages of patent are few.*

UINTA TUNNEL MIN. & TRANSP. CO., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501.

[25] After patent no parties have the right to enter upon the land and prospect for mineral. FRANCŒUR v. NEWHOUSE (C. C.) 40 Fed. 618.

[26] REDFIELD v. PARKS, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327. See Tyee Consol. Min. Co. v. Langstedt, 136 Fed. 124, 69 C. C. A. 548.

[27] "With the title passes away all authority or control of the executive department over the land and over the title which it has conveyed. It would be as reasonable to hold that any private owner who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals, and if the government is the party injured this is the proper course." MOORE v. ROBBINS, 96 U. S. 530, 533, 24 L. Ed. 848. Even a patent issued on an erroneous survey can be corrected only by suit, unless the patentee will surrender the patent and make a deed to the United States of the erroneously included land. UNITED STATES v. RUMSEY, 22 Land Dec. Dep. Int. 101. See Baldwin Star Coal Co. v. Quinn, 28 Land Dec. Dep. Int. 307.

[28] The added dignity given by a patent is recognized by a Montana case, which holds that a one-year state statute of limitations applicable to mining claims does not apply to patented property. Horst v. Shea, 23 Mont. 390, 59 Pac. 364. See, also, Rader v. Allen, 27 Or. 344, 41 Pac. 154.

* One disadvantage of a patent is that in a state where dower exists it will attach to a patented claim, but will not to an unpatented. BLACK v. ELKHORN MIN. CO., 163 U. S. 445, 16 Sup. Ct. 1101, 41 L. Ed. 221. Of dower in patented ground the Tennessee court said: "We hold, therefore, that dower is assignable to the widow in mines, quarries, and the like, and she may enjoy the same, either by an allotment of metes and bounds, or by a share of the rents and royalties, whether the mines or quarries were opened and operated in the life of the husband, whether the same be operated by the husband, or by lessee paying rent or royalty on the yield." Clift v. Clift, 87 Tenn. 17, 25, 9 S. W. 198, 360. Another disadvantage of patent is that after patent it is no longer possible to swing the claim or adjust boundaries, so as to make the location lie along the subsequently ascertained course of the vein, or so as to make the end lines parallel.

EFFECT OF PATENT OF PLACER ON KNOWN LODES IN THE PLACER.

109. It has been decided that the holder of a patent to a placer, which includes a known lode not mentioned in the application for placer patent, has no title to such known lode, and cannot disturb the peaceable possession of such lode by another, whether that other claims title or is a mere trespasser.

The subject of known lodes in placers has been discussed several times already;[29] but it is desirable to note here that it has been decided that the holder of a patent to a placer, which includes a known lode not mentioned in the application for placer patent, has no title to such known lode, and cannot disturb the peaceable possession of such lode by another, whether that other claims title or is a mere trespasser.[30] In chapter XXI, § 113, the soundness of this doctrine is doubted.

DIRECT ATTACKS ON PATENTS.

110. A patent may be set aside for fraud by a suit brought in equity by the United States within six years from the date of the patent's issuance, provided the property has not previously been conveyed to innocent purchasers for value, and provided the United States establishes its case by a preponderance of the evidence.

A suit by the United States to annul a patent must be brought within six years after the date of the issuance of the patent.[31] The burden of proof as to fraud is on the government, although in consequence it has to establish a negative proposition.[32] The suit will not lie as against an innocent purchaser for value,[33] but as against the patentee or a

[29] See chapter XV, §§ 75–77, and chapter XVIII, § 101a.

[30] REYNOLDS v. IRON SILVER MIN. CO., 116 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774; Noyes v. Clifford (Mont.) 94 Pac. 842. Compare IRON SILVER MIN. CO. v. CAMPBELL, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155.

[31] Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1521). A five-year period was fixed as to patents issued prior to the act. The Supreme Court of the United States has construed the statute to bar suits to set aside patents invalid when made and issued prior to the act. United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881.

[32] COLORADO COAL & IRON CO. v. UNITED STATES, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182; UNITED STATES v. IRON SILVER MIN. CO., 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; United States v. King, 83 Fed. 188, 27 C. C. A. 509.

[33] COLORADO COAL & IRON CO. v. UNITED STATES, supra; UNITED STATES v. WINONA & ST. P. R. CO., 67 Fed. 948, 15 C. C. A. 96; United States v. Clark, 138 Fed. 294, 70 C. C. A. 584.

grantee who does not pay value or does not take innocently "a court of equity may, in a direct proceeding for that purpose, set aside such a patent or certificate, or declare the legal title under it to be held in trust for one who has a better right to it, in cases in which the action of the land department has resulted from fraud, mistake, or erroneous views of the law." [34]

PATENTEES AS TRUSTEES.

111. In proper cases patentees will be held to be trustees for others equitably entitled to the land.

Where a suit is brought by an individual to have the patentee declared a trustee for him, he must fail if it appear that his location was made for the first time some years after the issuance of the patent.[35] His proper course is to get the United States to sue to cancel the patent for fraud; and if the only showing is that placer ground was bought as lode ground at the enhanced price, and with the smaller surface applicable to lode claims, such a suit must fail.[36] In any event the party seeking to have a trust declared must make out a case against the patentee by evidence that is plain and convincing beyond reasonable controversy.[37] It has been held that such a suit is clearly within the jurisdiction of the federal courts, regardless of the citizenship of the parties.[38]

[34] UNITED STATES v. WINONA & ST. P. R. CO., 67 Fed. 948, 959, 15 C. C. A. 96. See San Pedro & Cañon del Agua Co. v. United States, 146 U. S. 120, 13 Sup. Ct. 94, 36 L. Ed. 911. A patent will not be set aside or modified for mistake, except where the proof is plain beyond reasonable controversy. THALLMANN v. THOMAS, 111 Fed. 277, 49 C. C. A. 317.

[35] PEABODY GOLD MIN. CO. v. GOLD HILL MIN. CO., 111 Fed. 817, 49 C. C. A. 637.

[36] Id.

[37] THALLMANN v. THOMAS, 111 Fed. 277, 49 C. C. A. 317; Copper River Mining Co. v. McClellan, 2 Alaska, 134. For a bill making a sufficient showing of a trust, see LOCKHART v. LEEDS, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. Ed. 263. The suit to declare a trust may be brought after the issuance of a receiver's receipt and before patent, if the plaintiff need not adverse. MALABY v. RICE, 15 Colo. App. 364, 62 Pac. 228. If the patentee bring ejectment, the trust may be set up as an equitable defense in jurisdictions where such defenses are allowed. MURRAY v. MONTANA LUMBER & MFG. CO., 25 Mont. 14, 63 Pac. 719. An unsuccessful protest after entry does not give the protestants any basis for a suit to charge the patentee as trustee. Neilson v. Champagne Mining & Milling Co., 119 Fed. 123, 55 C. C. A. 576.

[38] CATES v. PRODUCERS' & CONSUMERS' OIL CO. (C. C.) 96 Fed. 7.

Where a co-owner has been excluded from the patent the patentees become trustees for him to the extent of his interest,[39] and it seems that he need not await the issuance of patent before suing.[40] Laches will operate as a bar.[41]

THE DOCTRINE OF RELATION.

112. The title conveyed by the patent relates back to the completion of the location.

In the case of patents, as in the case of locations, the doctrine of relation of title applies. The title conveyed by the patent relates back to the completion of the location upon which the application for patent was based.[42] But the doctrine of relation cannot be applied to cut off the rights of a prior patent on a junior location.[43] Because the order in which discovery and the acts of location take place is immaterial to the government, a patent does not fix the time to which the title relates, except that it asserts that at the time of entry there was a discovery and a perfect location.[44]

After patent the property conveyed by the United States to the patentee becomes fully subject to constitutional state legislation. As the Supreme Court of the United States said in an early case: "We hold the true principle to be this: That whenever the question in any court, state or federal, is whether a title to land which had once been

[39] BALLARD v. GOLOB, 34 Colo. 417, 83 Pac. 376. See Hallack v. Traber, 23 Colo. 14, 46 Pac. 110; Cascaden v. Dunbar, 157 Fed. 62, 84 C. C. A. 566. The fact that he did not adverse the patent application is immaterial. STEVENS v. GRAND CENTRAL MIN. CO., 133 Fed. 28, 67 C. C. A. 284; Suessenbach v. First Nat. Bank, 5 Dak. 477, 41 N. W. 662. But if, pending the patent, he parts with his interest to one of the co-owners, to whom patent issues, he has, of course, lost all ground to complain. WETZSTEIN v. LARGEY, 27 Mont. 212, 70 Pac. 717.

[40] MALABY v. RICE, 15 Colo. App. 364, 62 Pac. 228.

[41] Patterson v. Hewitt, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214. See Holt v. Murphy, 207 U. S. 407, 28 Sup. Ct. 212, 52 L. Ed. 271.

[42] CALHOUN GOLD MIN. CO. v. AJAX GOLD MIN. CO., 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200; Silver Bow Min. & Mill. Co. v. Clark, 5 Mont. 378, 5 Pac. 570; Talbott v. King, 6 Mont. 76, 9 Pac. 434; Kahn v. Old Telegraph Min. Co., 2 Utah, 174.

[43] Eureka Consol. Min. Co. v. Richmond Min. Co., 4 Sawy. (U. S.) 302, Fed. Cas. No. 4,548; RICHMOND MIN. CO. OF NEVADA v. EUREKA CONSOLIDATED MIN. CO., 103 U. S. 839, 26 L. Ed. 557; Hall v. Equator Mining & Smelting Co., Fed. Cas. No. 5,931.

[44] CREEDE & C. C. MIN. & MILL. CO. v. UINTA TUNNEL MIN. & TRANSP CO., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501.

the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." [45]

[45] Wilcox v. McConnell, 13 Pet. (U. S.) 498, 517, 10 L. Ed. 264.

CHAPTER XXI.

SUBSURFACE RIGHTS.*

Perhaps the most striking feature of American mining law is the law of the apex; i. e., the law of the right to the extralateral pursuit of veins in their descent into the earth. While an effort is being made to get Congress to abolish the extralateral right doctrine, the fact remains that all patented and unpatented lode mining claims now existing and of the proper shape have the right of extralateral pursuit of the veins which apex in the claims, and no legislation by Congress can take that right away from patented claims, at least, without violating the federal Constitution. The extralateral right doctrine

*The questions of easements arising between surface and subsurface owners are reserved for discussion in chapter XXV.

must therefore remain for generations an important doctrine, whatever rule Congress may adopt for future locations.

The top or apex of a vein we have already defined. It is for the jury to say in a given case which claim owner embraces within the lines of his location the apex of the vein in dispute.[1] It is for the court to announce what is the law of the apex applicable to the given situation.

Intralimital Rights.

Preliminary to an understanding of the extralateral right doctrine, a word is necessary about intralimital rights; that is, the rights in a mining claim which the common law gives to the owner of a fee simple, and which are qualified only by the extralateral and other rights given by the mining law to others.[2]

PRESUMPTION AS TO SUBSURFACE RIGHTS.

113. Prima facie a lode mining claim includes everything within its common-law boundaries, and therefore no one else than the lode claim's owner has a right to take ore within those boundaries, even if he takes it from a vein apexing outside the claim, unless he actually owns that vein's apex. That is because by a location and by a patent of a lode claim full common-law property rights pass to the locator and to the patentee in all the veins within the claim's common-law boundaries, whether those veins apex inside or outside the claim, subject only to the appropriation and retention of veins which apex outside by the locators of the apexes of such veins.

While prima facie everything within the common-law boundaries of a placer mining patented or unpatented claim belongs to the claim's owner, this presumption is rebutted where "known lodes" exist, and the case of Reynolds v. Iron Silver Min. Co.[3] suggests that a "known lode" may be worked on its dip by those who do not own the apex. But query?

Prima facie everything within the boundaries of the location or patented claim, both to the heights above and to the depths below,

[1] Blue Bird Min. Co. v. Largey (C. C.) 49 Fed. 289; Illinois Silver Mining & Milling Co. v. Raff, 7 N. M. 336, 34 Pac. 544. The prima facie presumption that a lode, the known course of which is substantially parallel with the side lines, continues in the same direction throughout the length of the claim, seems to apply where extralateral rights are involved. Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283.

[2] "Intralimital" is a word coined by Mr. Lindley. 1 Lindley on Mines (2d Ed.) § 549. See Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co., 32 Colo. 176, 186, 75 Pac. 1070, 64 L. R. A. 925.

[3] 116 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774.

belongs to the surface owner.[4] It is presumed that the owner of a mining claim, whatever its shape, is the owner of all deposits of ore within its boundaries extended downward, and it requires a preponderance of the testimony to show that any such ore deposits are part of a lode having its apex outside.[5] Whether that presumption is overcome by showing merely that the vein beneath the claim apexes outside, or whether it is not overcome unless the person claiming the right to work beneath the claim first establishes that the apex of the vein belongs to him, was once a troublesome question. That question was: Is the presumption in favor of the claim within the lines of which the ore is found merely a presumption that the ore is in a vein apexing in the location, or is it a presumption of right which can only be rebutted by one who shows that he himself has a better right? The Nevada court said that, when a lode locator who complains of a taking of ore within his boundaries is shown not to have the apex of the vein containing the ore, he does not make a case, even though the defendant does not own the apex.[6] But the prevailing view has been that, while a lode locator takes subject to the extralateral rights of others, those others have no rights on the dip unless they actually own the apex.[7]

[4] "We are of opinion that the patent conveys the subsurface, as well as the surface, and that, so far as this case discloses, the only limitation on the exclusive title thus conveyed is the right given to pursue a vein which on its dip enters the subsurface." ST. LOUIS MIN. & MILL. CO. v. MONTANA MIN. CO., 194 U. S. 235, 24 Sup. Ct. 654, 48 L. Ed. 953; Boston & Montana Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co., 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626.

[5] IRON SILVER MIN. CO. v. ELGIN MINING & SMELTING CO., 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98; Bell v. Skillicorn, 6 N. M. 399, 28 Pac. 768; Red Wing Gold Min. Co. v. Clays, 30 Utah, 242, 83 Pac. 841; Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283; Leadville Co. v. Fitzgerald (U. S.) Fed. Cas. No. 8,158; Cheesman v. Shreeve (C. C.) 37 Fed. 36. See Ophir Silver Min. Co. v. Superior Court, 147 Cal. 467, 478, 82 Pac. 70.

[6] "It is entirely immaterial whether the defendant has any title whatever, if the ledge does not belong to the plaintiff." JONES v. PROSPECT MOUNTAIN TUNNEL CO., 21 Nev. 339, 350, 31 Pac. 642. See Montana Co. v. Clark (C. C.) 42 Fed. 626, and Golden v. Murphy, 27 Nev. 379, 75 Pac. 625, 76 Pac. 29.

[7] "But the plaintiff also urges that wherever the apex of the vein may be, or if it have no apex at all, but is simply a blanket vein, if its apex be not between the defendant's side boundaries, the defendant has no right to follow it within the plaintiff's grounds, or within the boundaries of the claims of which the plaintiff is in possession. That is a proper construction of the law. The defendant's right to that ore, if he have such, must be based solely upon the fact that the vein has its apex within its [his?] own side lines." Gilpin v. Sierra Nevada Consol. Min. Co., 2 Idaho (Hasb.) 696, 704, 23 Pac. 547, 1014. See Leadville Min. Co. v. Fitzgerald, 4 Morr. Min. Rep. (U. S.)

This prevailing view has the sanction of the latest cases in the United States Supreme Court. In the first of these cases the court is particular to limit a patentee's ownership only "by virtue of the grant to another locator to pursue a vein apexing within his surface boundaries on its dip downward through some side line into the ground embraced within the patent. It withdraws from the grant made by the patent only such veins as others own and have a right to pursue." [8] In the second of these cases the court said: "Title by patent from the United States to a tract of ground, theretofore public, prima facie carries ownership of all beneath the surface, and possession under such patent of the surface is presumptively possession of all beneath the surface. This is the general law of real estate. True, in respect to mining property, this presumption of title to mineral beneath the surface may be overthrown by proof that such mineral is a part of a vein apexing in a claim belonging to some other party. But this is a matter of defense; and while proof of ownership of the apex may be proof of ownership of the vein descending on its dip below the surface of property belonging to another, yet such ownership of the apex must first be established before any extralateral title to the vein can be recognized." [9] And again it said: "Coming, now, to the merits, it is not open to dispute that the defendants were taking ore from beneath the surface of the plaintiff's four claims. The question therefore arises: What right had they to thus mine and

380, Fed. Cas. No. 8,158; Doe v. Waterloo Min. Co. (C. C.) 54 Fed. 935; Parrott Silver & Copper Co. v. Heinze, 25 Mont. 139, 64 Pac. 326, 53 L. R. A. 491, 87 Am. St. Rep. 386; Maloney v. King, 25 Mont. 188, 64 Pac. 351; Id., 30 Mont. 158, 76 Pac. 4; State v. District Court, 25 Mont. 504, 65 Pac. 1020; Grand Central Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 Pac. 648; Ophir Silver Min. Co. v. Superior Court, 147 Cal. 467, 82 Pac. 70; Anaconda Copper Mining Co. v. Heinze, 27 Mont. 161, 69 Pac. 909; Wakeman v. Norton, 24 Colo. 192, 196, 49 Pac. 283; Cheesman v. Shreeve (C. C.) 40 Fed. 787; Bell v. Skillicorn, 6 N. M. 399, 28 Pac. 768; Carson City Gold & Silver Min. Co. v. North Star Min. Co., 83 Fed. 658, 28 C. C. A. 333; Duggan v. Davey, 4 Dak. 110, 26 N. W. 887.

[8] ST. LOUIS MIN. & MILL. CO. v. MONTANA MIN. CO., 194 U. S. 235, 238, 24 Sup. Ct. 654, 655, 48 L. Ed. 953. The opinion ends with the quotation from Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C.) 63 Fed. 540: "Hands off of any and every thing within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim of which you are the owner." The opinion of an engineer that, if the vein continues to dip at the same angle at which it starts, it will reach the point in dispute within my lines, is not such proof. Heinze v. Boston & M. Consol Copper & Silver Min. Co., 30 Mont. 484, 77 Pac. 421.

[9] LAWSON v. UNITED STATES MIN. CO., 207 U. S. 1, 8, 28 Sup. Ct. 15, 17, 52 L. Ed. 65.

remove ore? They must show that the ore was taken from a vein belonging to them." [10]

Analogy of Powers to Revoke and to New-Appoint.

On this theory veins which apex outside the claim are not excepted from the location or patent, but are covered by each with a right, which is comparable to a power retained by a grantor to revoke an appointment of, and to new-appoint, real property, retained by the United States to give these veins to any subsequent locator or patentee of ground which incloses their apexes within parallel end lines. The analogy ought to be completed, however, by adding that the condition of annual labor[11] which attaches to the apex location will inure in favor of the intralimital right location, whether the latter precedes or follows the apex location, in case of an abandonment of the apex location or of the forfeiture of it by a relocation so shaped that the ore deposit in the intralimital right location is no longer affected.

A middle course must be held between the view, on the one hand, that the right of extralateral pursuit is in the nature of an easement imposed upon the land under which the vein dips, and the view, on the other hand, that the grant of a lode claim by the United States government, evidenced by location or patent, excepts all veins apexing outside the granted land's boundaries. This middle view admits that the locator of an apex gets a fee in the dip of the vein, defeasible only by abandonment or forfeiture, and that the patentee thereof gets an absolute fee in the dip of the vein, even though in each case the dip is under ground which was patented before the apex of the dipping vein was discovered; [12] but this middle view also gives that

[10] 207 U. S. 10, 28 Sup. Ct. 18, 52 L. Ed. 65.

[11] The objection to calling this a condition, when it is for the benefit of some one else than the grantor and his heirs, is of no weight. The United States, as a sovereign grantor, may impose conditions for third persons, even if other grantors may not; and it really does do that whenever it authorizes a forfeiture by a co-owner or a relocation by third parties. As sovereign grantor the United States may do what a private grantor cannot do, as is shown by the fact that it may give a legal fee and restrain its alienation. Smythe v. Henry (C. C.) 41 Fed. 705; Farrington v. Wilson, 29 Wis. 383.

[12] See 2 Lindley on Mines (2d Ed.) § 571; Montana Min. Co. v. St. Louis Min. & Mill. Co., 102 Fed. 430, 42 C. C. A. 415; EAST CENTRAL EUREKA MIN. CO. v CENTRAL EUREKA MIN. CO., 204 U. S. 266, 27 Sup. Ct. 258, 51 L. Ed. 476. Because the dip belongs to a subsequent locator of the apex (COLORADO CENT. CONSOL. MIN. CO. v. TURCK, 50 Fed. 888, 2 C. C. A. 67; Id., 54 Fed. 262, 4 C. C. A. 313; CHEESMAN v. HART [C. C.] 42 Fed. 98), except, perhaps, where the first location is based on a discovery on the dip (VAN ZANDT v ARGENTINE MIN. CO. [C. C.] 8 Fed. 725; but, despite the latter case, it seems that on principle the subsequent locator of the

full protection to the intralimital right owner, as against mere trespassers, which our common-law notions of ownership demand.[13] It should always be remembered that the common-law property right doctrines apply, except so far as the extralateral right doctrine necessarily limits their application.[14]

The suggestion that a locator takes everything within his boundary lines, subject to another's right to acquire the fee in veins dipping into his ground, and with a condition in the nature of a possibility of reverter in his favor attached to every such acquisition by another, seems to meet both the law and the justice of the situation, and, except in the case of known lodes in placers,[15] is believed to represent the outside limitation that should be put on the common-law rights of the locator or patentee of mineral land through which a vein apexing outside dips. In the case of known lodes in placers the decision in Reynolds v. Iron Silver Min. Co.[16] suggests that such "known lodes" may be worked on their dip by those who do not own the apex; but it is believed that such a difference between lode claims and plac-

apex should get all of the dip, see note 26, infra), the locator or patentee of a mining claim which is not based on a discovery on the dip, and yet embraces part of the dip and none of the apex, will have no legal right to work the dip deposit within the claim's boundaries until such time as the apex actually is located, unless some such analogy as is here suggested is adopted. To keep mere intruders out of the common-law lines of the location, and yet to refrain from violating real property conceptions, should be the aim of the cases, and the analogy offered meets all the needs of the situation. A location based on a discovery on the dip of a vein of which the apex has already been located is, of course, void as against the locator of the apex. BUNKER HILL, ETC., CO. v. SHOSHONE MIN. CO., 33 Land Dec. Dep. Int. 142.

[13] Messrs. Morrison and De Soto have intimated that any middle ground between easement and exception is impossible. Morrison's Mining Rights (13th Ed.) 186.

[14] "Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law." Doe v. Waterloo Min. Co. (C. C.) 54 Fed. 935. See Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U. S. 55, 66, 18 Sup. Ct. 895, 43 L. Ed. 72.

[15] In REYNOLDS v. IRON SILVER MIN. CO., 116 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774, a placer patentee was not allowed to recover in ejectment against the defendants who were working a lode which on its dip constituted in the placer a "known lode," and the reason given was that the placer patentee gets "no right whatever" in known lodes, even against trespassers. Common-law presumptions and analogies based on them may, of course, be inapplicable to cases of statutory exceptions; but query whether they are inapplicable in the case of excepted "known lodes" in placers?

[16] 116 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774.

er claims is of doubtful value and will probably not be continued by the United States Supreme Court.

EXTRALATERAL RIGHTS DEPENDENT ON THE VEIN APEXING IN A MINING LOCATION.

114. Veins which apex in agricultural grants and in patented townsites and mill sites seemingly have no extralateral rights attached to them; but veins which apex in patented placers, since they are in mining claims, would seem on principle to be governed by the extralateral right doctrine if the claim's end lines are parallel. In patented placers, however, veins not patented to the placer claimant as "known lodes" are supposed by many not to be within the extralateral right doctrine.

Veins Apexing in Agricultural Grants and in Patented Townsites.

The next thing to notice about the extralateral right doctrine is that by the federal statute extralateral rights are given only to "the locators of all mining locations." [17] It would therefore seem clear that the owner of an agricultural grant may not follow on its dip a vein which he discovers apexing in his land. The same reason will also apply to veins apexing in patented townsite lots. No extralateral rights attach to such veins, because they are not found in mining locations.

Veins Apexing in Patented Mill Sites.

Whether the extralateral right statute applies to mill sites, query? It would seem clearly not to apply to mill sites claimed merely by the erection and use of mills on them; but mill sites located in connection with a lode may be in a different situation. That such a mill site is a mining claim, within a statute excepting mining claims from a townsite patent, has been held in one case; [18] and if it is a mining claim within the townsite act it is possible to contend that it is a mining location within the extralateral right act. The fact that mill sites must be nonmineral would seem, however, to be conclusive proof that lodes discovered in them after patent do not enjoy extralateral rights.

Vein Apexing in Patented Placers.

But what about lodes in placers not known to be there until after the application for placer patent? They are in mining locations, and parallel end lines normally exist in placers. Moreover, what was intended to be an end line can often be ascertained readily, even in those cases where the strike of the vein does not cross opposite lines

[17] Rev. St. U. S. § 2322 (U. S. Comp. St. 1901, p. 1425).
[18] HARTMAN v. SMITH, 7 Mont. 19, 14 Pac. 648.

of the location. Moreover, such veins are within the express words of the extralateral right statute. Yet Mr. Lindley, with seeming approval, quotes a land department opinion to the effect that "it has been indisputably settled, and is admitted by protestants, that a placer claimant cannot follow a vein or lode beyond the surface boundaries of his claim extended vertically downward." [19]

Unless this departmental decision settles it, the point cannot be said to be indisputably settled; [20] and it certainly would seem on principle that, because "known lodes" in placers may carry dip rights, all lodes discovered after patent should also have them whenever the requirement of parallel end lines is met, and such rights would exist on "known lodes" patented as such. There seems to be no case on the subject, however, other than this departmental decision, and in that the shape of the placer would seem properly to have precluded any extralateral right.[21] The difficulty of discriminating between original and incidental "known veins" in placers, however, will probably result in the adoption of the land department's doctrine.

EXTRALATERAL RIGHTS DEPENDENT ON IDENTITY, CONTINUITY AND DIP OF VEIN.

115. The identity and substantial continuity of the vein from its apex down is essential to the existence of extralateral rights on the vein, and there are no extralateral rights unless the vein has an apex and a dip.

Growing out of the intralimital rights of a locator or patentee—that is, out of his common-law rights, so far as they are not necessarily impaired by the American mining law—is the first difficulty in the way of the extralateral right claimant. Not only must he own a claim which contains the apex of a vein, and which has its end lines so directed that the projected extralateral right planes will embrace the ore body in controversy, but the vein of which he owns the apex must be identified as the one the dip of which he is seeking to work,

[19] WOODS v. HOLDEN, 26 Land Dec. Dep. Int. 198, 205, 206. The opinion says: "There is no claim that the existence of the lode was known at the time of the Mt. Rosa placer entry or patent." Id.

[20] But see 2 Lindley on Mines, § 619.

[21] It is, of course, true that where a patent is issued for a placer, "excepting and excluding * * * all that portion of the surface ground herein described which is embraced" by a certain named lode claim, the placer patentee does not get title to the veins and lodes which apex beneath the excepted surface, for both the surface area in conflict and all veins apexing beneath it are carved out of the placer grant by the exception. Lellie Lode Mining Claim, 31 Land Dec. Dep. Int. 21.

and must in its nature be such a vein in continuity as to justify the exercise of the dip right. The identity and continuity of the vein on its strike is as essential to the proof as is its identity and continuity on its dip;[22] but as to the strike it seems that, when once the existence of its apex within the claim is established, it is presumed that the lode extends the full length of the claim.[23] As to the dip right, on the other hand, it must be remembered that a lode which will support a location will not necessarily carry a dip right and that not only does no presumption in favor of dipping exist, but the presumption is against dipping.

A miner's location may well be upheld because the mineralization justified a reasonable expectation of finding ore and the mineralization was in the form of a lode deposit, and yet no extralateral right be deemed to exist because before the locator can descend on the vein into another man's ground he must show that he has a clearly defined and substantially continuous vein[24] and because the vein in the given case does not meet that test. To uphold a location a practical miner's

[22] See Pennsylvania Consol. Min. Co. v. Grass Valley Exploration Co. (C. C.) 117 Fed. 509.

[23] Armstrong v. Lower, 6 Colo. 393, 399, 581, 586; WAKEMAN v. NORTON, 24 Colo. 192, 49 Pac. 283. This presumption applies even to the case of a lode within a placer. SAN MIGUEL CONSOL. GOLD MIN. CO. v. BONNER, 33 Colo. 207, 79 Pac. 1025. A patent purporting to describe the course and direction of the vein is not conclusive on that question. CONSOLIDATED WYOMING GOLD MIN. CO. v. CHAMPION MIN. CO. (C. C.) 63 Fed. 540. The presumption in each case yields to proof of the actual situs of the apex. Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 288, 536, 70 Pac. 1114, 71 Pac. 1005.

[24] "What may constitute a sufficient discovery to warrant a location of a claim may be wholly inadequate to justify the locator in claiming or exercising any rights reserved by the statutes. What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex to which attaches the statutory right to invade the possession of, and appropriate the property which is presumed to belong to, an adjoining owner. The question of a sufficient discovery of a vein, or of the validity of a notice of location, * * * is substantially different from one relating to the continuity of a vein on its dip from the apex, and which tests the rights of the undisputed owner of the surface to what lies underneath and within his own boundaries. It is the object and policy of the law to encourage the prospector and miner in their efforts to discover the hidden treasures of the mountains, and therefore, as between conflicting lode claimants, the law is liberally construed in favor of the senior location; but where one claims what prima facie belongs to his neighbor, because of an apex in the claimant's location, a more rigid rule of construction against the claimant prevails, and, as we have already observed, he has the burden to show, not merely that the vein on its dip may include the ore bodies in the adjoining ground, but that in fact it does so include them. Until he establishes such fact beyond reasonable controversy, he has no rights out-

reasonable expectations are justly given weight, but to sustain a claim of extralateral right the actual proof that the vein sought to be pursued has gone into the other man's territory must be made out.[25] For instance, it has been held that a location on the dip of a vein is valid, and will prevail as to the segment of the lode within its surface boundaries extended down, even against the subsequent locator of the apex;[26] but under the statute only the owner of an apex has extralateral rights, and a subsequent locator on the dip therefore has none.[27] And even where one locates an apex he may have no dip rights because of lack of continuity.

In tracing a vein from its apex down one may fix his attention on the vein matter or on the vein walls.[28] The Utah court has pointed out that in all definitions of a vein or lode "the essential elements of a vein are mineral or mineral-bearing rock and boundaries," [29] and that, if either is present, very slight evidence of the other will do.

side his side lines in another's ground." GRAND CENTRAL MIN. CO. v. MAMMOTH MIN. CO., 29 Utah, 490, 576, 83 Pac. 648, 677. See CHEESMAN v. SHREEVE (C. C.) 40 Fed. 787.

[25] "When it is said that a location may be sustained by the discovery of mineral deposits of such value as to at least justify the exploration of the lode in the expectation of finding ore sufficiently valuable to work, it is a very different question from telling a jury that the geological fact of the continuity of a vein to a certain point may be determined by what a practical miner might do in looking for some hoped-for continuity." FITZGERALD v. CLARK, 17 Mont. 100, 136, 42 Pac. 273, 284, 30 L. R. A. 803, 52 Am. St. Rep. 665. Even the opinion of an expert that, if the vein continued to dip as it started, it would dip under the adjoining land, is not enough to overcome the presumption that the adjoining landowner has title to everything within his boundaries extended downward. Heinze v. Boston & M. Consol. Copper & Silver Min. Co., 30 Mont. 484, 77 Pac. 421. But actual proof of identity and continuity will, of course, overcome that presumption. MONTANA ORE PURCHASING CO. v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO., 27 Mont. 288, 536, 70 Pac. 1114, 71 Pac. 1005.

[26] VAN ZANDT v. ARGENTINE MIN. CO. (C. C.) 8 Fed. 725. But query? Compare Hope Mining Co. v. Brown, 7 Mont. 550, 19 Pac. 218. The subsequent locator of the apex has a valid location, of course. Eilers v. Boartman, 3 Utah, 159, 2 Pac. 66. And on principle the locator on the dip has a valid location only until the location of the apex, which carries with it the dip covered by the dip location. Since, however, VAN ZANDT v. ARGENTINE MIN. CO. (C. C.) 8 Fed. 725, works out a just result, even though it is an illogical one, it may possibly be followed. But see Larkin v. Upton, 144 U. S. 19, 21, 12 Sup. Ct. 614, 36 L. Ed. 330.

[27] Hallett, J., in IRON SILVER MIN. CO. v. MURPHY (D. C.) 3 Fed. 368. The only possible qualification of this statement would seem to be contained in the doctrine of theoretical apex hereafter discussed. See 118m.

[28] See Leadville Co. v. Fitzgerald (U. S.) Fed. Cas. No. 8,158.

[29] GRAND CENTRAL MIN. CO. v. MAMMOTH MIN. CO., 29 Utah, 575, 83 Pac. 677.

Indeed, the two may vary from time to time, thereby causing the need of distinguishing between identity and continuity.

Distinction between Identity and Continuity of Vein.

Identity may exist, although the continuity of the vein matter or of the walls is broken from time to time.[30] But, where there are no defined walls to the vein, then the identity of the vein for extralateral right purposes would seem not to exist, unless the value of the vein matter is sufficient to distinguish it from the country rock.[31] It is identity, rather than continuity, that is essential in the extralateral right cases.[32] While, to establish the extralateral right, the owner of the apex must show that the lode is continuous and in place throughout its whole course, from its origin in his own ground to the place beyond in which he claims it,[33] by continuous is meant that the vein "can be traced through the surrounding rocks, though slight interruptions of the mineral-bearing rock would not be alone sufficient to destroy the identity of the vein. Nor would a short partial closure of the fissure have that effect, if a little farther on it occurred again with mineral-bearing rock within it." [34] It is not required that the owner of the apex establish the identity of the vein by an actual tracing of it down to and including the disputed ore deposit; but it is enough that sufficient continuity to identify be established by satisfactory evidence.[35]

[30] "Identity must always exist. * * * It may be said to include a vein that is incessant. But a vein that is incessant or identical in its parts is not necessarily a vein which is continuous, in the sense that the continuity or union of its parts is absolute and uninterrupted. In other words, though a continuity of vein does not preclude identity of vein, yet identity does not necessarily include continuity. * * * In this discussion, however, we do not mean to exclude the need of a continuity sufficient to preserve identity. Nevertheless there may be an identical vein, although ore is found at considerable intervals and in small quantities, if the boundaries constituting the fissure are well-defined." BUTTE & B. MIN. CO. v. SOCIÉTÉ ANONYME DES MINES DE LEXINGTON, 23 Mont. 177, 58 Pac. 111, 75 Am. St. Rep. 505. See Pennsylvania Consol. Min. Co. v Grass Valley Exploration Co. (C. C.) 117 Fed. 509.

[31] GRAND CENTRAL MIN. CO. v. MAMMOTH MIN. CO., 29 Utah, 575, 576, 83 Pac 677. See BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. v. EMPIRE STATE-IDAHO MINING & DEVELOPING CO. (C. C.) 134 Fed. 268.

[32] IRON SILVER MIN. CO. v. CHEESMAN, 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712; Pennsylvania Consol. Min. Co. v. Grass Valley Exploration Co. (C. C.) 117 Fed. 509.

[33] Leadville Min. Co. v. Fitzgerald, 4 Morr. Min. Rep. (U. S.) 380, Fed. Cas. No. 8,158. See Stevens v. Gill, 1 Morr. Min. Rep. (U. S.) 576, Fed. Cas. No. 13,398.

[34] IRON SILVER MIN. CO. v. CHEESMAN, 116 U. S. 529, 538, 6 Sup. Ct. 481, 485, 29 L. Ed. 712.

[35] DAGGETT v. YREKA MIN. & MILL. CO., 149 Cal. 357, 86 Pac. 968.

Extralateral Rights Dependent on the Dipping of the Vein.

For extralateral rights to exist there must be both a vein with an apex in the location and a dipping of that vein beyond the side lines of the location. If that situation exists, and the end lines are parallel, and the vein on its strike cuts across at least one of the end lines, extralateral rights exist, even though the ground be patented and the patent does not mention such rights.[36] There is, of course, no extralateral right on the strike of the vein.[37] If a vein descends from the plane of the horizon, though the angle be very slight, it departs "from a perpendicular" within the meaning of Rev. St. U. S. § 2322 (U. S. Comp. St. 1901, p. 1425), the extralateral right statute.[38] A vein which does not descend from the horizon is a blanket vein, and has no dip rights, for the reason that its whole upper surface is really its apex strike,[39] and to allow extralateral rights would be to allow them on the strike of the vein.[40] While blanket veins must be located as lodes, and not as placers,[41] they do not enjoy extralateral rights.[42]

See Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. 273, 30 L. R. A. 803, 52 Am. St. Rep. 665. Evidence that the vein is not continuous is proper rebuttal by the opposite party. Anaconda Copper Min. Co. v. Heinze, 27 Mont. 161, 69 Pac. 909.

[36] Doe v. Waterloo Min. Co. (C. C.) 54 Fed. 935.

[37] SOUTHERN NEVADA GOLD & SILVER MIN. CO. v. HOLMES MIN. CO., 27 Nev. 107, 73 Pac. 759, 103 Am. St. Rep. 759; COLORADO CENT. CONSOL. MIN. CO. v. TURCK, 50 Fed. 888, 2 C. C. A. 67; McCormick v. Varnes, 2 Utah, 355; Tombstone Mill. & Min. Co. v. Way Up Min. Co., 1 Ariz. 426, 25 Pac. 794. In LARNED v. JENKINS, 113 Fed. 634, 51 C. C. A. 344, it is pointed out that this rule applies under the act of 1866 (Act July 26, 1866, c. 262, 14 Stat. 251), as well as under that of 1872 (Act May 10, 1872, c. 152, 17 Stat. 91). In regard to end lines under the act of 1866, see Pilot Hill and Other Lodes, 35 Land Dec. Dep. Int. 592, 593.

[38] Leadville Min. Co. v. Fitzgerald (U. S.) 4 Morr. Min. Rep. (U. S.) 380, Fed. Cas. No. 8,158; Stevens v. Williams (U. S.) Fed. Cas. No. 13,414.

[39] Homestake Min. Co., 29 Land Dec. Dep. Int. 689. See Leadville Min. Co. v. Fitzgerald, supra.

[40] See GILPIN v. SIERRA NEVADA CONSOL. MIN. CO., 2 Idaho (Hasb.) 23 Pac. 547, 1014. Even where, as in the case of the Leadville ore deposits, a blanket vein undulates so that it lies in the shape of waves of water, there is no apex of the vein, but only apexes of folds of the vein. 1 Lindley on Mines (2d Ed.) § 312. The Leadville juries, which refused to find that the Leadville veins have apexes, hardly deserve the blame Mr. Snyder gives them. 1 Snyder on Mines, § 802.

[41] IRON SILVER MIN. CO. v. MIKE & STARR GOLD & SILVER MIN. CO., 143 U. S. 394, 400, 430, 12 Sup. Ct. 543, 36 L. Ed. 201; IRON SILVER MIN. CO. v. CAMPBELL, 17 Colo. 274, 29 Pac. 513.

[42] The case of DUGGAN v. DAVEY, 4 Dak. 110, 26 N. W. 887, is understood by Messrs. Morrison and De Soto to hold that an 8° vein has no apex (Morrison's Mining Rights [13th Ed.] 170); but it seems, instead, simply to have held that, while there was an apex, the location which claimed to have

EXTRALATERAL RIGHTS AND THE RIGHT TO CROSS CUT THROUGH ANOTHER'S LAND.

116. Extralateral rights must be exercised by going down on the vein in its extralateral pursuit, and do not include the right to cross cut through another's land.

It seems almost unnecessary to say that extralateral rights must be exercised by going down on the vein. There is no right in the apex owner to tunnel through the laterally adjoining patented or unpatented claim in order to cut the vein.[43]

EXTRALATERAL RIGHTS UNDER THE ACT OF 1866.

117. Under the act of 1866 parallelism of end lines was not essential to extralateral rights.

Where the end lines converge on the dip, extralateral rights are measured, under the act of 1866, by extending those lines till they meet. Where end lines cannot be found, or the end lines diverge on the dip, planes are drawn parallel to each other through the point where the vein departs from the location and at right angles to the general course of the vein through the location, and the extralateral rights are measured by those planes.

Under the act of 1866, as well as under the act of 1872, there were extralateral rights; but under the act of 1866, unlike the act of 1872, parallelism of end lines was not essential.[44] The question of extra-

the apex was in fact upon an outcrop of the dip. 1 Lindley on Mines (2d Ed.) § 310.

[43] St. Louis Min. & Mill Co. of Montana v. Montana Min. Co., 113 Fed. 900, 51 C. C. A. 530, 64 L. R. A. 207, 194 U. S. 235, 24 Sup. Ct. 654, 48 L. Ed. 953. See Patten v. Conglomerate Min. Co., 35 Land Dec. Dep. Int. 617.

[44] "Under the act of 1866 (Act July 26, 1866, c. 262, 14 Stat. 251) parallelism in the end lines of a surface location was not required." IRON SILVER MIN. CO. v. ELGIN MINING & SMELTING CO., 118 U. S. 196, 208, 6 Sup. Ct. 1177, 30 L. Ed. 98. Even under that act the right to the strike was limited by the inclosing lines of the location and extralateral rights were regulated accordingly. Davis v. Shepherd, 31 Colo. 141, 147, 72 Pac. 57; Wolfley v. Lebanon Min. Co., 4 Colo. 112; Walrath v. Champion Min. Co., 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170. End lines need not be parallel in the case of a claim which was located under the act of 1866 (Act July 26, 1866, c. 262, 14 Stat. 251), and which had so far advanced to patent at the time the act of 1872 (Act May 10, 1872, c. 152, 17 Stat. 91) was passed that adverse claims were excluded. EAST CENTRAL EUREKA MIN. CO. v. CENTRAL EUREKA MIN. CO., 204 U. S. 266, 27 Sup. Ct. 258, 51 L. Ed. 476. See ARGONAUT MIN. CO. v. KENNEDY MIN. & MILL. CO., 131 Cal. 15, 63 Pac. 148, 82 Am. St. Rep. 317.

lateral rights under that earlier act arises chiefly in the case of claims patented under it with irregular forms. This includes patents issued subsequently to 1872 on applications pending prior to the passage of the act of 1872; and under all such patents parallelism of end lines is not essential to the existence of extralateral rights.[45] That parallelism of end lines in locations made under that act may affect extralateral rights in secondary veins, however, is settled by Walrath v. Champion Min. Co.[46]

Where the end lines of a claim patented under the act of 1866 converge on the dip, it seems to be unquestioned that the extralateral rights are computed by extending the end lines to their point of convergence. The situation is shown in Figure No. 13.[47]

FIGURE No. 13.

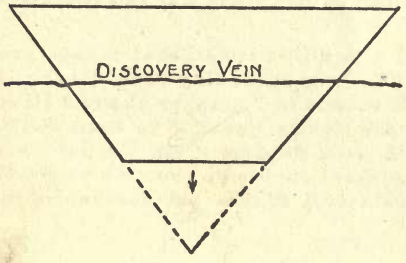
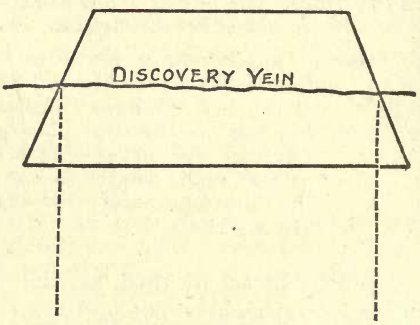


FIGURE No. 14.



While the cases so deciding are uniform,[48] it is difficult to see why, under the act of 1866, where no requirement of parallel end lines existed, a claim with converging end lines should not have the same dip rights as a claim with diverging end lines.[49] It was obviously

[45] 17 Stat. 94, c. 152, § 9; Eclipse Gold & Silver Min. Co. v. Spring, 59 Cal. 304; ARGONAUT MIN. CO. v. KENNEDY MIN. & MILL. CO., 131 Cal. 15, 63 Pac. 148, 82 Am. St. Rep. 317; New Dunderberg Min. Co. v. Old, 79 Fed. 598, 25 C. C. A. 116; Central Eureka Min. Co. v. East Central Eureka Min. Co., 146 Cal. 147, 79 Pac. 834, 9 L. R. A. (N. S.) 940; EAST CENTRAL EUREKA MIN. CO. v. CENTRAL EUREKA MIN. CO., 204 U. S. 266, 27 Sup. Ct. 258, 51 L. Ed. 476.

[46] 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170.

[47] The arrow indicates the direction of the dip.

[48] CARSON CITY GOLD & SILVER MIN. CO. v. NORTH STAR MIN. CO. (C. C.) 73 Fed. 597; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C.) 63 Fed. 540; Central Eureka Min. Co. v. East Central Eureka Min. Co., 146 Cal. 147, 79 Pac. 834, 9 L. R. A. (N. S.) 940.

[49] See Morrison's Mining Rights (13th Ed.) 173.

intended under that act that the length of the apex owned should be the length taken all the way down to the center of the earth.[50]

Where the end lines diverge on the dip, as in Figure No. 14, supra, it seems clear that Congress could not have intended the end lines extended to measure the right. Such a measure for extralateral rights would allow a locator so to shape his claim as to take in the dip of a vein for miles of its underground length. Since extralateral rights could not be denied, because of the shape of the claim, some other measure had to be sought, and that measure was found by drawing end lines at the extremities of the strike of the vein within the location lines; the end lines so drawn being parallel to each other and at right angles to the general course of the vein through the location.[51]

Figure No. 14 represents the method of determining dip rights under the act of 1866, where the end lines diverge on the dip. Where no end lines can be worked out, the rule just applied to diverging end lines would apply.

It has been held that under the act of 1866 a consolidated claim is entitled to extralateral rights based on its exterior boundaries, regardless of the interior lines which formed the boundaries of the original claim so consolidated.[52]

EXTRALATERAL RIGHTS UNDER THE ACT OF 1872.

118. The extralateral rights under the act of 1872 differ from those under the act of 1866 chiefly in the effect of the requirement in the act of 1872 that the end lines of a mining claim must be parallel.

The extralateral right section of the act of 1872 is as follows:

"The locators of all mining locations * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins,

[50] See EUREKA CONSOL. MIN. CO. v. RICHMOND MIN. CO., 4 Sawy. (U. S.) 302, Fed. Cas. No. 4,548, affirmed in Richmond Min. Co. of Nevada v. Eureka Consolidated Min. Co., 103 U. S. 839, 26 L. Ed. 557.

[51] ARGONAUT MIN. CO. v. KENNEDY MIN. & MILL. CO., 131 Cal. 15, 63 Pac. 148, 82 Am. St. Rep. 317, decided on another ground in Kennedy Mining & Milling Co. v. Argonaut Mining Co., 189 U. S. 1, 23 Sup. Ct. 501, 47 L. Ed. 685; Eureka Case, 4 Sawy. (U. S.) 302, Fed. Cas. No. 4,548.

[52] CARSON CITY GOLD & SILVER MIN. CO. v. NORTH STAR MIN. CO. (C. C.) 73 Fed. 598; Id., 83 Fed. 658, 28 C. C. A. 333. But under Act May 10, 1872, c. 152, 17 Stat. 91, this seems not to be so. Del Monte Mining & Milling Co. v. New York & L. C. Min. Co. (C. C.) 66 Fed. 212.

lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." Rev. St. U. S. § 2322 (U. S. Comp. St. 1901, p. 1425).

By Rev. St. U. S. § 2320 (U. S. Comp. St. 1901, p. 1424), parallel end lines are called for in a mining location. That provision is read with the above quoted Rev. St. U. S. § 2322, and accordingly the extralateral rights awarded under the act of 1872 differ from those under the act of 1866 chiefly in the effect of that requirement in the act of 1872 that the end lines of the claim must be parallel. The reason for and the effect of such difference must now be stated.

SAME—PARALLELISM OF END LINES.

118a. Parallelism of end lines is deemed an essential prerequisite of extralateral rights under the act of 1872; but a possible exception is where the end lines, extended in their own direction, converge on the dip.

In the act of 1872 there is a requirement that the end lines of mining locations shall be parallel,[53] though that provision is not found in the extralateral right section.[54] But since there is no requirement that the side lines shall be parallel, and since the statute contemplates a location along the strike of the vein, it has been decided that the requirement of parallel end lines is for the purpose of bounding the underground extralateral rights which the owner of the location may exercise.[55] The result is that, with the possible exception of cases where the end lines converge on the dip, parallelism of end lines is essential

[53] Rev. St. U. S. § 2320 (U. S. Comp. St. 1901, p. 1424).

[54] Rev. St. U. S. § 2322 (U. S. Comp. St. 1901, p. 1425).

[55] DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO., 171 U. S. 55, 18 Sup. Ct. 55, 43 L. Ed. 72. To give extralateral rights, the end lines, in addition to being parallel, "must be straight lines, not broken or curved ones" WALRATH v. CHAMPION MIN. CO., 171 U. S. 293, 311, 18 Sup. Ct. 909, 43 L. Ed. 170.

to the right of the locator or patentee to follow his vein outside of the common-law limits of his claim. The claim itself is valid if the end lines are not parallel; but in such case it has not the extralateral right feature.[56] It is enough to give extralateral rights if the end lines are substantially parallel,[57] and it seems that the lines of the location may be changed and proper record made, so as to acquire extralateral rights, even though prior to the change the adjoining ground is located.[58] It is well settled that a locator may project his lines over a previous location in order to make them parallel for extralateral right purposes, provided in doing so he does not have to make forcible entry.[59] Such change of lines may be made even after patent applied for.[60] The right of a locator or patentee to veins which do not apex within the boundary lines of his location is, therefore, one which a relocation of the ground containing the apex or an amendment of the apex location may defeat under circumstances like those just considered. It has been held that where a patent describes the claim as having parallel end lines, and expressly grants extralateral rights, it cannot be shown, to defeat extralateral rights, that the end lines were not in fact parallel;[61] but since the act of April 28, 1904,[62] at least, it would seem to be clear that the monuments on the ground must control. The end lines are not expressly required to be of any given length, but

[56] IRON SILVER MIN. CO. v. ELGIN MINING & SMELTING CO., 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98; Montana Co. v. Clark, 42 Fed. 626. "There is liberty of surface form under Act May 10, 1872, c. 152, 17 Stat. 91." Walrath v. Champion Min. Co., 171 U. S. 293, 312, 18 Sup. Ct. 909, 43 L. Ed. 170. The notion announced in the Eureka Case, 4 Sawy. (U. S.) 302, Fed. Cas. No. 4,548, and supported by Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197 (compare, also, Doe v. Sanger, 83 Cal. 203, 23 Pac. 365), that the requirement of parallelism "is merely directory, and no consequence is attached to a deviation from its direction," is erroneous so far as extralateral rights are concerned, but it is perfectly true as regards intralimital rights.

[57] CHEESMAN v. SHREEVE (C. C.) 40 Fed. 787, 792; DOE v. SANGER, 83 Cal. 203, 23 Pac. 365. See McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823. But for the correction of the location by making the end lines parallel, the case of DOE v. SANGER would have furnished an erroneous application of this principle; for the original end lines were far from being substantially parallel.

[58] DOE v. SANGER, supra.

[59] Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57; DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72.

[60] Last Chance Min. Co. v. Tyler Min. Co., 61 Fed. 557, 9 C. C. A. 613; Tyler Min. Co. v. Sweeney, 54 Fed. 284, 4 C. C. A. 329; Doe v. Waterloo Min. Co. (C. C.) 54 Fed. 935.

[61] Waterloo Min. Co. v. Doe, 82 Fed. 45, 27 C. C. A. 50.

[62] 33 Stat. 545, c. 1796 (U. S. Comp. St. Supp. 1907, p. 477).

the land department declares that one less than three inches long cannot be considered.[63]

For end lines to meet the test of parallelism required for extralateral right purposes, they must be straight. They cannot be broken, as in Figure No. 15, nor curved, as in Figure No. 16.*

FIGURE No. 15.

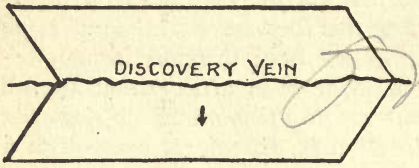
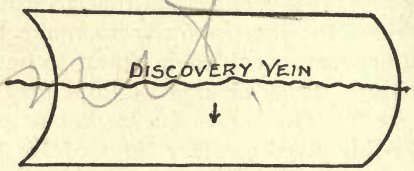


FIGURE No. 16.



The dictum to this effect in Walrath v. Champion Min. Co. is based on the common-sense doctrine that it is impossible to extend such lines in their own direction to fix satisfactory extralateral right bounding planes. When it is said that end lines must be parallel to give extralateral rights, it must not be forgotten that where the location is laid across, instead of along, the strike, the side lines become for extralateral right purposes the end lines.[64] What this means will be considered later.

Convergence on the Dip.

The one possible case under the act of 1872 where there may be extralateral rights, even though the end lines are not parallel, is where, as in Figure No. 13, supra, those end lines converge on the dip.[65]

[63] "The department is of opinion that a line less than three inches in length is not within the spirit or intent of the statute. The end lines, required in all cases to be parallel to each other, are important features of a vein or lode location, and the statute clearly contemplates that such lines shall have substantial existence in fact, and in length shall reasonably comport with the width of the claim as located." Jack Pot Lode Min. Claim, 34 Land Dec. Dep. Int. 470, 471. The other end line was over 800 feet long, and the claim in consequence was excessive. Id. For a similar case, see Belligerent and Other Lode Mining Claims, 35 Land Dec. Dep. Int. 22.

* WALRATH v. CHAMPION MIN. CO., 171 U. S. 293, 311, 18 Sup. Ct. 909, 43 L. Ed. 170.

[64] FLAGSTAFF SILVER MIN. CO. OF UTAH v. TARBET, 98 U. S. 463, 25 L. Ed. 253; ARGENTINE MIN. CO. v. TERRIBLE MIN. CO., 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140; KING v. AMY & SILVERSMITH CONSOL. MIN. CO., 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed. 419; Parrot Silver & Copper Co. v. Heinze, 25 Mont. 139, 64 Pac. 326, 53 L. R. A. 491, 87 Am. St. Rep. 386; Southern Nevada Gold & Silver Min. Co. v. Holmes Min. Co., 27 Nev. 107, 73 Pac. 759, 103 Am. St. Rep. 759.

[65] The giving of extralateral rights within fan-shaped end line planes

Mr. Lindley insists that the reasoning in favor of extralateral rights where end lines converge on the dip is the same under the act of 1872 as under the act of 1866.[66] The only reason, he says, why parallelism of end lines is required is that more shall not be had of the dip than can be claimed of the apex, and, "where the reason of the rule ceases, the rule itself should cease." [67] Since the statutory requirement as to end lines being parallel is not contained in the extralateral right section of the statute—a reason which, however, Messrs. Morrison and De Soto properly call "the weakest of all reasons in statutory construction" [68]—and since no principle is violated by awarding extralateral rights where there is convergence on the dip, Mr. Lindley's contention ought to prevail. So far it seems to be supported in the cases only by dicta[69] and by concessions of counsel.[70]

It is well settled that in order to get extralateral rights the lines of a junior lode location may be laid within, upon, or across the surface of a valid senior location, provided that no forcible entry is made.[71] The same thing seems to be true, although the senior location is patented,[72] and on principle should be so. The extent of the extralateral

—i. e., within planes which diverged as they were extended—was forbidden in Hickey v. Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806.

[66] 2 Lindley on Mines (2d Ed.) pp. 981, 982, § 582.

[67] Id.

[68] Morrison's Mining Rights (13th Ed.) 172.

[69] CARSON CITY GOLD & SILVER MIN. CO. v. NORTH STAR MIN. CO., 83 Fed. 658, 28 C. C. A. 333.

[70] BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. v. EMPIRE STATE–IDAHO MINING & DEVELOPING CO., 109 Fed. 538, 540, 48 C. C. A. 665. The literal construction of the statute is impaired by the cases which make the side lines serve as end lines where the location is laid across the strike of the vein.

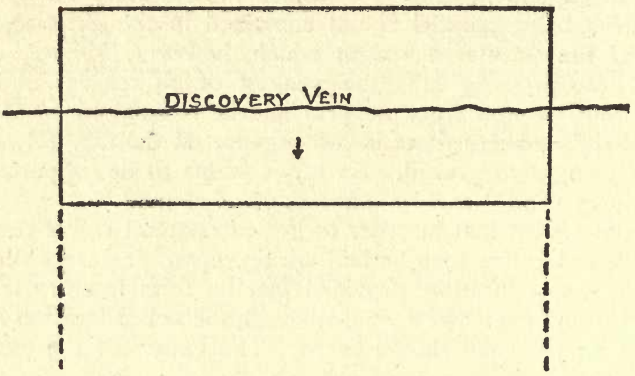
[71] DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57. The failure of the senior locator to object makes the junior location valid for extralateral right purposes. EMPIRE STATE–IDAHO MINING & DEVELOPING CO. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO., 131 Fed. 591, 66 C. C. A. 99; Big Hatchet Consol. Min. Co. v. Colvin, 19 Colo. App. 405, 75 Pac. 605. If the junior locator is allowed to patent the conflict area, he gets the extralateral rights which go with the conflict area in priority to the senior locator. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. v. EMPIRE STATE–IDAHO MINING & DEVELOPING CO., 109 Fed. 538, 48 C. C. A. 665. Except in the case of broad veins apexing partly within two or more adjacent lode claims. Lawson v. United States Min. Co., 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65.

[72] Hidee Gold Min. Co., 39 Land Dec. Dep. Int. 420; BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. v. EMPIRE STATE–IDAHO MINING & DEVELOPING CO. (C. C.) 106 Fed. 471. But see State v. District Court, 25 Mont. 572, 65 Pac. 1020.

rights where locations conflict will be discussed later in connection with the Del Monte Case.

The Ideal Location.

FIGURE No. 17.



The ideal location contemplated by the statute is one where parallel end lines are bisected by the strike of the vein which they cross at right angles and the strike itself passes through the center of the claim practically parallel with the side lines.[73] Such a location is represented in Figure No. 17; its extralateral rights being measured by extending its parallel end lines in the direction of the dip and dropping the requisite planes.[74] Departures from this ideal and conflicts with the dip rights of other locations cause the complications.

SAME—SIDE LINES AS END LINES.

118b. Where the discovery (original or principal) vein crosses both side lines, instead of going out of the end lines as located, and does not touch an end line, the side lines become, for extralateral right purposes, the end lines.

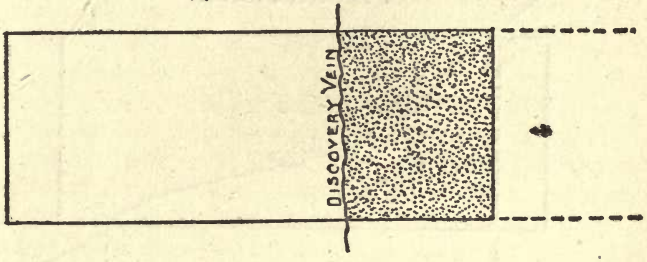
When the apex crosses both side lines and does not touch an end line, it is, as has already been pointed out, well settled that for extra-

[73] "There can be no arbitrary or ironclad rule to govern the laying of end lines in all cases other than this: They must be straight and parallel to each other, and when at right angles with the side lines they must not exceed 600 feet in length." Belligerent and Other Lode Mining Claims, 35 Land Dec. Dep. Int. 22, 26.

[74] See Iron Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98.

lateral right purposes the side lines become end lines.[75] There is a dispute, however, as to just what this means. It is clear that the side lines become end lines sufficiently to defeat any right of the owner of the claim to follow the vein on its dip beyond them.[76] But Messrs. Morrison and De Soto insist that, while the side lines become end lines for this purpose, they do not become end lines for any other purpose, and that, even though they are parallel, they do not permit any dip right beyond the bounding planes of the location.[77]

FIGURE No. 18.



In Figure No. 18, Messrs. Morrison and De Soto would allow the locator to have the dip as shaded within the claim's boundaries, but no more. In other words, they confine the locator to intralimital rights. But the same reason which justifies calling the side lines end lines necessitates calling the end lines side lines, and, if the end lines are for extralateral right purposes side lines, then the apex owner can pursue the vein beyond them.[78] While there is only one case

[75] See cases cited supra, note 64; Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co., 131 Fed. 579, 66 C. C. A. 299; Tyler Min. Co. v. Sweeney, 79 Fed. 277, 24 C. C. A. 578; New Dunderberg Min. Co. v. Old, 79 Fed. 598, 25 C. C. A. 116.

[76] FLAGSTAFF SILVER MIN. CO. OF UTAH v. TARBET, 98 U. S. 463, 25 L. Ed. 253. ARGENTINE MIN. CO. v. TERRIBLE MIN. CO., 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140; KING v. AMY & SILVERSMITH CONSOL. MIN. CO., 152 U. S. 222, 14 Sup. Ct. 510, 38 L. Ed. 419; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; Watervale Min. Co. v. Leach, 4 Ariz. 34, 33 Pac. 418; Parrot Silver & Copper Co. v. Heinze, 25 Mont. 139, 64 Pac. 326, 53 L. R. A. 491, 87 Am. St. Rep. 386. Any other rule would really give the right of extralateral pursuit of the strike of a vein, and that is not allowed. Colorado Cent. Consol. Min. Co. v. Turck, 50 Fed. 888, 2 C. C. A. 67; SOUTHERN NEVADA GOLD & SILVER MIN. CO. v. HOLMES MIN. CO., 27 Nev. 107, 73 Pac. 759, 103 Am. St. Rep. 759; McCormick v. Varnes, 2 Utah, 355; Tombstone Mill. & Min. Co. v. Way Up Mining Co., 1 Ariz. 426, 25 Pac. 794.

[77] Morrison's Mining Rights (13th Ed.) 180, 181.

[78] "Our conclusions may be summed up in these propositions: * * * Fourth. The only exception to the rule that the end lines of the location as

actually deciding that the side lines as end lines are to be extended, and that the apex owner can go through the end lines as side lines in following the dip,[79] the doctrine was conceded by counsel in another case,[80] and it would seem that Mr. Lindley is right in supporting it.[81]

It has been suggested that, where the vein crosses the location in such a way as to cut the side lines at an angle of less than 45°, the regular end lines remain the end lines.[82] That theory would bound extralateral rights as indicated in Figure No. 19.

FIGURE No. 19.

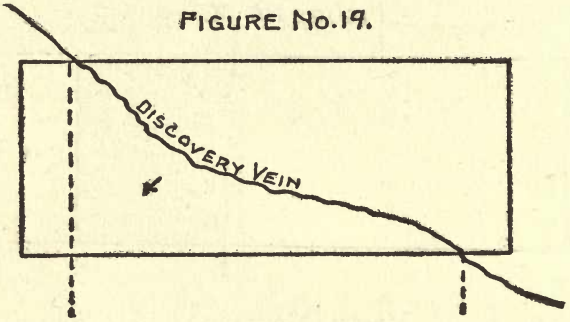
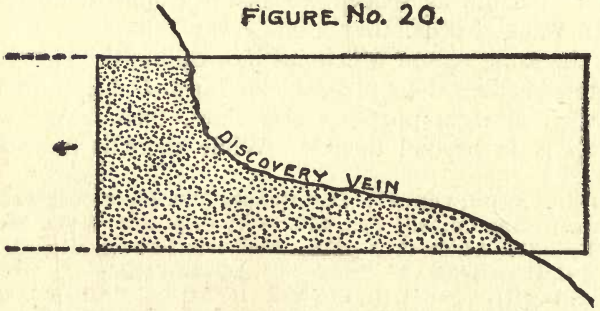


FIGURE No. 20.



the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator calls his side lines are his end lines and those which he called end lines are in fact side lines." DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO., 171 U. S. 55, 89, 90, 18 Sup. Ct. 895, 908, 43 L. Ed. 72.

[79] EMPIRE MILLING & MINING CO. v. TOMBSTONE MILL. & MIN. CO. (C. C.) 100 Fed. 910; Id. (C. C.) 131 Fed. 339.

[80] BUNKER HILL & S. MINING & CONCENTRATING CO. v. EMPIRE STATE-IDAHO MINING & DEVELOPING CO., 109 Fed. 538, 48 C. C. A. 665.

[81] 2 Lindley on Mines (2d Ed.) § 589.

[82] Mr. John M. Zane, "A Problem in Mining Law," 16 Harv. Law Rev. 94,

The theory of Figure No. 19 might well be adopted, if it were the only way to avoid the objectionable consequences of the just explained doctrine of Messrs. Morrison and De Soto; but, as their doctrine cannot be accepted, it seems to be sufficient to point out that the theory here being considered is believed not to be consistent with the various side lines as end lines cases, and in particular with the case of Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.[83]

A practical question should not be complicated by technical tests difficult of ascertainment. As the Supreme Court of the United States has pointed out: "With all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein. But whatever inconvenience or hardship may thus happen, it is better that the boundary planes [for extralateral right purposes] should be definitely determined by the lines of the surface location than that they should be subject to perpetual readjustment according to subterranean developments made by mine workings. Such readjustment at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims." [84] The sole question should be which lines are crossed, and no attention should be paid to the angle at which they cross, except so far as may be necessary to prevent the locator from getting extralateral rights on the strike as contrasted with the dip.

The extralateral rights for the claim in Figure No. 19 are therefore as represented in Figure No. 20. The shaded portion simply reminds the reader of the theory of Messrs. Morrison and De Soto explained in connection with Figure No. 18. Of course, where the side lines which serve as end lines are not parallel, there can be no extralateral rights for the vein crossing them, unless those side line end lines converge on the dip.[85]

101, citing Last Chance Min. Co. v. Tyler Min. Co., 61 Fed. 559, 9 C. C. A. 613, and Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C.) 63 Fed. 540, but seemingly admitting in the next preceding note of the article that DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72, is contra.

[83] 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72.

[84] IRON SILVER MIN. CO. v. ELGIN MINING & SMELTING CO., 118 U. S. 196, 207, 6 Sup. Ct. 1177, 1183, 30 L. Ed. 98.

[85] 2 Lindley on Mines (2d Ed.) § 590.

SAME—VEIN CROSSING ONE END LINE AND ONE SIDE LINE.

118c. Where the discovery (original or principal) vein crosses one end line and one side line, the extralateral right bounding planes are drawn along the crossed end line and parallel thereto through the point where the vein crosses the side line.

Because the locator miscalculates the course of a vein, it often happens that the discovery vein which has entered one end line goes out a side line. In such case it is settled that the end line crossed remains the end line of the location for all purposes, and that the extralateral right extends between parallel planes drawn along the end line crossed by the vein and through the point where the vein departs from the side line.[86]

FIGURE No. 21.

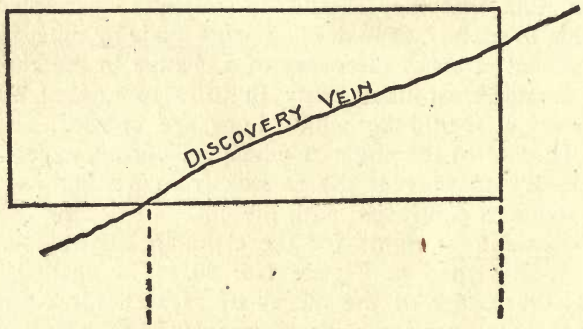


Figure No. 21 shows the method of calculation. The important feature is that the located end lines remain the end lines for extralateral right purposes, except so far as it is necessary to draw them in to meet the requirements of the located apex.

[86] DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; Clark v. Fitzgerald, 171 U. S. 92, 18 Sup. Ct. 941, 43 L. Ed. 87; Republican Min. Co. v. Tyler Min. Co., 79 Fed. 733, 25 C. C. A. 178; Tyler Min. Co. v. Last Chance Min. Co. (C. C.) 71 Fed. 848; TYLER MIN. CO. v. SWEENEY, 54 Fed. 284, 4 C. C. A. 329; Last Chance Min. Co. v. Tyler Min. Co., 61 Fed. 557, 9 C. C. A. 613; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C.) 63 Fed. 540; Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. 273, 30 L. R. A. 803, 52 Am. St. Rep. 665. See Parrot Silver & Copper Co. v. Heinze, 25 Mont. 139, 64 Pac. 326, 53 L. R. A. 491, 87 Am. St. Rep. 386.

SAME—VEIN CROSSING ONE END LINE, BUT STOPPING BEFORE ANOTHER BOUNDARY LINE IS REACHED.

118d. Where the discovery (original or principal) vein crosses one end line and stops before another boundary line is reached, the extralateral right bounding planes are drawn along the crossed end line and parallel thereto through the end of the vein inside the claim.

In the Del Monte Case it is said: "Suppose a vein enters at an end line, but terminates half way across the length of the location, his [the locator's] right to follow that vein on its dip between the vertical side lines is as plainly given by the statute as though in its course it had extended to the farther end line. It is a vein 'the top or apex of which lies inside of such surface lines extended downward vertically.'" [87] The dictum just quoted seems perfectly sound.[88] It is within the principle governing the case of a vein crossing one end line and one side line.

FIGURE No. 22.

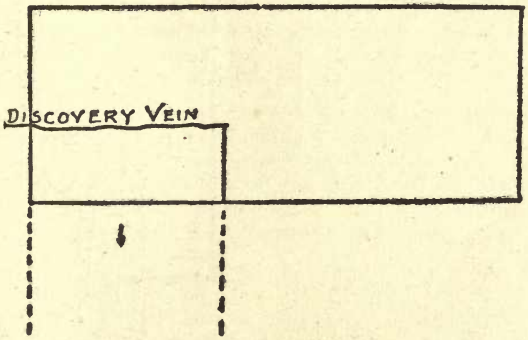
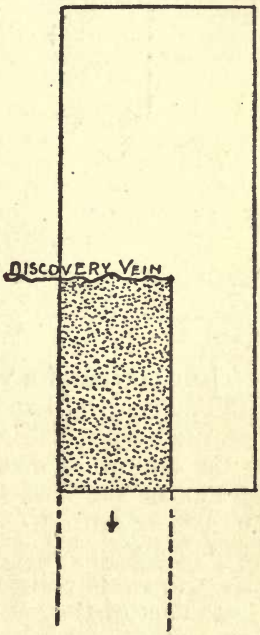


FIGURE No. 23.



[87] DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO., 171 U. S. 55, 89, 18 Sup. Ct. 895, 908, 43 L. Ed. 72.

[88] CARSON CITY GOLD & SILVER CO. v. NORTH STAR MIN. CO.

The situation is pictured in Figures Nos. 22 and 23, except that in Figure No. 23 the shaded portion represents the only part of the vein which Messrs. Morrison and De Soto would allow the claim owner to take.

SAME—VEIN NOT REACHING ANY BOUNDARY LINE.

118e. Extralateral rights on discovery (original or principal) veins not touching any boundary line are fixed by drawing planes through the ends of the veins and parallel to the lines of the location which for extralateral right purposes are deemed its end lines.

FIGURE No. 24.

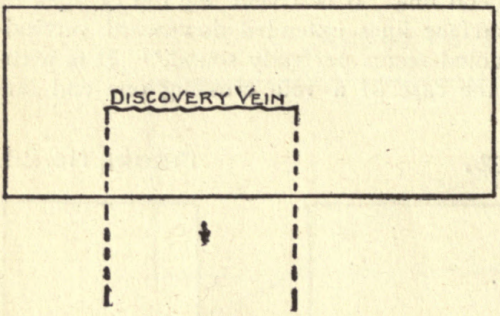
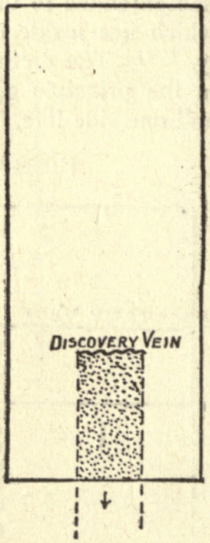


FIGURE No. 25.



The situation of a vein not reaching any boundary line, as pictured in Figures Nos. 24 and 25, seems to call for the same treatment as the one dealt with in Figures Nos. 22 and 23. In Figure No. 24, as in the case of Figures Nos. 21 and 22, the end lines located as such remain the end lines for extralateral right purposes, because there is no genuine reason for selecting other end lines to fix dip rights; but in Figure No. 25 as in the case of Figures Nos. 18, 20, and 23, the inability to award extralateral rights on the strike of the vein, and the evident intent of Congress to award extralateral rights, furnish sufficient

(C. C.) 73 Fed. 597; Id., 83 Fed. 658, 28 C. C. A. 333; Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283. See Tyler Min. Co. v. Sweeney, 54 Fed. 284, 293, 4 C. C. A. 329.

reason for regarding for dip right purposes the side lines as end lines. Where the vein does not touch any side or end line, then the rule to be adopted should be to treat as end lines those lines which it would cross if it were extended on its strike.[89] There seem to be no cases on the situation presented in Figures Nos. 24 and 25.

A real difficulty would be experienced, were the vein to lie in the claim at such an angle that it would be impossible to tell which lines should be regarded as end lines and which as side lines; but in such case, since the burden is on the owner of the apex to establish his right to come into his neighbor's ground, extralateral rights should be denied pending further disclosures as to the course of the vein.

SAME—VEIN CROSSING TWO OPPOSITE PARALLEL BOUNDARY LINES, BUT IN ITS COURSE GOING OUT OF AND RETURNING THROUGH ANOTHER BOUNDARY LINE.

118f. Extralateral rights on discovery (original or principal) veins which cross the two opposite parallel end lines located as such, but which in their course go out of and return through one of the side lines located as such, are measured by drawing parallel planes through the opposite parallel end lines and through the point of departure of the vein from the side line; no extralateral right attaching to the space where the vein apexes outside the claim.

Extralateral rights on such veins, which cross the two opposite parallel side lines located as such, and which in their course go out of and return through one of the end lines located as such, also appear to be governed by planes drawn parallel to the end lines located as such and through the points of departure of the vein from the side lines located as such.

Certain difficulties are to be experienced with veins which cut three boundary lines of a location. Those difficulties are represented in Figures Nos. 26, 27, 28, and 29.

The situation in Figures Nos. 26 and 27 calls for the representation of more than two planes to show the dip rights. The spaces representing the dip rights on that part of the apex which lies outside the claim are, or course, out of bounds for the claim owner.[90]

[89] "If the lode runs more nearly parallel with the end lines than with the side lines as marked on the ground as such, then the end lines of the location must be considered by the courts as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines as marked on the ground are considered by the court as the end lines of the location. In both cases the extralateral rights are preserved and maintained as defined in the statute." CONSOLIDATED WYOMING GOLD MIN. CO. v. CHAMPION MIN. CO. (C. C.) 63 Fed. 540, 549.

[90] WATERLOO MIN. CO. v. DOE, 82 Fed. 45, 27 C. C. A. 50.

FIGURE No. 26.

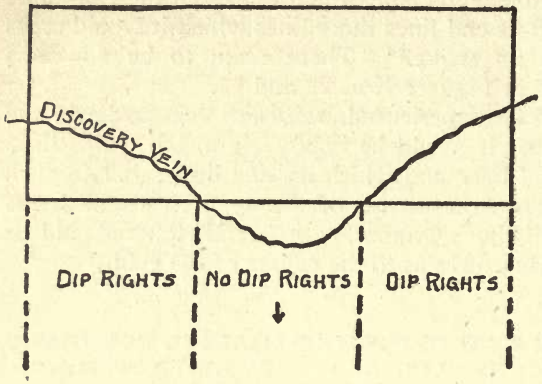


FIGURE No. 28.

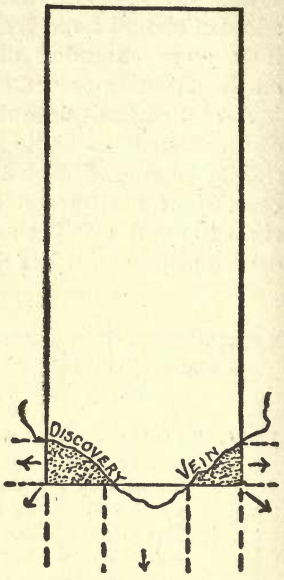


FIGURE No. 27.

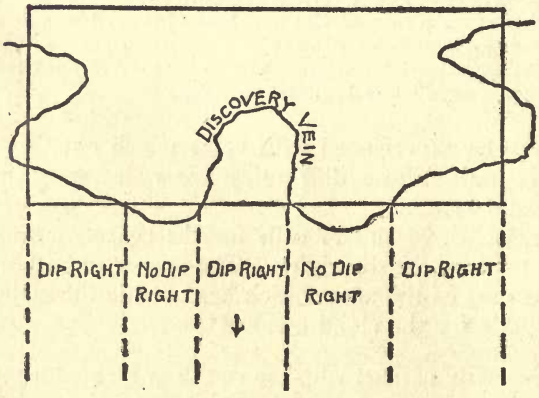
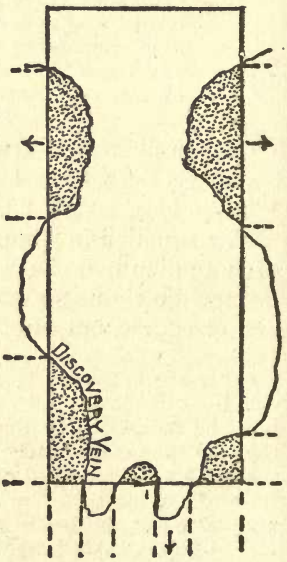


FIGURE No. 29.



In Figure No. 28 there is a difficulty. At first sight it seems as if the doctrine of Figure No. 18 makes the side lines become end lines, and hence that according to Messrs. Morrison and De Soto the claim owner would get only the shaded portions of Figure No. 28, while according to the other doctrine he would be able to go out through the located end line as a side line. But a scrutiny of the figure shows that the vein goes through a side line and an end line, and in accordance with the rule applied in the case of Figure No. 21 the located end lines should, therefore, remain the end lines for extralateral right purposes. It is believed that such is the right rule, and that the claim owner gets dip rights out of both sides of his location. The discussion of Figure No. 29 should make that clearer.

While in Figure No. 27 the true extralateral rights seem to be properly represented, there is a difficulty which Figure No. 29 seems to emphasize. In Figure No. 29 the vein goes in and out of three of the four boundary lines, dipping away from the claim in all cases. If those parts of the vein which go in and out of the side lines located as such are to control, the rules governing in Figures Nos. 21 and 26 would seem to apply and to give dip rights under both side lines. But what about the part of the vein going in and out of the end line? That is, as a matter of fact, the only part of the vein which crosses two opposite parallel boundary lines of the location. Does that make the case one of side lines becoming end lines, and so determined by the rule which at first sight seemed to apply in Figure No. 28? If it does, the shaded portions represent all of the vein that Messrs. Morrison and De Soto would allow the claim owner to get, while Figure No. 28 shows what on the other view should be allowed in such case. But the doctrine applied in Figures Nos. 21, 22, 24, and 27, namely, that the end lines of the claim as located shall control for extralateral right purposes, in the absence of an overpowering reason to the contrary, makes it certain that in Figures Nos. 28 and 29, as in Figure No. 27, the sole dip rights are through the side lines located as such. In Figures Nos. 28 and 29, however, unlike the other cases we have considered, the claim owner seems to have dip rights under both side lines. No case seems yet to have disclosed situations like those pictured in Figures Nos. 27, 28, and 29.

FIGURE No. 30.

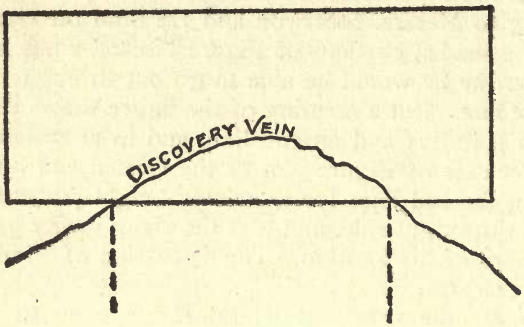


FIGURE No. 31.

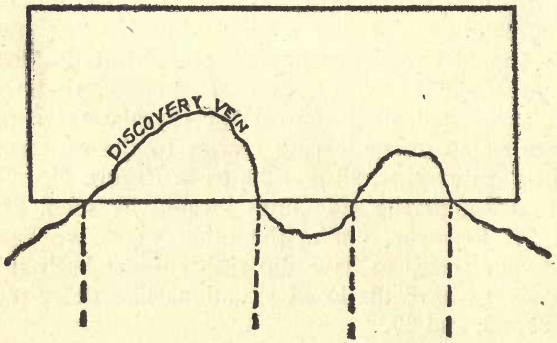


FIGURE No. 32.

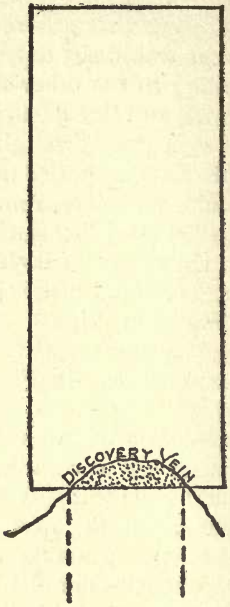
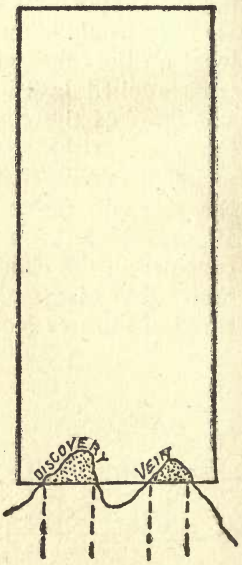


FIGURE No. 33.

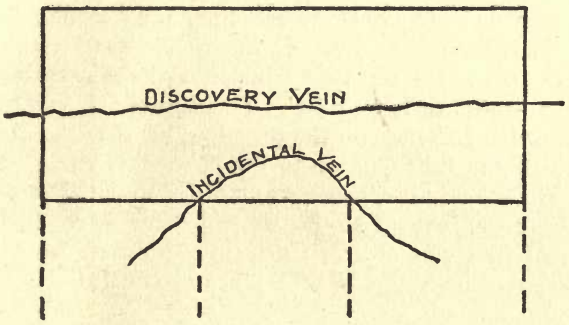


SAME—VEIN ENTERING AND DEPARTING THROUGH ONLY ONE BOUNDARY LINE.

118g. Extralateral rights on discovery (original or principal) veins which enter and depart by the same boundary line only are on principle the same as where the veins do not reach any boundary line; but the only decision directly in point denies any extralateral right in such case.

Where a vein enters and departs by the same side or end line, the principle that governed in Figures Nos. 24 and 25 requires that lines be drawn as in Figures Nos. 30, 31, 32, and 33. The only decision squarely on the situation, however, is to the effect that there are no extralateral rights in such cases.[91] The Colorado case so deciding emphasized the fact that there was very little of the apex in the claim dealt with, and that it did not run parallel or nearly parallel to the side lines;[92] but it seems clearly to deny extralateral rights in such a case as that in Figure No. 30, and on that ground is supported by Messrs. Morrison and De Soto.[93] The Colorado case has been supposed to be opposed by a later federal court case.[94] The later case presented a different situation, however, for the original principal or discovery vein went through both end lines and was for its entire length within the claim, and only extralateral rights on a secondary or incidental vein were involved.[95] The situation in the later federal case may be represented by Figure No. 34.

FIGURE No 34.



[91] CATRON v. OLD, 23 Colo. 433, 48 Pac. 687, 58 Am. St. Rep. 256.
[92] 23 Colo. 441, 48 Pac. 687, 58 Am. St. Rep. 256.
[93] Morrison's Mining Rights (13th Ed.) 174.
[94] ST. LOUIS MIN. & MILL. CO. OF MONTANA v. MONTANA MIN. CO.,

[95] See 2 Lindley on Mines (2d Ed.) § 584.

While the allowance of extralateral rights to the secondary or incidental vein under the circumstances shown in Figure No. 34 is not necessarily inconsistent with Catron v. Old,[96] it certainly suggests the propriety of refusing to follow that case. If extralateral rights can be had on a secondary or incidental vein entering and departing by one side line, they should be allowed where a similarly situated vein is an original principal or discovery vein.

SAME—VEIN COVERED BY CONFLICTING SURFACE LOCATIONS WHICH HAVE DIVERSE EXTRALATERAL RIGHT PLANES—"JUDICIAL APEX."

118h. Where the apex of the vein is covered by conflicting locations, which have end lines so differently slanted that after the senior claim's extralateral rights are fully protected the junior claim finds a part of the dip unlocated by the senior locator and within the junior's end line planes extended, the junior is on principle entitled thereto. For judicial purposes the junior claim has the apex, a doctrine which finds its ultimate justification in Lavagnino v. Uhlig.

In the Del Monte Case[97] a question was raised which was not passed upon. There are three locations shown on the diagram of the case; but only two, the New York and the Last Chance, are important for our purposes.

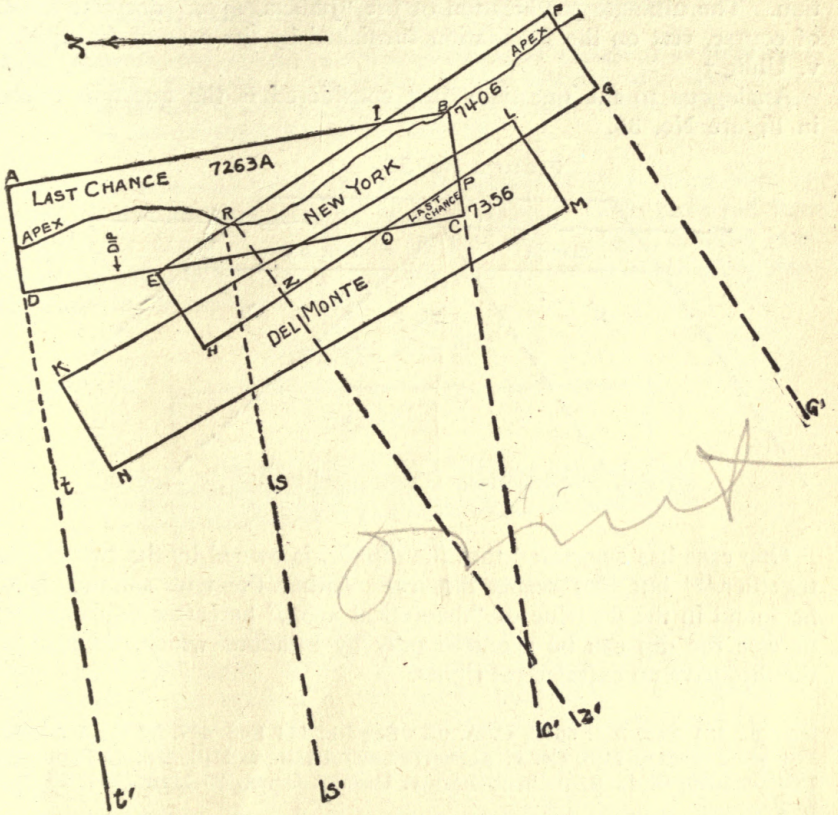
The New York being the senior location, and the vein coming in one of its end lines and going out a side line, its extralateral rights are between the planes f—g—g′ and R—z—z′. The Last Chance claim has the vein going out one end line, and through the other end line as projected on the New York. a—d—t—t′ clearly furnishes one boundary plane for the Last Chance, and the question is whether the other is r—s—s,′ or is b—c—c′. The Supreme Court of the United States did not have to pass on the question, because the dispute related to the right of the Last Chance to the space between a—d—t—t′ and r—s—s′. That the Last Chance was entitled to the dip between a—d—t—t′ and b—c—c,′ except so far as the New York dip rights were carved out of it, seems clear on principle, however, even though for judicial purposes both the New York and the Last Chance thereby

104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725; MONTANA MIN. CO. v. ST. LOUIS MIN. & MILL. CO., 102 Fed. 430, 42 C. C. A. 415. See Mr. John M. Zane, "A problem in Mining Law," 16 Harv. Law Rev. 94, 101.

[96] 23 Colo. 433, 48 Pac. 687, 58 Am. St. Rep. 256.

[97] DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72.

FIGURE No. 35.



are allowed to base a right upon the same part of the apex. Because the Last Chance was allowed to throw its end line over on the New York to perfect its extralateral rights, it had for extralateral right purposes all the apex within the lines so thrown, and all the dip that went with it, subject only to the prior dip right of the New York. The Del Monte Case does not so decide, because the question was not involved there;[98] but it seems to be a logical extension of the principles announced in that decision,[99] and is sustained by the decision on a sim-

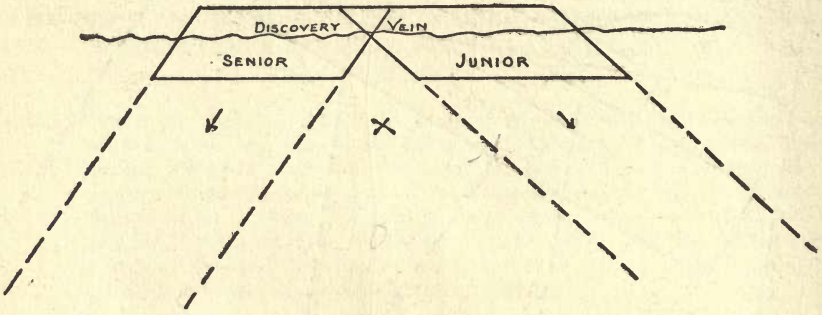
[98] 171 U. S. 85, 18 Sup. Ct. 895, 43 L. Ed. 72.

[99] Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co., 109 Fed. 538, 547, 48 C. C. A. 665; Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrat-

ilar situation found in the broad vein cases discussed in the next section. The ultimate justification of the "judicial apex" doctrine must, of course, rest on the foundation furnished by the case of Lavagnino v. Uhlig.†

Analogous to the questions just considered is the question raised in Figure No. 36.

FIGURE No. 36.



One case has suggested that the dip, X, is owned by the two claims together,[100] but that seems illogical Either the true solution is to be found in the doctrine of "theoretical apex," hereafter explained,[101] or else the dip can be acquired only by locations which, because on the dip, have no extralateral rights.

ing Co., 131 Fed. 591, 66 C. C. A. 99. See Id., 114 Fed. 417, 52 C. C. A. 219. But see Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925; State v. District Court, 25 Mont. 504, 65 Pac. 1020.

† 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119.

[100] CHAMPION MIN. CO. v. CONSOLIDATED WYOMING GOLD MIN. CO., 75 Cal. 78, 16 Pac. 513. This case takes the view that extralateral rights may be taken beyond the end line planes extended if no third persons are thereby injured, and that they are not injured if the claims concerned own the whole of the apex above the dip taken. But query?

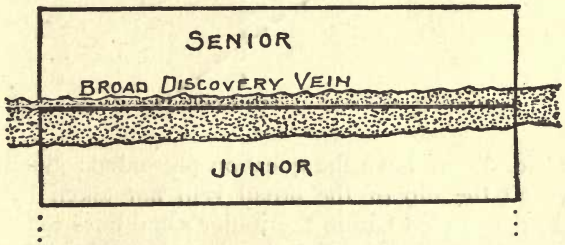
[101] See § 118m, infra.

SAME—BROAD VEIN BISECTED ON ITS STRIKE BY THE COMMON SIDE LINE OF TWO ADJOINING LOCATIONS.

118i. Extralateral rights on a broad discovery (original or principal) vein, bisected on its strike by the common side line of two adjoining locations, belong to the senior claim, subject only to the qualification noted in 118h.

A question analogous to the last is presented by a broad vein bisected by the common side line of two locations which have end lines of different slant. Before taking up that case, though, a word must be said about the case where the end lines of the two adjoining locations are in the same direction.

FIGURE No. 37.

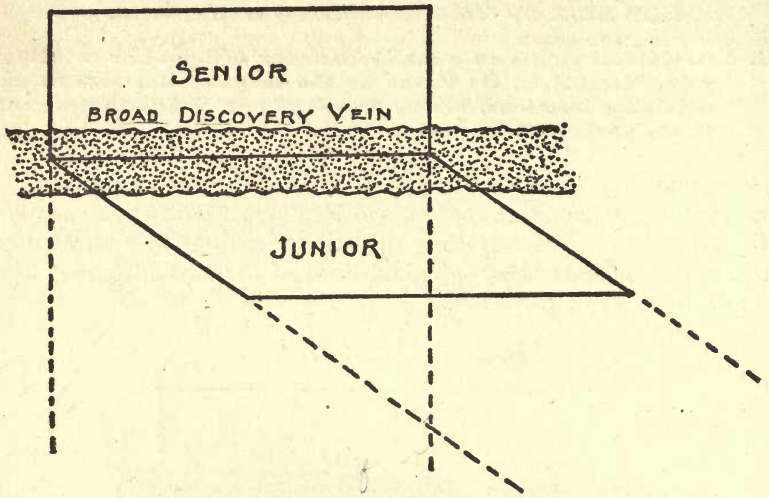


In Figure No. 37 it is now settled that the senior location takes all the extralateral rights on the broad vein, though, of course, it gets no rights on the surface of the junior location.[102] In determining seniority, priority of discovery may be shown by testimony other than the entries and patents, and it is settled that acceptance by the government of location proceedings had before the statute of 1866, and issuance of a patent thereon, is evidence that those location proceedings were in accordance with the rules and customs of the local mining district.[103]

[102] ST. LOUIS MIN. & MILL. CO. OF MONTANA v. MONTANA MIN. CO., 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725; Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 114 Fed. 417, 52 C. C. A. 219; Id., 131 Fed. 591, 66 C. C. A. 99; Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co., 131 Fed. 579, 66 C. C. A. 299; UNITED STATES MIN. CO. v. LAWSON, 134 Fed. 769, 67 C. C. A. 587. The last case overruled Hall v. Equator Mining & Smelting Co. (U. S.) Fed. Cas. No. 5,931, an earlier decision by Judge Hallett, and has been affirmed in LAWSON v. UNITED STATES MIN. CO., 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65. See, also, ARGENTINE MIN. CO. v. TERRIBLE MIN. CO., 122 U. S. 478, 7 Sup. Ct. 1356, 30 L. Ed. 1140.

[103] LAWSON v. UNITED STATES MIN. CO., 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65.

FIGURE No. 38.



In Figure No. 38 we have the question presented: Shall the junior location have all the dip of the broad vein not taken by the senior location, and yet included within the junior's end lines extended? One federal case answers the question in the affirmative,[104] though the reasoning of a Utah case seems to support the negative.[105] The affirmative answer would seem to be sound, because the senior locator is protected fully. Moreover, the affirmative answer is supported by the case just discussed of a vein covered by conflicting surface locations.

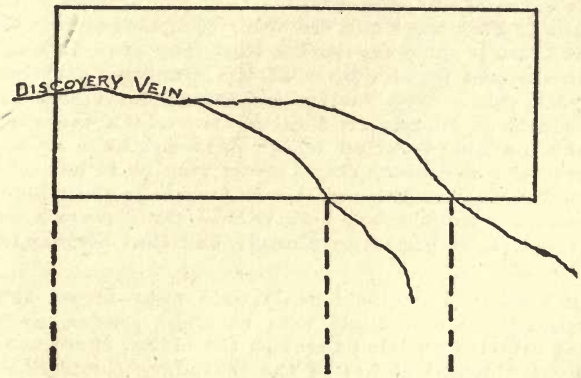
[104] EMPIRE STATE-IDAHO MINING & DEVELOPING CO. v. BUNKER HILL & S. MINING & CONCENTRATING CO., 114 Fed. 417, 52 C. C. A. 219.

[105] BULLION BECK & CHAMPION MIN. CO. v. EUREKA HILL MIN. CO., 5 Utah, 3, 11 Pac. 515.

SAME—VEIN SPLITTING ON ITS STRIKE.

118j. Where a discovery (original or principal) vein splits within the claim, so as to form two separate veins, extralateral rights on each split portion seem to be determined as if each remains the principal vein.

FIGURE No. 39.



Where a vein splits on its strike, so as to make two veins from that point, it seems that extralateral rights are measured on each part as if it were the main vein.[106] Instead of one split part being regarded as the principal vein and the other as the secondary, both seem to be regarded as principal veins. The situation is represented in Figure No. 39. But it should be remembered that broken-off bodies of ore may be so connected with the fissure vein as not to form a separate vein entitled to extralateral rights.[107] Where one of the split ends entitled to extralateral rights passes on its strike into another location, the dip rights of the first location are measured from the point of departure, while the second location may follow the part of the fork within its lines on the dip of that part under the first location.[108]

[106] See HICKEY v. ANACONDA COPPER MIN. CO., 33 Mont. 46, 81 Pac. 806. Compare Doe v. Waterloo Min. Co. (C. C.) 54 Fed. 935.

[107] TOMBSTONE MILL. & MIN. CO. v. WAY UP MIN. CO., 1 Ariz. 426, 25 Pac. 794.

[108] COLORADO CENT. CONSOL. MIN. CO v. TURCK, 50 Fed. 888, 2 C. C. A. 67. But see WALRATH v. CHAMPION MIN. CO., 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170; JEFFERSON MIN. CO. v. ANCHORIA-LELAND MIN. & MILL. CO., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925.

SAME—SECONDARY OR INCIDENTAL VEINS.

118k. Extralateral rights on secondary (incidental) veins—that is, on veins other than the discovery (original or principal) vein—are determined with reference to those lines which for the discovery (original or principal) vein's extralateral rights are the end lines of the claim. On principle and under one state decision the secondary (incidental) veins are allowed all the extralateral rights which they would have with those end lines if they were the discovery (original or principal) veins; but there is some contention that they are confined within the extralateral right planes of the discovery (original or principal) vein. The latter contention finds some support in Walrath v. Champion Mining Co., which contains a dictum that a senior location which does not have as much of the apex of a secondary (incidental) vein as it has of the discovery (original or principal) vein may take the whole dip of the secondary (incidental) vein within the discovery vein's extralateral right bounding planes; but that dictum may well be doubted.

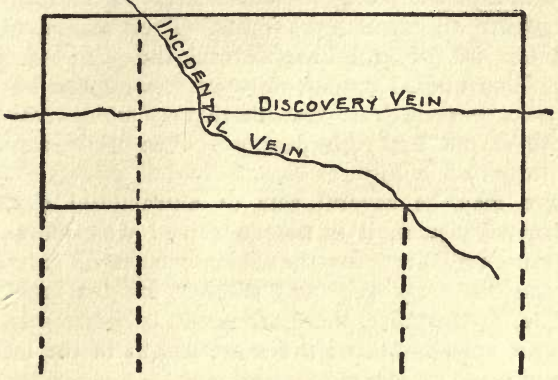
Where the secondary (incidental) vein cuts across the discovery (original or principal) vein at right angles, and maintains that relative position through the claim, there can usually be no extralateral rights in the secondary (incidental) vein, because to award them would be to give extralateral rights on the strike of such vein.

Under the act of 1866 only one vein could be located or patented; but under the act of 1872 claims located and patented under the act of 1866, as well as those under the act of 1872, are entitled to all veins apexing therein.[109] The only exception is in the case of locations under the act of 1866, where adverse rights in secondary veins were acquired prior to the act of 1872.[110] There is no doubt that extralateral rights may be had on secondary or incidental veins, if they are properly situated with reference to the discovery vein; and there is no doubt that they are properly situated with reference to that vein if they are more or less parallel with it and are embraced within the

[109] Rev. St. U. S. § 2322 (U. S. Comp. St. 1901, p. 1425); WALRATH v. CHAMPION MIN. CO., 171 U. S. 293, 305, 18 Sup. Ct. 909, 43 L. Ed. 170.

[110] Rev. St. § 2328 (U. S. Comp. St. 1901, p. 1431); Eclipse Gold & Silver Min. Co. v. Spring, 59 Cal. 304; Mt. Diablo Mill. & Min. Co. v. Callison, 5 Sawy. (U. S.) 439, Fed. Cas. No. 9,886; North Noonday Min. Co. v. Orient Min. Co. (C. C.) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666; Iron Silver Min. Co. v. Cheesman (C. C.) 8 Fed. 297; Book v. Justice Min. Co. (C. C.) 58 Fed. 106; Armstrong v. Lower, 6 Colo. 393.

FIGURE No. 40.



parallel planes which measure the extralateral rights on the discovery vein.[111] The situation is represented in Figure No. 40.[112]

It is also perfectly clear that the lines of the claim, determined to be the legal end lines of the claim with reference to the discovery vein, are such for all secondary veins.[113] But beyond these points there is confusion. Messrs. Morrison and De Soto insist that because the end lines of the location, ascertained to be such with reference to

[111] WALRATH v. CHAMPION MIN. CO., 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170; St. Louis Min. & Mill. Co. of Montana v. Montana Min. Co., 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725.

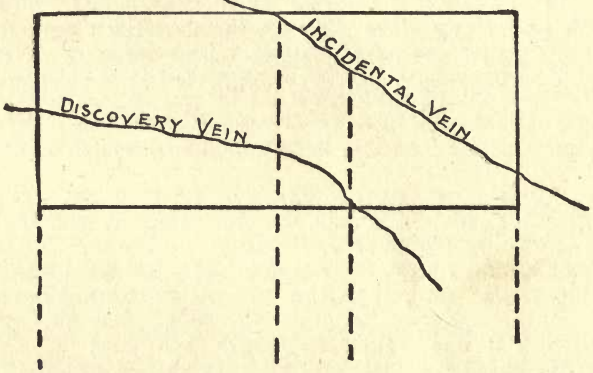
[112] In JEFFERSON MIN. CO. v. ANCHORIA-LELAND MIN. & MILL. CO., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925, the court failed to allow the secondary vein all the benefit of the discovery vein's planes for extralateral right purposes which it was entitled to, though both veins cut across both side lines, and the side lines, therefore, were for extralateral right purposes end lines. To the extent of such failure the decision must be wrong. While the case has the support, seemingly, of WALRATH v. CHAMPION MIN. CO., 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170, that case is discredited, as the discussion in this section (infra, p. 447) shows, and anyway should be confined to locations under the act of 1866. Under the doctrine of the "judicial apex" treated in § 118h, supra, and supported by DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72, it would seem as if the owner of the Mattie L claim should have been given all rights in the secondary vein within his side line end lines not included within the extended extralateral right bounding planes of the Anchor claim on that secondary vein. In any event he was entitled to all between the east side line end line and a plane parallel thereto drawn through the point where the secondary vein left the Mattie L to enter the Anchor claim.

[113] COSMOPOLITAN MIN. CO. v. FOOTE (C. C.) 101 Fed. 518; JEFFERSON MIN. CO. v. ANCHORIA-LELAND MIN. & MILL. CO., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925; ST. LOUIS MIN. & MILL. CO. OF MONTANA v. MONTANA MIN. CO., 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725.

the discovery vein, are such for all secondary or incidental veins, therefore the end line planes fixing the extralateral rights on the discovery veins must govern all extralateral rights. Their statement is: "There can be but one set of end lines for all the veins covered by the patent." [114] That quoted remark must be conceded to be true; but it is just as true, nevertheless, that there may be several sets of end line planes for extralateral right purposes, even on the same vein. The situation represented in Figures Nos. 26 and 27 proves that.

Since there may be several sets of extralateral right planes on the same discovery vein, it is not conceived why there may not be within the same end lines for the claim one set of extralateral right planes for the discovery vein and another for the incidental.[115] In Figure No. 34, for instance, there are necessarily two sets, because the secondary vein apex is not of the same length in the location as the discovery vein.‡

FIGURE No. 41.



So in Figure No. 41, for the same reason, there must be two sets of planes run, one set for each vein. Since the end lines of the claim for the discovery vein remain the same for the secondary or incidental vein as for the discovery vein, and all planes must be parallel to them,

[114] Morrison's Mining Rights (13th Ed.) 178.

[115] Even though it be admitted that the dictum in WALRATH v. CHAMPION MIN. CO., 72 Fed. 978, 19 C. C. A. 323, and 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170, means that the end line planes for the discovery vein, when they are identical with the end lines of the claim itself, are to serve for secondary veins as well, that dictum does not logically require that anything short of the actual end lines of the claim (including, of course, side lines treated as end lines) and short of the points of entrance and departure of the secondary vein from the claim shall determine the secondary vein's extralateral rights.

‡ But see the discussion of Walrath v. Champion Min. Co., infra.

all technicalities are complied with, while the gift of extralateral rights on all veins within the location can be satisfied in no other way. The Colorado case giving extralateral rights on secondary veins, even though they do not apex in the same segment of the claim as does the discovery vein, seems perfectly sound.[116] Under that doctrine as full extralateral rights would exist on the incidental vein in Figure No. 41 as if that vein were the discovery vein, instead of the extralateral rights being confined to the segment of the incidental vein shown in Figure No. 41 to be between the extralateral right bounding planes for the discovery vein. It should be noticed that the foregoing doctrine enables the Colorado court to escape from what would otherwise be an absurd result of Catron v. Old[117] at the same time that it discredits Catron v. Old.

Under Catron v. Old there would be extralateral rights on neither vein in Figure No. 42. Whether there would be any in the secondary vein in Figure No. 43 is, perhaps, in doubt under that decision. Prob-

FIGURE No. 42.

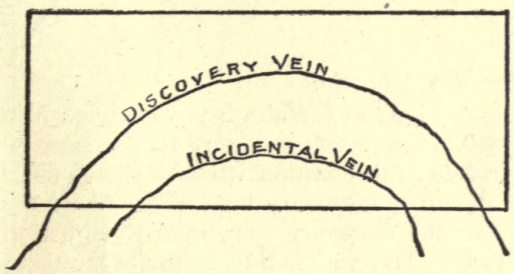
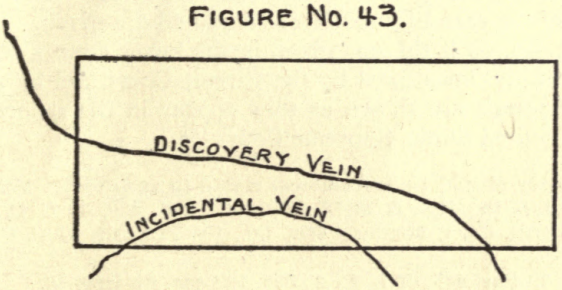


FIGURE No. 43.

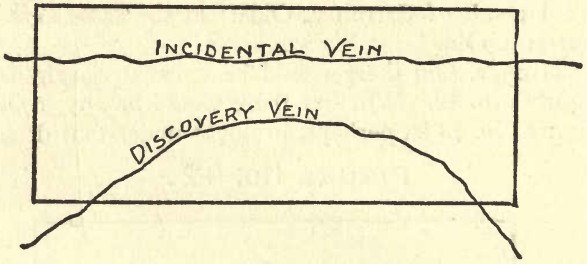


[116] AJAX GOLD MIN. CO. v. HILKEY, 31 Colo. 131, 72 Pac. 447, 62 L. R. A. 555, 102 Am. St. Rep. 23. But see Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925.

[117] 23 Colo. 433, 48 Pac. 687, 58 Am. St. Rep. 256.

ably, however, there would be.[118] But under Catron v. Old there would be none on the discovery vein in Figure No. 44, and but for Ajax Gold Min. Co. v. Hilkey** the consequence would be that there would be no extralateral rights on the incidental or secondary vein, which extends clear across the claim and cuts both end lines. The Colorado court wisely avoided such an absurd result; but at the same time, by giving extralateral rights on the incidental or secondary vein in Figure No. 44, that court made the implied denial of extralateral rights on the discovery vein in the same figure highly objectionable.

FIGURE No. 44.



Walrath v. Champion Min. Co.

The much discussed case of Walrath v. Champion Min. Co. [119] has raised a very important question in regard to a secondary vein's extralateral rights, namely, the question whether the senior location may take the whole dip of a secondary vein within the extralateral right bounding planes of the discovery vein, even though a greater length of the dip of the secondary vein is thus secured than there is length of the apex of the secondary vein within the location.[120] For a clear understanding of the case Figures Nos. 45 and 46 are given. The diagram in Figure No. 45 is the one given in the lower court's report.[121] In Figure No. 46 the lines fixed by the Circuit Court and by the Circuit Court of Appeals are shown as they appear in the report of the decision of the United States Supreme Court.[122]

[118] There certainly should be extralateral rights in such case. MONTANA MIN. CO. v. St. LOUIS MIN. & MILL. CO., 102 Fed. 430, 42 C. C. A. 415; St. Louis Min. & Mill. Co. v. Montana Min. Co., 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725.

** 31 Colo. 131, 72 Pac. 447, 62 L. R. A. 555, 102 Am. St. Rep. 23.

[119] 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170.

[120] That he cannot have more of the discovery (i. e., original or principal) vein than he has of its apex is, of course, clear. See Bunker Hill & S. Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. (C. C.) 108 Fed. 189; Id., 109 Fed. 538, 48 C. C. A. 665.

[121] Walrath v. Champion Min. Co. (C. C.) 63 Fed. 552, 554.

[122] 171 U. S. 293, 295, 18 Sup. Ct. 909, 43 L. Ed. 170.

FIGURE No. 45.

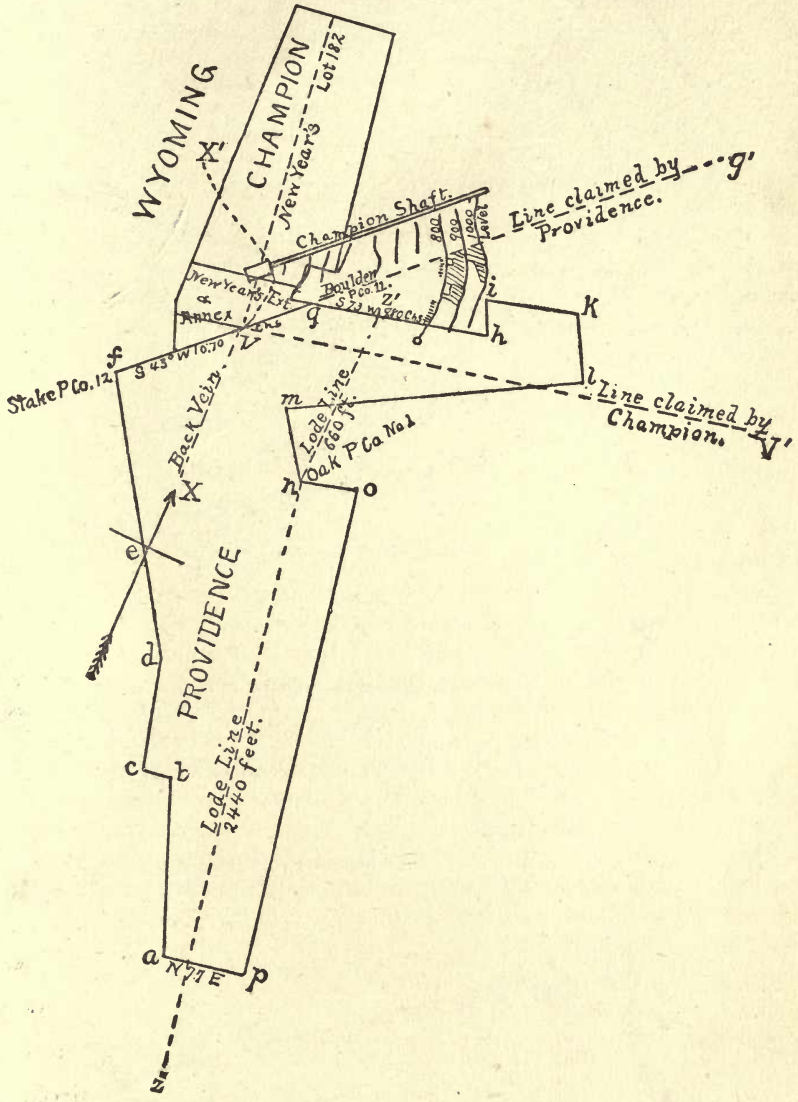
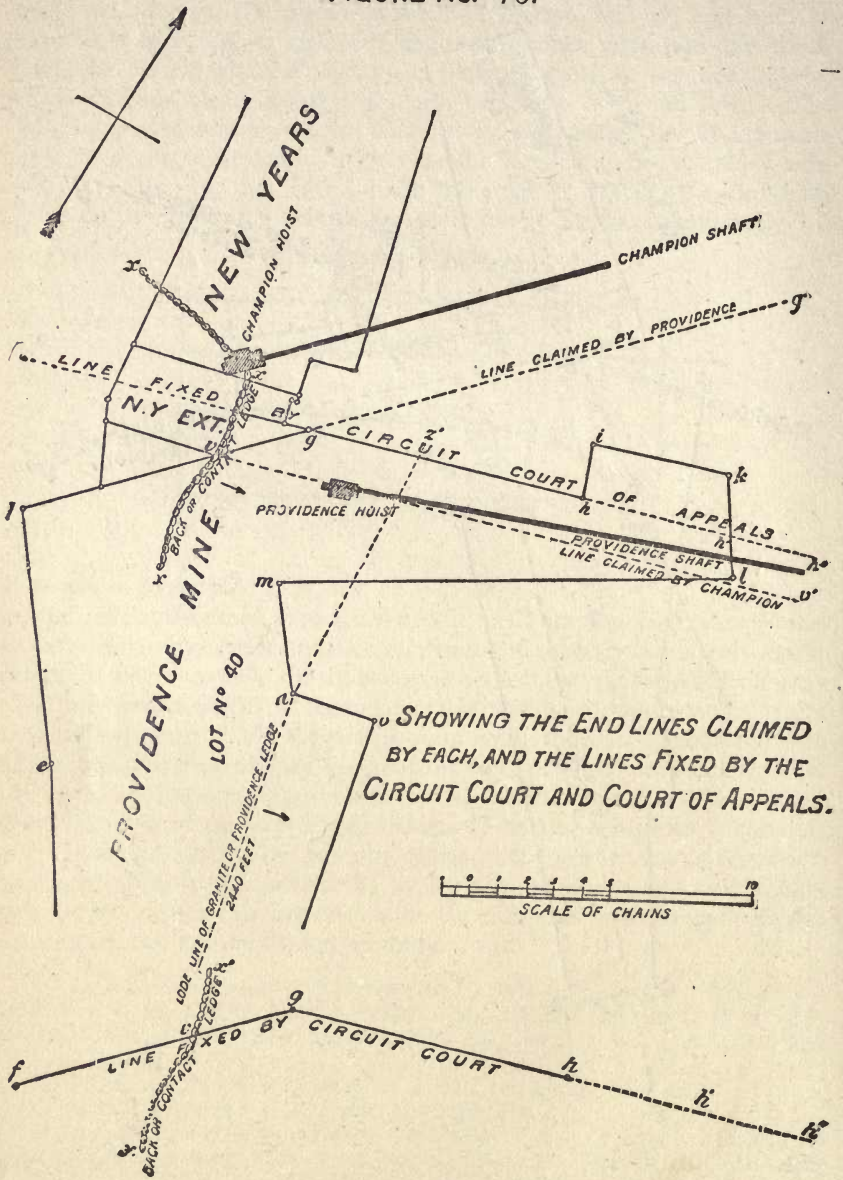

WYOMING
CHAMPION
New Years Lot 182
New Years Ext.
New Years & Annex
Champion Shaft.
Line claimed by Providence.
Boulder
Stake P Co. 11.
Stake P Co. 12
S 43° W 16.70
Back Vein.
Lode Line 660 ft.
Oak P Co No 1
Line claimed by Champion.
PROVIDENCE
Lode Line 2440 feet.
N 71 E
X
X'
Y
Y'
Z
Z'
a
b
c
d
e
f
g
g'
h
i
K
l
m
n
o
p

FIGURE No. 46.


NEW YEARS
CHAMPION HOIST
CHAMPION SHAFT
LINE CLAIMED BY PROVIDENCE
LINE FIXED BY N.Y EXT.
CIRCUIT COURT OF APPEALS
PROVIDENCE HOIST
PROVIDENCE SHAFT
LINE CLAIMED BY CHAMPION
PROVIDENCE MINE
LOT N° 40
SHOWING THE END LINES CLAIMED BY EACH, AND THE LINES FIXED BY THE CIRCUIT COURT AND COURT OF APPEALS.
SCALE OF CHAINS
LINE FIXED BY CIRCUIT COURT

The question in the case related to the dip rights of the Providence on the secondary vein x—x. The discovery, and hence principal, vein z—z,' cut both the lines g—h and a—p, which were substantially parallel, and were treated by the courts as the statutory end lines. The Supreme Court of the United States affirmed the decree of the Circuit Court of Appeals. The decree affirmed allowed the Providence claim rights on the secondary vein x—x, within the extended planes bounding the discovery vein's extralateral rights; i. e., within planes drawn downward through g—h and a—p, extended indefinitely in their own direction.[123] It is conceded that, as the case stands, that gave a greater dip right on the secondary vein than would exist if it were the original vein. But, to make the matter worse, the decree fixed the planes as above, "subject to the condition that the complainant has no right to enter upon the surface of the respondent's claims";[124] and it has been suggested that the Providence was to have the right to upraise on the vein x—x, between the planes v—v' and g—h extended across the New Year's extension. Mr. Lindley, who was one of the counsel in the case, is, however, "quite satisfied that this result was neither intended nor contemplated by the court."[125] But, even so, that still leaves the Providence owning more of the dip of the secondary vein than it has apex within its boundary lines. Such a doctrine may not be defended, even on the principle announced in Van Zandt v. Argentine Min. Co.;[126] for in Van Zandt v. Argentine Min. Co. the dip claimed by location was the discovery vein of the location. The holding that a prior location on the dip based solely on a discovery on the dip may retain the part of the dip inclosed within its common-law boundaries as against a subsequent locator of the apex may possibly be justified on the ground that the location was valid when made, because based on a sufficient discovery, and could not be invalidated through no fault of the locator;[127] but to say, as Walrath v. Champion Min. Co. does, that a mining claim has all of the dip of incidental lodes which apex within it, so far as that dip is contained within the extended bounding planes established for extralateral rights on the discovery vein, is to do something not necessary for the continued validity of the claim, and something which places an undue limitation on the rights of the present or future owners of that part of

[123] WALRATH v. CHAMPION MIN. CO., 72 Fed. 978, 19 C. C. A. 323.
[124] Id.
[125] 2 Lindley on Mines (2d Ed.) p. 1043, § 593.
[126] (C. C.) 8 Fed. 875.
[127] The writer has already doubted the soundness of the decision in VAN ZANDT v. ARGENTINE MIN. CO. See note 12, supra.

the apex of the incidental vein which is outside the claim and yet covers part of the dip thereof awarded to the claim.[128]

That the court fell into the error which it did was doubtless due to the fact that the ore bodies in dispute did not lie between the line v—v' claimed as a bounding plane by the Champion (which should have been the line fixed by the court) and the line g—h—h'—h". The ore bodies contended for were north of the line g—h, outside of the vertical boundaries of either party, and lying between the 800 and 1,000 foot levels of the Champion. That g—h, instead of v—v', was fixed as the bounding plane for the secondary vein x—x, is therefore strictly in the nature of a dictum; and because it was a dictum which affected no substantial right of the Champion, that company took no cross-appeal.[129] It will take another decision by the United States Supreme Court to define the effect of Walrath v. Champion Min. Co., and to determine whether that dictum is to become settled law. Meanwhile it is possible to say that in any event the case announces a rule applicable only to claims located and patented under the act of 1866.[130]

Where the incidental vein cuts across the discovery vein at right angles, or otherwise lies at right angles, to the discovery vein, the doctrines that there can be but one set of end lines for extralateral right purposes for the claim, that those must be fixed with reference to the discovery vein, and that there can be no extralateral right of pursuit on the strike of a vein, necessarily compel a denial of any

[128] See "A Problem in Mining Law, Walrath v. Champion Mining Company," by Mr. John M. Zane, in 16 Harv. Law Rev. 94. That article deserves careful reading. The true doctrine to adopt for all cases would seem to be that no dip rights can be awarded to a location in respect to any part of a vein which apexes in another location when to award such rights would interfere with what would otherwise be the dip rights of the location having that part of the apex. See McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823.

[129] "No cross-appeal was taken by the Champion Company to either of the appellate courts for economic reasons. All of the vein within the New Year's and New Year's Extension claims north of the plane f—g had been worked out years before the litigation arose. There was nothing of value there to justify litigation. The narrow strip of ground between the plane claimed by the Champion, v—v', and the one fixed by the court, g—h—h', did not embrace the ore 'shoot,' and was practically valueless. The valuable ore bodies over which the litigation arose, and which alone engaged the attention of either courts or litigants, were within the triangle formed by the line g—h—h' and the one claimed by the providence, f—g—g'. The only object to be gained by prosecuting a cross-appeal would have been to secure the establishment of a principle to be followed in other cases." 2 Lindley on Mines (2d Ed.) p. 1043, § 593, note.

[130] Mr. John M. Zane, in 16 Harv. Law Rev. 94, 107.

extralateral right to the secondary vein.[131] The situation is represented by Figures Nos. 47 and 48.

FIGURE No. 47.

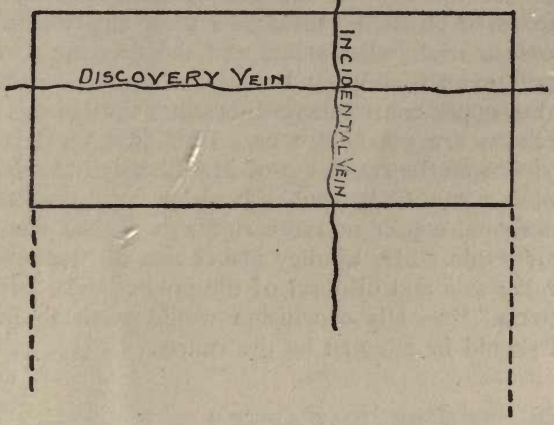
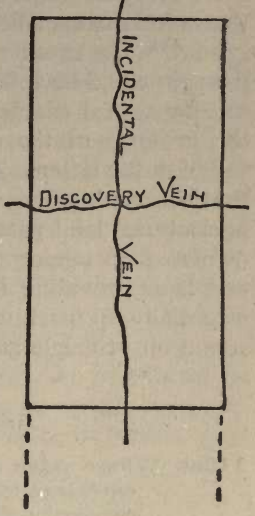


FIGURE No. 48.



SAME—VEIN DIPPING UNDER PRIOR PATENTED LAND.

118*l*. Extralateral rights exist, although the vein dips under prior patented mining land, and on principle where it dips under a prior agricultural grant; but the only case on the latter situation denies the right of extralateral pursuit on veins which dip under agricultural grants which antedate the mining location.

Vein Dipping under Prior Mining Claims.

Except as qualified by Walrath v. Champion Min. Co., as just explained, except as further limited by the doctrine of Van Zandt v. Argentine Min. Co., giving a locator on the dip whose location is expressly based thereon the part of the dip within his boundary planes, and except as restricted by the prior dip rights of others, the apex owner may follow his vein on its dip within his extralateral right planes under senior mining locations and patented claims, as well as under junior.[132] Even under Van Zandt v. Argentine Min. Co. the owner of

[131] COSMOPOLITAN MIN. CO. v. FOOTE (C. C.) 101 Fed. 518. That the right to follow a vein on its strike is limited to the lines of the location is clear. Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57. See cases in note 37, supra.

[132] COLORADO CENT. CONSOL. MIN. CO. v. TURCK, 50 Fed. 888, 2 C. C. A. 67; Id., 70 Fed. 294, 17 C. C. A. 128; Cheesman v. Hart (C. C.) 42 Fed.

the apex would have a right of way through the claim on the dip to get at the dip still further below.

Vein Dipping under Prior Agricultural Grant.

In the only reported case squarely on the point it has been held that a vein cannot be followed on its dip through a prior agricultural grant.[133] In another case a trial judge announced the doctrine that the vein could be followed under such land; but, as a settlement pending the appeal enabled the upper court to avoid deciding the point,[134] the grounds of the decision are not before us. Doubtless the trial judge in the latter case followed the reasoning of Mr. Lindley, namely, that the mining law is but a part of the public land law, and that an agricultural land patent should confer no more rights as against apex owners than mining patents do. Mr. Lindley insists that all the federal laws providing for the sale and disposal of the public lands "are essentially in pari materia." [135] His conclusion would seem to be sound on principle and should be adopted by the courts.

SAME—"THEORETICAL APEX."

118m. Where veins apex in land from which they cannot be pursued extralaterally, there is some reason to contend that the locator of a lode claim on the dip of such a vein adjoining the land in which it apexes shall be deemed theoretically to have the apex for extralateral right purposes.

A land department decision [136] raises a question that is of interest, namely, whether a vein apexing in an agricultural or other grant of land, from which it cannot be pursued extralaterally, can be located on the dip in such a way that the dip locator will get extralateral rights. The question is whether the courts will "theorize" an apex so to speak, by treating the part of the dip just outside the lines of the grant containing the real apex as if that part really were the

98. See DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72, where ore on the dip and under the senior claim, the Del Monte, was awarded to the Last Chance, the junior claim, which owned the apex.

133 AMADOR MEDEAN GOLD MIN. CO. v. SOUTH SPRING HILL GOLD MIN. CO. (C. C.) 36 Fed. 668. Compare Paterson v. Ogden, 141 Cal. 43, 74 Pac. 443, 99 Am. St. Rep. 31, where the agricultural land patent expressly reserved dip rights. The court did not have to pass on the validity of that reservation, but seemed to think it void.

134 WEDEKIND v. BELL, 26 Nev. 395, 69 Pac. 612. The state report gives the briefs of counsel, showing what the trial court ruled.

135 2 Lindley on Mines (2d Ed.) § 612.

136 WOODS v. HOLDEN, 26 Land Dec. Dep. Int. 198.

apex. The term "theoretical apex" should be applied to such a case, and the term "judicial apex" kept for the case where the junior claim really does throw its lines over the apex, albeit partly within the lines of a senior location.††

The question could arise just as well where the apex of the vein is wholly occupied by locations having end lines diverging on the dip. For instance, in a case such as in Figure No. 36, where the apex is taken by locations having their end lines so directed that large parts of the dip belong to nobody, and yet none of the real apex is left to locate, there is really no reason why the courts should not evolve a theoretical apex to meet the situation.[137] The Del Monte Case lets each of two conflicting locations have the same apex for extralateral right purposes, the junior having it subject of course to the prior rights of the senior; but that case of "judicial apex" is different from this case of "theoretical apex," because in that case of judicial apex the lines of the junior claim actually embrace the apex, though subject to the full rights of the senior claim, while in this case of theoretical apex the lines of the claim do not actually embrace the apex. It is, perhaps, wiser to adopt Mr. Lindley's attitude, and refuse to predict what the courts will do.[138]

SAME—RIGHTS OF GRANTOR AND GRANTEE AFTER A GRANT OF PART OF A LOCATED APEX.

118n. The grantee of part of a location with an inclosed part of the apex of the located vein is on principle entitled to extralateral rights bounded by planes drawn parallel to the original location's end lines and through the points where the vein enters and departs from the granted land.

The grantor under such a grant ought on principle to have full extralateral rights under the granted land, subject only to the grantee's prior right to veins apexing in the granted land; but a California case holds that he is estopped by the grant from extralateral pursuit of veins under the granted lands.

As a conveyance of a location conveys with the apex of the vein all extralateral rights, a conveyance of part of the location containing a portion of the apex should convey pro tanto extralateral rights. It is admitted, of course, that the parties may in their conveyance

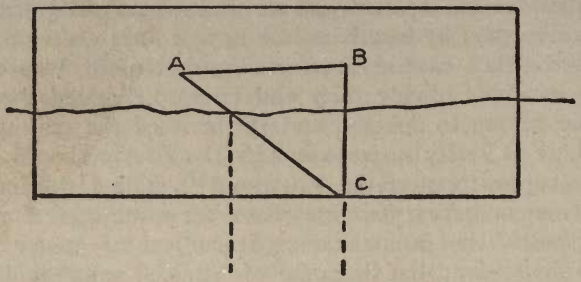
†† For "judicial apex," see § 118h.

137 The land department favors it. WOODS v. HOLDEN, 26 Land Dec. Dep. Int. 198; Id., 27 Land Dec. Dep. Int. 375.

138 1 Lindley on Mines (2d Ed.) p. 567, § 312a.

expressly define their rights; but the question is what rule to apply in the absence of any such expression of intention.

FIGURE No. 49.



Take Figure No. 49, where the owner of the claim conveys the triangular piece a—b—c. Is the grantee to be allowed dip rights, or is he to be estopped from claiming them by the fact that this strip does not have parallel end lines? The best rule is that the grantee has extralateral rights within planes drawn through the points where the vein crosses the grantee's boundaries and parallel to the end lines of the grantor's claim.[139] If the grantor has in his remaining piece the apexes of veins which dip under the granted land, it would seem that on principle he should have the right to follow that dip. The same reasoning that will allow a subsequent locator to follow the dip of his vein under a prior patented claim should allow the grantor to follow the dip of his lodes under the granted land. But a recent California case holds that the grantor is estopped to do so.[140]

[139] MONTANA ORE PURCHASING CO. v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO., 27 Mont. 288, 536, 70 Pac. 1114, 71 Pac. 1005. But see Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co. (C. C.) 89 Fed. 529.

[140] Riley v. North Star Min. Co. (Cal.) 93 Pac. 194.

CROSS VEINS.

119. Veins which cross on their dip belong to the locators having the apexes, except that the ore at the space of intersection belongs to the senior location.

Veins which cross on their strike likewise belong to the locators having the apexes; but under the construction given the federal statute there is a right of way in the junior locator through the space of intersection from one part of his claim to another. Whether that right of way is confined to the course of the vein, or is to be exercised where the junior claimant finds it most convenient within the conflict area of the two claims, is in doubt.

"Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine." Rev. St. U. S. § 2336 (U. S. Comp. St. 1901, p. 1436).

Considering that the next sentence of the above section of the Revised Statutes treats of veins uniting on the dip, there is very little doubt that, if the question were an original one to-day, the above portion of the section would be held to apply only to veins crossing on the dip. Unfortunately, however, it was decided early in Colorado that the section governed the case of veins crossing on the strike;[141] and while the Colorado court, with the affirmation of the Supreme Court of the United States, has reversed that earlier ruling[142] so far as to give the first locator of a claim all veins within his boundaries, it still seems to be true that, where the junior locator's lines are laid along his vein across the senior claim, the junior locator is deemed entitled to a right of way through the senior's claim from one segment of the junior's bisected claim to the other. In this view of the matter, "space of intersection," in the federal statute, means the space in the senior claim within junior lines, instead of meaning, as it ought, if

[141] Branagan v. Dulaney, 8 Colo. 408, 8 Pac. 669; Hall v. Equator Mining & Smelting Co. (U. S.) Fed. Cas. No. 5,931. On the effect of a contract affecting conflicting ground, when this case was law, see Bogart v. Amanda Consol. Gold Min. Co., 32 Colo. 32, 74 Pac. 882.

[142] CALHOUN GOLD MIN. CO. v. AJAX GOLD MIN. CO., 27 Colo. 1, 59 Pac. 607, 50 L. R. A. 209, 83 Am. St. Rep. 17; Id., 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200.

applicable at all to veins crossing on their strike, the space where the veins actually intersect in crossing on the strike.‡‡

Now that Branagan v. Dulaney, which allowed the junior locator to take all the ore on the cross vein within the senior's lines, save only where the veins actually intersected on their strike, has been repudiated, the fact that a right of way through the senior claim still exists on the strike of the cross vein or through the space of claim intersection seems a small matter.[143]

‡‡ In CALHOUN GOLD MIN. CO. v. AJAX GOLD MIN. CO., supra, the Colorado court, in speaking of the cross vein claimant, said: "But, if the expression 'space of intersection' is limited to the intersection of veins, as the space through which he should have a right of way for the convenient working of his mine, it would be of no avail, for he would have no right under which he could reach the easement; and so, again, in order to recognize one which would be of any value to the junior cross claimant, the space of intersection must also mean the intersection of the claims." 27 Colo. 1, 19, 59 Pac. 607, 615, 50 L. R. A. 209, 83 Am. St. Rep. 17. That argument, however, contains a false assumption. If an easement through the space of intersection of veins is given, that would seem necessarily to imply an easement from one part of the junior cross claim along the cross vein, to and through the space of intersection of veins, and thence along the cross vein to the other part of the junior cross claim. Assuming, then, that the statute was meant to apply to veins crossing on their strikes, the controversy must be as to whether the easement of a right of way through senior ground must be exercised by the cross claimant only in and along the cross vein, or whether he may exercise that easement at the most convenient place for him in the space of intersection of the two claims. It is to be regretted that the statute was ever construed to give an easement in the case of veins crossing on their strikes. The cross vein statute appears to have been meant to apply only to veins crossing on their dips.

143 The Supreme Court of the United States expressly refused to say whether the right of way was only through the vein, as held in Arizona, California, and Montana, or was through the space of intersection of the claim, as held in Colorado. CALHOUN GOLD MIN. CO. v. AJAX GOLD MIN. CO., 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200. See WATERVALE MIN. CO. v. LEACH, 4 Ariz. 34, 33 Pac. 418; Wilhelm v. Silvester, 101 Cal. 358, 35 Pac. 997; Pardee v. Murray, 4 Mont. 234, 2 Pac. 16. It has been said of CALHOUN GOLD MIN. CO. v. AJAX GOLD MIN. CO., supra, that "under the decision of the Supreme Court of the United States four questions growing out of the two sections of the statute referred to are still undetermined: (1) Does section 2336, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1436), apply to veins located under the law of 1866 which cross each other on their course or strike within the limits of the older location? (2) If so, does the 'space of intersection' mean the intersection of the veins or of the claims? (3) If the 'space of intersection' means the intersection of the claims, has the junior locator the right of way within the claim entirely across the location? (4) Can one locate a vein which crosses another on its strike within the surface boundaries of a valid location in such manner as to leave it entirely subdivided by the older location?" 27 Cyc. 586.

FIGURE No. 50.

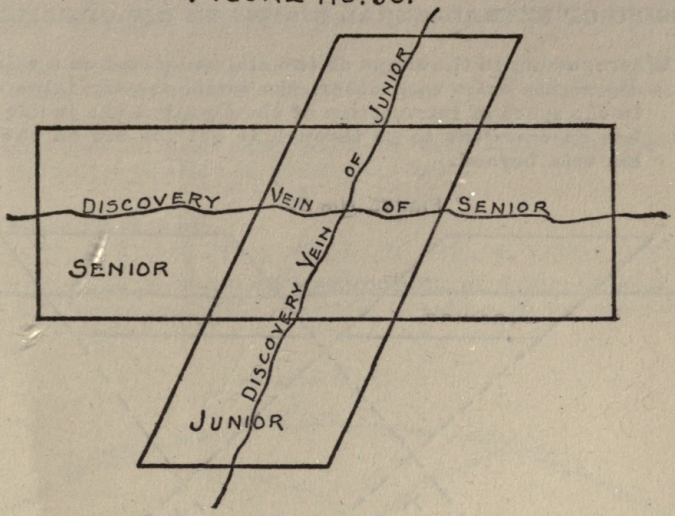


Figure No. 50 represents the situation dealt with by the courts where the veins cross on their strikes.

FIGURE No. 51.

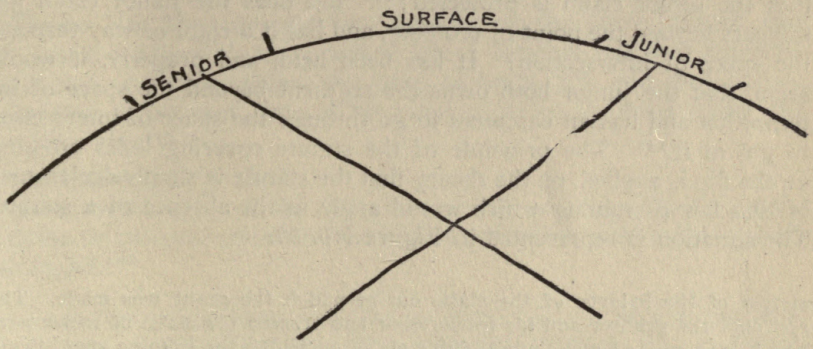


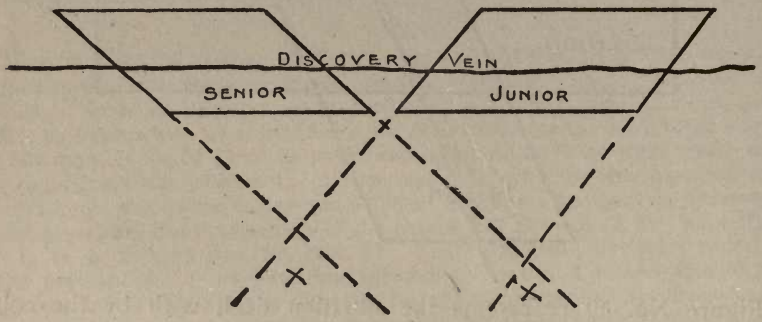
Figure No. 51 represents veins crossing on the dip.***

*** In Stinchfield v. Gillis, 96 Cal. 33, 30 Pac. 839, veins crossed on the dip, and the question about the ownership of the ore at the space of intersection arose between the grantee of part of a mining claim and his grantor. As the intersection occurred under the granted land, the ore at the place of intersection was awarded to the grantee, although the grantor's location antedated a relocation by the grantee. In Stinchfield v. Gillis, 107 Cal. 84, 40 Pac. 98, the grantee's right was reaffirmed, despite the fact that the location of the grantor was senior, and did not, as had been supposed on the earlier appeal, consist

CROSSING OF EXTRALATERAL RIGHTS ON DIP OF SAME VEIN.

120. Where, owing to the shape of two claims located on a vein, their dip rights cross each other, the senior locator takes the ore in the space of intersection of the dips, but the junior locator has an easement to go through to get the ore on the dip of his vein beyond.

FIGURE No. 52.



Analogous to the case of veins crossing on the dip is the case of the crossing on the same vein of dip rights. It is clear, of course, that the senior claim is protected;[144] but does the junior claim get the part beyond the point of crossing, and has it a right of way through the space of intersection? It has been held, and properly, it would seem, that the junior both owns the segment beyond the space of intersection and has an easement to go through the space of intersection to get at it.[145] The principle of the statute covering lodes crossing on the dip is applied, on the theory that the statute is simply declaratory of that law of mining which would apply in the absence of a statute. The situation is represented in Figure No. 52.

merely of the balance of the claim out of which the grant was made. The fact that the grantor and his predecessor had treated the claim of which part had been conveyed and the adjoining claim on which the grantor was relying as together making one claim led the court to apply the same rule as if they had actually constituted one claim.

[144] ARGENTINE MIN. CO. v. TERRIBLE MIN. CO., 122 U. S. 478, 7 Sup. Ct. 1356, 1140. See Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925.

[145] EMPIRE STATE–IDAHO MINING & DEVELOPING CO. v. BUNKER HILL & S. MINING & CONCENTRATING CO., 121 Fed. 973, 58 C. C. A. 311; BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO. v. EMPIRE STATE–IDAHO MINING & DEVELOPING CO. (C. C.) 134 Fed. 268; DAVIS v. SHEPHERD, 31 Colo. 141, 72 Pac. 57.

VEINS UNITING ON THE DIP AND ON THE STRIKE.

121. Where two or more veins unite on the dip, the senior location takes the compound vein below the point of union, as well as the space of union.

122. Where two or more veins unite on the strike, they belong to the senior location in which they apex.

Veins Uniting on the Dip.

Rev. St. U. S. § 2336 (U. S. Comp. St. 1901, p. 1436): "* * * Where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

FIGURE No. 53.

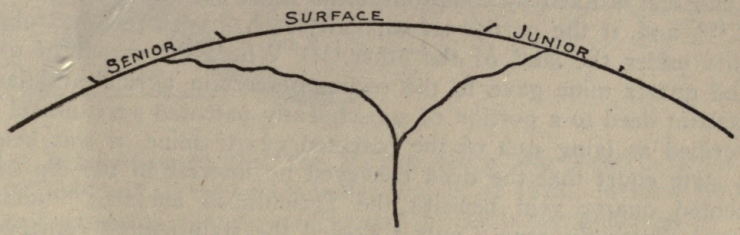


Figure No. 53 represents veins uniting on the dip. In such case the first location, without regard to which location was first patented, takes the whole vein below the point of union;[146] and that is true, regardless of whether, beyond the point of union, it passes under still a third claim.[147]

Veins Uniting on the Strike.

Veins which unite on the strike are owned, of course, by the senior location or patented claim within the lines of which their united apexes are found.[148]

[146] LITTLE JOSEPHINE MIN. CO. v. FULLERTON, 58 Fed. 521, 7 C. C. A. 340; CONSOLIDATED WYOMING GOLD MIN. CO. v. CHAMPION MIN. CO. (C. C.) 63 Fed. 540. See Champion Min. Co. v. Consolidated Wyoming Gold Min. Co., 75 Cal. 78, 16 Pac. 513.

[147] ROXANNA GOLD MINING & TUNNELING CO. v. CONE (C. C.) 100 Fed. 168.

[148] LEE v. STAHL, 13 Colo. 174, 22 Pac. 436; Book v. Justice Min. Co. (C. C.) 58 Fed. 106. That is because the word "below" in the statute cannot be construed to mean "beyond." LEE v. STAHL, supra.

EXTRALATERAL RIGHT COMPROMISE AGREEMENTS AND DEEDS.

123. Relative extralateral and intralimital rights may be adjusted by compromise agreements and deeds. Such adjustments are most likely to occur during adverse suits.

It is, of course, possible for the owners of adjoining mining claims to adjust by deed their relative extralateral rights. Where an agreement is entered into which awards one mine owner extralateral rights under an adjoining mine owner's land, and deeds are executed to carry out the agreement, the right of the first owner to the extralateral pursuit of his vein under the second one's land cannot be denied on the ground that the end lines of his claim are not parallel.[149] So, where an end line is fixed by compromise, no right beyond it can be claimed;[150] and, if the parties so stipulate, each may forego extralateral rights under the land of the other.[151] Where the owner of a patented quartz mine gave to the owner of certain agricultural land a quitclaim deed to a portion of subsequently patented agricultural land described as lying east of the patented quartz mine, it was held by the state court that the deed conveyed no interest in the dip of the patented quartz vein beneath the agricultural surface;[152] and the United States Supreme Court followed the state court's construction of the deed.[153] So rights to cross veins may be changed by contract.[154]

[149] RICHMOND MIN. CO. OF NEVADA v. EUREKA CONSOLIDATED MIN. CO., 103 U. S. 839, 26 L. Ed. 557.

[150] KENNEDY MINING & MILLING CO. v. ARGONAUT MINING CO., 189 U. S. 1, 23 Sup. Ct. 501, 47 L. Ed. 685. Where a patent is issued for a placer, "excepting and excluding * * * all that portion of the surface ground herein described which is embraced by" a lode named, the placer patentee does not get title to the veins and lodes which apex beneath the excepted surface; for not only the surface area embraced in the conflict area, but also all veins or lodes beneath such surface having their tops or apexes within the vertical lines thereof, are carved out of the placer grant by the exception. LELLIE LODE MINING CLAIM, 31 Land Dec. Dep. Int. 21.

[151] MONTANA MIN. CO. v. ST. LOUIS MIN. & MILL. CO., 204 U. S. 204, 27 Sup. Ct. 254, 51 L. Ed. 444. See Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont. 536, 71 Pac. 1005; RILEY v. NORTH STAR MIN. CO. (Cal.) 93 Pac. 194.

[152] Central Eureka Min. Co. v. East Central Eureka Min. Co., 146 Cal. 147, 79 Pac. 834, 9 L. R. A. (N. S.) 940.

[153] EAST CENTRAL EUREKA MIN. CO. v. CENTRAL EUREKA MIN. CO., 204 U. S. 266, 27 Sup. Ct. 258, 51 L. Ed. 476.

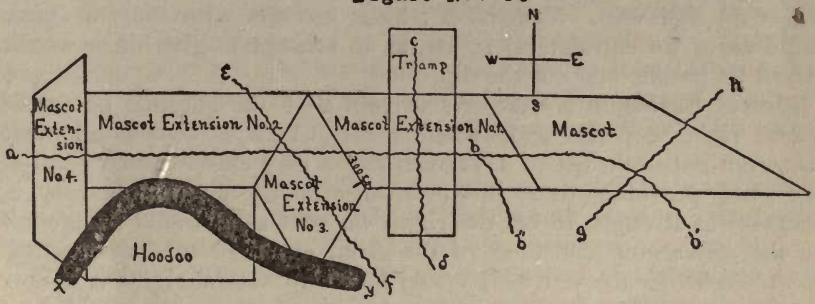
[154] Coffee v. Emigh, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125.

DIAGRAM TO ILLUSTRATE RELATIVE EXTRALATERAL RIGHTS.

124. Relative extralateral rights may best be illustrated by Figure No. 54.

A good diagram to illustrate relative extralateral rights is found in Figure No. 54.

Figure No. 54



Let it be assumed that the Mascot claim was located under the act of 1866 and all the others under the act of 1872. Assume that the Mascot extension claims were located in the order indicated by their names, and that after they were located the Hoodoo claim was located, and then the Tramp. Let vein a—b—b′ be the original discovery vein on all but the Hoodoo and Tramp claims. Let vein c—d be the discovery vein of the Tramp, and the broad vein, x—y, that of the Hoodoo. Veins e—f and g—h are secondary veins, and b—b″ is a split-off part or spur of the vein a—b—b′. Let vein a—b dip to the south, b—b″ and e—f dip southwest, g—h dip southeast, and c—d dips west. The extralateral rights of the claims then are:

Mascot. As the Mascot was located under the act of 1866, the end lines need not be parallel to give extralateral rights. The first question is as to the discovery vein, b—b′. The general course of the vein in the Mascot must be established, and parallel planes are then drawn at right angles to that course through the points where the vein enters and leaves the surface boundaries. Then with reference to the secondary vein, g—h, we note that while under the act of 1866 it did not belong to the owner of the Mascot, and therefore had no extralateral rights, the act of 1872 changed that rule by express provision. Owing to the way g—h lies in the claim, however, it probably could have no extralateral rights if the end lines fixed for b—b′ govern, as to try to award them would be to give the strike, not the dip,

and even if Ajax Min. Co. v. Hilkey[155] is to be followed the same difficulty would exist. It would seem to be clear that g—h has no extralateral rights.

Mascot Extension No. 1. The end lines would be extended to fix the planes for extralateral rights on vein a—b—b.' These rights would be subject, of course, to the prior rights, if any, of the Mascot. Planes parallel to the end lines would be drawn through the points where vein c—d enters and leaves the location to fix the extralateral rights on that vein. Vein b—b", being parallel with the end lines, could enjoy no extralateral rights, as to attempt to give them would award the strike, and not the dip.

Mascot Extension No. 2. As to vein a—b the question of extralateral rights depends upon whether Mr. Lindley's view is adopted, that even under the act of 1872 such rights may exist without parallel end lines, providing those lines converge on the dip. If his view is adopted, as it ought to be, the rights on vein a—b would be limited by the converging end lines of the claim extended to their meeting point. Whether the vein e—f would have extralateral rights is doubtful, however. The rule for the broad vein, x—y, would probably apply. On the broad vein, x—y, lines would probably be drawn through its points of entrance into and departure from the claim parallel to the respective converging end lines of the claim, and these new lines extended to their point of convergence. On one view of Walrath v. Champion Min. Co. all the dip of the broad vein and of vein e—f could be claimed by Mascot Extension No. 2 within the converging end lines of the location as extended; but that view must be repudiated.

Mascot Extension No. 3. Find the end lines established as such by the locator by looking at his notices, end line or side line posts, etc., and then draw lines parallel to those end lines through the points where the discovery vein, a—b, enters and departs from the location. That will fix the extralateral right lines on that vein. Then, if e—f is not parallel with the claim's end lines, extralateral rights will exist on it. If Ajax Min. Co. v. Hilkey[156] is to be followed as it should be, these rights will be bounded by the claim's end lines extended. If it is not to be followed, they will be bounded by the end lines fixed for vein a—b extended. Of course, if vein e—f turns out to be parallel to the claim's end lines, no extralateral rights on it can be allowed, as to attempt to give them would be to award the strike of the vein. What has been said of these other veins will apply to the broad vein x—y.

[155] 31 Colo. 131, 72 Pac. 447, 62 L. R. A. 555, 102 Am. St. Rep. 23.
[156] Id.

Mascot Extension No. 4. In this claim the side lines are the end lines, and they are parallel, so there should be extralateral rights on vein a—b. Messrs. Morrison and De Soto would not allow the vein to be pursued beyond the located end line; but, as that has become a side line for this purpose, pursuit of the vein beyond it and within the planes formed by extending the other and parallel lines is doubtless permitted. If vein a—b may be pursued beyond the claim's vertical boundaries, vein x—y may be. As to the rule with reference to that vein the same question about Walrath v. Champion Min. Co. arises as did with reference to Mascot Extension No. 2. The true way of determining the rights would seem to be to draw planes parallel to the extralateral right end lines through the extreme points of entrance and exit of x—y, provided that doing so will not give extralateral pursuit of the strike of the vein.

Hoodoo. The Hoodoo gets all extralateral rights in x—y within the extended end line planes of the Hoodoo not already awarded to the Mascot Extension No. 2 and to the Mascot Extension No. 3.

The Tramp. The Tramp gets all extralateral rights on the vein c—d within the Tramp's end line planes extended not already awarded to the Mascot Extension No. 1. The Tramp also gets whatever "cross vein" rights there may be under the federal statutes.[157]

[157] As to these, see the discussion of cross veins, supra, § 119.

CHAPTER XXII.

COAL LAND AND TIMBER AND STONE LAND ENTRIES AND PATENTS.

COAL LAND ENTRIES.

125. Coal lands are entered by legal subdivisions by qualified individuals and associations. They may be entered (1) by ordinary cash entry, and (2) by cash entry under preference right.

Coal lands [1] are entered by legal subdivisions.[2] Any individual who is a citizen of the United States, or has declared himself to be such, and who is 21 years of age, may enter by such subdivisions, not to exceed 160 acres.[3] Any association, which includes a corporation,[4] composed of individuals qualified to make entry as individuals, may enter not to exceed 320 acres by private entry, [5] and if the association consists of not less than four qualified persons, who shall have expended not less than $5,000 in working and improving a coal mine or mines, it may enter not to exceed 640 acres, including such mining improvements.[6] The right to purchase coal lands can be exercised but once, whether the person exercising it did so alone or as a member of an association, and no entry can be allowed to an association which has in it a single person disqualified.[7] Moreover, in a recent case where

[1] "Lands containing lignites are included under the term 'coal lands.'" Coal Lands Regulations, part 1, rule 2. See Appendix.

"The lands must be vacant and unappropriated, and must contain workable deposits of coal, and must not be valuable for mines of gold, silver, or copper." Id.

[2] Id.

[3] Rev. St. U. S. § 2347 (U. S. Comp. St. 1901, p. 1440); Coal Land Regulations, part 1, rule 3.

[4] UNITED STATES v. TRINIDAD COAL & COKING CO., 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640.

[5] Rev. St. U. S. § 2347 (U. S. Comp. St. 1901, p. 1440); Coal Land Regulations, part 1, rule 3.

[6] Rev. St. U. S. § 2348 (U. S. Comp. St. 1901, p. 1440); Coal Land Regulations, part 1, rule 4.

[7] Rev. St. U. S. § 2350 (U. S. Comp. St. 1901, p. 1441); Coal Land Regulations, part 1, rule 5.

"The right so to enter or hold is exhausted, whether an entry embraces in

a wife sought to purchase coal lands, the land department said: "The provisions of the coal land laws fully warrant the requirement in all cases that in entries thereunder the entryman shall show under oath that the entry is made in good faith in his own and individual interest, and not in the interest, directly or indirectly, in whole or in part, of any other person or persons whomsoever." [8]

The coal land laws recognize two kinds of entry: (1) Ordinary cash entry; and (2) cash entry under a preference right.

SAME—ORDINARY CASH ENTRY.

125a. Ordinary cash entry is without previous occupation or improvement of the land, and the steps in it are (1) the filing of a sworn application; (2) the posting and publication of a notice of application; (3) the proofs of the completed posting and publication; (4) the determination in the land office of adverse claims and protests; (5) the report by the chiefs of field division of special agents of the land department; (6) the register's certificate for entry and the receiver's receipt; (7) the patent.

The ordinary cash entry may be made without previous occupation or improvement of the coal land. To enter the lands the entryman must make oath to an application prescribed by the land department showing his qualifications to purchase, the fact that no part of the land is in the possession of anybody else, and that it is chiefly valuable for its coal deposits.[9] Upon the filing of this application, the applicant is required, at his own expense, to publish for 30 days a notice of the application in a form prescribed by the land department. The notice must be published "in a newspaper nearest the lands, to be designated by the register," and during the period of publication "a similar notice

any instance the maximum area allowed by the law or less; also by the acquisition of a preference right of entry, unless sufficient cause for the abandonment thereof is shown." Id. See UNITED STATES v. TRINIDAD COAL & COKING CO., 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640.

[8] Jessie E. Oviatt, 35 Land Dec. Dep. Int. 235, 238. The ruling was that, in a state where by virtue of the marriage a husband had no vested interest in his wife's property, she could enter coal lands for herself. See, also, Johnson v. Leonhard, 1 Wash. St. 564, 20 Pac. 591. But on the essentials of criminal conspiracy in the entry of coal lands, see United States v. Keitel (D. C.) 157 Fed. 396; Pereles v. Weil (D. C.) 157 Fed. 419; Arnold v. Weil (D. C.) 157 Fed. 429; United States v. Robbins (D. C.) 157 Fed. 999. Compare Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278.

[9] Coal Land Regulations, part 1, rule 10, contains the form of application. By rule 16 the verification must take place in the district where the land is situated and before the register or receiver in that district.

must be posted in the local land office and in a conspicuous place on the land." [10] Proofs of publication of the notice and of its conspicuous and continued posting on the land must be furnished, and the register must add his certificate that the notice remained posted in his office.[11] The notice is a call for protests and adverse claims, and if any are filed before entry the local officers will hear them; but after entry the local officers can only forward the papers to the General Land Office for instructions.[12] An entry will in no case be allowed until the proofs of publication of notice and of posting are filed.[13] If the specified proofs are not furnished, and the purchase price is not tendered, within 30 days after the expiration of the period of newspaper publication, the local land officers must reject the application, subject to appeal.[14] "Furthermore, in the exercise of a preference right to purchase, no part of the 30-day period specified herein may extend beyond the year fixed by the statute." [15]

When the requisite proofs are furnished, and all adverse claims and protests are disposed of, and the register finds both that the tract applied for is vacant, surveyed, and unappropriated, and that the claimant has complied with all the coal land laws and regulations, the register will certify the facts to the receiver, stating the prescribed purchase price for the land, and the applicant must then pay the amount of purchase money.[16] Registers and receivers will not issue final certificates, or their equivalents, until notice has been given to the

[10] Coal Land Regulations, part 1, rule 17, 19.

[11] Coal Land Regulations, part 1, rule 18.

[12] Coal Land Regulations, part 1, rules 8, 9. The decision of the Interior Department in canceling an entry on coal land, permitting an amendment of another entry, and issuing a patent on the latter entry, cannot be collaterally attacked. Quinn v. Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552.

[13] Coal Land Regulations, part 1, rule 18.

[14] Coal Land Regulations, part 1, rule 18, as amended November 30, 1907.

[15] Id.

[16] Coal Land Regulations, part 1, rule 20. The price is fixed by statute with reference to completed railroads. The term "completed railroad" is held to mean "a railroad actually constructed, equipped, and operating at the date of entry." Coal Land Regulations, part 1, rule 6. The price is not less than $10 per acre where the land is situated more than 15 miles from any completed railroad, and not less than $20 per acre where it is within 15 miles of such road. Coal Land Regulations, part 1, rule 12; Rev. St. U. S. § 2347 (U. S. Comp. St. 1901, p. 1440). The distance is measured from the roadbed and not from the nearest shipping point. Clinton S. Conant, 29 Land Dec. Dep. Int. 637. The Commissioner of the General Land Office will furnish information from time to time to the registers and receivers showing the coal lands for sale, with a schedule of prices for them. The coal entries are to be allowed at the minimum prices stated above, except that lands known to contain workable deposits of coal and so designated on the maps furnished shall

chiefs of field division of special agents, and the latter have returned a copy of the notice with an indorsement not protesting the validity of the entry.[17] The receiver's receipt is followed in due time by patent.

SAME—CASH ENTRY UNDER A PREFERENCE RIGHT.

125b. The actual possession of coal lands and the bona fide opening thereon of a coal mine give a preference right in the lands, which must be exercised, if at all, within 60 days. The proceedings otherwise are substantially like those in the case of ordinary cash entry, except that entry claimed under a preference right cannot take place until a year after the expiration of the 60-day period allowed for filing the sworn application.

The preferential right to purchase* rests upon actual possession of the land and the opening of a coal mine thereon improved sufficiently to indicate good faith.[18] By ordinary cash entry one can get no rights in unsurveyed lands; but the preferential right, though it can be perfected only on surveyed lands, can be initiated on unsurveyed lands.[19] If initiated on unsurveyed lands, the declaratory statement must be filed within 60 days after the receipt of the township plat at the district land office;[20] while, if initiated on surveyed land for which the

be sold at the prices stated in the schedules and maps. Land Office Regulations, part 1, rule 6.

[17] Instructions of April 24, 1907, § 5. See Appendix.

*"The term 'preference' is a familiar one under the public-land laws and means 'exclusive.' A right thus secured, therefore, is to the exclusion of all other persons; and it is evident without argument that the duration and extent of a right of that character should be strictly governed by the statute. * * * Under the provisions of the law the preference right of entry arises only when a duly qualified person or persons open and improve a mine or mines of coal upon the public lands and are in actual possession of the same. Apart from the matter of qualification under the statute, three elements must concur in point of time to give rise to the preference right, viz.: The opening of a mine of coal; its improvement as such; and actual possession." Charles S. Morrison, 36 Land Dec. Dep. Int. 126, 128, 129.

[18] Rev. St. U. S. § 2348 (U. S. Comp. St. 1901, p. 1440); James D. Negus, 11 Land Dec. Dep. Int. 32; Reed v. Nelson, 29 Land Dec. Dep. Int. 615. "A perfunctory requirement with the law in this respect will not suffice; but a mine or mines of coal must be in fact opened and improved on the land claimed." Coal Land Regulations, part 1, rule 7. Clearing out old coal prospects at an expense of $10 will not do. Esther F. Files, 36 Land Dec. Dep. Int. 360.

[19] Holladay Coal Co. v. Kirker, 20 Utah, 192, 57 Pac. 882.

[20] Coal Land Regulations, part 1, rule 7. A method is provided for getting a survey of such unsurveyed lands under Act Aug. 20, 1894, c. 302, 28 Stat. 423 (U. S. Comp. St. 1901, p. 1477). See Circular 21 Land Dec. Dep. Int. 77. See Coal Land Regulations, part 1, rule 23.

township plat is already on file, the tract must be claimed within 60 days from the date of actual possession and commencement of improvements upon the land.[21] The declaratory statement must set forth the qualifications of the applicant, the circumstances giving preferential rights, and the fact that the land is chiefly valuable for coal; and it must be verified.[22] Then, within one year after the expiration of the period allowed for filing the declaratory statement, the applicant[23] may file a sworn application to purchase, substantially in repetition of the declaratory statement,[24] and after a publication and posting of notices similar to that in the case of ordinary cash entry,[25] and after special notice to all others who appear of record as claimants of the same tract, he may make final proof and payment.[26] Protests and adverse claims are governed by the same rules as in ordinary cash entry. There is the same notice to and return of copy by the chiefs of field divisions of special agents. The register makes the same certificate as in ordinary cash entry, and on payment of the money the receiver's receipt issues. Patent follows in due course.

[21] Rev. St. U. S. § 2349 (U. S. Comp. St. 1901, p. 1440); Coal Land Regulations, part 1, rule 7. "From the date the mine is opened upon the coal and improvements thereon are commenced, the possession concurring, the period of 60 days within which a declaratory statement may be filed in accordance with section 2349 begins to run." Charles S. Morrison, 36 Land Dec. Dep. Int. 126, 129. If the declaratory statement is not filed within the 60 days but is filed within the period of substantially 14 months allowed to the claimant to purchase and before adverse rights intervene, the preference right exists. CHARLES S. MORRISON (ON REVIEW) 36 Land Dec. Dep. Int. 319.

[22] A form is suggested by the land department. Coal Land Regulations, part 1, rule 11. By rule 16 the verification must take place in the district where the land is situated and before the register or receiver of the land district.

[23] "Assignment of a preference right of entry under section 2348, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1440), will not hereafter be recognized." Coal Land Regulations, part 1, rule 5. A contract by one person to enter coal land and after patent convey it to another, who has exhausted his right, is clearly contrary to public policy. JOHNSON v. LEONHARD, 1 Wash. St. 564, 20 Pac. 591.

[24] For form of affidavit, see Coal Land Regulations, part 1, rule 14.

[25] Coal Land Regulations, part 1, rules 17, 18, 19. Publication must be made sufficiently in advance to permit entry within the year specified by the statute. Id. rule 17.

[26] Coal Land Regulations, part 1, rule 12. "A declarant will not be permitted to file after the expiration of the 60 days allowed, nor to exercise a preference right of purchase after the expiration of the year." Coal Land Regulations, part 1, rule 13. See Rev. St. U. S. § 2350 (U. S. Comp. St. 1901, p. 1441); Reed v. Nelson, 29 Land Dec. Dep. Int. 615.

SAME—INDIAN COAL LAND LEASES.

125c. Certain Indian coal lands are not allowed to be sold, but are leased for the Indians by the United States. It is possible that ultimately a similar leasing system will completely displace the present system of coal land entries.

The coal lands of the tribes of Indians in that part of Oklahoma which was Indian Territory have been protected from sale, and are still to some extent protected from sale, by various United States statutes, but have been leased for the Indians by the United States. In view of at least one bill pending in Congress to end the sale of all coal lands and substitute a system of leasing such lands, the regulations adopted by the United States for the leasing of some of such Indian mineral lands, and, in addition, some of the forms used by the United States, are embodied in the appendix of this book.

TIMBER AND STONE LAND ENTRIES.

126. A plan analogous to that used in coal land entries is followed under the timber and stone act for timber and stone lands, which are unfit for cultivation and are valuable chiefly for timber and stone. The steps are: (1) The sworn application; (2) the posting and publication of the notice of application; (3) the proofs of posting and publication; (4) an oral hearing, and, if there are any adverse claims or protests, their determination; (5) a report by the chief of field division of special agents of the land department; (6) entry; (7) patent.

Under the timber and stone act of June 3, 1878,[27] as amended August 4, 1892,[28] a somewhat similar method to that for coal lands is provided for acquiring lands valuable chiefly for timber or stone and unfit for cultivation at the time of sale.[29] The same rules as to individual and association qualifications apply to claimants of such lands as do to claimants for coal lands, except that only 160 acres can be acquired by any one person or association.[30] No land can be entered until after the filing of a sworn application and a hearing thereon, had upon the proper posting and publication of the requisite notice.

[27] 20 Stat. 89, c. 151 (U. S. Comp. St. 1901, p. 1545).

[28] 27 Stat. 348, c. 375 (U. S. Comp. St. 1901, p. 1547).

[29] Johnson v. McMillan, 22 Land Dec. Dep. Int. 647. A timber and stone entry on unsurveyed land was held to be a nullity in Cobb v. Oregon & California R. R. Co., 36 Land Dec. Dep. Int. 268.

[30] In the case of an association claiming coal lands, each of the persons must prove the requisite qualifications, and each must subscribe and swear to the application or affidavit. Coal Land Regulations, part 1, rule 15.

The statute prescribes that the sworn application must be made in duplicate, must designate by legal subdivisions the particular tract of land the applicant desires to purchase, and must set forth that the same is unfit for cultivation and valuable chiefly for its timber or stone; that it is uninhabited; that it contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any persons except himself.[31]

Upon the filing of the sworn statement, the register must post in his office for 60 days a notice of the application, and furnish the applicant a copy to publish for a like period in the newspaper nearest the location of the premises.[32] This notice must describe the land by legal subdivisions,[33] must state the time and place when, and the officer before whom, the applicant intends to offer proof, and must contain the names of the witnesses who are to testify.[34] The claimant has to be corroborated by two disinterested witnesses,[35] so at least two witnesses must be named in the notice.

The hearing is by oral examination, reduced to writing upon the blanks furnished for the purpose.[36] Payment must be made at the time of offering proof. Until recently proof of everything contained in the sworn application has been required; but the Supreme Court

[31] Act June 3, 1878, c. 151, § 2, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545). By the application no such vested right is acquired, prior to making final proof and payment, as will prevent withdrawal of the lands under the irrigation act (Act June 17, 1902, c. 1093, 32 Stat. 388 [U. S. Comp. St. Supp. 1907, p. 511]). Charles O. De Land, 36 Land Dec. Dep. Int. 18. An application to purchase under the timber and stone act was held a valid exercise of a preference right gained in contesting a homestead entry for the same land in Harris v. Heirs of Ralph H. Chapman, 36 Land Dec. Dep. Int. 272. In Cain v. Carrier, 36 Land Dec. Dep. Int. 356, two applications for stone and timber land were treated as simultaneous, and entry awarded to the higher bidder. The filing of an application for a tract of land to which the applicant can complete title exhausts the applicant's right of purchase under the act. George F. Brice, 37 Land Dec. Dep. Int. 145.

[32] Act June 3, 1878, c. 151, § 3, 20 Stat. 90 (U. S. Comp. St. 1901, p. 1546).

[33] Id.

[34] General Land Office Circular Issued Jan. 25, 1904, p. 41, rule 10. See Sarah L. Bigelow, 20 Land Dec. Dep. Int. 6.

[35] General Land Office Circular Issued Jan. 25, 1904, p. 41, rule 11.

[36] Id.

of the United States has just decided in a criminal case that the land department cannot require an applicant under the timber and stone act to make oath on final hearing of his bona fides and of the absence of any contract or agreement by him in respect to the title.[37] A report from the chiefs of field division of special agents of the land department seems to be required, just as in the case of coal land.

No entry will be allowed until previous adverse claims and protests have been determined.[38] Special provision is made for contest after entry and before patent.[39] In the case of uncontested applications, patent issues in due course after entry.

[37] Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278.
[38] General Land Office Circular Issued Jan. 25, 1904, p. 42, rule 14.
[39] General Land Office Circular Issued Jan. 25, 1904, p. 42, rule 15.

CHAPTER XXIII.

OIL AND GAS LEASES.

KINDS OF OIL AND GAS LEASES.

127. Oil and gas leases display certain peculiarities which grow out of the migratory character of oil and gas. Such so-called leases seem to be of three kinds:

(1) "Optional leases," terminable by either party.

(2) The ordinary so-called leases, which are licenses, irrevocable while being exercised in accordance with their terms, but carrying no estate in the minerals or the land.

(3) Genuine leases, carrying a present estate in the land and the lessor's full qualified property in the oil and gas for the terms of the leases.

Oil lands, as we have seen,[1] are to be located as placers.[2] So are natural gas lands, it would seem,[3] since natural gas is a mineral.[4] But the volatile and fugitive character of such minerals has resulted in certain peculiarities of oil and gas leases which need to be dwelt upon.

Because of the migratory character of the oil and the gas, the landowner's title to them is contingent, and liable to be defeated at any time by their escape into other land.[5] Until the oil or gas is discovered in a well in a given tract of land, indeed, there is no certainty that

[1] See chapter XV, § 69, supra.

[2] Act Feb. 11, 1897, c. 216, 29 Stat. 526 (U. S. Comp. St. 1901, p. 1434); Union Oil Co., 25 Land Dec. Dep. Int. 351.

[3] Cf. 1 Lindley on Mines (2d Ed.) § 423.

[4] WESTMORELAND & CAMBRIA NATURAL GAS CO. v. DE WITT, 130 Pa. 235, 249, 18 Atl. 724, 5 L. R. A. 731; MURRAY v. ALLRED, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740; Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 Pac. 995; Preston v. White, 57 W. Va. 278, 50 S. E. 236; Sult v. Hochstetter Oil Co. (W. Va.) 61 S. E. 307. But see Silver v. Bush, 213 Pa. 195, 62 Atl. 832.

[5] "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as mineral feræ naturæ. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. * * * They belong to the owner of the land, and are part of it, so long as they are on it or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone." WESTMORE-

any is contained in it. Accordingly a landowner may drill an oil well on his land, though he may draw from an oil well on adjoining land;[6] but it has been declared in Indiana that, independently of the statutes which exist there against pumping,[7] "natural gas in the ground is so far the subject of property rights in the owners of the superincumbent lands that while each of them has the right to bore or mine for it on his own land, and to use such portion of it as, when left to natural laws of flowage, may rise in the wells of such owner and into his pipes, no one of the owners of such lands has the right, without the consent of all the other owners, to induce an unnatural flow into or through his own wells, or to do any act with reference to the common reservoir and body of gas therein injurious to or calculated to destroy it." [8]

LAND & CAMBRIA NATURAL GAS CO. v. DE WITT, 130 Pa. 235, 249, 18 Atl. 724, 5 L. R. A. 731. See BROWN v. SPILMAN, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304; Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 Atl. 801; Kelley v. Ohio Oil Co., 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721; Richmond Natural Gas Co. v. Davenport, 37 Ind. App. 25, 76 N. E. 525; Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46. For a discussion of the distinction between animals feræ naturæ and mineral deposits of oil and gas, see OHIO OIL CO. v. STATE OF INDIANA, 177 U. S. 190, 208–211, 20 Sup. Ct. 576, 44 L. Ed. 729.

[6] BARNARD v. MONONGAHELA NATURAL GAS CO., 216 Pa. 362, 65 Atl. 801.

[7] Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 461, 468, 57 N. E. 912, 50 L. R. A. 768.

[8] Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 469, 57 N. E. 912, 50 L. R. A. 768. See Calor Oil & Gas Co. v. Franzell, 33 Ky. Law Rep. 98, 109 S. W. 328. But see People's Gas Co. v. Tyner, 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433. But, where the reservoir is almost depleted, the pumps are so small in cost that they are within the reach of all operators, and, if all use them, nobody will be injured, the use of the pumps will not be enjoined. JONES v. FOREST OIL CO., 194 Pa. 379, 44 Atl. 1074, 48 L. R. A. 748. And it has been held that a landowner may let gas escape and go to waste to the depletion of the gas basin where others are operating. Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714, 22 L. R. A. 141, 37 Am. St. Rep. 736. But see LOUISVILLE GAS CO. v. KENTUCKY HEATING CO., 25 Ky. Law Rep. 1221, 77 S. W. 368. Id. (Ky.) 111 S. W. 374, contra. In the latter case the true measure of damages for waste is discussed. A lessee of two tracts of oil land, who sinks a well on one tract which drains a portion of the other, must pay the lessor of the other his proportionate share of royalty on the oil produced. KLEPPNER v. LEMON, 198 Pa. 581, 48 Atl. 483.

It has to be admitted that, in failing to protect one oil or gas well owner against the waste and malice of another, the courts have fallen too far short of the progressive stand being taken by them in regard to percolating water. See a note on "Correlative Rights in Percolating Waters," Barclay v. Abraham, 64 L. R. A. 256. The recent case of LOUISVILLE GAS CO. v. KENTUCKY HEATING CO., 25 Ky. Law Rep. 1221, 77 S. W. 368, where a lessee was not allowed to waste the gas from gas wells in order to injure the own-

The fact to be remembered is that oil and gas are the subject of only qualified ownership while they remain in the land, and that a lessor cannot confer on his lessee anything more than the qualified property in the minerals which he himself has.[9] There seem to be three kinds of contracts referred to in the books as oil and gas leases.

"Optional" Oil and Gas Leases.

There is, first, what from the so-called lessor's point of view is nothing but a revocable license, and from the so-called lessee's point of view is a mere option. These so-called "optional leases" are illustrated by the case of a lease which expressly gives the lessee the right to surrender it at any time without payment of rent or fulfillment of any covenant on his part.[10] Such an executory lease is terminated by the death of the lessor [11] and at the will of either party.[12] Whether an oil or gas lease shall be construed to be a real lease, or only a license, depends upon the intention of the parties as expressed in the written instrument, in view of the peculiar character of the minerals dealt with. A so-called oil and gas lease which does not obligate the lessee to commence or prosecute the work, and which he may terminate at his pleasure without compensation to the lessor, other than the $1 consideration paid for it, is practically a revocable license, or at best a conditional estate at will, terminable at the will of either party.[13]

er of wells on adjoining land, is a step in the right direction. See, also, dictum in Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 772, 773, 64 L. R. A. 236, 99 Am. St. Rep. 35.

[9] One lawfully in possession of oil or gas lands is not entitled to extract oil or gas without permission of the owner of the fee. Richmond Natural Gas Co. v. Davenport, 37 Ind. App. 25, 76 N. E. 525.

[10] Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923; Glasgow v. Chartiers Oil Co., 152 Pa. 48, 25 Atl. 232. See Snodgrass v. South Penn Oil Co., 47 W. Va. 509, 35 S. E. 820; Tennessee Oil, Gas & Mineral Co. v. Brown, 131 Fed. 696, 65 C. C. A. 524; Brooks v. Kunkle, 24 Ind. App. 624, 57 N. E. 260; O'Neill v. Risinger (Kan.) 93 Pac. 340.

[11] TREES v. ECLIPSE OIL CO., 47 W. Va. 107, 34 S. E. 933. Compare Mathews v. People's Natural Gas Co., 179 Pa. 165, 36 Atl. 216.

[12] TENNESSEE OIL, GAS & MINERAL CO. v. BROWN, 131 Fed. 696, 65 C. C. A. 524; J. M. Guffey Petroleum Co. v. Oliver (Tex. Civ. App.) 79 S. W. 884. But see Central Ohio, etc., Co. v. Eckert, 70 Ohio St. 127, 71 N. E. 281, where the court construed an instrument to be a lease at the option of the lessee only. A lease to terminate within 60 days after unpaid rental becomes due is terminable in that way only at the option of the lessor. HANCOCK v. DIAMOND PLATE GLASS CO., 162 Ind. 146, 70 N. E. 149. An option, which, when exercised, becomes a vested interest, may, of course, be given in the form of a lease. Emery v. League, 31 Tex. Civ. App. 474, 72 S. W. 603.

[13] FEDERAL OIL CO. v. WESTERN OIL CO. (C. C.) 112 Fed. 373; Roberts & Corley v. McFadden, Weiss & Kyle, 32 Tex. Civ. App. 47, 74 S. W. 105;

The Ordinary So-Called Oil or Gas Lease.

The second kind of oil or gas leases is that where the lessee is either impliedly or expressly bound to go ahead and drill wells (with perhaps the provision that certain test wells shall first be put down to see whether there is oil or gas in the land), and it is the express or implied condition of any estate in the minerals or in the land vesting in the lessee that oil or gas shall be found in such quantities as to justify the expenditure by the lessee of the money necessary for their production.[14] In such leases, because of the uncertainty whether oil or gas will be found, and because both public policy and the due protection of the lessor require that the lessee be spurred on to make a discovery,[15] it is held that the lessee has no estate in the oil or gas in the land until he actually discovers them in his well in paying quantities.[16] Indeed, it

Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253; O'Neill v. Risinger (Kan.) 93 Pac. 340. See Shepherd v. McCalmont Oil Co., 38 Hun, 37; Dark v. Johnston, 55 Pa. 164, 93 Am. Dec. 732; Murray v. Barnhart, 117 La. 1023, 42 So. 489; Dill v. Fraze (Ind.) 79 N. E. 971. But see Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46; Allegheny Oil Co. v. Snyder, 106 Fed. 764, 45 C. C. A. 604; BREWSTER v. LANYON ZINC CO., 140 Fed. 801, 72 C. C. A. 213; New American Oil Co. v. Troyer, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739. See Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566. Where a lessee must either drill or pay rent under penalty of the lease being void, he cannot take advantage of his own wrongful refusal to do either to terminate the lease. HENNE v. SOUTH PENN OIL CO., 52 W. Va. 192, 43 S. E. 147; Jackson v. O'Hara, 183 Pa. 233, 38 Atl. 624. Such a lease is based on a sufficient consideration. Great Western Oil Co. v. Carpenter (Tex. Civ. App.) 95 S. W. 57; Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate, 115 La. 107, 38 So. 932. But there is no consideration if the agreement is to complete a second well within 90 days after the completion of a first well, which the lessee does not agree even to commence. FEDERAL OIL CO. v. WESTERN OIL CO. (C. C.) 112 Fed. 373.

[14] On the question of when oil has been found in such quantities, see MANHATTAN OIL CO v. CARRELL, 164 Ind. 526, 73 N. E. 1084; Bay State Petroleum Co. v. Penn. Lubricating Co., 27 Ky. Law Rep. 1133, 87 S. W. 1102; SUMMERVILLE v. APPOLO GAS CO., 207 Pa. 334, 56 Atl. 876. See, also, note 37, infra.

[15] See PLUMMER v. HILLSIDE COAL & IRON CO., 160 Pa. 483, 493, 28 Atl. 853, where oil and gas leases are distinguished from coal leases.

[16] The right to go ahead under such a lease may be lost by abandonment. STEELSMITH v. GARTLAN, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732; FLORENCE OIL & REFINING CO. v. ORMAN, 19 Colo. App. 79, 73 Pac. 628; RAWLINGS v. ARMEL, 70 Kan. 778, 79 Pac. 683; HUGGINS v. DALEY, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320. See Detlor v. Holland, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266; Aye v. Philadelphia Co., 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; Sult v. Hochstetter Oil Co. (W. Va.) 61 S. E. 307; Mills v. Hartz (Kan.) 94 Pac. 142. Under an Ohio recording act, such a lease

seems clear that the lessee of an exclusive right to mine and excavate oil on a royalty basis has no title in the oil until he has actually taken the oil from the ground and reduced it to possession.[17] That is because in reality the lessor's right is only that.[18]

Prior to the discovery of oil or gas, this usual kind of oil or gas lease is merely a grant of possession of the realty for the purpose of searching for and procuring oil or gas,[19] and so is in the nature of a li-

has been held to be of no force against third persons unless it is recorded, or unless the lessee is actually in possession of the land. Northwestern Ohio Natural Gas Co. v. Tiffin, 59 Ohio St. 420, 54 N. E. 77. And the doctrine covers an extension of a lease under an option contained in it. Brown v. Ohio Oil Co., 21 Ohio Cir. Ct. R. 117. But it may not apply to a license, as distinguished from a lease. Allegheny Oil Co. v. Snyder, 106 Fed. 764, 45 C. C. A. 604. Where a lessee who has bound himself by covenants to develop the oil tract has actually produced oil, he has a vested estate, which cannot be taken away because he exercises his discretion, without fraud, by not sinking more wells. COLGAN v. FOREST OIL CO., 194 Pa. 234, 45 Atl. 119, 75 Am. St. Rep. 695.

[17] WAGNER v. MALLORY, 169 N. Y. 501, 62 N. E. 584. See Lawson v. Kirchner, 50 W. Va. 344, 348, 40 S. E. 344; Duffield v. Hue, 136 Pa. 602, 607, 20 Atl. 526; Backer v. Penn Lubricating Co. (C. C. A.) 162 Fed. 627. See, also, note 25, infra.

[18] "Petroleum oil is a mineral, and while in the earth is part of the realty, and should it move from place to place, by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and if it moves to the next adjoining tract it becomes part and parcel of that tract; and it forms part of some tract until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property, the property of the person into whose well it came. And this is so whether the oil moves, percolates, or exists in pools or deposits. In either event, it is the property of, and belongs to, the person who reaches it by means of a well and severs it from the realty and converts it into personalty." KELLEY v. OHIO OIL CO., 57 Ohio St. 317–328, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721; Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292. See State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627; Ohio Oil Co. v. State of Indiana, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729; Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768.

[19] BARNHART v. LOCKWOOD, 152 Pa. 82, 25 Atl. 237; Richlands Oil Co. v. Morriss (Va.) 61 S. E. 762. "A lease to mine for oil or gas is a mere incorporeal right to be exercised in the land of another. It is a profit à prendre, which may be held separate and apart from the possession of the land itself." FEDERAL OIL CO. v. WESTERN OIL CO. (C. C.) 112 Fed. 373, 375, 376. See FUNK v. HALDEMAN, 57 Pa. 229, 243. It is sufficient of an inchoate interest to enable the lessee to maintain an injunction against a wrongdoer's extraction of oil and gas from the land. TREES v. ECLIPSE OIL CO., 47 W. Va. 107, 34 S. E. 933. Or to recover damages against the wrongdoer. Backer v. Penn Lubricating Co. (C. C. A.) 162 Fed. 627. Where

cense; * but it differs from a mere license, in that there is no right to revoke it so long as the lessee proceeds with due diligence and prudence to carry out his part of the undertaking. It is, if one dislikes the term "lease," a license irrevocable so long as its express and implied terms are fulfilled by the licensee.[20] Until oil or gas is struck, as well as afterwards, a genuine oil or gas lease is irrevocable, except for breach of an express or an implied condition.[21]

The doctrine is fundamental that because of the peculiar nature of oil and gas, and the danger of loss to the lessor through the drainage of oil and gas by surrounding wells, oil and gas leases are to be construed most strongly against the lessee and in favor of the lessor.[22] While, therefore, where the lessor granted, demised, and let for five years, or as much longer as oil or gas should be found in paying quantities, all the petroleum and gas in or under a specified tract of land, "for the purpose and with the exclusive right of drilling and operating upon said premises for said petroleum and gas," it was held that the instrument was more than a license and was a lease,[23] no estate could vest in oil or gas under it until found, and the presumption is against any estate even in the land vesting until then.[24] The better view is that

the lessor has a homestead, it is a conveyance of an interest in that. Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46.

* Beardsley v. Kansas Natural Gas Co. (Kan.) 96 Pac. 859.

[20] DARK v. JOHNSTON, 55 Pa. 164, 93 Am. Dec. 732; Shepherd v. McCalmont Oil Co., 38 Hun, 37; Grubb v. Bayard, 2 Wall. Jr. (U. S.) 81, Fed. Cas. No. 5,849. Subscribing witnesses are as necessary to a lease of land for the development of oil or gas as to any other lease for the same length of time for any other purpose. Langmede v. Weaver, 65 Ohio St. 17, 60 N. E. 992.

[21] See HARRIS v. OHIO OIL CO., 57 Ohio St. 118, 48 N. E. 502, Carr v. Huntington Light & Fuel Co., 33 Ind. App. 1, 70 N. E. 552, and Dickey v. Coffeyville Vitrified Brick & Tile Co., 69 Kan. 106, 76 Pac. 398, to the effect that the right becomes vested on the discovery of oil or gas. To the same effect is Headley v. Hoopengarner, 60 W. Va. 626, 55 S. E. 744.

[22] HUGGINS v. DALEY, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; STEELSMITH v. GARTLAN, 45 W. Va. 27, 35, 29 S. E. 978, 44 L. R. A. 107; Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566.

[23] Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62. Such a grant seems to create a tenancy from year to year until a well is completed, and then the tenancy continues as long as oil or gas is produced in paying quantities. Lowther Oil Co. v. Guffey, 52 W. Va. 88, 43 S. E. 101. A gas or oil lease, to extend so long as gas and oil may be found in paying quantities, is not void for uncertainty as to term. DICKEY v. COFFEYVILLE VITRIFIED BRICK & TILE CO., 69 Kan. 106, 70 Pac. 398.

[24] "It is well settled in West Virginia that a lease of this character is not a grant of property in the oil or in the land, but merely a grant of possession for the purpose of searching for and procuring oil. The title is inchoate, and for the purpose of exploration only, until the oil is found. If it is not found, no estate vests in the lessee." HUGGINS v. DALEY, 99 Fed. 606, 608,

title to the oil or gas does not even vest on discovery, nor at any time prior to extraction.[25] It is held in Pennsylvania that under an oil lease for a fixed period and for as long thereafter as oil is found in paying quantities, the lessor to receive one-eighth of the oil produced, the expiration of the fixed period without oil being found in paying quantities converts the tenancy as to the surface of the land into a tenancy in the nature of a tenancy at will.[26] Moreover, the principle that oil and gas leases will be construed more strongly against the lessee works, not only to delay the vesting of an estate in the lessee, but also to compel him to a diligent search for and extraction of the minerals.[27] When his search for the product is successful, he becomes answerable for the rental stipulated in the contract.[28] The fact that the lessee has to do something affirmative gives the lease mutuality.[29]

Oil and Gas Leases That are Genuine Leases.

The third kind of oil or gas lease is where a present estate in the land and the landowner's qualified interest in the minerals are vested in the lessee, to be divested if the obligations of the lease are not performed.[30] It is a lease where the genuine relation of landlord and tenant exists,

40 C. C. A. 12, 48 L. R. A. 320. See RAWLINGS v. ARMEL, 70 Kan. 778, 79 Pac. 683; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; Brown v. Fowler, 65 Ohio St. 507, 63 N. E. 76; Richlands Oil Co. v. Morriss (Va.) 61 S. E. 762. See, however, Lawson v. Kirchner, 50 W. Va. 344, 40 S. E. 344.

[25] PARISH FORK OIL CO. v. BRIDGEWATER GAS CO., 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566; Kelly v. Keys, 213 Pa. 295, 62 Atl. 911, 110 Am. St. Rep. 547. See note 17, supra.

[26] CASSELL v. CROTHERS, 193 Pa. 359, 44 Atl. 446. See American Window Glass Co. v. Indiana Natural Gas & Oil Co., 37 Ind. App. 439, 76 N. E. 1006; Indiana Natural Gas & Oil Co. v. Pierce, 34 Ind. App. 523, 68 N. E. 691, 73 N. E. 194; Chaney v. Ohio & I. Oil Co., 32 Ind. App. 193, 69 N. E. 477; Diamond Plate Glass Co. v. Echelbarger, 24 Ind. App. 124, 55 N. E. 233; Murdock-West Co. v. Logan, 69 Ohio St. 514, 69 N. E. 984.

[27] Aye v. Philadelphia Co., 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566; Elk Fork Oil & Gas Co. v. Jennings (C. C.) 84 Fed. 839 (affirmed, sub nom. Foster v. Elk Fork Oil & Gas Co., 90 Fed. 178, 32 C. C. A. 560).

[28] WILSON v. PHILADELPHIA CO., 210 Pa. 484, 60 Atl. 149.

[29] Ingle v. Bottoms, 160 Ind. 73, 66 N. E. 160.

[30] DUKE v. HAGUE, 107 Pa. 57; Brown v. Beecher, 120 Pa. 590, 15 Atl. 608; Iams v. Carnegie Natural Gas Co., 194 Pa. 72, 45 Atl. 54; Chicago & A. Oil & Mining Co. v. United States Petroleum Co., 57 Pa. 83; Gale v. Petroleum Co., 6 W. Va. 200. See Kitchen v. Smith, 101 Pa. 452; Heller v. Dailey, 28 Ind. App. 555, 63 N. E. 490; Haskell v. Sutton, 53 W. Va. 206, 44 S. E. 533. A grant of oil or gas while in the earth passes nothing which can be the subject of an ejectment or other real action. Watford Oil, etc., Co. v. Shipman, 233 Ill. 9, 84 N. E. 53.

and seems to be more like a lease for tillage than it is like a lease for the mining or quarrying of solid minerals.[31] Under such a lease it seems that the lessee has such title that, where the lessor has stipulated that no other well shall be driven on his lands near the lessee's land, except for the lessor and his neighbors, the lessee may have an injunction against a stranger who is threatening to bore a well in the lessor's land, although the stranger is not intruding on the leased land, and although the lessee has not yet struck oil or gas.[32]

Because of the rule that oil and gas leases are construed more strongly in favor of the lessor and against the lessee, it will seldom happen that the lease will pass the lessor's qualified property in the oil or gas, or anything more than an easement in the surface, prior to the actual discovery and appropriation of the oil or gas; and it is therefore with the second class of oil and gas leases, rather than the first or third, that the courts have mainly to deal.[33]

[31] WETTENGEL v. GORMLEY, 160 Pa. 559, 28 Atl. 934, 40 Am. St. Rep. 733. See, also, Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027.

[32] Indianapolis Natural Gas Co. v. Kibbey, 135 Ind. 357, 35 N. E. 392. See Brown v. Spilman, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304. On necessary parties to such an injunction suit, see Steelsmith v. Fisher Oil Co., 47 W. Va. 391, 35 S. E. 15.

[33] See Shepherd v. McCalmont Oil Co., 38 Hun, 37. "While most of the cases cited have gone upon the ground of abandonment, the governing principle in all oil leases of the character under consideration is that the discovery and production of oil is a condition precedent to the continuance or vesting of any estate in the demised premises; that such leases vest no present title in the lessee, and if, at any time, the lessee has the option to suspend operations, the lease is no longer binding on the lessor, because of want of mutuality; and, where the only consideration is prospective royalty to come from exploration and development, failure to explore and develop renders the agreement a mere mudum pactum, and works a forfeiture of the lease, for it is of the very essence of the contract that work should be done." HUGGINS v. DALEY, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320.

THE ORDINARY OBLIGATIONS OF LESSORS AND LESSEES.

128. The lessor's ordinary covenants, implied where not expressed, are that the lessee shall have the right to enter and shall have quiet enjoyment, and the lessee's ordinary covenants are to start work promptly and to use reasonable diligence in sinking enough wells to utilize the supply of oil and gas.

The lessor's obligations under the ordinary gas and oil lease are simple. The grant of a right to drill for oil and gas on the lessor's premises does not carry with it any implied covenant that oil or gas exists there, in paying quantities or otherwise.[34] The lessor does, however, impliedly covenant that the lessee shall have the right to enter and shall have quiet enjoyment.[35] The lessor must be careful not to take oil or gas from the premises to the injury of the lessee, even though he takes it from lands reserved from the lease, provided there is no reservation of the right to take oil or gas.[36]

The lessee's obligations under the ordinary gas and oil lease are more fundamental. They are: (1) To comply with the express provisions of the lease;[37] (2) to start work in the manner and at the time

[34] But where both parties believe that an oil-producing well is being transferred, and it has really been salted by previous owners, a rescission of the transfer may be had. Rowland v. Cox, 28 Ky. Law Rep. 307, 89 S. W. 215.

[35] KNOTTS v. McGREGOR, 47 W. Va. 566, 35 S. E. 899. But see Chambers v. Smith, 183 Pa. 122, 38 Atl. 522. An absolute conveyance of oil lands by the lessor, without reserving the lessee's right of entry to drill for oil, is a constructive eviction. MATHEWS v. PEOPLE'S NATURAL GAS CO., 179 Pa. 165, 36 Atl. 216.

[36] Lynch v. Burford, 201 Pa. 52, 50 Atl. 228; Fanker v. Anderson, 173 Pa. 86, 34 Atl. 434.

[37] Gillespie Tool Co. v. Wilson, 123 Pa. 19, 16 Atl. 36. An oil lease gives the lessee no right to a gas well developed by him. Palmer v. Truby, 136 Pa. 556, 20 Atl. 516. Under a lease where the rights of the lessee depend upon the finding of oil in paying quantities, the jury, in determining whether the oil or gas can be marketed at a reasonable profit, must take into account the distance to market and the expense of marketing. IAMS v. CARNEGIE NATURAL GAS CO., 194 Pa. 72, 45 Atl. 54. A paying well normally means one that pays to operate after it is sunk. "But if a well, being down, pays a profit, even a small one, over the operating expenses, it is producing in 'paying quantity,' though it may never repay its cost, and the operation as a whole may result in a loss. Few wells, except the very largest, repay cost under a considerable time, and many never do; but that is no reason why the first loss should not be reduced by profits, however small, in continuing to operate. The phrase 'paying quantities,' therefore, is to be construed with reference to the operator, and by his judgment when exercised in good faith." YOUNG v. FOREST OIL CO., 194 Pa. 243, 250, 251, 45 Atl. 121; Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027. See, also, cases in note 14, supra.

fixed in the lease, or, if none is fixed, then in a reasonable time,[38] and to prosecute it continuously and diligently to its termination;[39] (3) to exercise good faith in drilling and working enough wells both to get out with reasonable promptitude the oil and gas found and to prevent loss by drainage to other wells.[40]

[38] Starn v. Huffman (W. Va.) 59 S. E. 179; Mills v. Hartz (Kan.) 94 Pac. 142. Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co., 126 Fed. 623, 61 C. C. A. 359. See Consumers' Gas Trust Co. v. Worth, 163 Ind. 141, 71 N. E. 489; National Oil & Pipe Line Co. v. Teel, 95 Tex. 586, 68 S. W. 979; Id. (Tex. Civ. App.) 67 S. W. 545. "The smaller the tract of land demised, the more important is the need of prompt exploration and development, because the lessor is entitled to his royalty as promptly as it can be had, and delay endangers the drainage of oil and gas from the demised premises through wells in its immediate vicinity." FEDERAL OIL CO. v. WESTERN OIL CO. (C. C.) 112 Fed. 373, 375.

[39] AYE v. PHILADELPHIA CO., 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696; Cleminger v. Baden Gas Co., 159 Pa. 16, 28 Atl. 293; Henderson v. Ferrell, 183 Pa. 547, 38 Atl. 1018; Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566; J. M. Guffey Petroleum Co. v. Oliver (Tex. Civ. App.) 79 S. W. 884; Elk Fork Oil & Gas Co. v. Jennings (C. C.) 84 Fed. 839 (affirmed sub nom. Foster v. Elk Fork Oil & Gas Co., 90 Fed. 178, 32 C. C. A. 560); HUGGINS v. DALEY, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320. See Price v. Black, 126 Iowa, 304, 101 N. W. 1056; Venedocia Oil & Gas Co. v. Robinson, 71 Ohio St. 302, 73 N. E. 222, 104 Am. St. Rep. 773; Florence Oil & Refining Co. v. Orman, 19 Colo. App. 79, 73 Pac. 628; Buffalo Valley Oil & Gas Co. v. Jones, 75 Kan. 18, 88 Pac. 537. Time is of the essence in agreements relative to mining property. Waterman v. Banks, 144 U. S. 394, 403, 12 Sup. Ct. 646, 36 L. Ed. 479.

"Where an oil lease, to run for a number of years, provides for the completion of a test well within a certain time, and states what shall be done if oil is found in paying quantities, but does not provide what shall be done if the test well proves dry, there is an implied obligation on the lessee, when the test well does prove dry, to proceed further with the exploration and development of the land with reasonable diligence according to the usual course of the business, and a failure to do so amounts to an abandonment, which will sustain a re-entry by the lessor. AYE v. PHILADELPHIA CO., 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696. See Rawlings v. Armel, 70 Kan. 778, 79 Pac. 683. To constitute abandonment proper, however, there must be both an intent to abandon and an actual relinquishment of the leased premises. LOWTHER OIL CO. v. MILLER-SIBLEY OIL CO., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; Phillips v. Hamilton (Wyo.) 95 Pac. 846.

[40] J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co. (Tex. Civ. App.) 107 S. W. 609. See Coffinberry v. Sun Oil Co., 68 Ohio St. 488, 67 N. E. 1069. This last obligation will also be implied in some states in cases where the lease is silent on the subject. Allegheny Oil Co. v. Snyder, 106 Fed. 764, 45 C. C. A. 604; BREWSTER v. LANYON ZINC CO., 140 Fed. 801, 72 C. C. A. 213; Acme Oil & Mining Co. v. Williams, 140 Cal. 681, 74 Pac. 296; Barnsdall v. Boley (C. C.) 119 Fed. 191; American Window Glass Co. v. Williams, 30 Ind. App. 685, 66 N. E. 912; Gadbury v. Ohio & I. Consol. Natural & Il-

A failure by the lessee to comply with the lease may amount to an abandonment,[41] and in extreme cases may be held to do so, regardless of the lessee's actual intent.[42]

luminating Gas Co., 162 Ind. 9, 67 N. E. 259, 62 L. R. A. 895; Adams v. Stage, 18 Pa. Super. Ct. 308; Phillips v. Hamilton (Wyo.) 95 Pac. 846. "The extent of the development and number of wells to be drilled, and as to the protection of the lines, is often, if not usually, expressed in the lease; and that is certainly the better practice. When the extent of the development and protection of lines is provided for in the lease, there can be no implied covenant for further development and protection of lines. The implied covenant arises only when the lease is silent on the subject." HARRIS v. OHIO OIL CO., 57 Ohio St. 118, 128, 48 N. E. 502. See McKnight v. Manufacturers' Natural Gas Co., 146 Pa. 185, 23 Atl. 164, 28 Am. St. Rep. 790; Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46; Brewster v. Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213. Where there is no way to market the product of wells if they are sunk, the remedy for breach of an implied covenant to drill wells has been held to be, not forfeiture, but an action for damages. Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46. That the remedy for a breach of an implied covenant in an oil lease is ordinarily not by forfeiture, but by an action for damages, is asserted in CORE v. NEW YORK PETROLEUM CO., 52 W. Va. 276, 43 S. E. 128. But see CONSUMERS' GAS TRUST CO. v. LITTLER, 162 Ind. 320, 70 N. E. 363; Hodges v. Brice, 32 Tex. Civ. App. 358, 74 S. W. 590; Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co., 162 Ind. 9, 67 N. E. 259, 62 L. R. A. 895. That equity may cancel the lease for delay in development, see Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; Starr v. Huffman (W. Va.) 59 S. E. 179. Where the same person holds an oil well on two adjacent farms, he will not be allowed to drill an oil well to drain the oil off of one of the farms to the detriment of the other. Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 Atl. 801.

[41] AYE v. PHILADELPHIA CO., 193 Pa. 451, 44 Atl. 555. See, also, note 39, supra.

[42] WILMORE COAL CO. v. BROWN (C. C.) 147 Fed. 931.

CHAPTER XXIV.

OTHER MINING CONTRACTS AND LEASES.

Our review of the peculiarities of oil and gas leases prepares the way for a consideration of the peculiarities of other mining leases and contracts. Only those matters which differentiate mining contracts and leases from ordinary real estate contracts and leases will be considered.

PROSPECTING OR GRUB-STAKING CONTRACTS.

129. Prospecting or grub-staking contracts are agreements by which miners, in consideration of supplies furnished to them, undertake to prospect for and locate claims to be held by all parties in certain agreed shares. Unless the supplies are furnished, a grub-staking agreement is without consideration, and does not bind the prospector. If they are furnished, the rights of the outfitters are fully protected at law and in equity.

The kind of contract common in the mining region, whereby a miner is furnished supplies by people who wish to locate mining claims, and in return agrees to prospect for and to locate such claims for all concerned in the shares agreed upon, has caused considerable litigation. One reason has been that such contracts have almost universally been regarded as not within the statute of frauds.[1] They have been

[1] SHEA v. NILIMA, 133 Fed. 209, 66 C. C. A. 263; Cascaden v. Dunbar, 2 Alaska, 408, 157 Fed. 62, 84 C. C. A. 566; MURLEY v. ENNIS, 2 Colo. 300; MEYLETTE v. BRENNAN, 20 Colo. 242, 38 Pac. 75; Moritz v. Lavelle, 77 Cal. 10, 18 Pac. 803, 11 Am. St. Rep. 229; Raymond v. Johnson, 17 Wash. 232, 49 Pac. 492, 61 Am. St. Rep. 908; Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195; Eberle v. Carmichael, 8 N. M. 169, 42 Pac. 95; Id., 8 N. M. 696, 47 Pac. 717. See Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943. The case of CRAW v. WILSON, 22 Nev. 385, 40 Pac. 1076, supposed to be contrary to the foregoing, holds that where an oral partnership has been formed under which some mining locations are made and other property obtained, and one partner acquires for himself still other mining locations, without employing partnership capital in their acquisition, the excluded partner cannot have a trust declared. The matter has since been set at rest for Nevada by a statute

subject to all those disputes as to terms which naturally attend important verbal contracts.[2]

While such contracts are sometimes referred to as mining partnerships, they are not such unless, in addition to covering the location and holding in common of mining claims, they provide for the development of the claims, and actually do develop them for the joint benefit of the contractors. So far as the contracts to locate claims contemplate only the discovery work essential to location, and the co-ownership which is to result from the location of the claims, they are not mining partnership contracts, but are simply "grub-staking" or prospecting contracts.[3] A grub-staking contract does not constitute a partnership, unless the agreement extends beyond the mere furnishing of supplies as a consideration of a participation in the results of discoveries.[4]

Before the miner's obligation under a prospecting contract can be enforced against him, the other party to the contract must furnish the supplies agreed upon. If, therefore, the supplies are not furnished to him, the miner may go ahead and locate lodes in his own right, without regard to the contract.[5] But if the supplies are furnished, and the miner locates claims in his own name, he holds the title thus acquired, or the property for which it is exchanged, in trust for himself and the outfitter in the proportions called for by the prospecting contract,[6] and must account for the proceeds received on any sale of such

making grub-stake contracts void unless recorded. If acknowledged and recorded, they are made prima facie evidence in all cases where the title to mining locations is in question. Laws Nev. 1907, p. 370, c. 174. In Oregon such contracts seem to be void unless recorded. B. & C. Comp. Or. § 3985. In Idaho they may be recorded to make them constructive notice. Civ. Code Idaho 1901, § 2784. A verbal release of a grub-staking contract was upheld in Eubanks v. Petree, 1 Alaska, 427.

[2] See Abbott v. Smith, 3 Colo. App. 264, 266, 32 Pac. 843.

[3] See, however, Berry v. Woodburn, 107 Cal. 504, 512, 40 Pac. 802, 804, where such contracts are called "qualified partnerships." See, also, Boucher v. Mulverhill, 1 Mont. 306; Lawrence v. Robinson, 4 Colo. 567.

While prospecting contracts are partnerships of a kind, the term "mining partnership" is strictly applicable only where there is actual joint working of the claim. DORSEY v. NEWCOMER, 121 Cal. 213, 53 Pac. 557; Anaconda Copper Mining Co. v. Butte & Boston Min. Co., 17 Mont. 519, 43 Pac. 924. See, also, cases, cited in chapter XXV, note 6, infra. For that reason the term "prospecting contract," or the miners' term, "grub-staking contract," should be kept to apply to the kind of contract here considered.

[4] See Costello v. Scott (Nev.) 93 Pac. 1.

[5] MURLEY v. ENNIS, 2 Colo. 300; Miller v. Butterfield, 79 Cal. 62, 21 Pac. 543. See Windmuller v. Clarkson, 2 Alaska, 298.

[6] MEYLETTE v. BRENNAN, 20 Colo. 242, 38 Pac. 75; Marks v. Gates, 2 Alaska, 519; Mack v. Mack, 39 Wash. 190, 81 Pac. 707. See Stewart v. Douglas, 148 Cal. 511, 83 Pac. 699. But, after the prospecting contract

title.* Where the supplies are so inadequate as to make it apparent to anybody that the property located is not acquired by means of the grub-stake furnished and pursuant to the grub-stake contract, the California court refuses to compel a conveyance by the miner to the alleged outfitter.[7] A contract to exchange interests in existing claims for supplies is not a grub-staking contract.[8]

There has been some question as to the amount of proof necessary to establish an oral prospecting contract sufficiently to make the miner a trustee of the claims located. In Idaho, for instance, it was at first declared that a mere preponderance of the evidence was not enough, but that the evidence must be so clear and certain as to leave no well-founded doubt in the mind of the court.[9] Since then, however, it has been held in Idaho that the courts "should not refuse to enforce these grub-stake agreements simply because a plaintiff cannot produce that great preponderance of evidence which reaches a moral certainty and precludes all reasonable doubt." [10] The latter seems the better doctrine where a statute does not require a writing, for all that should be required of evidence in such cases is that it be convincing.[11]

is rescinded by mutual agreement of the parties, one of them may relocate unperfected locations, and, in the absence of fraud, will hold such locations free from any trust. Page v. Summers, 70 Cal. 121, 12 Pac. 120; McLaughlin v. Thompson, 2 Colo. App. 135, 29 Pac. 816; Eubanks v. Petree, 1 Alaska, 427.

* But the complaining party must act promptly, or he may be denied any rights. McKenzie v. Coslett, 28 Nev. 65, 78 Pac. 976.

[7] PRINCE v. LAMB, 128 Cal. 120, 60 Pac. 689.

[8] Roberts v. Date, 123 Fed. 238, 59 C. C. A. 242.

[9] Rice v. Rigley, 7 Idaho, 115, 61 Pac. 290. Compare Copper River Mining Co. v. McClellan, 2 Alaska, 134.

[10] MORROW v. MATTHEW, 10 Idaho, 423, 79 Pac. 196. The court there says that the rule requiring evidence so convincing as to leave no reasonable doubt is properly applied when one seeks to declare a trust as against a record title conveyed to a defendant by a third person, but has no application where the defendant, as locator of a mining claim, creates his own record title.

[11] "Grub-stake contracts will be enforced by the courts, but only as other contracts; that is to say, it is not enough for parties to assert that they have rights, in order to secure legal protection, but they must be able to prove in each case a clear and definite contract, and that by the terms and conditions of such contract, and compliance therewith on their part, rights have become vested." Cisna v. Mallory (C. C.) 84 Fed. 851, 854.

MINING LICENSES AND LEASES.

130. In distinguishing between licenses, leases, and sales of mineral in place, it is the intention of the parties gathered from the terms of the instrument, and not the form of the instrument, that determines which kind of interest exists in the given case.

The common-law rule is that the lessee of real property may work already opened mines, but cannot open new ones. But the lease may expressly, or by implication from express powers, give the right to open new mines. If a leasehold estate is created in the land, with a right to take the minerals, the instrument is a genuine lease.[12] On the other hand, if an attempt is made by the instrument to pass title to the minerals in place, there is really a sale of the mineral.[13] If no title to the minerals passes, and a leasehold estate even is not created in the so-called lessee, the instrument merely creates a license.[14] It is not the form of the instrument, but rather the intention of the parties gathered from its terms, that determines whether it is a lease, or passes title to the minerals, or is only a license.[15]

[12] Cahoon v. Bayaud, 123 N. Y. 298, 25 N. E. 376; Young v. Ellis, 91 Va. 297, 21 S. E. 480; PAUL v. CRAGNAZ, 25 Nev. 293, 312–314, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540; MALCOMSON v. WAPPOO MILLS (C. C.) 85 Fed. 907; Raynolds v. Hanna (C. C.) 55 Fed. 783; Appeal of Hope (Pa.) 3 Atl. 23; Harlan v. Lehigh Coal & Navigation Co., 35 Pa. 287. See Wilkins v. Abell, 26 Colo. 462, 58 Pac. 612; Fuhr v. Dean, 26 Mo. 118, 69 Am. Dec. 484; National Light & Thorium Co. v. Alexander, 80 S. C. 10, 61 S. E. 214.

[13] PLUMMER v. HILLSIDE COAL & IRON CO., 104 Fed. 208, 43 C. C. A. 490; In re Lazarus' Estate, 145 Pa. 1, 23 Atl. 372; Kingsley v. Hillside Coal & Iron Co., 144 Pa. 613, 23 Atl. 250; Delaware, L. & W. R. Co. v. Sanderson, 109 Pa. 583, 1 Atl. 394, 58 Am. Rep. 743; Hobart v. Murray, 54 Mo. App. 249; Edwards v. McClurg, 39 Ohio St. 41 (but see Buchannan v. Cole, 57 Mo. App. 11); Dorr v. Reynolds, 26 Pa. Super. Ct. 139. It is none the less a sale that the coal conveyed is to be taken out within a fixed term. HOSACK v. CRILL, 204 Pa. 97, 53 Atl. 640. But a so-called "sale" may really be "a lease without impeachment of waste." Coolbaugh v. Lehigh & Wilkes-Barre Coal Co., 213 Pa. 28, 62 Atl. 94, 4 L. R. A. (N. S.) 207.

[14] Wheeler v. West, 71 Cal. 126, 11 Pac. 871. See Silsby v. Trotter, 29 N. J. Eq. 228. Such a license is not such an interest in the land as to be taxable as real property. Board of Sup'rs of Hancock County v. Imperial Naval Stores Co. (Miss.) 47 So. 177. Even a quitclaim deed may be so worded as to be a license. BAKER v. CLARK, 128 Cal. 181, 60 Pac. 677. A parol license passes no title to ores not severed, even though the licensee has expended money in mining. McCullagh v. Rains, 75 Kan. 458, 89 Pac. 1041.

[15] CONSOLIDATED COAL CO. v. PEERS, 150 Ill. 344, 37 N. E. 937; PAUL v. CRAGNAZ, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540; Baker v. Clark, 128 Cal. 181, 60 Pac. 677; Tennessee Oil, Gas & Mineral Co. v.

Since a mere license must be revocable at will,[16] and, being only a personal privilege, must also be nonassignable,[17] it is comparatively easy to tell when one is dealing with such a right. But because a license may be coupled with an interest, and so may be irrevocable[18] and assignable,[19] it may be doubtful in a given case whether an irrevocable license or a lease exists. While it is true that an exclusive license may exist,[20] the fact that a right given is exclusive of the creator of the right, and is exclusive of other people later empowered by him, goes far to show that the instrument giving the right is a lease.[21] But if it appears that the persons given the so-called lease were not bound to do anything, but could enter and work "if they saw fit," the lack of mutuality in the arrangement makes the right a mere revocable license.[22]

The rules applicable to ordinary leases govern in mining leases. There is, in addition, an implied covenant that the lessee will work the claim with reasonable diligence, or forfeit his interest in all leases,

Brown, 131 Fed. 696, 65 C. C. A. 524. See Hosack v. Crill, 204 Pa. 97, 53 Atl. 640; Couch v. Welsh, 24 Utah, 36, 66 Pac. 600. Coal in place is subject to a sale absolute, a conditional sale, or a lease. Gallagher v. Hicks, 216 Pa. 243, 68 Atl. 623.

[16] EAST JERSEY IRON CO. v. WRIGHT, 32 N. J. Eq. 248. See Desloge v. Pearce, 38 Mo. 588; Lockwood v. Lunsford, 56 Mo. 68. A promise not to revoke will not make it irrevocable. Entwhistle v. Henke, 211 Ill. 273, 71 N. E. 990, 103 Am. St. Rep. 196. Even the payment of a consideration will not make it irrevocable. Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203. In any event a revocation cannot make trespasses of acts already done under the license. FURR v. DEAN, 26 Mo. 116, 69 Am. Dec. 484. The licensee has property merely in the ore actually taken from the mine. CLARK v. WALL, 32 Mont. 219, 79 Pac. 1052.

[17] MANNING v. FRAZIER, 96 Ill. 279. See Dark v. Johnston, 55 Pa. 164, 93 Am. Dec. 732. But see Muskett v. Hill, 5 Bing. N. C. 694, where, however, the deed operated both as a license and as a grant of the ore, and hence there was not a mere license.

[18] HALL v. ABRAHAM, 44 Or. 477, 75 Pac. 882; Silsby v. Trotter, 29 N. J. Eq. 228; Grubb v. Bayard, 2 Wall. Jr. (U. S.) 81, Fed. Cas. No. 5,849. See Bingo Min. Co. v. Felton, 78 Mo. App. 210.

[19] Muskett v. Hill, 5 Bing. N. C. 694. A revocable license may become by estoppel irrevocable and assignable. Hosford v. Metcalf, 113 Iowa, 240, 84 N. W. 1054.

[20] Muskett v. Hill, 5 Bing. N. C. 694; Funk v. Haldeman, 53 Pa. 229.

[21] CONSOLIDATED COAL CO. v. PEERS, 150 Ill. 344, 37 N. E. 937. See Stinson v. Hardy, 27 Or. 584, 41 Pac. 116.

[22] Wheeler v. West, 71 Cal. 126, 11 Pac. 871; Id., 78 Cal. 95, 20 Pac. 45. In that case there was no chance to uphold the arrangement as a lease by implying a promise to work, and hence the case is like the revocable license cases considered in the chapter on oil and gas leases. But see Woodside v. Ciceroni, 93 Fed. 1, 35 C. C. A. 177.

where only royalty of so much per ton is to be paid.[23] There is in some cases an implied covenant on the lessor's part that the land contains minerals in paying quantities;[24] but in other cases there is no such covenant.[25] As in the case of other leases, mining leases may be abandoned.[26] It has been held in a recent case that a lessee of a lower level in a mine has no cause of action against the lessor for the willful or negligent caving in of higher levels by those to whom the lessor leased the higher levels, for the reason that the lessor was, at the most, guilty only of nonfeasance.[27]

Some forms of leases used by the United States in leasing mineral Indian lands are given in the appendix.[28]

[23] Brown v. Wilmore Coal Co., 153 Fed. 143, 82 C. C. A. 295; Sharp v. Behr (C. C.) 117 Fed. 864; Shenandoah Land & Anthracite Coal Co. v. Hise, 92 Va. 238, 23 S. E. 302; Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; Conrad v. Morehead, 89 N. C. 31. See Aye v. Philadelphia Co., 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696; National Light & Thorium Co. v. Alexander, 80 S. C. 10, 61 S. E. 214. Where the lessor in a mining lease evicted the lessee, and thereafter extracted a large amount of valuable ore, and the lessee sued for damages, the court put on the lessor the burden of proving the amount and value of the ores extracted. Isabella Gold Min. Co. v. Glenn, 37 Colo. 165, 86 Pac. 349. The phrase "smelter returns" in a contract should ordinarily be construed to mean returns from the ore, less the smelting charges, without deducting the charges for hauling, freight and switching. Frank v. Bauer, 19 Colo. App. 445, 75 Pac. 930.

[24] BROOKS v. COOK, 135 Ala. 219, 34 So. 960; Blake v. Lobb's Estate, 110 Mich. 608, 68 N. W. 427. See Diamond Iron Min. Co. v. Buckeye Iron Min. Co., 70 Minn. 500, 73 N. W. 507; Boyer v. Fulmer, 176 Pa. 282, 35 Atl. 236; Bannan v. Graeff, 186 Pa. 648, 40 Atl. 805; Fritzler v. Robinson, 70 Iowa, 500, 31 N. W. 61. For an instance where the lessor was allowed to rescind because of mutual mistake as to the existence of coal in the leased land and because of other reasons, see Bluestone Coal Co. v. Bell, 38 W. Va. 297, 18 S. E. 493. See, also, Muhlenberg v. Henning, 116 Pa. 138, 9 Atl. 144.

[25] See CLIFTON v. MONTAGUE, 40 W. Va. 207, 21 S. E. 858, 33 L. R. A. 449, 52 Am. St. Rep. 872; Clark v. Babcock, 23 Mich. 164. BAMFORD v. LEHIGH ZINC & IRON CO. (C. C.) 33 Fed. 677. If the land does not contain mineral, the consideration for the rental may fail. As to the latter point, however, see Wharton v. Stoutenburgh, 46 N. J. Law, 151.

[26] Wilmore Coal Co. v. Brown (C. C.) 147 Fed. 931.

[27] PETERSON v. BULLION-BECK & CHAMPION MIN. CO. (Utah) 91 Pac. 1095.

[28] The state of Washington has a statute governing the leasing of state mineral lands. Laws Wash. 1901, p. 313, c. 151.

LEASES AND OPTIONS AND TITLE BONDS.

131. An option to purchase may be accompanied by a lease, and, when so accompanied, may end with the lease, or may survive it.

132. A title bond is an offer under seal to convey a good title if the offer's terms are complied with. It is, on principle, irrevocable for the time specified, or until after a reasonable time if no time is specified; but the cases seem to hold that unless it is actually supported by a genuine consideration it is revocable at any time.

Very often there is coupled with a lease either an option to purchase or a bond for title. Even a license to enter and mine, when accompanied by an option to purchase the mining claim by paying a fixed sum, on which sum the licensee is to be credited with the net proceeds of working paid to the seller, has been held to become so coupled with an interest as to be irrevocable, except as in the contract provided.[29] On the other hand, a lease and an option to purchase, though contained in one instrument, may be separate and independent agreements, so as to make the option survive a forfeiture of the lease.[30] Time is of the essence of an option to purchase mining property.[31]

With reference to title bonds, whereby the owner of a mining claim by bond binds himself to convey a good title to the obligee in the bond, if the latter makes certain payments at the time or times specified, there can be no question that the bond constitutes an offer under seal to sell at the amount named, to be paid at the time or times specified. Whether that offer can be accepted in any other way than by payment or tender of payment as called for therein will depend wholly upon the proper construction of the instrument. In the ordinary case it would seem to be performance by the obligee, rather than a promise to perform, that is called for;[32] but sometimes a bilateral contract is called for, and hence is complete when the offer is duly accepted.[33]

Being under seal, the offer is, on principle, irrevocable during the

[29] CLARNO v. GRAYSON, 30 Or. 111, 46 Pac. 426; HALL v. ABRAHAM, 44 Or. 477, 75 Pac. 882. An option to purchase with a license to extract ore, instead of a covenant running with the land, was found to exist in Smith v. Jones, 21 Utah, 270, 60 Pac. 1104.

[30] MATHEWS SLATE CO. v. NEW EMPIRE SLATE CO. (C. C.) 122 Fed. 972.

[31] Merk v. Bowery Min. Co., 31 Mont. 298, 78 Pac. 519; Settle v. Winters, 2 Idaho, 215, 10 Pac. 216. On the surrender of an option see K. P. Min. Co. v. Jacobson, 30 Utah, 115, 83 Pac. 728, 4 L. R. A. (N. S.) 755.

[32] See Largey v. Bartlett, 18 Mont. 265, 44 Pac. 962.

[33] Pennsylvania Min. Co. v. Smith, 207 Pa. 210, 56 Atl. 426.

time which it specifies, [34] or until the lapse of a reasonable time if no time is specified; but the few cases involving mining title bonds hold that, unless there is a genuine consideration for them, such bonds are either revocable offers [35] or are absolutely invalid.[36]

WORKING CONTRACTS.

133. It seems that working contracts are sometimes formed which do not amount to a mining partnership.

In addition to the contracts above set forth are contracts to work a mine for cash payments or a share in the proceeds. For instance, a contract by which a third person agreed with the owner of a mining claim to work the mine, and pay one-half the expenses, and receive one-half the product, has been held not to constitute a mining partnership, but instead a contract to work the mine on shares.[37] Such a case raises a close question of fact. In the ordinary case of letting a contract for the sinking of a shaft or the running of a cross cut no difficulty arises; the case being governed by the principles applicable to ordinary contracts.[38]

[34] Willard v. Tayloe, 8 Wall. (U. S.) 557, 19 L. Ed. 501; O'Brien v. Boland, 166 Mass. 481, 44 N. E. 602.

[35] GORDON v. DARNELL, 5 Colo. 302. See Finnerty v. Fritz, 5 Colo. 174. An option to purchase, not under seal, may be a revocable offer. SNOW v. NELSON (C. C.) 113 Fed. 353.

[36] SMITH v. REYNOLDS (C. C.) 8 Fed. 696. For a case finding a sale with a valid option, see Pittsburg Vitrified Pav. & Bldg. Brick Co. v. Bailey, 76 Kan. 42, 90 Pac. 803, 12 L. R. A. (N. S.) 745.

[37] STUART v. ADAMS, 89 Cal. 367, 26 Pac. 970; Hudepohl v. Liberty Hill Con. Min. & Water Co., 80 Cal. 553, 22 Pac. 339. So where the plaintiff worked the defendant's mine, and agreed that the defendant's mill should treat the ore at a certain price plus one-half the proceeds above plantiff's expense of extracting the ore, it was held that no partnership existed. Vietti v. Nesbitt, 22 Nev. 390, 41 Pac. 151.

[38] Time is of the essence of such a contract. Montrozona Gold Min. Co. v. Thatcher, 19 Colo. App. 371, 75 Pac. 595. In the absence of an express provision in the contract, or of a custom requiring it, the contractor need not timber a shaft contracted for. No. 5 Min. Co. v. Bruce, 4 Colo. 293. He may have to do so, however, to make such a shaft as the other party is bound to accept in fulfillment of the contract, as, for instance, where because of the crumbling nature of the ground the shaft, if untimbered, will be dangerous to use. Unless the contract so specifies, it seems that an extension of an old shaft contracted for need not follow the dip of the vein, if the course of the old shaft is continued. Buckeye Min. & Mill. Co. v. Carlson, 16 Colo. App. 446, 66 Pac. 168. Where a contract called for a shaft to be sunk 500 feet on a vein, and at 330 feet the vein gave out entirely, the contractor was held excused from further performance. Woodworth v. McLean, 97 Mo. 325, 11 S.

ORE CONTRACTS.

134. Contracts may be made for the sale of ore either after severance or while in place in the mine. Care should be taken to comply with the statute of frauds.

In connection with working contracts should be considered contracts for the sale of ore. Where the ore to be sold has already been severed from the vein, it is, of course, personalty, and the ordinary rules as to sales of personalty apply. Where the ore is contained in the collection of waste rock and débris known as a "dump," and is therefore held to be real estate,[39] it has been intimated that a contract for its sale is within the statute of frauds.[40] Where the contract is to sell ore after it has been severed from the vein, the ordinary rules of contract and of the law of damages apply.

Assays.

A word is necessary in regard to assays. An assay is the determination of the amount of gold, silver, lead, or other metals in a given lot of ore, by ascertaining how much is contained in a small sample selected as representative.[41] The whole value of an assay depends upon the representative character of the sample[42] and upon the thoroughness with which the assayer extracts the values from the sample.

W. 43. To sink three holes to bed rock requires only that some part of each hole extend to bed rock. Meehan v. Nelson, 137 Fed. 731, 70 C. C. A. 165.

[39] ROGERS v. COONEY, 7 Nev. 213. Refuse matter from washing iron ore, which refuse contained less iron than could profitably be worked, was held not to be "iron ore," within the meaning of a lease. Appeal of Erwin (Pa.) 12 Atl. 149.

[40] Foster v. Lumbermen's Min. Co., 68 Mich. 188, 200, 36 N. W. 171. See dicta in Smart v. Jones, 15 C. B. (N. S.) 717, where a mere promise to let the plaintiff dig and carry away cinders from a cinder tip, for breach of which promise the plaintiff's only remedy was an action for damages, was held not to amount to an incorporeal hereditament, requiring creation by deed.

[41] "Gold, silver, and platinum are assayed for the number of ounces per ton of ore; lead, copper, zinc, and the base metals generally, for the per cent. of the minerals in the ore." Morrison's Mining Rights (13th Ed.) 376.

[42] See Pittsburg Concentrating & Mining Co. v. Glick, 7 Colo. App. 43, 42 Pac. 188; Golden Reward Min. Co. v. Buxton Min. Co., 97 Fed. 413, 38 C. C. A. 228. Because it is more representative, a mill sample is a better test of value than a car sample is. FOX v. HALE & NORCROSS SILVER MIN. CO., 108 Cal. 369, 41 Pac. 308. For a statement of the method of taking mill samples at a certain mill, see Chisholm v. Eagle Ore Sampling Co., 144 Fed. 670, 75 C. C. A. 472.

CHAPTER XXV.

MINING PARTNERSHIPS AND TENANCIES IN COMMON.

MINING PARTNERSHIPS.

135. A mining partnership is that relationship short of ordinary partnership which the law affirms where two or more persons, who own or for exploitation acquire a mining claim, actually engage together in working the claim.

So closely connected with prospecting or "grub-staking" contracts as to require consideration with them are mining partnerships. A mining partnership, so called, is something different from a regular commercial partnership; but, to avoid any misunderstanding, it must be stated that just as a prospecting contract may also involve a mining partnership, so what at first sight seems to be a mining partnership may be an ordinary partnership.[1] The peculiar kind of partnership known distinctively as a "mining partnership" is all that is discussed here.

State statutes regarding mining partnerships are in general merely declaratory of what is the law in the absence of legislation.[2] A mining partnership exists where two or more persons who own a mining claim, or who acquire one for development purposes, actually engage together in the working of the claim.[3] Though no express agreement of partnership is necessary,[4] mere co-tenancy is not enough to con-

[1] See Costello v. Scott (Nev.) 93 Pac. 1; Bybee v. Hawkett (C. C.) 12 Fed. 649; Haskins v. Curran, 4 Idaho, 573, 43 Pac. 559; Decker v. Howell, 42 Cal. 636; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. Compare Freeman v. Hemenway, 75 Mo. App. 611; Lawrence v. Robinson, 4 Colo. 567.

[2] CONGDON v. OLDS, 18 Mont. 487, 489, 46 Pac. 261; FERRIS v. BAKER, 127 Cal. 520, 59 Pac. 937.

[3] Stuart v. Adams, 89 Cal. 367, 26 Pac. 970; Dorsey v. Newcomer, 121 Cal. 213, 53 Pac. 557; Marks v. Gates, 2 Alaska, 519; Walker v. Bruce (Colo.) 97 Pac. 250. See note 6, infra.

[4] Manville v. Parks, 7 Colo. 128, 134, 2 Pac. 212; Dale & Bennett v. Goldenrod Min. Co., 110 Mo. App. 317, 85 S. W. 929; DURYEA v. BURT, 28 Cal. 569; Snyder v. Burnham, 77 Mo. 52. That an agreement of mining partnership,

stitute a mining partnership.[5] A mining partnership arises only when there is a joint working of the mining claim.[6]

SAME—DIFFERENCES BETWEEN MINING PARTNERSHIPS AND ORDINARY PARTNERSHIPS.

135a. The chief difference between mining partnerships and ordinary partnerships lies in the fact that there is no delectus personæ in mining partnerships. From this results the fact that the implied authority of one mining partner to bind the others is extremely limited.

A mining partnership exhibits striking differences from the ordinary commercial partnerships.

In the first place, in a mining partnership there is no delectus personæ. One partner may retire, sell his interest to a stranger, or die, without destroying the partnership.[7] A sale may be made by one

where one exists, is not within the statute of frauds, see cases cited, chapter XXIV, note 1. A mining partnership may exist, even though the partners agreed that they should not be liable as partners. Bentley v. Brossard (Utah) 94 Pac. 736.

[5] HARTNEY v. GOSLING, 10 Wyo. 346, 68 Pac. 1118; First Nat. Bank v. G. V. B. Min. Co. (C. C.) 89 Fed. 449; G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 35, 35 C. C. A. 510; Tuck v. Downing, 76 Ill. 71. A mining partnership is a cross between a tenancy in common and a regular partnership. Bates on Partnership, § 14.

[6] Hartney v Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005. See note 3, supra. See First Nat. Bank v. G. V. B. Min. Co. (C. C.) 89 Fed. 449; Caley v. Coggwell, 12 Colo. App. 394, 55 Pac. 939; Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. 735; Ferris v. Baker, 127 Cal. 520, 59 Pac. 937; Madar v. Norman, 13 Idaho, 585, 92 Pac. 572; Higgins v. Armstrong, 9 Colo. 38, 10 Pac. 232; Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Anaconda Copper Mining Co. v. Butte & Boston Min. Co., 17 Mont. 519, 43 Pac. 924; Marks v. Gates, 2 Alaska, 519. It exists, although the partners are only lessees. Kirchner v. Smith, 61 W. Va. 434, 58 S. E. 614. Where some furnish the money, and the others do the work, and all are to share equally in results, there is a mining partnership. LYMAN v. SCHWARTZ, 13 Colo. App. 318, 57 Pac. 735; CHILDERS v. NEELY, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777. But the partnership extends to the work and its profits, and not necessarily to the title to the claim. McMahon v. Meehan, 2 Alaska, 278. In PRINCE v. LAMB, 128 Cal. 120, 60 Pac. 689, it was held that though a contract for the formation of a mining partnership in the future possibly existed, an actual mining partnership did not. At the most there was a grub-staking contract. In Dodge v. Chambers (Colo.) 96 Pac. 178, the court found that loans were made to a corporation by its shareholders, and hence no partnership existed between the contributing shareholders.

[7] KAHN v. CENTRAL SMELTING CO., 102 U. S. 641, 26 L. Ed. 266; BLACKMARR v. WILLIAMSON, 57 W. Va. 249, 50 S. E. 254; Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777. A retiring partner

partner against the protest of the others, and yet the purchaser becomes a partner.[8] The death of one partner neither dissolves the partnership nor gives to the surviving partners as such any right to control the property.[9]

In the second place, and growing out of the fact that there is no delectus personæ, it is the rule that in mining partnerships there is no general implied authority of any of the partners to bind any of the others.[10] Even in mining partnerships, however, authority to do so is implied to the limited extent that such authority is necessary and usual in the case of such partnerships.[11] Where, on due notice to the world, a co-tenant mining partner withdraws from the partnership, which he may do when he wills,[12] he is restored to his regular condition as tenant in common, subject merely to such liabilities as were incurred by the partnership prior to his withdrawal.[13] The remaining partners do not lose the lien they have on the partnership property, which is a right in equity to have partnership assets go for partnership debts.[14] A purchaser from a retiring partner takes subject

must give notice, of course, to persons who have dealt with the partnership, if he wishes to escape any further liability to them. Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727.

[8] KAHN v. CENTRAL SMELTING CO., 102 U. S. 641, 26 L. Ed. 266; Bissell v. Foss, 114 U. S. 252, 5 Sup. Ct. 851, 29 L. Ed. 126; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Nisbet v. Nash, 52 Cal. 540; CHILDERS v. NEELY, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777; Taylor v. Castle, 42 Cal. 367.

[9] JONES v. CLARK, 42 Cal. 180.

[10] Skillman v. Lachman, 23 Cal. 198, 83 Am. Dec. 96; DURYEA v. BURT, 28 Cal. 569; Decker v. Howell, 42 Cal. 636; Bentley v. Brossard (Utah) 94 Pac. 736.

[11] Bentley v. Brossard (Utah) 94 Pac. 736; HARTNEY v. GOSLING, 10 Wyo. 346, 68 Pac. 1118; Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Manville v. Parks, 7 Colo. 128, 2 Pac. 212; Abbott v. Smith, 3 Colo. App. 264, 32 Pac. 843; Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. 735; Nolan v. Lovelock, 1 Mont. 224.

But even this limited authority is subject to the rule that those who own a majority of the shares or interests in the partnership shall control. Dougherty v. Creary, 30 Cal. 291, 89 Am. Dec. 116; CHILDERS v. NEELEY, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777; Nolan v. Lovelock, 1 Mont. 224; Taylor v. Castle, 42 Cal. 367; BLACKMARR v. WILLIAMSON, 57 W. Va. 249, 50 S. E. 254.

[12] Lawrence v. Robinson, 4 Colo. 567.

[13] SLATER v. HAAS, 15 Colo. 574, 25 Pac. 1089, 22 Am. St. Rep. 440. See First Nat. Bank v. G. V. B. Min. Co. (C. C.) 89 Fed. 449.

[14] DURYEA v. BURT, 28 Cal. 569; CHILDERS v. NEELEY, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777. See Beck v. O'Connor, 21 Mont. 109, 53 Pac. 94; G. V. B. Min. Co. v. First Nat. Bank, 95 Fed. 35, 35 C. C. A. 510; Ervin v. Masterman, 16 Ohio Cir. Ct. 62, 8 Ohio Dec. 516.

to the lien, even though he does not become personally liable for the partnership debts contracted prior to his purchase.[15]

In conclusion, it should be noted that the copartners hold fiduciary relations toward one another, which will prevent one acquiring for himself property which rightfully belongs to the partnership.[16] But a location made by one partner after dissolution upon a discovery prior to dissolution will not inure to the benefit of the other partner, unless the failure to locate during the partnership was fraudulent.[17]

TENANCIES IN COMMON OF MINING PROPERTY.

136. The mere fact that one is a tenant in common and works the claim does not make him a mining partner of his co-tenant; but the latter may call on him to account.

Mere co-tenancy, as we have seen, does not create a mining partnership;[18] but the peculiar nature of an unpatented mining claim and the fact that any co-tenant can enjoy the claim only by more or less rapidly exhausting its ore bodies have contributed to make special problems for co-tenants of mining property and to differentiate co-tenancy of such property somewhat from co-tenancy of other kinds of real property.

Each co-tenant has a perfect right to enter upon the mining claim and work it,[19] and to maintain an action for its recovery without join-

As to what constitutes mining partnership property, see Dorsey v. Newcomer, 121 Cal. 213, 53 Pac. 557.

[15] Jones v. Clark, 42 Cal. 180.

[16] KIMBERLY v. ARMS, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Continental Divide Min. Inv. Co. v. Bliley, 23 Colo. 160, 46 Pac. 633; Settembre v. Putnam, 30 Cal. 490; Brown v. Bryan, 5 Idaho, 145, 51 Pac. 995; McMahon v. Meehan & Larson, 2 Alaska, 278.

[17] JENNINGS v. RICKARD, 10 Colo. 395, 15 Pac. 677. See Pierce v. Pierce, 55 Mich. 629, 22 N. W. 81. One mining partner may sell out, it seems, at a higher price than his partners get. Harris v. Lloyd, 11 Mont. 390, 38 Pac. 736, 28 Am. St. Rep. 475.

[18] Where some co-owners engage in working a mine, and others do not, the former are mining partners, and the latter are merely co-tenants. Madar v. Norman, 13 Idaho, 585, 92 Pac. 572. See, also, Garside v. Norval, 1 Alaska, 19.

[19] Kahn v. Old Telegraph Min. Co., 2 Utah, 13; McCORD v. OAKLAND QUICKSILVER MIN. CO., 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686; Marsh v. Holley, 42 Conn. 453. The doctrine to the contrary in Murray v. Haverty, 70 Ill. 318, 320, cannot be supported. A co-tenant has no more right to exclude the other co-tenants from a tunnel run to work the claim than to exclude them from the claim itself. People v. District Court, 27 Colo. 465, 62 Pac. 206. And he has no right to work the claim itself through a shaft from another mine to which his co-tenants have no right of access. Butte & B. Consol. Min. Co. v. Montana Ore-Purchasing Co., 24 Mont. 125, 60 Pac. 1039. And no right to

ing his co-tenants;[20] but he must account to his co-tenants for their share of the ore that he takes out and sells. The other co-tenants, while entitled to claim their share of the profits, are not responsible for any losses, except that they cannot claim any damages if in fact the working co-owner emerges with a loss.[21] It is not waste for the tenant in common to take out ore in minerlike fashion, but may be a violation of a state statute for the protection of co-tenants.[22]

By statutes in the different jurisdictions the right of one tenant in common to sue another has been considerably enlarged.[23]

SAME—ACCOUNTING BETWEEN CO-TENANTS.

136a. The proper basis for accounting between co-tenants of mining property would seem to be the net profits after the deduction of the actually incurred reasonable expenses; but where the co-tenant who works the claim invites the others to join in the work, and they refuse, the justice of this rule is doubted by some.

The common-law rule was that a tenant in common of real property had no right to an account from his co-tenant. This was changed by the statute of Anne,[24] which gave an account for rents and profits actually received by the defendant co-tenant from third persons, but it gave none for the use and occupation of the co-tenant.[25] Where, however, one co-tenant excluded another from the possession of the joint property, an account would lie.[26] If the co-tenant is not ex-

use a tunnel on the claim to convey ore from an outside claim. Laesch v. Morton, 38 Colo. 171, 87 Pac. 1081.

[20] Morenhaut v. Wilson, 52 Cal. 263; Weese v. Barker, 7 Colo. 178, 2 Pac. 919; Binswanger v. Henninger, 1 Alaska, 509. See Melton v. Lambard, 51 Cal. 258.

[21] WOLFE v. CHILDS (Colo.) 94 Pac. 292; Stickley v. Mulrooney, 36 Colo. 242, 87 Pac. 547, 118 Am. St. Rep. 107; McCORD v. OAKLAND QUICKSILVER MIN. CO., 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686; Edsall v. Merrill, 37 N. J. Eq. 114. See Goller v. Felt, 30 Cal. 481.

[22] ANACONDA COPPER MINING CO. v. BUTTE & BOSTON MIN. CO., 17 Mont. 519, 43 Pac. 924.

[23] For cases under the Montana statute, see Connole v. Boston & M. Consol. Copper & Silver Min. Co., 20 Mont. 523, 52 Pac. 263; Butte & B. Consol. Mining Co. v. Montana Ore-Purchasing Co., 24 Mont. 125, 60 Pac. 1039; Id., 25 Mont. 41, 63 Pac. 825.

[24] St. 4 Anne, c. 16, § 27.

[25] 1 Tiffany, Real Property, 392.

[26] Id. So it has been held that a lessee of one co-tenant, when excluded by the other co-tenant, may have an accounting, and may even recover damages based on loss of profits. PAUL v. CRAGNAZ, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540.

cluded by the one in possession, there is a diversity of views. Mr. Snyder contends that he must account,[27] and Mr. Lindley that he need not.[28] It is believed that the sounder view is that he must account.[29] In some states the matter is regulated by statutes.[30]

Where an accounting is called for, there are various rules for determining what the co-tenant in possession must pay. Where the complaining co-tenant refused to share the risks, his recovery is limited by some cases to his share of the fair rental value of the land.[31] The difficulty of such a measure of damages for mining property, if it were possible to fix a fair rental value for such property, is that, if it is to hold, there should be a recovery, even if the tenant in possession has made a loss. The same is true of the rule measuring recovery by the value of the ore in place.[32] The view which gives the complaining co-tenant his proportionate share of the profits after deducting all proper expenses, a view which clearly applies where the defendant has excluded the plaintiff from the joint property,[33] and where the defendant has received royalties from a lessee,[34] would seem to be the proper one to apply to the case of mines.[35] The only objection to it is the one applicable to all the others, namely, that it lets a man who refused to take the risk share the profit. The answer to that would seem to be that the co-tenant who works does so with his eyes open to the consequences. He must make up his mind whether he will get a lease from his co-tenants, will force a partition, or will abide by the rules of co-tenancy.[36]

[27] 2 Snyder on Mines, § 1444.

[28] 2 Lindley on Mines (2d Ed.) § 789a.

[29] McGOWAN v. BAILEY, 179 Pa. 470, 36 Atl. 325; COLEMAN v. COLEMAN, 1 Pearson (Pa.) 470; GAGE v. GAGE, 66 N. H. 282, 29 Atl. 543, 28 L. R. A. 829; KAHN v. SMELTING CO., 102 U. S. 641, 646, 26 L. Ed. 266. But see Pico v. Columbet, 12 Cal. 414, 73 Am. Dec. 550. See Morrison's Mining Rights (13th Ed.) p. 334.

[30] Laws Mont. 1899, p. 134; Comp. Laws Nev. (1861–1900) § 250. See Butte & B. Consol. Min. Co. v. Montana Ore-Purchasing Co., 25 Mont. 41, 63 Pac. 825; Red Mount Consol. Min. Co. v. Esler, 18 Mont. 174, 44 Pac. 523.

[31] Early v. Friend, 16 Gratt. (Va.) 21, 78 Am. Dec. 649. See Edsall v. Merrill, 37 N. J. Eq. 114.

[32] McGowan v. Bailey, 179 Pa. 470, 36 Atl. 325.

[33] WILLIAMSON v. JONES, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891.

[34] CECIL v. CLARK, 49 W. Va. 459, 39 S. E. 202.

[35] WOLFE v. CHILDS (Colo.) 94 Pac. 292; Graham v. Pierce, 19 Gratt. (Va.) 28, 100 Am. Dec. 658. See Ruffners v. Lewis' Ex'rs, 7 Leigh (Va.) 720, 30 Am. Dec. 513; Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351, 38 South. 253; Lone Acre Oil Co. v. Swayne (Tex. Civ. App.) 78 S. W. 380.

[36] Under the interpretation given by the Idaho Supreme Court to a state statute, the owner of a majority interest in a claim being worked by a co-ten-

SAME—FIDUCIARY RELATIONSHIP OF CO-TENANTS.

136b. There is the same fiduciary relationship between tenants in common of mining property as between those of other property.

The same fiduciary relationship exists between tenants in common of mining property as of other property.[37] An instance is found in a Washington case, where a mining company that had joined with several people in the location of a mining claim, and then, fearing that the claim was located on the dip of a vein apexing within a senior location, had bought a four-sevenths interest in the senior location, was compelled to let the co-tenants share in that four-sevenths interest when it became apparent that the senior location did have the apex.[38]

SAME—RELATIONS BETWEEN SURFACE AND SUBSURFACE OWNERS.

136c. Where the title to the minerals has been severed from that to the surface, the owner of the minerals and the owner of the surface are not tenants in common of the whole.

It would seem to be unnecessary to say, except that the point has been expressly decided, that, where there has been such a severance that the title to the surface of a mining claim is in one person and the title to the minerals is in another, the two are neither joint tenants nor tenants in common, but each owns in severalty what is his.[39]

ant having a minority interest can dictate the manner in which the latter shall work, because by interfering the majority owner converts the co-tenancy into a mining partnership. Hawkins v. Spokane Hydraulic Min. Co., 3 Idaho (West.) 970, 3 Idaho, 241, 28 Pac. 433; Id. 3 Idaho, 650, 33 Pac. 40. See Sweeney v. Hanley, 126 Fed. 97, 61 C. C. A. 153. That being so, the majority owner must account to the minority for the latter's share of the profits, if the majority owner works the property. Id.

[37] STEVENS v. GRAND CENTRAL MIN. CO., 133 Fed. 28, 67 C. C. A. 284. See Royston v. Miller (C. C.) 76 Fed. 50; Hallack v. Traber, 23 Colo. 14, 46 Pac. 110; Hunt v. Patchin (C. C.) 35 Fed. 815; Garside v. Norval, 1 Alaska, 19. For an application of this doctrine to a case of relocation, see Van Wagenen v. Carpenter, 27 Colo. 449, 61 Pac. 698. For other instances, see chapter XVII, § 96, supra.

[38] CEDAR CANYON CONSOL. MIN. CO. v. YARWOOD, 27 Wash. 271, 67 Pac. 749, 91 Am. St. Rep. 841. Though the location made by the so-called co-tenants was invalid, because the vein was already located, the mining company was nevertheless held bound. In the absence of a discovery of some other vein within the claim, the correctness of that holding may be doubted.

[39] VIRGINIA COAL & IRON CO. v. KELLY, 93 Va. 332, 24 S. E. 1020; HUTCHINSON v. KLINE, 199 Pa. 564, 49 Atl. 312. See, also, cases in chapter XXVI, note 28, infra.

CHAPTER XXVI.

CONVEYANCES AND LIENS.

NECESSITY OF WRITTEN CONVEYANCES OF MINING CLAIMS.

137. While oral transfers of unpatented mining claims early received judicial sanction, it has long been settled that such claims are real estate, and conveyances of them must conform to the requirements of conveyances of real estate.

In the early days of California, Idaho, and Nevada, before the real nature of mining locations was understood, it became established that a writing was not necessary for the conveyance of a mining claim.[1] That was a doctrine which grew out of the supposed necessities of the time, before it was seen that a mining claim was essentially real property, and the doctrine has since been abandoned.

The doctrine has, however, had some interesting survivals. In 1879 the United States Supreme Court, on the strength of one of those early California cases,[2] stated that "a written conveyance is not necessary to the transfer of a mining claim." [3] The natural conclusion that a mining claim, which is not real estate within the statute of frauds, is not real estate within a state statute making judgments liens on real estate,[4] and is not an interest in real property within a state

[1] JACKSON v. FEATHER RIVER & GIBSONVILLE WATER CO., 14 Cal. 18; TABLE MOUNTAIN TUNNEL CO. v. STRANAHAN, 20 Cal. 198; Antoine Co. v. Ridge Co., 23 Cal. 219; Patterson v. Keystone Min. Co., 23 Cal. 575; Lockhart v. Rollins, 2 Idaho, 540, 21 Pac. 413; Kinney v. Consolidated Va. Min. Co., 4 Sawy. (U. S.) 382, 451, 452, Fed. Cas. No. 7,827. Even in California this doctrine did not hold where the claim was in the adverse possession of third persons. COPPER HILL MIN. CO. v. SPENCER, 25 Cal. 18.

[2] TABLE MOUNTAIN TUNNEL CO. v. STRANAHAN, 20 Cal. 198.

[3] UNION CONSOL. SILVER MIN. CO. v. TAYLOR, 100 U. S. 37, 42, 25 L. Ed. 541. See, also, Lockhart v. Rollins, 2 Idaho, 540, 21 Pac. 413.

[4] PHŒNIX MIN. & MILL. CO. v. SCOTT, 20 Wash. 48, 54 Pac. 777. See, contra, BUTTE HARDWARE CO. v. FRANK, 25 Mont. 344, 65 Pac. 1; Brad-

statute affecting the jurisdiction of justices of the peace,[5] or within a state statute of limitation,[6] has been adopted in two states. In Washington, however, the court regards a mining claim as the equitable estate of the locator, rather than as personalty;[7] while in Oregon a statute now makes all conveyances of mining claims subject to the same rules as apply to "other realty."[8] The facts that the Idaho case related only to transfers prior to the act of 1866 supported by mining customs, that California passed an act as early as 1860 which the courts construed to require the conveyances of mining claims to be in writing, that the California courts have ever since called a mining claim real estate,[9] and that in 1862 Nevada passed an act requiring the same formalities for the conveyance of mining claims as of other real estate,[10] far outweigh the earlier erroneous California and Nevada cases.

It would seem to be clear that an unpatented mining claim is realty, and as such within the state statutory requirements applicable to real property.[11] While, under the old rule allowing oral transfers, a written transfer did not have to be under seal,* a seal would now seem to be necessary, wherever it is necessary to the conveyance of ordinary real estate.

Transfers of Unperfected Claims.

But, while the above is true of an actually perfected mining location, it seems still to be true that an unperfected location may be

ford v. Morrison (Ariz.) 86 Pac. 6. Compare Waller v. Hughes, 2 Ariz. 114, 11 Pac. 122.

[5] DUFFY v. MIX, 24 Or. 265, 33 Pac. 807.

[6] HERRON v. EAGLE MIN. CO., 37 Or. 155, 61 Pac. 417.

[7] Phœnix Min. & Mill. Co. v. Scott, 20 Wash. 48, 54 Pac. 777.

[8] B. & C. Comp. Or. § 3981. See, also, Lohmann v. Helmer (C. C.) 104 Fed. 178.

[9] GOLLER v. FETT, 30 Cal. 481; King v. Randlett, 33 Cal. 318; Melton v. Lambard, 51 Cal. 258; GARTHE v. HART, 73 Cal. 541, 15 Pac. 93; Moore v. Hamerstag, 109 Cal. 122, 41 Pac. 805; Bakersfield & Fresno Oil Co. v. Kern County, 144 Cal. 148, 77 Pac. 892.

[10] Gen. St. Nev. 1885, § 2650. See Hale & Norcross Gold & Silver Min. Co. v. Storey County, 1 Nev. 104, 108.

[11] ROSEVILLE ALTA MIN. CO. v. IOWA GULCH MIN. CO., 15 Colo. 29, 24 Pac. 920, 22 Am. St. Rep. 373; Alaska Exploration Co. v. Northern Min. & Trading Co., 152 Fed. 145, 81 C. C. A. 363; REAGAN v. McKIBBEN, 11 S. D. 270, 76 N. W. 943; Harris v. Equator Min. & S. Co. (C. C.) 8 Fed. 863; Hopkins v. Noyes, 4 Mont. 550, 2 Pac. 280; Cascaden v. Dunbar, 2 Alaska, 408. See Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1; Bradford v. Morrison (Ariz.) 86 Pac. 6. A mining claim descends as realty to the heirs of the intestate owner. LOHMANN v. HELMER (C. C.) 104 Fed. 178; KEELER v. TRUEMAN, 15 Colo. 143, 25 Pac. 311. See, also, chapter XX, note 17, supra.

* Jackson v. Feather River & Gibsonville Water Co., 14 Cal. 18; Draper v. Douglass, 23 Cal. 347; St. John v. Kidd, 26 Cal. 265.

transferred without writing, and the transferee will acquire the legal title if he perfects the location in his own name.[12] That is because, until the location is perfected, it has not acquired the status of real property, and in consequence is not governed by the statutes affecting real property.

It being settled that a perfected mining location must be conveyed in writing, and, of course, that a patented claim must be so conveyed, a question arises as to the form of deed.

QUITCLAIM AND WARRANTY DEEDS.

138. A grantor of an unpatented claim should convey by a quitclaim deed or by a carefully worded special warranty deed.

The question is whether a quitclaim deed or a warranty should be used in conveying a mining claim. In the case of a patented claim a warranty deed may be used, whenever it would be used in regard to other real property, if only care be taken to have the warranty except anything excepted by the patent itself; but in the case of an unpatented claim a warranty deed should never be given, without expressly stating in the deed that the warranty does not apply to the United States. In the case of an unpatented claim a grantor should insist upon giving either a quitclaim deed or a carefully worded special warranty deed.

It often happens that so-called warranty deeds are really quitclaims, because the granting clause conveys only the right, title, and interest of the grantor, and the passage of that is all that is warranted;[13] and it also often happens that a so-called quitclaim deed will have in it a covenant of warranty.[14] The choice between mere quitclaims and various kinds of warranty deeds will, of course, depend wholly upon the purposes which the parties have in view.[15]

[12] MILLER v. CHRISMAN, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Doe v. Waterloo Min. Co., 70 Fed. 455, 17 C. C. A. 190. See Weed v. Snook, 144 Cal. 439, 77 Pac. 1023. Compare Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936.

[13] Sweet v. Brown, 12 Metc. (Mass.) 175, 45 Am. Dec. 243. But see Loomis v. Bedel, 11 N. H. 74.

[14] A common form of mining deed in use in Colorado purports to quitclaim, but contains a covenant of further assurance. Such a deed is not invalid to pass present title because of such covenant, WHOLEY v. CAVANAUGH, 88 Cal. 132, 25 Pac. 1112; while an after-acquired title will pass under it, Id.; Norfleet v. Russell, 64 Mo. 176; Phelps v. Kellogg, 15 Ill. 131; Bennett v. Waller, 23 Ill. 97.

[15] That the grantee in a quitclaim deed of mining property will take title as free from equities as if the deed contained full covenants of warranty was

SAME—THE SPECIAL "DIPS, SPURS," ETC., CLAUSE.

138a. While the clause in mining deeds, conveying all veins, with their dips, spurs, angles, and variations, is on principle superfluous, its retention is recommended.

It is customary to insert in mining deeds, following the description of the claim, a clause conveying all lodes and veins, with their dips, spurs, angles, and variations. The purpose of this is to grant the small veins, which are offshoots or feeders of the larger veins, and are known as spurs,[16] as well as to grant the larger veins themselves, and to convey all extralateral rights on the various veins, whatever may be the irregularity of the construction and strike of such veins. That the conveyance of the land by an ordinary real estate deed not containing such a clause conveys the tops of the veins within the common-law boundaries, and that the ownership of the tops of the veins carries with it, of necessity, the extralateral rights which the grantor had, would seem to be clear.[17] As a matter of fact, the custom of inserting in a mining deed such a clause as the one under consideration is an inheritance from conditions prevailing under the act of 1866 and prior thereto, when the vein was the principal thing in a location and the surface a mere incident. It has no application under the present statutes, where the claim consists of a piece of real estate embracing lodes or veins. Such a clause is deemed by all mining law writers to be superfluous; but out of abundant caution, and because some lawyers reason that the long continuance of the custom proves its necessity, and on that account may question a deed which does not contain such a clause, its insertion in a deed of mining property is recommended.[18]

held in BRADBURY v. DAVIS, 5 Colo. 265. That case ought to be followed as to unpatented mining claims, even in a jurisdiction where as to ordinary real property and as to patented mining claims the taking of a quitclaim deed is deemed evidence that the grantee knows that something is wrong with the title. A contract to convey a mining claim "by good and sufficient deed in fee simple" was held fulfilled, where the grantee knew that the claim was unpatented, by the conveyance of full title to the unpatented claim, in Bash v. Cascade Min. Co., 29 Wash. 50, 69 Pac. 402, 70 Pac. 487.

[16] The law fixes no limit to the size or prominence of a mineral-bearing vein before a mining location can be made upon it. CARSON CITY GOLD & SILVER MIN. CO. v. NORTH STAR MIN. CO. (C. C.) 73 Fed. 597, 601.

[17] "It is probably not necessary to specify extralateral rights in order that a conveyance of a mining claim be operative to transfer them, and yet it is not strange that the custom grew up of naming them for the sake of avoiding the possibility of disputes." MONTANA MIN. CO. v. ST. LOUIS MIN. & MILL. CO., 204 U. S. 204, 27 Sup. Ct. 254, 257, 51 L. Ed. 444.

[18] In MONTANA MIN. CO. v. ST. LOUIS MIN. & MILL. CO., 204 U. S.

SAME—AFTER-ACQUIRED TITLE.

138b. The courts are liberal in assisting title to pass under mining deeds by estoppel.

With reference to mining deeds the courts have adopted a very liberal estoppel doctrine. Regardless of whether a deed is a warranty deed, or only a quitclaim, the courts endeavor to estop the grantor as to after-acquired title, and to make the deed pass all that the state of facts at the time of the conveyance will justify. For instance, where the grantor has made first a location and then a relocation of the same ground, a conveyance will pass his rights under both locations,[19] although a different name is used for each, and the conveyance gives only one name.[20] Where the owners of a mining claim changed its stakes after record, so as to make the claim conflict with an adjoining claim, and then, without amending the record, but by deed (which seemingly referred to patent proceedings started for the reformed claim), conveyed the claim by reference to the record, it was held that, when the grantors afterwards acquired title to the adjoining claim, the title to the conflict area passed to the grantees by estoppel.[21] The courts are often helped by state statutes, which provide, as the state statutes in the case just cited did,[22] that any deed which purports to pass the fee will carry an after-acquired title. Accordingly such a quitclaim deed, given after entry in patent proceedings, will pass the patented title to the grantee.[23] But the after-acquired title will not

204, 27 Sup. Ct. 254, 51 L. Ed. 444, the words "together with all the minerals therein," when added to the "dips, spurs, and angles" clause, were held to show that despite the latter clause the grantee was to have only common-law rights in the vein embraced in the conveyed land. That case shows the danger of special clauses.

[19] WEILL v. LUCERNE MIN. CO., 11 Nev. 200; COLLINS v. McKAY, 36 Mont. 123, 92 Pac. 295.

[20] PHILLPOTTS v. BLASDEL, 8 Nev. 61; LEBANON MIN. CO. v. CONSOLIDATED REPUBLICAN MIN. CO., 6 Colo. 371; COLLINS v. McKAY, 36 Mont. 123, 92 Pac. 295. See SHOSHONE MIN. CO. v. RUTTER, 87 Fed. 801, 31 C. C. A. 223.

[21] SHREVE v. COPPER BELL MIN. CO., 11 Mont. 309, 28 Pac. 315. As no application for patent could be pending without a plat and description being given, the reference to the patent proceedings would seem to have described the conflict area, while under the Montana statutes the conveyance was one which would pass an after-acquired title. Id., 11 Mont. 347, 28 Pac. 315. See Bernardy v. Colonial & U. S. Mortg. Co., 17 S. D. 637, 98 N. W. 166, 106 Am. St. Rep. 791.

[22] Shreve v. Copper Bell Min. Co., 11 Mont. 309, 347, 28 Pac. 315.

[23] Bradbury v. Davis, 5 Colo. 265; Crane v. Salmon, 41 Cal. 63. This is

pass by estoppel to a grantee where the grantee has forfeited the unpatented location conveyed and the grantor has purchased it from a subsequent relocator.[24]

EASEMENTS ON SEVERANCE.

139. Upon severance of surface from minerals by conveyance, the proper easements of access and support arise, unless they are expressly contracted away. The grantor's right to the support of the surface by the minerals is on principle retained, even where he grants all the minerals, with the right to remove them, and where it is their careful removal that causes the subsidence of the surface; but the authorities on the point are in conflict.

The severance which exists because of reservations under the townsite acts has already been considered, but the severance which arises from conveyance must be noted. While it is not common in the precious metal mining regions to separate the ownership of the minerals in place from the ownership of the surface of the ground, it is always possible, and in coal mining regions it is comparatively common, to have such severance.[25] Such severance exists either because the owner of the mining claim conveys the minerals and keeps the surface, or because he conveys the surface but keeps the minerals.[26]

in accordance with the rule applicable to public lands generally. See 16 Cyc. 696, and cases cited.

[24] McDERMOTT MIN. CO. v. McDERMOTT, 27 Mont. 143, 69 Pac. 715.

[25] Peterson v. Hall, 57 W. Va. 535, 50 S. E. 603; Manning v. Frazier, 96 Ill. 279; Hartwell v. Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448; Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760. The city of Victor, Colo., for instance, is situated on the surface of patented mining claims, and all deeds of city lots except minerals and reserve mining rights.

[26] WILLIAMS v. SOUTH PENN OIL CO., 52 W. Va. 181, 43 S. E. 214, 60 L. R. A. 795; Brand v. Consolidated Coal Co., 219 Ill. 543, 76 N. E. 849; McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622; Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574, 54 S. E. 593; Marvin v. Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322; Moore v. Griffin, 72 Kan. 164, 83 Pac. 395; Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485; Huss v. Jacobs, 210 Pa. 145, 59 Atl. 991; Smoot v. Consolidated Coal Co., 114 Ill. App. 512; Preston v. White 57 W. Va. 278, 50 S. E. 236. See GILL v. FLETCHER, 74 Ohio, 295, 78 N. E 433, 113 Am. St. Rep. 962, where there was an exception of one-half of the mineral, though the surface and the rest of the mineral passed. To the same effect, see NEGAUNEE IRON CO. v. IRON CLIFFS CO., 134 Mich. 264, 96 N. W. 468. The exception in a deed of oil from a well now producing oil covers oil obtained by sinking the well to a lower sand rock after it has ceased to flow. Ammons v. Toothman, 59 W. Va. 165, 53 S. E. 13, 115 Am. St. Rep. 908. See Jones v. American Ass'n, 27 Ky. Law Rep. 804, 86 S. W. 1111. A deed excepting granite on the lot has been held,

Whatever the form of the instrument of conveyance, and even though the parties speak of it in its terms as a lease,[27] if its fair construction shows that the title to the minerals in place is to pass upon the delivery of the instrument, while the surface is retained, or vice versa, there is a severance for the length of time of the granted estate, and, of course, for all time, if the fee is granted,[28] except that the fee to the space occupied by the minerals seems to terminate when the mine is exhausted.[29]

however, to cover only exposed granite. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666. But in that case exposed granite was held to cover granite thereafter exposed by the washing away of the soil. Id. See Brady v. Smith, 181 N. Y. 178, 73 N. E. 963, 106 Am. St. Rep. 531. On the distinction between a reservation and an exception and on the effect of an exception upon a remote grantee of the grantee, see Moore v. Griffin, 72 Kan. 164, 83 Pac. 395, 4 L. R. A. (N. S.) 477. See, also, Marvin v. Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322.

[27] PLUMMER v. HILLSIDE COAL & IRON CO., 104 Fed. 208, 43 C. C. A. 490. See Denniston v. Haddock, 200 Pa. 426, 50 Atl. 197.

[28] McCONNELL v. PIERCE, 210 Ill. 627, 71 N. E. 622; Kinsley v. Iron Co., 144 Pa. 613, 23 Atl. 250; Plummer v. Iron Co., 160 Pa. 483, 28 Atl. 853; GALLAGHER v. HICKS, 216 Pa. 243, 65 Atl. 623; Barrett v. Kansas & Texas Coal Co., 70 Kan. 649, 79 Pac. 150. See City of New Haven v. Hotchkiss, 77 Conn. 168, 58 Atl. 753, where a reservation of a right to mine was held to create an estate of inheritance. Compare Ames v. Ames, 160 Ill. 599, 43 N. E. 592. "Coal and minerals in place are land. It is no longer to be doubted that they are subject to conveyance as such. Nothing is more common in Pennsylvania than that the surface right should be in one and the mineral right in another. It is not denied, in such a case, that both are landowners, both holders of a corporeal hereditament. Our English ancestors, indeed, found difficulty in conceiving of a corporeal interest in an unopened mine—separate from the ownership of the surface—because livery of seisin was in their minds inseparable from a conveyance of land, and livery could not be made of an unopened mine. The consequence was that they were disposed to regard such rights as incorporeal, though they are not rights issuing out of land, but the substance. With us, unfettered as we are by the necessity of livery of seisin, and abounding in mineral districts, I am not aware that it has been seriously doubted that the ownership of a coal bed or seam is a corporeal interest in land." CALDWELL v. FULTON, 31 Pa. 475, 483, 72 Am. Dec. 760. Accordingly, if the owner of the surface takes out the minerals, the owners of the minerals may maintain trespass. Ashman v. Wigton (Pa.) 12 Atl. 74. Compare Yellow Poplar Lumber Co. v. Thompson's Heirs (Va.) 62 S. E. 358. The two are neither tenants in common nor joint tenants, but are owners in severalty of distinct estates in different subjects. INTERSTATE COAL & IRON CO. v. CLINTWOOD COAL & TIMBER CO., 105 Va. 574, 54 S. E. 593. And each subject is capable of sale or incumbrance. HOSACK v. CRILL, 204 Pa. 97, 53 Atl. 640. And the owner of one can safely buy the estate of the other at tax sale. Hutchinson v. Kline, 199 Pa. 564, 49 Atl. 312. The purchase of an outstanding title by one does not inure to the other's benefit. Virginia Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. 1020.

[29] MOORE v. INDIAN CAMP COAL CO., 75 Ohio St. 493, 80 N. E. 6. Until

Where a severance has taken place, two questions may arise, namely: Has the owner of the minerals any rights on the surface? and has the owner of the surface a complete right to its support? [30]

Relative Rights of Surface Owner and of Subjacent Mineral Owner.

It seems clear that arising out of the grant the mineral owner has an easement of access through the surface,[31] and a right to work the mine by occupying as much of the surface as is reasonably necessary for the purpose.[32] Moreover, it seems that where the owner of land conveys the coal under the surface, retaining for himself the surface, he retains title to everything beneath the coal, and has the right of access to it, although the deed does not expressly so provide.[33] It is also well settled that, unless the surface owner has by deed or otherwise estopped himself from claiming the right, he has a clear right to the support of the surface by the vertically underlying minerals and other constituent parts of the land.[34] The right to vertical or subja-

such exhaustion the unrestricted owner of the minerals may use the space left by proper mining for such purposes as he may see fit, which do no injury to the surface. Id.

[30] "The word 'surface,' as used in the books, means not merely the geometrical superficies, without thickness, but includes whatever earth, soil, or land lies above and superincumbent on the mine. Surface, therefore, includes the appellee's mine, which lies above the appellant's mine and below the top surface, which still may remain undisturbed and uninjured in the original grantor." Yandes v. Wright, 66 Ind. 319, 325, 32 Am. Rep. 109. "Surface," when conveyed, means that portion of the land which is or may be used for agricultural purposes. Williams v. South Penn Oil Co., 52 W. Va. 181, 43 S. E. 214, 60 L. R. A. 795.

[31] ROBERTSON v. YOUGHIOGHENY RIVER COAL CO., 172 Pa. 566, 33 Atl. 706; Baker v. Pittsburg, C. &. W. R. Co., 219 Pa. 398, 68 Atl. 1014.

[32] Wardell v. Watson, 93 Mo. 107, 5 S. W. 605; Williams v. Gibson, 84 Ala. 228, 4 So. 350, 5 Am. St. Rep. 368.

[33] CHARTIERS BLOCK COAL CO. v. MELLON, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645; Mansfield Coal & Coke Co. v. Mellon, 152 Pa. 286, 25 Atl. 601. But see Jefferson Iron Works v. Gill Bros., 9 Ohio Dec. 481. In CHARTIERS BLOCK COAL CO. v. MELLON, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 Am. St. Rep. 645, an owner of land had granted away the coal underlying his land, with full right of removal, but later, discovering that gas and oil underlay the coal, gave oil and gas leases under which the lessees sought to drill through the coal beds to get at the oil and gas. The coal company sought an injunction, but was refused one on condition that the oil and gas lessees give bond to indemnify the coal company from any damage which might be caused by oil and gas leaking into the coal mine from the wells sunk. While the decision is satisfactory, the reasoning of the court is not. See the dissenting opinion of Mr. Justice Williams.

[34] Weaver v. Coal Co., 216 Pa. 195, 65 Atl. 545; YOUGHIOGHENY RIVER COAL CO. v. ALLEGHENY NAT. BANK, 211 Pa. 319, 60 Atl. 924, 69 L. R. A. 637; NOONAN v. PARDEE, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722; Pringle v. Vesta Coal Co., 172 Pa. 438, 33 Atl. 690; ROBERT-

cent support for the surface in its natural state prima facie belongs to every surface owner.

While the common-law right of subjacent support extends only to the surface in its natural state, it is violated, even though buildings or other structures are erected on the surface, if the subsidence would have occurred had the superstructures not been there; and in case of such violation damages for the injury to the buildings, as well as to the surface, may be recovered.[35] By agreement, also, the right of vertical or subjacent support may be extended to superstructures as well as to the surface,[36] and should be held so to be extended where, to accomplish the severance, the surface is platted into city lots and sold as such by the one who reserves the minerals. There are also statutes in several states, which are based upon the so-called police powers of the different states, and which give the surface owners express

SON v. YOUGHIOGHENY RIVER COAL CO., 172 Pa. 566, 33 Atl. 706; Jones v. Wagner, 66 Pa. 429, 5 Am. Rep. 385; Livingston v. Moingona Coal Co., 49 Iowa, 369, 31 Am. Rep. 150; Burgner v. Humphrey, 41 Ohio St. 340; Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666; Western Indiana Coal Co. v. Brown, 36 Ind. App. 44, 74 N. E. 1027, 114 Am. St. Rep. 367; Yandes v. Wright, 66 Ind. 319, 32 Am. Rep. 109; Chicago & A. R. Co. v. Brandau, 81 Mo. App. 1; Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335; Perry County Coal Min. Co. v. Maclin, 70 Ill. App. 444. That the injury happened in spite of due care and skill in working is no defense. NOONAN v. PARDEE, supra; YANDES v. WRIGHT, 66 Ind. 319, 32 Am. Rep. 109; Carlin v. Chappel, 101 Pa. 348, 47 Am. Rep. 722; Collins v. Gleason Coal Co. (Iowa) 115 N. W. 497. For cases holding a lessor liable where his lessee did not leave sufficient support for the surface, see Kistler v. Thompson, 158 Pa. 139, 27 Atl. 874; Campbell v. Louisville Coal Min. Co., 39 Colo. 379, 89 Pac. 767, 10 L. R. A. (N. S.) 822. For a case where the lessor was not liable, see Hill v. Pardee, 143 Pa. 98, 22 Atl. 815.

[35] WILMS v. JESS, 94 Ill. 464, 34 Am. Rep. 242; NOONAN v. PARDEE, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722; Gumbert v. Kilgore (Pa.) 6 Atl. 771; Chicago & A. R. Co. v. Brandau, 81 Mo. App. 1. See Matulys v. Philadelphia & Reading Coal & Iron Co., 201 Pa. 70, 50 Atl. 823. Compare Campbell v. Louisville Coal Min. Co., 39 Colo. 379, 89 Pac. 767, 10 L. R. A. (N. S.) 822. See, as to springs in the land, Weaver v. Berwind-White Coal Co., 216 Pa. 195, 65 Atl. 545. NOONAN v. PARDEE, supra, gives the surface owner a right of access to the mine below the surface to see that his right of surface support is being maintained. And it has further been held in Pennsylvania that the cause of action for injury to the surface arises where the support of the surface is so weakened that the surface might fall. TISCHLER v. PENNSYLVANIA COAL CO., 218 Pa. 82, 66 Atl. 988; NOONAN v. PARDEE, supra. But an injunction will not lie against removal of the minerals where an action at law for damages is an adequate remedy. Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 Atl. 329. It has been held, also, that the surface owners do not have to show affirmatively that the subsidence did not occur by reason of his buildings. Western Indiana Coal Co. v. Brown, 36 Ind. App. 44, 74 N. E. 1027, 114 Am. St. Rep. 367; WILMS v. JESS, supra.

[36] BURGNER v. HUMPHREY, 41 Ohio St. 340.

rights, which, if valid, necessarily imply a right of superstructure a well as surface support.[37]

But the right of surface support by subjacent land, a right which prima facie belongs to the surface owner as such, but which may b reserved to him or increased by express stipulation, may be los to him by express agreement.[38] It should be remembered, however that "the mere fact of giving a right to sink pits and to work or ge coal (or other minerals) does not of itself establish a right to get ri of that which is the common-law right of the surface owner to hav his surface undisturbed," even though a covenant is taken from th grantee of the minerals that he will pay compensation for damage to the surface.[39]

But the right given may be so extensive as to carry with it a righ to let down the surface, and the courts are divided over the questio whether it is so extensive where the right given is to mine and re move "all the coal." It would seem as if the grantee of coal or o precious metal minerals should not have the right to deprive the sur face of support, unless the right to let down the surface is grante in express terms or by unavoidable implication, which does not exis where "all the coal" or "all the mineral" is granted; and that is th majority view.[40] But the view that the right to take "all the coal

[37] In Colorado, for instance, the statute provides that no person shall hav the right to mine under any building or improvement unless he shall first se cure the parties owning the same from all damages except by priority o right (Mills' Ann. St. Colo. §§ 3139, 3620); and there is a provision for injun tion (Id. § 3159). See, also, Civ. Code Idaho 1901, § 2571; Rev. St. Wyo. 189 § 2537; Rev. Codes N. D. 1899, § 1436; Ann. St. S. D. 1899, § 2666. In Col rado, though the bond is not exacted, the surface owner may still recove damages occasioned by the negligent removal of support. Campbell v. Louis ville Coal Min. Co., 39 Colo. 379, 89 Pac. 767, 10 L. R. A. (N. S.) 822.

[38] Compare SCRANTON v. PHILLIPS, 94 Pa. 15, where one who grante the surface expressly reserved the right to cause it to subside, if that shoul prove necessary in getting out all the coal. See, also, Madden v. Lehig Valley Coal Co., 212 Pa. 63, 61 Atl. 559.

[39] New Shariston Collieries Co. v. Earl of Westmoreland, 82 Law T. (N. S 725, 726. So in the converse case of reservation of minerals. Williams v. Ha 120 Pa. 485, 14 Atl. 379, 6 Am. St. Rep. 719; Fairview Coal Co. v. Hay (Pa.) 1 Atl. 383.

[40] ROBERTSON v. YOUGHIOGHENY RIVER COAL CO., 172 Pa. 566, 3 Atl. 706; Weaver v. Berwind-White Coal Co., 216 Pa. 195, 65 Atl. 545 WILMS v. JESS, 94 Ill. 464, 34 Am. Rep. 242; Mickle v. Douglas, 75 Iowa. 7 39 N. W. 198; BURGNER v. HUMPHREY, 41 Ohio St. 340; Horner v. Wa son, 79 Pa. 242, 21 Am. Rep. 55; Coleman v. Chadwick, 80 Pa. 81, 21 Am Rep. 93; Erickson v. Michigan Land & Iron Co., 50 Mich. 604, 16 N. W. 16 See Williams v. Gibson, 84 Ala. 228, 4 So. 350, 5 Am. St. Rep. 368; Yande v. Wright, 66 Ind. 319, 32 Am. Rep. 109.

means the right to take it even though the surface subsides, unless the right of surface support is expressly reserved, has its advocates.[41] The cases which deny to the grantor of the surface, who excepts the minerals, or "all" the minerals, and reserves mining privileges, the right to let down the surface granted,[42] are, of course, in support of the majority view.[43]

Because by the better view the owner who grants the minerals and keeps the surface retains the right of support despite the fact that his grant is of all the minerals, it seems equally the better view that the grantee of the surface has the right of subjacent support by the grantor who excepts all the minerals and reserves mining rights.[44] Moreover, as the surface owner's right of subjacent support is absolute, it would seem as if the subjacent owner has as absolute a right that the surface owner shall not cause his surface to drop down on the subjacent mine, or let water down into it, as a result of surface excavation.[45]

With reference to the right of subjacent support the weight of authority is that the right is not infringed until there is a subsidence,

[41] GRIFFIN v. FAIRMONT COAL CO., 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. (N. S.) 1115, where both sides of the question are vigorously presented.

[42] COLLINS v. GLEASON COAL CO. (Iowa) 115 N. W. 497; Lord v. Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812; Carlin v. Chappel, 101 Pa. 348, 47 Am. Rep. 722; Erickson v. Michigan Land & Iron Co., 50 Mich. 604, 16 N. W. 161. See Marvin v. Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322.

[43] An interesting side light is thrown on the question by the decisions dealing with ways of necessity. Where a grantor conveys away all his land except a piece from which he has no way out except over the granted land, the law implied a grant back to him from his grantee of a way of necessity, even though the grantor gives a deed containing general covenants of warranty. Brigham v. Smith, 4 Gray (Mass.) 297, 64 Am. Dec. 76; New York & N. E. R. Co. v. Commissioners, 162 Mass. 81, 38 N. E. 27; Whitehouse v. Cummings, 83 Me. 91, 21 Atl. 743, 23 Am. St. Rep. 756. This doctrine is a recognized exception to the general rule that in construing deeds the intention of the parties as manifested by the language used in the deed itself should govern, and the exception exists because public policy demands such an implied regrant, despite the general words of warranty in the deed. Buss v. Dyer, 125 Mass. 287, 291. Public policy would seem to call just as strongly for the implied right of subjacent support, and even though the deed purports to convey all the coal, with the right to remove all of it, the implication of the right of subjacent support is not as inconsistent with the express grant as is the implication of a way of necessity for the grantor in the face of the latter's general covenants of warranty.

[44] LORD v. CARBON IRON MFG. CO., 42 N. J. Eq. 157, 6 Atl. 812. The grantor may expressly reserve the right to let down the surface, however. Scranton v. Phillips, 94 Pa. 15.

[45] See Bagnall v. L. & N. W. Ry. Co., 7 Hurl. & N. 423, 11 Hurl. & C. 544.

and that each subsidence gives a new cause of action.[46] The question is important in the law of damages and with reference to the statute of limitations.[47]

The Right of Lateral Support.

The right of lateral support is not lost by the severance of title to the minerals from title to the surface. The surface owner still has the right, unless he has contracted it away. Even where the grantor of the surface, in excepting minerals and reserving mining rights, expressly stipulates that he shall not be liable for any damage occasioned thereby, such stipulation applies only to operations under the surface conveyed, and does not relieve the grantor from liability for taking away the lateral support from the surface by operations on other land.[48] Where gold placer claims worked by hydraulic process adjoin, it has been held that neither has a right of lateral support as against the other.[49]

But with reference to a breach of the right of lateral support where there are buildings, and yet the ground would have fallen if there had been none, it seems that, while the injury to the surface can be recovered for despite due care on the part of the defendant, any injury to plaintiff's buildings can be compensated only on proof of defendant's negligence.[50]

[46] Darley Main Colliery Co. v. Mitchell, 11 App. Cas. 127; Crumbo v. Wallsend Local Board [1891] 1 Q. B. 503; Smith v. Seattle, 18 Wash. 484, 51 Pac. 1057, 63 Am. St. Rep. 910; Bank of Hartford County v. Waterman, 26 Conn. 324; Church of Holy Communion v. Paterson Extension R. Co., 66 N. J. Law, 218, 49 Atl. 1030, 55 L. R. A. 81. The cases of NOONAN v. PARDEE, 200 Pa. 482, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722, and Chicago & A. R. Co. v. Brandau, 81 Mo. App. 1, are contra. In the latter case the doctrine is adopted that, where damages for subsidence would be inadequate to compensate for the injury done, injunction will lie against the removal of the mineral. In NOONAN v. PARDEE, supra, the cause of action for the subsidence is held to arise when the coal is removed without leaving proper support, and the statute of limitations is held to begin to run then. See TISCHLER v. PENNSYLVANIA COAL CO., 218 Pa. 82, 66 Atl. 988, to the same effect.

[47] The owner or lessee in possession at the time of subsidence is held not to be liable where the damage was caused by the working of the mine by a predecessor in title. Hall v. Duke of Norfolk [1900] 2 Ch. 493; Greenwall v. Low Beechburn Coal Co. [1897] 2 Q. B. 165.

[48] MATULYS v. PHILADELPHIA & READING COAL & IRON CO., 201 Pa. 70, 50 Atl. 823.

[49] HENDRICKS v. SPRING VALLEY MIN. & IRR. CO., 58 Cal. 190, 41 Am. Rep. 257.

[50] MATULYS v. PHILADELPHIA & READING COAL & IRON CO., 201 Pa. 70, 50 Atl. 823, where the court concedes that in cases of subjacent support the damage to houses may be recovered for, when the subsidence would

MORTGAGES.

140. Mining claims may be mortgaged; but, if they are unpatented, the mortgagee should secure himself against a default in the doing of the annual labor.

It is possible to mortgage an unpatented mining claim; but, owing to the need of the assessment work being done to keep the claim from being forfeited, such a mortgage is a precarious security, unless the mortgagee himself undertakes the doing of the annual labor. In such case the mortgage should be so drawn that the necessary assessment work and any additional development work may be paid out of the rents, issues, and profits of the claim before the mortgagee has to look to the claim itself.[51] A patented mining claim may, of course, be mortgaged in the same way that other real estate may be, and a continuance of mining by the mortgagor, if carried on in proper mining fashion, cannot be enjoined as waste.[52]

OTHER LIENS.

141. Except in a few jurisdictions, the same liens attach to mining claims as adhere to ordinary real estate.

The same liens which attach to ordinary real estate adhere in general to mining claims. The only states making exceptions are those where an unpatented mining claim is regarded as personalty. The result is that a mining claim is subject to a judgment lien,[53] to the lien of taxes on real estate,[54] and usually to the liens provided for

have taken place if the houses had not been there, even though no negligence is shown. Donk Bros. Coal & Coke Co. v. Novero, 135 Ill. App. 633, despite its syllabus, is a case of subjacent, and not of lateral, support. For the different views on lateral support, see 1 Tiffany, Real Property, 668–670.

[51] Charter Oak Life Ins. Co. v. Stephens, 5 Utah, 319, 15 Pac. 253. A mortgage of the "Jim Blaine mining claim" was held to pass the "Slap Jack mine" in Wemple v. Yosemite Gold Min. Co., 4 Cal. App. 78, 87 Pac. 280.

[52] Capner v. Flemington Min. Co., 3 N. J. Eq. 467.

[53] Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1; Bradford v. Morrison (Ariz.) 86 Pac. 6. But see, contra, Phœnix Min. & Mill. Co. v. Scott, 20 Wash. 48, 54 Pac. 777. For a case where a judgment lien reached the interest of a landowner in coal in place leased by him by a lease sometimes called a sale, see Coolbaugh v. Lehigh & Wilkes-Barre Coal Co., 213 Pa. 28, 62 Atl. 94, 4 L. R. A. (N. S.) 207.

[54] Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313. Where the surface is owned by one and the minerals by another, the minerals may be assessed and taxed separately from the surface. Stuart v. Commonwealth, 15 Ky. Law Rep. 513, 23 S. W. 367; Consolidated Coal Co. of St. Louis v. Baker, 135 Ill. 545, 26 N. E. 651, 12 L. R. A. 247. Under the Colorado statute the mineral survey number is so essential a part of the tax assessment description of a

in the mechanic's lien laws.[55] Moreover, since the issuance of a patent for a claim does not terminate the liens which attached to the unpatented claim,[56] a patent inures to the benefit of the lien holder.[57] We have already considered a mining partner's lien. In considering what is a lien on mining claims the only safe test is to ask what is a lien on other real estate.

EXAMINATIONS OF TITLE.

142. The examination of the title of a mining claim requires careful scrutiny of the ground, as well as of the abstract, and even where the claim is patented a search is necessary for certain papers antedating patent.

Patented Claims.

The examination of the title of a patented mining claim presents very few questions not applicable to ordinary real estate. Nothing need be looked for in the record prior to patent, except conveyances under which the patented title may pass by estoppel, disclosures as to co-tenants excluded from the application for patent, and liens saved by the terms of Rev. St. U. S. § 2332 (U. S. Comp. St. 1901, p. 1433). Outside of the record, however, certain investigations must be made even with reference to patented claims. By the act of April 28, 1904,[58] it is provided that the monuments established on the ground when the official survey is made shall constitute the highest authority as to what land is patented, and erroneous or inconsistent descriptions or calls in the patent shall give way thereto.

claim that its omission invalidates a tax sale. Hammon v. Nix, 104 Fed. 689, 44 C. C. A. 132.

[55] Where several locations are known as one mine, a mechanic's lien against the property under the consolidated name will be enforced. TREDINNICK v. RED CLOUD CONSOLIDATED MIN. CO., 72 Cal. 78, 13 Pac. 152; Phillips v. Salmon River Min. & Development Co., 9 Idaho, 149, 72 Pac. 886; Hamilton v. Delhi Min. Co., 118 Cal. 148, 50 Pac. 378. See Salt Lake Hardware Co. v. Chainman Mining & Electric Co. (C. C.) 137 Fed. 632. Under the California act a tract of land in process of development as "an oil mine" is subject to the act. Berentz v. Belmont Oil Min. Co., 148 Cal. 577, 84 Pac. 47, 113 Am. St. Rep. 308. Whether work done for a lessee can be charged against the lessors' interest or not depends, of course, on the state statute and the nature of the lease. See Higgins v. Mining Co., 148 Cal. 700, 84 Pac. 758, 113 Am. St. Rep. 344; Williams v. Eldora Enterprise Gold Min. Co., 35 Colo. 127, 83 Pac. 780; Littler v. Robinson, 38 Ind. App. 104, 77 N. E. 1145; Cascaden v. Wimbish (C. C. A.) 161 Fed. 241.

[56] Rev. St. U. S. § 2332 (U. S. Comp. St. 1901, p. 1433).

[57] Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1.

[58] 32 Stat. 545, c. 1796 (U. S. Comp. St. Supp. 1907, p. 477).

A surface examination, therefore, is essential to make certain that the monuments on the ground show that the claims correspond to the patent description, as well as to make sure that nobody is in possession under claim of hostile title.[59] Placer claims should also be inspected, to see whether they contain "known lodes." Due care also suggests that, where a patent is unaccompanied by a diagram of the ground patented, a certified copy of the plat of the claim should be obtained from the surveyor general, to be used in verifying the patent descriptions and the monuments on the ground.[60]

Unpatented Claims.

The title to unpatented claims is much more precarious than that to patented. The record title begins, of course, with the location certificate; but, because the location itself is not de jure until discovery, a subsequent record based upon a proper discovery may disclose the better title.[61] Moreover, as we have noticed, the mere fact of a discovery is not enough. It must be a discovery on unoccupied and unappropriated land of the United States. An inspection of the premises and an investigation into the legality of the discovery, the proper performance of the various acts of location, and the doing of the annual labor are indispensable. In the case of unpatented claims the record title must be examined; but the facts investigated outside of the record are of paramount importance. As in the case of other real estate, a purchaser takes subject to the rights of those openly in possession,[62] but not of those claiming under an unrecorded secret trust.[63] A survey should be advised, and a complete investigation as to conflicting mining claims and the ownership of conflict areas instituted. Because of the holding in several states that any part of an unpatented location which is made more than the statutory distance from the center of the vein by the devious course pursued by the vein is to that extent void for excess, the client should also be advised to make as careful an investigation into the question of the strike of the vein as is possible.

[59] COFFEE v. EMIGH, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125. See WETZSTEIN v. LARGEY, 27 Mont. 212, 70 Pac. 717.

[60] See Combs v. Virginia Iron, Coal & Coke Co., 32 Ky. Law Rep. 601, 106 S. W. 815.

[61] "Location and record may both be prior to those of a cross lode, and still the latter be the older and better title, by reason of an earlier discovery, perfected within the statutory time, of which the record gives no information." Patterson v. Hitchcock, 3 Colo. 533, 538.

[62] Reedy v. Wesson, 1 Alaska, 570; WETZSTEIN v. LARGEY, 27 Mont. 212, 70 Pac. 717.

[63] Reed v. Munn, 148 Fed. 737, 80 C. C. A. 215.

CHAPTER XXVII.

MINING REMEDIES.

Any book on mining law would be incomplete without some reference to the various legal remedies available in mining disputes.

EJECTMENTS AND SUITS TO QUIET TITLE.

143. Except in the case of adverse suits, ejectments and suits to quiet title are not varied by the fact that mining claims are the subject of litigation.

Ejectment is the action to try title to mining claims, except in those cases where the plaintiff is in possession. In the latter case a suit to quiet title is what results. In either legal proceeding the fact that a mining claim is being litigated about necessitates no special rules, except where it is brought to determine adverse claims in patent proceedings. The peculiarities of adverse suits in patent application matters have been discussed fully in chapter XIX, supra.[1] By statute ejectment will lie for a mining claim, although the paramount title is in the United States.[2] The same is true of a suit to quiet title.[3]

[1] As against all but the United States an unpatented claim is treated as real property held in fee, and will support a suit to quiet title. Mt. Rosa Mining, Milling & Land Co. v. Palmer, 26 Colo. 56, 56 Pac. 176; Fulkerson v. Chrisna Min. & Imp. Co., 122 Fed. 782, 58 C. C. A. 582. To be in possession at the time of wrongful entry it is, of course, not necessary to be actually on the property. Davis v. Dennis, 43 Wash. 54, 85 Pac. 1079. A trespasser, having possession of the surface of mineral land, may eject a subsequent trespasser who enters beneath the surface. Lincoln-Lucky & Lee Min. Co. v. Hendry, 9 N. M. 149, 50 Pac. 330.

[2] Rev. St. U. S. § 910 (U. S. Comp. St. 1901, p. 679). See Davidson v. Calkins (C. C.) 92 Fed. 230, 232.

[3] Fulkerson v. Chrisna Min. & Imp. Co., 122 Fed. 782, 58 C. C. A. 582.

TRESPASS.

144. Trespass is the action usually resorted to when damages are sought for the wrongful taking of ore.

Trespass is the action usually resorted to when damages are sought for the unlawful extraction of ore. This is true, even where the ore is taken on the dip of the vein outside the surface line planes extended downward, for the reason that the ownership and possession of a vein which has extralateral rights gives the owner of the apex of the vein possession of its dip between the bounding end line planes of his location extended as far as the dip goes.[4]

SAME—THE MEASURE OF DAMAGES.

144a. The measure of damages for the taking of ore varies in different jurisdictions. In some the good faith of the defendant will enable him to deduct the cost of getting out the ore, and in others it will not; and, to put it in another way, in some the bad faith of the defendant will prevent him from deducting the cost of getting out the ore, and in others it will not. In some the bad faith of the defendant makes him liable for exemplary damages, and in others it does not.

The real difficulty, where ore is taken, is the measure of damages. On that question there is great conflict of authority. It seems to be well settled that one who by innocent mistake of fact mines the ore of another or cuts down his standing timber has a right of a quasi contractual nature to mitigate the damages by deducting from the fair value of the ore or timber, after its severance from the soil, the amount which that value has been enhanced by his labor in getting out the ore and the timber.[5] In other words, the majority of

Where the title to minerals is severed from title to the surface, it seems that a suit to quiet title to the minerals under the surface may be maintained, though plaintiff is not in actual possession of the land. Combs v. Virginia Iron, Coal & Coke Co., 32 Ky. Law Rep. 601, 106 S. W. 815.

[4] FLAGSTAFF SILVER MINING CO. v. TARBET, 98 U. S. 463, 25 L. Ed. 253; MONTANA MIN. CO. v. ST. LOUIS MIN. & MILL. CO., 102 Fed. 430, 42 C. C. A. 415; Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66; Pardee v. Murray, 4 Mont. 234, 2 Pac. 16.

[5] WATERS v. STEVENSON, 13 Nev. 157, 29 Am. Rep. 293; Empire Gold Min. Co. v. Bonanza Gold Min. Co., 67 Cal. 406, 7 Pac. 810; DONOVAN v. CONSOLIDATED COAL CO., 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206; Austin v. Huntsville Coal & Min. Co., 72 Mo. 535, 37 Am. Rep. 446; DURANT MIN. CO. v. PERCY CONSOL. MIN. CO., 93 Fed. 166, 35 C. C. A. 252; Hall v. Abraham, 44 Or. 477, 75 Pac. 882; Colorado Cent. Consol. Min. Co. v. Turck, 70 Fed. 294, 17 C. C. A. 128; Anderson v. Besser, 131 Mich. 481, 91

the courts allow the plaintiff simply the value of the ore or timber before its severance from the land.[6] A few jurisdictions, however, do not allow the morally innocent defendant to deduct anything, but give the plaintiff the value of the ore after severance.[7] One jurisdiction favors the rule of allowing the recovery of a reasonable royalty against a defendant who acted in good faith.* If, in addition, to the defendant's action being in good faith, the plaintiff has knowingly let the defendant labor under the mistake, the defendant's right everywhere to a deduction of the increase in value which he gave the ore or timber would seem to be perfectly clear.[8] Some courts, which have repudiated the doctrine of exemplary damages, or which consciously or unconsciously are influenced by the doctrine of Britton v. Turner[9] and kindred quasi contract cases, allow the defendant who knowingly trespasses the same deduction as they allow an innocent defendant.[10] Other courts, either because they allow exemplary damages or because they deny to a wrongdoer a quasi contractual recovery, allow an innocent plaintiff to recover from the willful trespasser the value of the property at the time it is finally converted to the use of the trespassers; i. e., its value as enhanced by the labor of the defendant.[11] A similar rule has been applied in

N. W. 737; Crawford v. Forest Oil Co., 208 Pa. 5, 57 Atl. 47. See Montrozona Gold Min. Co. v. Thatcher, 19 Colo. App. 371, 75 Pac. 595. Nowhere, however, is the trespasser allowed to charge against the owner the cost of running levels, drifts, and cross cuts to reach the vein. St. Clair v. Cash Gold Mining & Milling Co., 9 Colo. App. 235, 241, 47 Pac. 466.

[6] Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617; EGE v. KILLE, 84 Pa. 333; DURANT MIN. CO. v. PERCY CONSOL. MIN. CO., 93 Fed. 166, 35 C. C. A. 252; Maye v. Yappen, 23 Cal. 306; United States v. Ute Coal & Coke Co. (C. C.) 158 Fed. 20. See, also, cases in note 5, supra.

[7] See White v. Yawkey, 108 Ala. 270, 19 So. 360, 32 L. R. A. 199, 54 Am. St. Rep. 159; IVY COAL & COKE CO. v. ALABAMA COAL & COKE CO., 135 Ala. 579, 33 So. 547, 93 Am. St. Rep. 46; Atlantic & G. C. Consol. Coal Co. v. Maryland Coal Co., 62 Md. 135.

* Sandy River Cannel Coal Co. v. White House Cannel Coal Co., 30 Ky. Law Rep. 1308, 101 S. W. 319.

[8] SINGLE v. SCHNEIDER, 24 Wis. 299; Gustin v. Embury-Clark Lumber Co., 145 Mich. 101, 108 N. W. 650.

[9] 6 N. H. 481, 26 Am. Dec. 713.

[10] WEYMOUTH v. CHICAGO & N. W. R. CO., 17 Wis. 550, 84 Am. Dec. 763; Carpenter v. Lingenfelter, 42 Neb. 728, 60 N. W. 1022, 32 L. R. A. 422; Omaha & Grant Smelting & Refining Co. v. Tabor, 13 Colo. 41, 21 Pac. 925, 5 L. R. A. 236, 16 Am. St. Rep. 185. But see St. Clair v. Cash Gold Mining & Milling Co., 9 Colo. App. 235, 47 Pac. 466. Such a jurisdiction naturally allows the same deduction where, in addition, the plaintiff's conduct is reprehensible. SINGLE v. SCHNEIDER, 30 Wis. 570.

[11] BENSON MINING & SMELTING CO. v. ALTA MINING & SMELTING

some states where the defendant's trespass was not willful, but was negligent.[12] Indeed, it has even been held that an additional recovery of exemplary damages may be had.[13] The question of damages for innocent or willful trespass is sometimes complicated by innocent or willful confusion of goods, and occasionally by accession.[14] It is also complicated at times by having the willful trespasser sell to an innocent third person, who is sued in trover.[15]

The damages above mentioned are recoverable only by the owner of the ore. A licensee cannot recover the value of ore in place tak-

CO., 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; Bolles Woodenware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; Dougherty v. Chestnutt, 86 Tenn. 1, 5 S. W. 444; United States v. Ute Coal & Coke Co. (C. C. A.) 158 Fed. 20; United States v. Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303; Cheesman v. Shreeve (C. C.) 40 Fed. 787; Cheeney v. Nebraska & C. Stone Co. (C. C.) 41 Fed. 740; Barton Coal Co. v. Cox, 39 Md. 1, 17 Am. Rep. 525; Baker v. Hart, 52 Hun, 363, 5 N. Y. Supp. 345. By statute in at least one state a diligent plaintiff may recover the highest market value of the ore converted at any time between the conversion and the verdict. Golden Reward Min. Co. v. Buxton Min. Co., 97 Fed. 413, 38 C. C. A. 228. See, also, Sunnyside Coal & Coke Co. v. Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

[12] Donovan v. Consolidated Coal Co., 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206; Sunnyside Coal & Coke Co. v. Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46. But see, contra, Durant Min. Co. v. Percy Consol. Min. Co., 93 Fed. 166, 35 C. C. A. 252. A deliberate refusal to learn about boundaries is more than negligence, and makes the defendant a willful trespasser. Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668, 64 C. C. A. 180. Compare United States v. Ute Coal & Coke Co. (C. C. A.) 158 Fed. 20, at page 24.

[13] FRANKLIN COAL CO. v. McMILLAN, 49 Md. 549, 33 Am. Rep. 280; Illinois & St. L. R. & Coal Co. v. Ogle, 92 Ill. 353.

[14] Cheesman v. Shreeve (C. C.) 40 Fed. 787; Little Pittsburg Con. Min. Co. v. Little Chief Con. Min. Co., 11 Colo. 223, 234, 17 Pac. 760, 7 Am. St. Rep. 226; Maloney v. King, 30 Mont. 158, 76 Pac. 4; Stone v. Marshall Oil Co., 208 Pa. 85, 57 Atl. 183, 65 L. R. A. 218, 101 Am. St. Rep. 904; Great Southern Gas & Oil Co. v. Logan Natural Gas & Fuel Co., 155 Fed. 114, 83 C. C. A. 574.

[15] In TUTTLE v. WHITE, 46 Mich. 485, 9 N. W. 528, 41 Am. Rep. 175, such an innocent purchaser of logs from one who willfully cut them from plaintiff's land was allowed to deduct only the enhanced value arising from the purchaser's money and labor; but in OMAHA & GRANT SMELTING & REFINING CO. v. TABOR, 13 Colo. 41, 56, 57, 21 Pac. 925, 5 L. R. A. 236, 16 Am. St. Rep. 185, such a purchaser of ore willfully severed was made liable for only the value of the ore less the reasonable and proper cost of raising it from the mine after it was broken and hauling it from the mine to the place of sale. The problem will be solved differently in the various jurisdictions. An innocent purchaser being liable in trover, it is perfectly clear that a knowing one is similarly liable. United States v. Ute Coal & Coke Co. (C. C. A.) 158 Fed. 20.

en by a trespasser, but can recover damages if the trespasser diminishes the supply, so that enough does not remain to satisfy his right.[16]

It has been held that a city in which the fee of its streets is vested in trust for the public has a right of action for the full value of coal taken from under such streets without its consent, even though the removal of the coal does not affect the use of the land for street purposes.[17]

Where ore has been taken by trespass and sold, the tort may be waived, and an action for money had and received maintained.[18]

TROVER AND REPLEVIN.

145. Trover and replevin may also be resorted to where ore has been taken, but neither trover nor replevin will lie for ore mined by a disseisor, unless the action is brought after the disseisor has been ejected.

What has been said of the measure of damages in trespass is true also of trover. "In very strict form, trespass is the proper remedy for a wrongful taking of personal property, and for cutting timber, or quarrying stone, or digging coal on another man's land and carrying it away; and yet the trespass may be waived and trover maintained, without giving up any claim for any outrage or violence in the act of taking. * * * But when the law does allow this departure from the strict form, it is not in order to enable the plaintiff, by his own choice of actions, to increase his recovery beyond just compensation, but only to give him a more convenient form for recovering that much." [19]

What is here said of trover is also true of replevin where a redelivery bond has been given,[20] though there seems to be no doubt that the property in its changed state belongs to the plaintiff unless the unintentional trespasser has acquired title by accession.[21]

[16] Arnold v. Bennett, 92 Mo. App. 156.

[17] Union Coal Co. v. City of La Salle, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326. But see City of Leadville v. Bohn Mining Co., 37 Colo. 248, 86 Pac. 1038, 8 L. R. A. (N. S.) 422.

[18] McGONIGLE v. ATCHISON, 33 Kan. 726, 7 Pac. 550; Alderson v. Ennor, 45 Ill. 128.

[19] FORSYTH v. WELLS, 41 Pa. 291, 80 Am. Dec. 617; United States v. Ute Coal & Coke Co. (C. C. A.) 158 Fed. 20. See Smoot v. Consolidated Coal Co., 114 Ill. App. 512. For a discussion of the technical ground on which greater recovery was once allowed in trover than in trespass, see 2 Sedgwick on Damages, §§ 500–503.

[20] HERDIC v. YOUNG, 55 Pa. 176, 93 Am. Dec. 739. See Single v. Schneider, 24 Wis. 299.

[21] See Anderson v. Besser, 131 Mich. 481, 91 N. W. 737 (timber).

But with reference both to trover and to replevin it must be borne in mind that, where there has been a disseisin prior to the mining of the ore, the adverse possession raises a question as to the title to the ground and to the ore which makes it impossible to maintain the action of trover or that of replevin.[22] In such case the real owner of the land must instead resort to his remedy for the possession of the land and mesne profits,[23] though it seems that, after the recovery of possession in ejectment, trover or replevin may be maintained for property severed during the disseisin.[24]

INJUNCTION.

146. The general equity doctrines about injunction apply in mining cases.

While in mining cases, as in others, temporary injunctive relief is normally granted simply to preserve the property pending the judicial determination of its ownership,[25] it must be noticed that under

[22] OPHIR SILVER MIN. CO. v. SUPERIOR COURT OF CITY & COUNTY OF SAN FRANCISCO, 147 Cal. 467, 82 Pac. 70; LEHIGH ZINC & IRON CO. v. NEW JERSEY ZINC & IRON CO., 55 N. J. Law, 350, 26 Atl. 920; Brown v. Caldwell, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660; National Transit Co. v. Weston, 121 Pa. 485, 15 Atl. 569. See Harrison v. Hoff, 102 N. C. 126, 9 S. E. 638; Page v. Fowler, 28 Cal. 605; Anderson v. Hapler, 34 Ill. 436, 85 Am. Dec. 318.

[23] "So long as the owner is disseised by the adverse possession of another, he must resort to his legal remedy to recover the principal thing—the possession of the land—and he cannot be permitted to institute separate suits for every act of his adversary which is merely incidental to that possession. When he recovers possession by ejectment, then in a single suit he may recover also damages for all that he lost by being deprived of the possession." LEHIGH ZINC & IRON CO. v. NEW JERSEY ZINC & IRON CO., 55 N. J. Law, 350, 358, 26 Atl. 920. Compare Wright v. Guier, 9 Watts (Pa.) 172, 177, 178, 36 Am. Dec. 108.

[24] See WILSON v. HOFFMAN, 93 Mich. 72, 52 N. W. 1037, 32 Am. St. Rep. 485; Alliance Trust Co. v. Hardwood Co., 74 Miss. 584, 21 South. 396, 36 L. R. A. 155, 60 Am. St. Rep. 531; Morgan v. Varick, 8 Wend. (N. Y.) 587; Pacific Live Stock Co. v. Isaacs (Or.) 96 Pac. 460. But see Brothers v. Hurdle, 32 N. C. 490, 51 Am. Dec. 400.

[25] ERHARDT v. BOARO, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; Lockhart v. Leeds, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. Ed. 263; Preteca v. Maxwell Land Grant Co., 50 Fed. 674, 1 C. C. A. 607; Dimick v. Shaw, 94 Fed. 266, 36 C. C. A. 347. Working for exploration only will not be enjoined. St. Louis Min. & Mill. Co. v. Montana Min. Co. (C. C.) 58 Fed. 129. Nor will an injunction against a defendant be dissolved because the complainant interferes with the enjoined premises to do necessary assessment work and to perform acts required to save insurance on the property from being forfeited. SILVER PEAK MINES v. HANCHETT (C. C.) 93 Fed. 76.

some state statutes mandatory injunctions issue to restore possession of the property to an ousted plaintiff.[26] Apart from such statutory remedies, which the federal courts may enforce if they see fit,[27] the general equity doctrines govern injunctions with reference to mining claims.[28] The granting or withholding of an injunction resting in the sound discretion of the trial court, the complainant's laches,[29] the solvency or insolvency of the parties,[30] and the relative inconveniences to the parties which will ensue if a temporary injunction issues,[31] must be considered. There is nothing peculiar in the application of the general equitable principles to mining claims beyond the frequent urgent need of injunctive relief because of the destructible nature of mineral deposits.†

[26] SPRAGUE v. LOCKE, 1 Colo. App. 171, 28 Pac. 142; Cole v. Cady, 2 Dak. 29, 3 N. W. 322.

[27] Aspen Mining & Smelting Co. v. Rucker (C. C.) 28 Fed. 220.

[28] See NEGAUNEE IRON CO. v. IRON CLIFFS CO., 134 Mich. 264, 96 N. W. 468. An injunction will not lie on proof of a single act of trespass. Parker v. Furlong, 37 Or. 248, 62 Pac. 490. But in a proper case trespass will be enjoined. Muldrick v. Brown, 37 Or. 185, 61 Pac. 428; Integrity Min. & Mill. Co. v. Moon (Mo. App.) 109 S. W. 1057; Oolagah Coal Co. v. McCaleb, 68 Fed. 86, 15 C. C. A. 270.

[29] Patterson v. Hewitt, 11 N. M. 1, 66 Pac. 552, 55 L. R. A. 658.

[30] LOCKHART v. LEEDS, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. Ed. 263; Clark v. Wall, 32 Mont. 219, 79 Pac. 1052. The mere insolvency of defendant is not enough to justify the granting of an injunction. Parker v. Furlong, 37 Or. 248, 62 Pac. 490. Nor will one be dissolved because of defendant's solvency. Mable Min. Co. v. Pearson Coal & Iron Co., 121 Ala. 567, 25 South. 754. See, also, Boyd v. Desrozier, 20 Mont. 444, 52 Pac. 53.

[31] COPPER KING v. WABASH MIN. CO. (C. C.) 114 Fed. 991; Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335; Berkey v. Berwood-White Coal Min. Co., 220 Pa. 65, 69 Atl. 329. Compare Crescent Min. Co. v. Silver King Min. Co., 14 Utah, 57, 45 Pac. 1093.

†A mining licensee, as such incapable of maintaining an action for unlawful detainer, was allowed an injunction to restrain a trespass upon his possession in Integrity Min. & Mill. Co. v. Moon (Mo. App.) 109 S. W. 1057.

ACCOUNTING.

147. An accounting will be ordered in a proper case.

Wherever proper, an accounting will be ordered.[32]

INSPECTION AND SURVEY.

148. Both inspection and survey may be ordered in equity, in the absence of statute; but in some states they are provided for by statute.

Independently of state statutes a court of equity has the power to compel an inspection and survey of mining claims when it is shown to be necessary to a proper determination of the issues between the parties.[33] For that matter, it has been held that where a trial court allows the evidence of one party to an action to be admitted as to indications and conditions found in a particular mining property over which that party has absolute control, and an inspection of which that party denies to his adversary, who wants to get a foundation for rebuttal, a new trial will be granted.[34]

But in a number of the mining law states and territories the matter of inspection and survey is regulated by statute.[35] Under the most of these statutes, as is true of equity's action in the absence of statute, the inspection and survey cannot be ordered, except in aid of a suit already started, though it may be ordered in the suit in which the order is asked.[36] But in Montana the statute authorizes an inspection

[32] SWEARINGEN v. STEERS, 49 W. Va. 312, 38 S. E. 510. See the discussion in chapter XXV, § 136a, on the right of a co-tenant to an accounting.

[33] BLUE BIRD MIN. CO. v. MURRAY, 9 Mont. 468, 23 Pac. 1022. See Montana Co. v. St. Louis Min. & Mill. Co., 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398; Thomas Iron Co. v. Allentown Min. Co., 28 N. J. Eq. 77; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Penny v. Central Coal & Coke Co., 138 Fed. 769, 71 C. C. A. 135; Duggan v. Davey, 4 Dak. 110, 26 N. W. 887.

[34] AMBERGRIS MIN. CO. v. DAY, 12 Idaho, 108, 85 Pac. 109.

[35] Code Civ. Proc. Cal. §§ 742, 743; Mills' Ann. St. Colo. §§ 3164, 3176; Code Civ. Proc. Idaho 1901, §§ 3383, 3384; Rev. Code Civ. Proc. Mont. § 6876; Comp. Laws Nev. § 252; Rev. Codes N. D. 1899, § 1442; Ann. St. S. D. 1899, § 2672; Rev. St. Utah 1898, §§ 3515, 3516. In Colorado either party has a right to have the jury view the premises. Laws Colo. 1893, p. 78, c. 42. See Ormund v. Granite Mountain Min. Co., 11 Mont. 303, 28 Pac. 289.

[36] PEOPLE v. DE FRANCE, 29 Colo. 309, 68 Pac. 267; State v. District Court, 26 Mont. 396, 68 Pac. 570, 69 Pac. 103.

and survey without suit, and the statute has been held to be constitutional.[37]

Where a jury is allowed to view premises, it seems that the jury, in applying and weighing the evidence, is to consider the knowledge acquired by the view;[38] but states differ on that general question.

RECEIVERSHIPS.

149. The general rules about receiverships apply to receiverships of mining property.

A mining claim may require the appointment of a receiver.[39] Unless otherwise specified by statute or by the order appointing him, a receiver of mining property has no power to work the same, except that in the case of unpatented claims he may perform the assessment work necessary to save them from forfeiture. The business of a receiver of a mining property is to preserve the property and to close out the business turned over to him,[40] and a court of equity has no authority to direct its receiver in charge of mines to carry on a general mining business and to charge up the losses against the property as a preference over prior recorded mortgages and incumbrances.[41]

[37] Montana Co. v. St. Louis Min. & Mill. Co., 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398; State v. District Court, 26 Mont. 416, 424, 68 Pac. 794, 946. The Montana court will not allow the statute to be made an instrument of injustice and oppression. State v. District Court, 25 Mont. 572, 65 Pac. 1020; Id., 28 Mont. 528, 73 Pac. 230; Id., 30 Mont. 206, 76 Pac. 206.

[38] McCORMICK v. PARRIOTT, 33 Colo. 382, 80 Pac. 1044. A view need not be ordered where the evidence does not make out a case sufficient to go to the jury. McMillen v. Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 105 Am. St. Rep. 64. That the trial court by consent of the parties inspected the claim is a fact to which the upper court can give no weight. Dibble v. Castle Chief Gold Min. Co., 9 S. D. 618, 70 N. W. 1055; Golden v. Murphy, 27 Nev. 379, 75 Pac. 625, 76 Pac. 29. That a party to the suit may be appointed to show the mine to the jury, see Wilson v. Harnette, 32 Colo. 172, 75 Pac. 395. On misconduct by the guide, corrected by an instruction, see Beals v. Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

[39] See Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673; Hill v. Taylor, 22 Cal. 191; Parker v. Parker, 82 N. C. 165.

[40] Hendrie & Bolthoff Mfg. Co. v. Parry, 37 Colo. 359, 86 Pac. 113.

[41] DALLIBA v. RIGGS, 11 Idaho, 364, 82 Pac. 107, 114 Am. St. Rep. 267; Farmers' Loan & Trust Co. v. Grape Creek Coal Co. (C. C.) 50 Fed. 481, 16 L. R. A. 603. But see Traylor v. Barry, 96 Ill. App. 644.

PARTITION.

150. The general rules about partition apply to mining property.

Both patented and unpatented mining claims may be partitioned.[42] From the difficulty of making an actual division of the ground that will be equitable, partition proceedings affecting mining claims usually result in a sale of the property and a division of the proceeds;‡ but, whenever possible, the ground will actually be divided.[43] An actual division by parol agreement of partition will be upheld.[44] Where the surface of mineral lands is owned by one person and the mineral underneath by another, the surface land may be partitioned the same as if there were no severance.[45] Where a lessee participates in a partition of oil land, and recognizes the several ownerships of the partitioned premises, the character of his holding may change from that of

[42] HUGHES v. DEVLIN, 23 Cal. 502; Aspen Mining & Smelting Co. v. Rucker (C. C.) 28 Fed. 220. But see Strettell v. Ballou (C. C.) 9 Fed. 256. For necessary averments to secure a partition of the interests of lessees of the usual oil and gas lease, see Beardsley v. Kansas Natural Gas Co. (Kan.) 96 Pac. 859.

‡ "Mining property from its very nature is not as a rule susceptible of partition. The ores are unevenly distributed, while the values are purely conjectural until tested by extended development and careful tests, which can only be obtained as the result of a vast expenditure of money and time; so that it is known in advance of bringing suit for partition that the only feasible relief that can be awarded is a decree for the sale of the property." Brown v. Challis, 23 Colo. 145, 46 Pac. 679, 680. See Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263; Hall v. Vernon, 47 W. Va. 295, 34 S. E. 764, 81 Am. St. Rep. 791.

[43] Dall v. Confidence Silver Min. Co., 3 Nev. 531, 93 Am. Dec. 419; Mitchell v. Cline, 84 Cal. 409, 24 Pac. 164. For the rule under the Alaska Code, see Manley v. Boone (C. C. A.) 159 Fed. 633. So far as possible improved parts of the land will be awarded to those equitably entitled to the improvements. BRINKMEYER v. RANKIN, 22 Ky. Law Rep. 1881, 61 S. W. 1007.

[44] Four Hundred & Twenty Min. Co. v. Bullion Min. Co., 3 Sawy. (U. S.) 346, Fed. Cas. No. 4,989. For a similar holding as to adoption of boundary lines, see TONOPAH & S. L. MIN. CO. v. TONOPAH MIN. CO. OF NEVADA (C. C.) 125 Fed. 400. But an oral agreement as to boundary lines cannot affect the extralateral rights of one who has bought in ignorance of the agreement, where those extralateral rights are asserted by him against third parties owning junior claims. Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 131 Fed. 591, 66 C. C. A. 99. An agreement that one should locate and get patent and convey to the others their shares was held not to constitute a partition, though the others occupied their agreed tracts, in Mullins v. Butte Hardware Co., 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430.

[45] SMITH v. JONES, 21 Utah, 270, 60 Pac. 1104; Same v. Forbes, Id.

lessee of the joint owners of the whole tract to lessee of each owner of the respective tracts.**

CONDEMNATION PROCEEDINGS—EMINENT DOMAIN.

151. Except in California, and possibly, also, in Colorado, mining is held in the mining states and territories to be a public use, justifying condemnation proceedings under statutes permitting such proceedings for mining purposes. Under the Colorado Constitution some condemnation may take place for private mining use.

In the different mining states and territories, condemnation proceedings are authorized for various purposes. By the federal statutes rights of way are granted over public lands,[46] but by the state statutes rights of way may be condemned over private property. The different state statutes must be consulted, for they are not all alike. In Colorado the state Constitution was held not to authorize a statute providing for condemning a right of way for a tramway,[47] yet it was under a Utah statute providing for condemnation of a right of way for a tramway that the case went to the United States Supreme Court which caused that body to declare that the determination by the Legislature and the Supreme Court of a mining state that mining is a public use justifying condemnation proceedings by one private mine owner against another should be accepted.[48] California and Colorado have been the only mining law states refusing to find a public use in mining sufficient to justify condemnation,[49] and it is to be expected

** J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co. (Tex. Civ. App.) 107 S. W. 609.

[46] Rev. St. U. S. § 2477 (U. S. Comp. St. 1901, p. 1567); Hobart v. Ford, 6 Nev. 77.

[47] People v. District Court, 11 Colo. 147, 17 Pac. 298. The Colorado court thought in that case that a tramway to a privately owned mining claim was clearly for a private use, but the Utah court has declared that it is for a public use. Highland Boy Gold Min. Co. v. Strickley, 28 Utah, 215, 78 Pac. 296, 1 L. R. A. (N. S.) 976, 107 Am. St. Rep. 711.

[48] STRICKLEY v. HIGHLAND BOY GOLD MIN. CO., 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581. Compare Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085 (irrigation). On condemnation for a tunnel, see Tanner v. Treasury Tunnel Mining & Reduction Co., 35 Colo. 593, 83 Pac. 464, 4 L. R. A. (N. S.) 106.

[49] Consolidated Channel Co. v. Central Pac. R. Co., 51 Cal. 269; People v. Pittsburgh R. Co., 53 Cal. 694; Amador Queen Min. Co. v. Dewitt, 73 Cal. 482, 15 Pac. 74; People v. District Court of Pitkin County, 11 Colo. 147, 17 Pac. 298. The situation in Colorado is better than that in California, because the Colorado Constitution allows ways of necessity and reservoirs, drains, flumes, or ditches on or across private lands to be taken for mining

that the United States Supreme Court decision will work a change in the rule in those states. The other mining law states and territories have adopted the proper view that mining is a public use justifying condemnation.[50] A recent Nevada statute allowing the location of minerals in unfenced and unimproved privately owned land, and the condemnation of the land located on payment of a compensation to the owner without considering the minerals, would seem, however, to be unconstitutional.[51]

PERSONAL INJURY ACTIONS.

152. The recovery of damages for personal injuries received in mining is governed by the same rules as prevail in equally hazardous occupations.

The same rules govern the recovery of damages against mine owners for personal injuries as prevail in equally hazardous businesses. The reader is referred to treatises on the law of torts for those rules.

ADVERSE POSSESSION—STATUTES OF LIMITATION.

153. Adverse possession of mining property does not differ from adverse possession of other real property. The title to unpatented mining property may be acquired by adverse possession, just as the title to patented mining property may be; but the running of the statute against an unpatented claim will be interrupted by the issuance of a patent to the disseisee.

It is well settled that title to an unpatented mining claim may be acquired by adverse possession.[52] This follows logically from the provisions of Rev. St. U. S. § 910 (U. S. Comp. St. 1901, p. 679), re-

purposes, even though for private use. Const. Colo. art. 2, §§ 14, 15. The Colorado Supreme Court has recently shown an enlarged conception of mining as a public use in Tanner v. Treasury Tunnel Mining & Reduction Co., 35 Colo. 593, 83 Pac. 464, 4 L. R. A. (N. S.) 106.

[50] Highland Boy Gold Min. Co. v. Strickley, 28 Utah, 215, 78 Pac. 296, 1 L. R. A. (N. S.) 976, 107 Am. St. Rep. 711; Dayton Gold & Silver Min. Co. v. Seawell, 11 Nev. 394; Overman Silver Min. Co. v. Corcoran, 15 Nev. 147; Douglass v. Byrnes (C. C.) 59 Fed. 31; Byrnes v. Douglas, 83 Fed. 45, 27 C. C. A. 399; Butte, A. & P. Ry. Co. v. Montana U. Ry. Co., 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508. Compare Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376 (irrigation).

[51] Laws Nevada 1907, p. 140, c. 65.

[52] GLACIER MOUNTAIN SILVER MIN. CO. v. WILLIS, 127 U. S. 472, 8 Sup. Ct. 1214, 32 L. Ed. 172; Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047; Cox v. Clough, 70 Cal. 345, 11 Pac. 732; Herriman Irr. Co. v. Butterfield Min. & Mill. Co., 19 Utah, 453, 57

quiring each mining case to be adjudged by the law of possession, regardless of the fact that the paramount title to the land is in the United States. Moreover, in Rev. St. U. S. § 2332 (U. S. Comp. St. 1901, p. 1433), express provision is made that possession of a mining claim for the period of the state statute of limitations "shall be sufficient to establish a right to patent thereto * * * in the absence of any adverse claim," and, despite some decisions to the contrary,[53] it would seem to be clear that, even if there is an adverse claim, the law of possession shall govern.[54] Twenty years' open occupation of a mining claim under color of title will entitle a plaintiff to enjoin a location of the same ground by defendant, even though no evidence is introduced to show the devolution of title from the original locator to the plaintiff.[55] In most mining law states is seems that a much shorter time will suffice.[56]

But the running of the statute of limitations will be interrupted by the issuance of patent to the record owner.[57] Any adverse possession

Pac. 537, 51 L. R. A. 930; Lavagnino v. Uhlig, 26 Utah, 1, 71 Pac. 1046, 99 Am. St. Rep. 808; Four Hundred & Twenty Min. Co. v. Bullion Min. Co., 9 Nev. 240; Bradley v. Johnson, 11 Idaho, 689, 83 Pac. 927; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87. See Shafer v. Constans, 3 Mont. 369. Where a purchaser of mining claims has held them adversely for the period of limitation, it will be presumed against an adverse claimant that the claims were regularly located. BUFFALO ZINC & COPPER CO. v. CRUMP, supra.

[53] Cleary v. Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207; McGowan v. Maclay, 16 Mont. 234, 40 Pac. 602.

[54] See Barklage v. Russell, 29 Land Dec. Dep. Int. 401; Belk v. Meagher 104 U. S. 279, 287, 26 L. Ed. 735; Four Hundred & Twenty Min. Co. v. Bullion Min. Co., 9 Nev. 240; Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87; Risch v. Wiseman, 36 Or. 484, 59 Pac. 1111, 78 Am. St. Rep. 783; Harris v. Equator Min. & S. Co. (C. C.) 8 Fed. 863. See, also, Four Hundred & Twenty Min. Co. v. Bullion Min. Co., 3 Sawy. (U. S.) 634, Fed. Cas. No. 4,989.

[55] RISCH v. WISEMAN, 36 Or. 484, 59 Pac. 1111, 78 Am. St. Rep. 783. See Minnesota & Montana Land & Improvement Co. v. Brasier, 18 Mont. 444, 45 Pac. 632.

[56] Seven years in Colorado. Eberville v. Leadville Tunneling, Mining & Drainage Co., 28 Colo. 241, 64 Pac. 200. (Under one statute it was five years. Glacier Mountain Silver Min. Co. v. Willis, 127 U. S. 472, 8 Sup. Ct. 1214, 32 L. Ed. 172.) One year in Montana Horst v. Shea, 23 Mont. 390, 59 Pac. 364. Two years in Nevada. South End Mining Co. v. Tinney, 22 Nev. 19, 35 Pac. 89; Id., 22 Nev. 221, 38 Pac. 401. Seven years in Utah. Lavagnino v. Uhlig, 26 Utah, 1, 71 Pac. 1046, 99 Am. St. Rep. 808. Possession for the statutory period does not of course relieve the possessor from the annual labor requirement and upon his failure to perform the annual labor the claim may be relocated. Upton v. Santa Rita Min. Co. (N. M.) 89 Pac. 275.

[57] TYEE CONSOL. MIN. CO. v. LANGSTEDT, 136 Fed. 124, 69 C. C. A. 548; Tyee Consol Min. Co. v. Jennings, 137 Fed. 863, 70 C. C. A. 393.

must either be asserted in the patent proceedings, by adverse claim and suit, or else must date from the issuance of patent or later.[58] While a receiver's receipt vests in the patent applicant the equitable title, it is held that the statute of limitations does not run until patent actually issues.[59]

What constitutes adverse possession of mining claims is the same as what constitutes it in other real property. Secret underground mining will not serve;[60] but such open, continuous, and exclusive acts of possession and of mining as the nature of the business and customs of the country call for will suffice.[61] Where the estate in the minerals has been severed from that in the surface, adverse possession of the surface does not carry with it adverse possession of the minerals.[62]

One tenant in common cannot get title by adverse possession against his co-tenants by taking exclusive possession of the property, without notice to his co-tenants of a hostile claim.[63]

[58] SOUTH END MINING CO. v. TINNEY, 22 Nev. 221, 38 Pac. 401; Mayer v. Carothers, 14 Mont. 274, 36 Pac. 182; Clark v. Barnard, 15 Mont. 176, 38 Pac. 834.

[59] Id. See REDFIELD v. PARKS, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327. But see Hamilton v. Southern Nev. Gold & Silver Min. Co. (C. C.) 33 Fed. 562.

[60] Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co. (C. C.) 139 Fed. 838; Pardee v. Murray, 4 Mont. 234, 2 Pac. 16; Pierce v. Barney, 209 Pa. 132, 58 Atl. 152; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57. See Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co., 131 Fed. 579, 66 C. C. A. 299; Plummer v. Hillside Coal & Iron Co., 104 Fed. 208, 43 C. C. A. 490.

[61] Stephenson v. Wilson, 37 Wis. 482; Hamilton v. Southern Nev. Gold & Silver Min. Co. (C. C.) 33 Fed. 562; Four Hundred & Twenty Min. Co. v. Bullion Min. Co., 9 Nev. 240. Adverse possession of a mining claim cannot extend to a portion of a vein apexing outside of the claim, for that is no part of it. Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57. For instances of insufficient adverse possession, see Costello v. Muheim (Ariz.) 84 Pac. 906; Gill v. Fletcher, 74 Ohio St. 295, 78 N. E. 433, 113 Am. St. Rep. 962; Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485. Lessees of mining ground in possession, who oust their lessor by relocating the ground and setting up an adverse title in themselves, forfeit all rights under the lease. Silver City Gold & Silver Min. Co. v. Lowry, 19 Utah, 334, 57 Pac. 11.

[62] CATLIN COAL CO. v. LLOYD, 176 Ill. 275, 52 N. E. 144; Id., 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216; Caldwell v. Copeland, 37 Pa. 427, 78 Am. Dec. 436; Armstrong v. Caldwell, 53 Pa. 284; ALGONQUIN COAL CO. v. NORTHERN COAL & IRON CO., 162 Pa. 114, 29 Atl. 402. See Lulay v. Barnes, 172 Pa. 331, 34 Atl. 52. Compare Yellow Poplar Lumber Co. v. Thompson's Heirs (Va.) 62 S. E. 358.

[63] Faubel v. McFarland, 144 Cal. 717, 78 Pac. 261.

CHAPTER XXVIII.

WATER RIGHTS AND DRAINAGE.

THE APPROPRIATION OF WATER DOCTRINE.

154. The appropriation of water doctrine prevails in whole or in part in the several mining law states and territories.

155. The appropriation of water is regulated to-day by local statutes, and the usual steps in an appropriation are: (1) The posting and record of a notice of appropriation; (2) the reasonably diligent diversion of the water; and (3) the application of the water within a reasonable time to a beneficial use. Mining is a beneficial use, and appropriators take in the order of appropriation.

It so happens that the leading mining law states and territories are those where the appropriation of water doctrine in whole or in part prevails. The development of the appropriation of water doctrine was contemporaneous with that of the mining law, because it met a mining need. As Mr. Justice Field pointed out in an early case, "the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains, and through cañons and ravines, to supply communities engaged in mining, as well as for agriculturalists and ordinary consumption. Numerous regulations were adopted or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights of water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs

were appealed to in controversies in the state courts, and received their sanction; and properties to the value of many millions rested upon them." [1]

Starting as it did at a time when the federal government owned both the land and the water which flowed over the land, and fostered as it was by the acquiescence of the federal government in the repudiation by the settlers of the riparian right doctrine,[2] the appropriation of water doctrine was firmly established before the riparian right doctrine could give effective resistance. In the act of 1866 the appropriation of water doctrine was expressly sanctioned by Congress.[3] By the subsequent act of 1870 all patents were to be granted and preemptions and homesteads allowed subject to all vested water rights and to all ditch and reservoir rights connected with such water rights.[4] The acts of 1866 and of 1870 were held to be "rather the voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one"; [5] but they at least expressly sanctioned what before had rested only on implication.

The California System.

Despite the sanction given to the appropriation of water doctrine by the federal government, however, the mining law states of California, North Dakota, Oregon, South Dakota, Washington, and probably, also, Montana, have only in part adopted it. They have what is known as the "California System." [6] Appropriation of water may there be made prior to the issuance of a federal patent to riparian land, and the patent will therefore be subject to prior appropriations; but, if the patentee chooses to stand on his rights as a riparian owner, no appropriation subsequent to his patent that will diminish his riparian rights can be made.[7] In such states it is of the first importance to determine when the patent takes effect within this rule, and it seems

[1] JENNISON v. KIRK, 98 U. S. 453, 458, 459, 25 L. Ed. 240.

[2] ATCHISON v. PETERSON, 20 Wall. (U. S.) 507, 22 L. Ed. 414.

[3] Rev. St. U. S. § 2339 (U. S. Comp. St. 1901, p. 1437).

[4] Rev. St. U. S. § 2340 (U. S. Comp. St. 1901, p. 1437).

[5] BRODER v. NATOMA WATER & MINING CO., 101 U. S. 274, 25 L. Ed. 790.

[6] Long on Irrigation, § 6; Mills' Irrigation Manual, § 20; Weil's Water Rights in the Western States (2d Ed.) § 22.

[7] LUX v. HAGGIN, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; BROWN v. BAKER, 39 Or. 66, 65 Pac. 799, 66 Pac. 193; Carson v. Gentner, 33 Or. 512, 52 Pac. 506, 43 L. R. A. 130; BENTON v. JOHNCOX, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; SMITH v. DENNIFF, 24 Mont. 20, 60 Pac. 398, 81 Am. St. Rep. 408. See CRUSE v. McCAULEY (C. C.) 96 Fed. 369.

clear that it takes effect by relation from the time of the initial step in the acquisition of title.[8]

The Colorado System.

But in Arizona, Colorado, Idaho, Nevada, New Mexico, Utah, and Wyoming there are no riparian rights, and in such states and territories the appropriation doctrine of water rights is supreme, whether the appropriation is made before patent to the land on the banks of the stream or after such patent.[9] The system of water rights prevailing in these states and territories is known as the "Colorado System." [10]

The Method of Appropriating Water.

While it is beyond the scope of this book to go into a detailed discussion of the appropriation of water doctrine, a word must be said about the method of appropriating water. Appropriations were originally governed by local customs and rules, but to-day they are regulated by statute. Prior to statute the way to appropriate was to make a diversion of the water with an intent to apply it to beneficial uses, and then to follow up that diversion by actually applying it with reasonable diligence to such beneficial uses. If the diversion was thus followed up, the law would date the right to appropriate the water by relation as of the time when the work of building the dam or ditch to divert the water began.[11] But since the statutes have prescribed, in addition to the foregoing steps, the posting and record of a notice, and have provided that a compliance with the statute shall cause the water right to date from the posting of the notice, the courts are

[8] STURR v. BECK, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761; Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. 352; McGuire v. Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; Faull v. Cooke, 19 Or. 455, 26 Pac. 662, 20 Am. St. Rep. 836; BENTON v. JOHNCOX, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912.

[9] COFFIN v. LEFT HAND DITCH CO., 6 Colo. 443; Jones v. Adams, 19 Nev. 78, 6 Pac. 442, 3 Am. St. Rep. 788; Reno Smelting, Milling & Reduction Works v. Stevenson, 20 Nev. 269, 21 Pac. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364. See Hammond v. Rose, 11 Colo. 524, 19 Pac. 466, 7 Am. St. Rep. 258. And this is true even though the patent antedates the act of 1866. Twaddle v. Winters (Nev.) 85 Pac. 280. The right of a state to adopt the appropriation of water doctrine as a system is recognized in UNITED STATES v. RIO GRANDE DAM & IRRIGATION CO., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136. See STATE OF KANSAS v. STATE OF COLORADO, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838; Id., 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

[10] Mills' Irrigation Manual, § 21; Weil's Water Rights in the Western States (2d Ed.) § 34.

[11] Irwin v. Strait, 18 Nev. 436, 4 Pac. 1215; Osgood v. El Dorado Water & Deep Gravel Min. Co., 56 Cal. 571.

inclined to say that there shall be no relation back in favor of one, however diligent, who does not comply with the statute. An appropriation may still be made without complying with the statutory requirements as to the posting and recording of a notice,[12] because the actual application of the water to a beneficial use is the best kind of notice of an appropriation;[13] but such an appropriation can no longer have the benefit of that relation back to which it was entitled before there was any statute.[14] Even under the statutes it still remains true that to constitute an appropriation there must be an appropriator who, with the intent to apply the water to some beneficial use, diverts it and then within a reasonable time actually applies it to that or an equivalent use.[15] Such an appropriation of water constitutes a water right which has priority over subsequent appropriations. Such water right is property, which in a proper case may be

[12] DE NECOCHEA v. CURTIS, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454. See Murray v. Tingley, 20 Mont. 260, 50 Pac. 723.

[13] Wells v. Mantes, 99 Cal. 583, 34 Pac. 324. "The term 'appropriation' is often loosely used by the authorities, and in general it is used with reference to a claim to the use of the water of a public stream from the time of the inception of the right, at all the intermediate stages, and down to the time when the last act is accomplished by which the right is finally and completely secured. An appropriation proper is not made until there has been an actual application of the water claimed to some beneficial purpose or some useful industry. All rights acquired prior to this time, at whatsoever step in the process, amount simply to a claim of an appropriation; but they are none the less rights and privileges which may be asserted and maintained against all persons not entitled to priority in rights and privileges of like nature. * * * So that actual user for a beneficial purpose is the true and only final test touching the question whether a party's claim has ripened into a valid appropriation. There can be no constructive appropriation, nor can any step required to be taken throughout the whole project and course of water appropriations be constructively accomplished. It is the actual physical performance of every essential requisite, from the time the purpose is definitely conceived down to the ultimate user of the water in connection with the advancement of some useful and beneficial industry, that matures and finally accomplishes the 'appropriation.'" NEVADA DITCH CO. v. BENNETT, 30 Or. 59, 89–91, 45 Pac. 472, 60 Am. St. Rep. 777.

[14] MURRAY v. TINGLEY, 20 Mont. 260, 50 Pac. 723; PYKE v. BURNSIDE, 8 Idaho, 487, 69 Pac. 477. See Sand Point Water & Light Co. v. Panhandle Development Co., 11 Idaho, 405, 83 Pac. 347. While this result is based on the supposed intent of the Legislature in passing the statute, it would seem as if nothing short of express legislative prohibition to that effect should be allowed to prevent that relation back which, but for the statute, would have existed. See MOYER v. PRESTON, 6 Wyo. 308, 44 Pac. 845, 71 Am. St. Rep. 914.

[15] CARTER v. WAKEMAN, 42 Or. 147, 70 Pac. 393.

alienated.[16] The different appropriators take in the order of their appropriations.

Mining as a Beneficial Use.

That the use of water in mining is a beneficial application of it within the appropriation law doctrine has never been doubted. Because mining was the very beneficial use which first called the appropriation of water doctrine into existence, it has, indeed, been especially favored. An extreme instance of such favoritism is found in the case where it was held that a placer location which covered both banks of a stream operated as an appropriation of all the waters of the stream so far as they were necessary for working the claim.[17] That decision must surely be qualified by letting the appropriation be effective only if before third parties appropriate the water it is applied with reasonable diligence to placer mining purposes.[18] Another case of favoritism to the mine owner is the rule that water encountered in mining and allowed to escape through a tunnel cannot be appropriated in such a way as to prevent the mine owner from diverting it to his own uses before it leaves the mining claim.[19] But, in general, an appropriation of water for mining purposes or flowing from mining claims is governed by the same rules as an appropriation of water for other purposes or flowing from other property.

[16] In Colorado a water right is realty. Wyatt v. Larimer & Weld Irrigation Co., 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280. But it does not pass as appurtenant to land unless the terms of the deed or extraneous evidence show affirmatively that such was the intention of the parties. Bessemer Irrigating Ditch Co. v. Woolley, 32 Colo. 437, 76 Pac. 1053, 105 Am. St. Rep. 91. In Utah it passes, unless expressly reserved. Fisher v. Bountiful City, 21 Utah, 29, 59 Pac. 520. See, also, Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025; Turner v. Cole, 31 Or. 154, 49 Pac. 971; Tucker v. Jones, 8 Mont. 225, 19 Pac. 571.

[17] SCHWAB v. BEAM (C. C.) 86 Fed. 41. See, also, Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, where one who appropriated water for a particular mining claim, which he worked out and abandoned, was allowed to apply the water to still another claim in priority to one who appropriated before the first claim was worked out.

[18] RODGERS v. PITT (C. C.) 129 Fed. 932. The case of SCHWAB v. BEAM is contra. The establishment of a military reservation upon a stream does not prevent an appropriation of water from the stream which does not interfere with a previous appropriation for the use of such reservation. Krall v. United States, 79 Fed. 241, 24 C. C. A. 543.

[19] CRESCENT MIN. CO. v. SILVER KING MIN. CO., 17 Utah, 444, 54 Pac. 244, 70 Am. St. Rep. 810; CARDELLI v. COMSTOCK TUNNEL CO., 26 Nev. 284, 66 Pac. 950. See Fairplay Hydraulic Min. Co. v. Weston, 29 Colo. 125, 67 Pac. 160; Ripley v. Park Center Land & Water Co., 40 Colo. 129, 90 Pac. 75.

POLLUTION OF WATER—DÉBRIS.

156. An appropriator of water may impair the quality of the water in the stream only so far as may be necessary to its application to his beneficial use, and then not to an extent unreasonably to interfere with the fair enjoyment of the water by other appropriators.

157. In California a federal act has created a Débris Commission to license and regulate placer mining on certain rivers, where such mining was covering farms and orchards with ruinous débris.

Because in appropriation law states one beneficial use is as good as another, and because the application of water to mining uses necessarily makes the undissipated part returned to the stream deteriorate more or less the quality of the water in the stream, the appropriation law states have inevitably come to look at the pollution of the water by a prior mining appropriator with more indulgence than was possible for an English court. The common-law right of a riparian proprietor to have the water come down to him substantially undiminished in quantity and unimpaired in quality has been changed in those states to a right on the part of a subsequent appropriator to have the prior appropriator diminish the quantity of water coming down and impair its quality only so far as may be the natural and reasonably necessary consequence of its beneficial use by the prior appropriator.[20] A prior appropriator down the stream can, of course insist that the subsequent appropriator up the stream treat him with even more consideration than that.[21] Even in the appropriation law states, however, a beneficial user of water may not taint the water by putting in poisonous chemicals;[22] but, short of that, the question has been one of fact as to whether the deterioration of the quality of the water is an unreasonable interference with the fair enjoyment of the water by other appropriators.[23]

[20] ALDER GULCH CON. MIN. CO. v. HAYES, 6 Mont. 31, 9 Pac. 581; Suffolk Gold Mining & Milling Co. v. San Miguel Consolidated Mining & Milling Co., 9 Colo. App. 407, 48 Pac. 828. See criticism of the decree in the last case in 2 Lindley on Mines (2d Ed.) § 841. But see Otaheite Gold & Silver Min. & Mill. Co. v. Dean (C. C.) 102 Fed. 929.

[21] Phœnix Water Co. v. Fletcher, 23 Cal. 481; Wixon v. Bear River and Auburn Water & Mining Co., 24 Cal. 367, 85 Am. Dec. 69. But see Atchison v. Peterson, 1 Mont. 561; Id., 20 Wall. (U. S.) 507, 22 L. Ed. 414.

[22] Crane v. Winsor, 2 Utah, 248.

[23] MONTANA CO. v. GEHRING, 75 Fed. 384, 21 C. C. A. 414; Otaheite Gold & Silver Min. & Mill. Co. v. Dean (C. C.) 102 Fed. 929. Even in Pennsylvania, where the riparian right doctrine exists, the doctrine prevailing in

Débris.

In a state where placer mining is a leading industry, the fact that tailings are carried into an irrigation ditch and upon the land below because of the operation of a placer mine will not justify an injunction, if the damage to the lower proprietor is nominal or slight.[24] The fact that, in addition to polluting the running water, the appropriator has caused débris to be deposited on the lower proprietor's land, is

appropriation law states has practically been adopted with reference to mining. PENNSYLVANIA COAL CO. v. SANDERSON, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445. In that case, after an extended litigation (SANDERSON v. PENNSYLVANIA COAL CO., 86 Pa. 401, 27 Am. Rep. 711; PENNSYLVANIA COAL CO. v. SANDERSON, 94 Pa. 302, 39 Am. Rep. 785; Sanderson v. Pennsylvania Coal Co., 102 Pa. 370), it was finally decided that one who, in the ordinary and usual manner, operates a coal mine, may so pump the water which percolates into his mine that it will drain into the stream which forms the natural drainage for that region, even though the quantity of the water may thereby be increased and its quality may be so affected that the water in the stream is rendered totally unfit for the domestic purposes of lower proprietors. In a later case the Pennsylvania court points out that the rule thus laid down does not go beyond the proper use of one's own land and unavoidable damages to the lower proprietor. Collins v. Chartiers Gas Co., 131 Pa. 143, 156, 18 Atl. 1012, 6 L. R. A. 280, 17 Am. St. Rep. 791. In Elder v. Lykens Valley Coal Co., 157 Pa. 490, 27 Atl. 545, 37 Am. St. Rep. 742, it was held that a mineowner who deposits culm or refuse from his mine in a stream or in a place where ordinary floods will carry it down upon the land of another is liable to that other for the damages caused thereby. In Hindson v. Markle, 171 Pa. 138, 33 Atl. 74, which followed Elder v. Lykens Valley Coal Co., the case of Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453, 57 Am. St. Rep. 445, is distinguished on the ground that there was in that case no deposit of any foreign substance on the land of plaintiff, and that, moreover, the case presented the pollution of a stream from "the mere flowage of natural water which was discharged by the natural and irresistible forces necessarily developed in the act of mining in a perfectly lawful manner." Compare Roaring Creek Water Co. v. Anthracite Coal Co. of Pittsburg, 212 Pa. 115, 61 Atl. 811.

[24] McCAULEY v. McKEIG, 8 Mont. 389, 21 Pac. 22. See, also, Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. 416, 63 Am. St. Rep. 622; Edwards v. Allouez Min. Co., 38 Mich. 46, 31 Am. Rep. 301. Compare, also, the case where the erection of dams necessary for working the mine for which water was appropriated caused the flooding of adjoining land. Stone v. Bumpus, 46 Cal. 218; Jones v. Robertson, 116 Ill. 543, 6 N. E. 890, 56 Am. Rep. 786. But, where a state statute provides that the miner must take care of his tailings on his own ground, an injunction will issue against the washing down of tailings dumped by defendant on his own ground and not looked after. Fuller v. Swan River Placer Min. Co., 12 Colo. 12, 19 Pac. 836. A placer mine owner may of course be enjoined from so using the waters of the stream as to render them unfit for use in supplying the inhabitants of a city for domestic purposes so long as the injunction does not interfere with the placer mine owner's use of the water in the customary manner. Travis Placer Min. Co. v. Mills, 94 Fed. 909, 37 C. C. A. 536.

however, in all jurisdictions, a clear violation of the lower proprietor's rights,[25] and in a given case may be a nuisance,[26] and of course may call for and receive injunctive relief.

Because in California hydraulic placer mining not only ruined farms and orchards, but threatened to interfere with the navigability of the San Joaquin and the Sacramento rivers, the courts enjoined such mining,[27] and the United States government, by the act of March 1,

[25] WOODRUFF v. NORTH BLOOMFIELD GRAVEL MIN. CO. (C. C.) 18 Fed. 753; Hardt v. Liberty Hill Consolidated Mining & Water Co., 27 Fed. 788; Nelson v. O'Neal, 1 Mont. 284; FITZPATRICK v. MONTGOMERY, 20 Mont. 181, 50 Pac. 416, 63 Am. St. Rep. 622; People v. Gold Run Ditch & Min. Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; Hobbs v. Amador & Sacramento C. Co., 66 Cal. 161, 4 Pac. 1147; Salstrom v. Orleans Bar Gold Min. Co. (Cal.) 96 Pac. 294; CARSON v. HAYES, 39 Or. 97, 65 Pac. 814; York v. Davidson, 39 Or. 81, 65 Pac. 819; Tennessee Coal, Iron & R. Co. v. Hamilton, 100 Ala. 252, 14 South. 167, 46 Am. St. Rep. 48; Threatt v. Brewer Min. Co., 49 S. C. 95, 26 S. E. 970. See County of Yuba v. Cloke, 79 Cal. 239, 21 Pac. 740; Otaheite Gold & Silver Min. & Mill. Co. v. Dean (C. C.) 102 Fed. 929; Mills' Ann. St. Colo. § 2393. This is true, even though the miner conducts his mining carefully and in the only feasible way. CARSON v. HAYES, supra; Salstrom v. Orleans Bar Gold Min. Co. supra.

In an early California case it was held that a reasonable amount of unappropriated public land may be appropriated as a place of deposit for tailings, but that to acquire a right to such ground "the place of deposit must be claimed as such, or as a mining claim." Jones v. Jackson, 9 Cal. 237. In Miser v. O'Shea, 37 Or. 231, 62 Pac. 491, 82 Am. St. Rep. 751, the Oregon court refused to yield consent to the doctrine that public domain may be acquired by depositing tailings upon it. While the reasoning of the Oregon court, based as it is on the statute of limitations not running against the United States, is not conclusive, it is certainly doubtful whether anything short of a mill site location will perfect a right to a place of deposit for tailings. Compare chapter XIV, § 64, supra. Messrs. Morrison and De Soto, however, think that an easement for tailings may be acquired in unlocated public ground, and "advise as strict a location, including staking, notice, and record, as should be made in the case of the location of the mining or ditch claim, to which such tailings may be appurtenant." Morrison's Mining Rights (13th Ed.) p. 232. In any event it seems that tailings, which have been deposited and kept on public lands under such circumstances as to show an intention not to abandon them, will be protected from location as a placer deposit by one who attempts to locate the ground on a discovery of mineral in the tailings and without showing a discovery elsewhere. RITTER v. LYNCH (C. C.) 123 Fed. 930. Land on which abandoned tailings have been deposited is, however, so analogous to mineral land that the first one to claim it by mining location may maintain trespass against any one who takes and carries away any of the tailings. ROGERS v. COONEY, 7 Nev. 213.

[26] CHESSMAN v. HALE, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410; WOODRUFF v. NORTH BLOOMFIELD GRAVEL MIN. CO. (C. C.) 18 Fed. 753.

[27] WOODRUFF v. NORTH BLOOMFIELD GRAVEL MIN. CO. (C. C.) 18 Fed. 753; Hardt v. Liberty Hill Consolidated Mining & Water Co. (C. C.) 27

1893,[28] created the California Débris Commission to license and regulate such mining on those rivers. The constitutionality of that act has been upheld in one case;[29] but it has also been held that one licensed by the Débris Commission to engage in hydraulic mining may nevertheless be enjoined from injuring by such mining the property of others.[30]

DRAINAGE.

158. Water from mine workings may legally drain through subjacent or adjacent lands, subject, according to the better opinion, to the right of the proprietor of the subjacent or adjacent lands to barricade himself against the water.

In the working of mining claims water is often encountered, and many questions naturally arise in regard to the right of the mine owner to let the water drain into his neighbor's territory. Such questions may come up between adjacent locations, or between superjacent and subjacent properties; but in each situation the true conclusion would seem to be the same, namely, that the owner of the lower lying ground may barricade himself against the water which is seeking the lower level, but cannot complain if by natural drainage it comes upon his ground.[31] In Alaska one whose extralateral right excavations are threatened with complete flooding through the sinking of shafts by another on unlocatable tide lands may have an injunction.[32] The owner of the higher ground cannot anywhere cast upon the lower ground water which, undirected, would not flow upon the latter;[33] and, wherever Fletcher v. Rylands[34] is followed, a mine

Fed. 788; People v. Gold Run Ditch & Min. Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; United States v. North Bloomfield Gravel Min. Co. (C. C.) 53 Fed. 625. See County of Yuba v. Cloke, 79 Cal. 239, 21 Pac. 740.

[28] 27 Stat. 507, c. 183 (U. S. Comp. St. 1901, p. 3553). Amended in 1907 (Act Feb. 27, 1907, c. 2077, 34 Stat. 1001 [U. S. Comp. St. Supp. 1907, p. 1064]).

[29] United States v. North Bloomfield Gravel Co. (C. C.) 81 Fed. 243; North Bloomfield Gravel Min. Co. v. United States, 88 Fed. 664, 32 C. C. A. 84.

[30] Sutter County v. Nicols (Cal.) 93 Pac. 872.

[31] Baird v. Williamson, 15 Com. B. (N. S.) 376; LORD'S EX'RS v. CARBON IRON MFG. CO., 38 N. J. Eq. 452; Philadelphia R., Coal & Iron Co. v. Taylor, 5 Leg. Gaz. (Pa.) 392. For the different views on this subject, see 30 Am. & Eng. Ency. Law (2d Ed.) pp. 326–347; 1 Tiffany's Modern Law of Real Property, § 298.

[32] Alaska Gold Min. Co. v. Barbridge, 1 Alaska, 311.

[33] Locust Mountain Coal & Iron Co. v. Gorrell, 9 Phila. 247; Horner v. Watson, 79 Pa. 242, 21 Am. Rep. 55.

[34] L. R. 3 H. L. 330. See Fletcher v. Smith, L. R. 2 App. Cas. 781.

owner who pens water in an artificial reservoir must keep it in at his peril.[35]

Local Statutes.

In at least one state by statute a reservoir owner seems to be made an insurer of the persons and property of others from injuries caused by the leakage, overflow, or giving way of the reservoir,[36] while in several the drainage of mines is regulated.[37] In Arizona the right to regulate such drainage is based upon Rev. St. U. S. § 2338 (U. S. Comp. St. 1901, p. 1436); but in Colorado and Wyoming it is based upon express provisions in the state constitutions.[38]

[35] But it has been held that this does not apply to the damming up of water necessary to the working of an upper claim, provided only that the water thrown on the lower thereby would have reached the latter anyhow. JONES v. ROBERTSON, 116 Ill. 543, 6 N. E. 890, 56 Am. Rep. 786.

[36] See Mills' Ann. St. Colo. § 2272; Larimer County Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. 1111; Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760.

[37] Civ. Code Ariz. 1901, pars. 3252–3257; Mills' Ann. St. Colo. §§ 3172–3180; Rev. St. Wyo. 1899, § 2535. A state statute which provided that any person who by machinery, or by drains or adit levels, or in any other way, should rid lead-bearing mineral lands of water, and should thereby make the lands productive and available for mining purposes, should "be entitled to receive one-tenth of all the lead mineral taken from said lands as compensation for such drainage," was held to be constitutional in Ahern v. Dubuque Lead & Level Min. Co., 48 Iowa, 140. Where mines were so situated that draining one drained the other, a contract between the owners to share the expense of draining was upheld. Fisk Min. & Mill. Co. v. Reed, 32 Colo. 506, 77 Pac. 240.

[38] Const. Colo. art. 16, § 3; Const. Wyo. art. 9, § 2.

APPENDICES.

APPENDIX A.

UNITED STATES REVISED STATUTORY PROVISIONS ON MINING AND SUBSEQUENT ACTS OF CONGRESS RELATING THERETO.

THE REVISED STATUTES.

Possessory actions for recovery of mining titles.

Sec. 910. No possessory action between persons in any court of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession. [27 Feb., 1865, c. 64, s. 9, v. 13, p. 441 (U. S. Comp. St. 1901, p. 679).]

MINERAL LANDS AND MINING RESOURCES.

Mineral lands reserved.

Sec. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. [4 July, 1866, c. 166, s. 5, v. 14, p. 86 (U. S. Comp. St. 1901, p. 1423).]

Mineral lands open to purchase by citizens.

Sec. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. [10 May, 1872, c. 152, s. 1, v. 17, p. 91 (U. S. Comp. St. 1901, p. 1424).]

Length of mining claims upon veins or lodes.

Sec. 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode

within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other. [10 May, 1872, c. 152, s. 2, v. 17, p. 91 (U. S. Comp. St. 1901, p. 1424).]

Proof of citizenship.

Sec. 2321. Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation. [10 May, 1872, c. 152, s. 7, v. 17, p. 94 (U. S. Comp. St. 1901, p. 1425).]

Locators' rights of possession and enjoyment.

Sec. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. [10 May, 1872, c. 152, s. 3, v. 17, p. 91 (U. S. Comp. St. 1901, p. 1425).]

Owners of tunnels, rights of.

Sec. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid, but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel. [10 May, 1872, c. 152, s. 4, v. 17, p. 92 (U. S. Comp. St. 1901, p. 1426).]

Regulations made by miners.

Sec. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section his interest in the claim shall become the property of his co-owners who have made the required expenditures. [10 May, 1872, c. 152, s. 5, v. 17, p. 92 (U. S. Comp. St. 1901, p. 1426).]

Patents for mineral lands, how obtained.

Sec. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a no-

tice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. [10 May, 1872, c. 152, s. 6, v. 17, p. 92 (U. S. Comp. St. 1901, p. 1429).]

Adverse claim, proceedings on.

Sec. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever. [10 May, 1872, c. 152, s. 7, v. 17, p. 93 (U. S. Comp. St. 1901, p. 1430).]

Description of mining vein or lode claims—Patents to conform to official monuments—Monuments to govern descriptions.

Sec. 2327. The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the surveyors-general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors-general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto. [10 May, 1872, c. 152, s. 8, v. 17, p. 94 (U. S. Comp. St. 1901, p. 1431). Amended Apr. 28, 1904, 33 Stat. 545 (U. S. Comp. St. Supp. 1907, p. 477).]

Pending applications; existing rights.

Sec. 2328. Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the General Land-Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two. [10 May, 1872, c. 152, s. 9, v. 17, p. 94 (U. S. Comp. St. 1901, p. 1431).]

Conformity of placer claims to surveys, limit of.

Sec. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. [9 July, 1870, c. 235, s. 12, v. 16, p. 217 (U. S. Comp. St. 1901, p. 1432).]

Subdivisions of ten-acre tracts—Maximum of placer locations.

Sec. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide preemption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser. [9 July, 1870, c. 235, s. 12, v. 16, p. 217 (U. S. Comp. St. 1901, p. 1432).]

Conformity of placer claims to surveys, limitation of claims.

Sec. 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or preemption purposes. [10 May, 1872, c. 152, s. 10, v. 17, p. 94 (U. S. Comp. St. 1901, p. 1432).]

What evidence of possession, &c., to establish a right to a patent.

Sec. 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent. [9 July, 1870, c. 235, s. 13, v. 16, p. 217 (U. S. Comp. St. 1901, p. 1433).]

Proceedings for patent for placer claim, etc.

Sec. 2333. Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim and twenty-five feet of surface on each side thereof. The remainder of the placer claim or any placer claim not embracing any vein or lode claim shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof. [10 May, 1872, c. 152, s. 11, v. 17, p. 94 (U. S. Comp. St. 1901, p. 1433).]

Surveyor-general to appoint surveyors of mining claims, etc.

Sec. 2334. The surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty

to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the Commissioner of the General Land Office. [10 May, 1872, c. 152, s. 12, v. 17, p. 95 (U. S. Comp. St. 1901, p. 1435).]

Verification of affidavits, etc.

Sec. 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given. [10 May, 1872, c. 152, s 13, v. 17, p. 95 (U. S. Comp. St. 1901, p. 1435).]

Where veins intersect, etc.

Sec. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection. [10 May, 1872, c. 152, s. 14, v. 17, p. 96 (U. S. Comp. St. 1901, p. 1436).]

Patents for nonmineral lands, etc.

Sec. 2337. Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section. [10 May, 1872, c. 152, s. 15, v. 17, p. 96 (U. S. Comp. St. 1901, p. 1436).]

What conditions of sale may be made by local legislature.

Sec. 2338. As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent. [26 July, 1866, c. 262, s. 5, v. 14, p. 252 (U. S. Comp. St. 1901, p. 1436).]

Vested rights to use of water for mining, etc.—Right of way for canals.

Sec. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. [26 July, 1866, c. 262, s. 9, v. 14, p. 253 (U. S. Comp. St. 1901, p. 1437).]

Patents, preemptions, and homesteads subject to vested and accrued water rights.

Sec. 2340. All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section. [9 July, 1870, c. 235, s. 17, v. 16, p. 218 (U. S. Comp. St. 1901, p. 1437).]

Mineral lands in which no valuable mines are discovered open to homesteads.

Sec. 2341. Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of preemption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title, relating to "Homesteads." [26 July, 1866, c. 262, s. 10, v. 14, p. 253 (U. S. Comp. St. 1901, p. 1437).]

Mineral lands, how set apart as agricultural lands.

Sec. 2342. Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to preemption and sale as other public lands, and be subject to all the laws and regulations applicable to the same. [26 July, 1866, c. 262, s. 11, v. 14, p. 253 (U. S. Comp. St. 1901, p. 1437).]

Additional land districts and officers, power of the President to provide.

Sec. 2343. The President is authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may

deem the same necessary for the public convenience in executing the provisions of this chapter. [26 July, 1866, c. 262, s. 7, v. 14, p. 252 (U. S. Comp. St. 1901, p. 1438).]

Provisions of this chapter not to affect certain rights.

Sec. 2344. Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six. [10 May, 1872, c. 152, s. 16, v. 17, p. 96; 9 July, 1870, c. 235, s. 17, v. 16, p. 218 (U. S. Comp. St. 1901, p. 1438).]

Mineral lands in certain states excepted.

Sec. 2345. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any bona fide entries of such lands within the States named since the tenth day of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands. [18 Feb., 1873, c. 159, v. 17, p. 465 (U. S. Comp. St. 1901, p. 1438).]

Grant of lands to states or corporations not to include mineral lands.

Sec. 2346. No act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant. [30 Jan., 1865, Res. No. 10, v. 13, p. 567 (U. S. Comp. St. 1901, p. 1439).]

ACTS OF CONGRESS PASSED SUBSEQUENT TO THE REVISED STATUTES.

An Act to amend the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two.

Claim located prior to May 10, 1872, first annual expenditure extended to January 1, 1875.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the first day of January, eighteen hundred and seventy-five. [Act of Congress approved June 6, 1874 (18 Stat. L., 61).]

An Act to amend section two thousand three hundred and twenty-four of the Revised Statutes, relating to the development of the mining resources of the United States.

Money expended in a tunnel considered as expended on the lode.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act. [Act of Congress approved February 11, 1875 (18 Stat. L., 315; U. S. Comp. St. 1901, p. 1427).]

An Act to exclude the States of Missouri and Kansas from the provisions of the act of Congress entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two.

Missouri and Kansas excluded from the operation of the mineral laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two, and all lands in said States shall be subject to disposal as agricultural lands. [Act of Congress approved May 5, 1876 (19 Stat. L., 52; U. S. Comp. St. 1901, p. 1439).]

An Act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes.

Citizens of Colorado, Nevada, and the Territories authorized to fell and remove timber on the public domain for mining and domestic purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States and other persons, bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: Provided, The provisions of this act shall not extend to railroad corporations. [Act of Congress approved June 3, 1878 (20 Stat. L., 88; U. S. Comp. St. 1901, p. 1528).]

Sec. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts. [Ibid.]

Sec. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months. [Ibid.]

An Act to amend sections twenty-three hundred and twenty-four and twenty-three hundred and twenty-five of the Revised Statutes of the United States concerning mineral lands.

Application for patent may be made by authorized agent.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "Provided, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: And provided, That this section shall apply to all applications now pending for patents to mineral lands." [Act of Congress approved Jan. 22, 1880 (21 Stat. L., 61; U. S. Comp. St. 1901, p. 1429).]

On unpatented claims period commences on January 1 succeeding date of location.

Sec. 2. That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "Provided, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two." [Act of Congress approved Jan. 22, 1880 (21 Stat. L., 61; U. S. Comp. St. 1901, p. 1427).]

An Act to amend section twenty-three hundred and twenty-six of the Revised Statutes relating to suits at law affecting the title to mining claims.

In action brought title not established in either party.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in contro-

versy until he shall have perfected his title. [Act of Congress approved March 3, 1881 (21 Stat. L., 505; U. S. Comp. St. 1901, p. 1431).]

An Act to amend section twenty-three hundred and twenty-six of the Revised Statutes in regard to mineral lands, and for other purposes.

Adverse claim may be verified by agent.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory. [Sec. 1, act of Congress approved Apr. 26, 1882 (22 Stat. L., 49; U. S. Comp. St. 1901, p. 1431).]

Affidavit of citizenship, before whom made.

Sec. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any State or Territory. [Sec. 2, act of Congress approved Apr. 26, 1882 (22 Stat. L., 49; U. S. Comp. St. 1901, p. 1425).]

An Act to exclude the public lands in Alabama from the operation of the laws relating to mineral lands.

Alabama excepted from the operation of the mineral laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: Provided, however, That all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale: And provided further, That any bona fide entry under the provisions of the homestead law of lands within said State heretofore made may be patented without reference to an act approved May tenth, eighteen hundred and seventy-two, entitled "An act to promote the development of the mining resources of the United States," in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto. [Act of Congress approved Mar. 3, 1883 (22 Stat. L., 487; U. S. Comp. St. 1901, p. 1439).]

An Act providing a civil government for Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * * * * * * *

Mining laws extended to the district of Alaska.

Sec. 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land office, and the clerk provided for by this act shall be ex officio receiver of public moneys, and the marshal provided for by this act shall be ex officio surveyor-general of said district and the laws of the Unit-

ed States relating to mining claims, and the rights incident thereto shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: Provided, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: And provided further, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid: And provided also, That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States. [Act of Congress approved May 17, 1884 (23 Stat. L., 24).]

An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * * * * * * *

Right of entry under all the land laws restricted to 320 acres. (Repealed, see act Mar. 3, 1891, sec. 17 [26 Stat. 1101; U. S. Comp. St. 1901, p. 1405].)—Reservation in patents for right of way for ditches and canals constructed.

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act: Provided, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States. * * * [Act of Congress approved Aug. 30, 1890 (26 Stat. L., 391; U. S. Comp. St. 1901, p. 1404).]

An Act to repeal the timber-culture laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * * * * * * *

Town sites on mineral lands authorized—Lands entered under the mineral laws not included in restriction to 320 acres.

Sec. 16. That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired

by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof, and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: Provided, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant. [Act of Congress approved Mar. 3, 1891 (26 Stat. L. 1101; U. S. Comp. St. 1901, p. 1459).]

Sec. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs, and that the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not include lands entered or sought to be entered under mineral land laws. [Act of Congress approved Mar. 3, 1891 (26 Stat. L. 1101; U. S. Comp. St. 1901, p. 1554).]

* * * * * * * * * * * * *

An Act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

Entry of lands chiefly valuable for building stone under the placer-mining laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer-mineral claims: Provided, That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act. [Act of Congress approved Aug. 4, 1892 (27 Stat. L., 348; U. S. Comp. St. 1901, p. 1434).]

An Act to amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims.

Requirement of proof of expenditure for the year 1893 suspended except as to South Dakota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section num-

bered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-three, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for nonperformance of the annual assessment for the year eighteen hundred and ninety-three: Provided, That the claimant or claimants of any mining location, in order to secure the benefits of this act shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-three, a notice that he or they, in good faith intend to hold and work said claim: Provided, however, That the provisions of this act shall not apply to the State of South Dakota.

This act shall take effect from and after its passage. [Act of Congress approved Nov. 3, 1893 (28 Stat. L., 6).]

An Act to amend section numbered twenty-three hundred and twenty-four of Revised Statutes of the United States relating to mining claims.

Requirement of proof of expenditure for the year 1894 suspended except as to South Dakota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-four, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for nonperformance of the annual assessment for the year eighteen hundred and ninety-four: Provided, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-four, a notice that he or they in good faith intend to hold and work said claim: Provided, however, That the provisions of this act shall not apply to the State of South Dakota. [Act of Congress approved July 18, 1894 (28 Stat. L., 114).]

Sec. 2. That this act shall take effect from and after its passage.

Wichita Lands (Oklahoma).

* * * * * * * * * * * * *

That the laws relating to the mineral lands of the United States are hereby extended over the lands ceded by the foregoing agreement. [Act Mar. 2, 1895, 28 Stat., 876–894–899.]

An Act to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States.

Entry and patenting of lands containing petroleum and other mineral oils under the placer-mining laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to en-

ter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: Provided, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof. [Act of Congress approved Feb. 11, 1897 (29 Stat. L. 526; U. S. Comp. St. 1901, p. 1434).]

An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes. (30 Stat., 34, 35, 36.)

All public lands heretofore designated and reserved by the President of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one [vol. 26, p. 1095], the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said act, shall be as far as practicable controlled and administered in accordance with the following provisions:

Forest reservations, when to be established.

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

* * * * * * * * * * * *

Use of timber, etc., by settlers, etc.

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

Egress and ingress of settlers within reservations, etc.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Provided, That such persons comply with the rules and regulations covering such forest reservations.

* * * * * * * * * * * *

Restoration of mineral or agricultural lands to the public domain.

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two

papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained. [Act June 4, 1897, 30 Stat. 34 (U. S. Comp. St. 1901, p. 1539).]

An Act making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, and for other purposes.

* * * * * * * * * * * * *

(Fort Belknap Indian Reservation, Montana.)

Provisos: Price—No occupancy prior to opening.

Sec. 8. * * * That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat of survey authorized by this section, the lands so surrendered shall be open to occupation, location, and purchase, under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: Provided, That said lands shall be sold at ten dollars per acre: And provided further, That the terms of this section shall not be construed to authorize the occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey. * * *

(Blackfeet Indian Reservation, Montana.)

Proviso: No occupancy prior to opening.

Sec. 9. * * * That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat of survey authorized by this section, the lands so surrendered shall be opened to occupation, location, and purchase under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: Provided, That the terms of this section shall not be construed to authorize occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey.

(San Carlos Indian Reservation, Arizona.)

Provisos: No occupancy prior to opening—Preference to discoverers of coal, etc.

Sec. 10. * * * That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat of survey authorized by this section, the lands so surrendered shall be opened to occupation, location, and purchase under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: Provided, That the terms of this section shall not be construed to authorize occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey: Pro-

vided, however, That any person who in good faith prior to the passage of this act had discovered and opened, or located, a mine of coal or other mineral, shall have a preference right of purchase for ninety days from and after the official filing in the local land office of the approved plat of survey provided for by this section. [Act of Congress approved June 10, 1896 (29 Stat., 321–360; act of Congress June 7, 1897, 30 Stat., 93).]

An Act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes.

* * * * * * * * * * * *

Mining rights in Alaska to native-born citizens of the Dominion of Canada.

Sec. 13. That native-born citizens of the Dominion of Canada shall be accorded in said district of Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules, and regulations; but no greater rights shall be thus accorded than citizens of the United States, or persons who have declared their intention to become such, may enjoy in said district of Alaska; and the Secretary of the Interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect. [Act of Congress approved May 14, 1898 (30 Stat. L., 415; U. S. Comp. St. 1901, p. 1424).]

An Act making further provisions for a civil government for Alaska, and for other purposes.

* * * * * * * * * * * *

What recorded.

Sec. 15. The respective recorders shall, upon the payment of the fees for the same prescribed by the Attorney-General, record separately, in large and well-bound separate books, in fair hand:

First. Deeds, grants, transfers, contracts to sell or convey real estate and mortgages of real estate, releases of mortgages, powers of attorney, leases which have been acknowledged or proved, mortgages upon personal property;

* * * * * * * * * * *

Ninth. Affidavits of annual work done on mining claims;

Tenth. Notices of mining location and declaratory statements.

Proviso: Mining claims—Where instruments recorded.

Eleventh. Such other writings as are required or permitted by law to be recorded, including the liens of mechanics, laborers, and others: Provided, Notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject-matter affected by the instrument is situated, and where the property or subject-matter is not situated in any established recording district the instrument affecting the same shall be recorded in the office of the clerk of the division of the court having supervision over the recording division in which such property or subject-matter is situated.

* * * * * * * * * * * *

Proviso: Miners' regulations for recording, etc.—Recorder—Records at Dyea, etc., legalized.

* * * Provided, Miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims,

water rights, flumes and ditches, mill sites and affidavits of labor, not in conflict with this act or the general laws of the United States; and nothing in this act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder to act as such until a recorder therefor is appointed by the court: Provided further, All records heretofore regularly made by the United States commissioner at Dyea, Skagway, and the recorder at Douglas City not in conflict with any records regularly made with the United States commissioner at Juneau, are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this act. [Act of Congress approved June 6, 1900 (31 Stat., 321–326–330).]

Mining laws—Provisos: Gold, etc., explorations on Bering Sea—Miners' regulations—Not to conflict with federal laws—Exclusive permits to mine void, etc.—Provision reserving roadway, etc., not to apply.

Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the district of Alaska: Provided, That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: Provided further, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permits shall be granted by the Secretary of War authorizing any person or persons, corporation, or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals, in said waters, below low tide, subject to such general rules and regulations as the Secretary of War may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation; and the reservation of a roadway sixty feet wide, under the tenth section of the act of May fourteenth, eighteen hundred and ninety-eight, entitled "An act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes." [Vol. 30, p. 413], shall not apply to mineral lands or town sites.

* * * * * * * * * * * *

Disposition of Comanche, Kiowa, and Apache lands under an agreement ratified by act of Congress of June 6, 1900 (31 Stat., 672, 676-680).

* * * * * * * * * * * * *

That should any of said lands allotted to said Indians, or opened to settlement under this act, contain valuable mineral deposits, such mineral deposits shall be open to location and entry, under the existing mining laws of the United States, upon the passage of this act, and the mineral laws of the United States are hereby extended over said lands.

An Act extending the mining laws to saline lands.

Mining laws extended to saline lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer-mining claims: Provided, That the same person shall not locate or enter more than one claim hereunder. [Act of Congress approved Jan. 31, 1901 (31 Stat. L., 745; U. S. Comp. St. 1901, p. 1435).]

An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes.

Uintah and White River Utes—Allotment of irrigable land—Unallotted lands restored to public domain—Provisos: Homestead entries—Mineral leases—Raven Mining Company—Application of proceeds from sales.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * * That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: Provided, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: And provided further, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of

the lands so restored to the public domain shall be applied, first to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. [Act of Congress approved May 27, 1902 (32 Stat. L., 263).]

* * * * * * * * * * * *

An Act defining what shall constitute and providing for assessments on oil mining claims.

Assessment required for oil mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all: Provided, That said labor will tend to the development or to determine the oil-bearing character of such contiguous claims. [Act of Congress approved Feb. 12, 1903 (32 Stat. L., 825; U. S. Comp. St. Supp. 1907, p. 478).]

An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *

Uncompahgre Indian Reservation—Mining claims located on prior to Jan. 1, 1891, valid—Patents to issue on relocations, etc., of claims—Claims located after Jan. 1, 1891, invalid—Sale of remainder of mineral lands—Restrictions.

That in the lands within the former Uncompahgre Indian Reservation, in the State of Utah, containing gilsonite, asphaltum, elaterite, or other like substances, which were reserved from location and entry by provision in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight and for other purposes," approved June seventh, eighteen hundred and ninety-seven [30 Stat., p. 87], all discoveries and locations of any such mineral lands by qualified persons prior to January first, eighteen hundred and ninety-one, not previously discovered and located, who recorded notices of such discoveries and locations prior to January first, eighteen hundred and ninety-one, either in the State of Colorado, or in the office of the county recorder of Uintah County, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral land laws, provided that the owners of such locations shall relocate their respective claims and record the same in the office of the county recorder of Uintah County, Utah, within ninety days after the passage of this act. All locations of any such mineral lands made and recorded on or subsequent to January first, eighteen hundred and ninety-one, are hereby declared to be null and void;

and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even-numbered sections, shall be sold and disposed of in tracts not exceeding forty acres, or a quarter of a quarter of a section, in such manner and upon such terms and with such restrictions as may be prescribed in a proclamation of the President of the United States issued for that purpose not less than one hundred and twenty days after the passage of this act, and not less than ninety days before the time of sale or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress. [Act of Congress approved Mar. 3, 1903 (32 Stat. L., 998).]

* * * * * * * * * * * *

An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

* * * * * * * * * * *

Classification, etc., of lands.

Sec. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

* * * * * * * * * * *

Disposal of lands—Timber and school lands excepted.

Sec. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. * * *

* * * * * * * * * *

Mineral land entries—Proviso: Exceptions.

Sec. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: Provided, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian. [Act of Congress approved Apr. 23, 1904 (33 Stat., 302).]

An Act to ratify and amend an agreement with the Indians of the Crow Reservation, in Montana, and making appropriations to carry the same into effect.

* * * * * * * * * * *

Town-site and mineral lands.

Sec. 5. * * * And provided further, That the price of said lands shall be four dollars per acre, when entered under the homestead laws. * * * Lands

entered under the town-site and mineral land laws shall be paid for in amount and manner as provided by said laws, but in no event at a less price than that fixed herein for such lands, if entered under the homestead laws. * * * [Act of Congress approved Apr. 27, 1904 (33 Stat., 352).]

An Act to amend section twenty-three hundred and twenty-seven of the Revised Statutes of the United States, relating to lands.

[Act April 28, 1904, c. 1796 (33 Stat. 545), amends said section to read as set forth at page 543, supra.]

An Act to authorize the sale and disposition of surplus or unallotted lands of the Yakima Indian Reservation, in the State of Washington.

* * * * * * * * * *

Appraisal of unallotted lands, etc.—Mineral lands—Provisos: Lands not classified as mineral lands—Restriction.

Sec. 3. That the residue of the lands of said reservation—that is, the lands not allotted and not reserved—shall be classified under the direction of the Secretary of the Interior as irrigable lands, grazing lands, timber lands, or arid lands, and shall be appraised under their appropriate classes by legal subdivisions, with the exception of the mineral lands, which need not be appraised, and the timber on the lands classified as timber lands shall be appraised separately from the land. The basis for the appraisal of the timber shall be the amount of standing merchantable timber thereon, which shall be ascertained and reported.

* * * * * * * * * *

The lands classified as mineral lands shall be subject to location and disposal under the mineral-land laws of the United States: Provided, That lands not classified as mineral may also be located and entered as mineral lands, subject to approval by the Secretary of the Interior and conditioned upon the payment, within one year from the date when located, of the appraised value of the lands per acre fixed prior to the date of such location, but at not less than the price fixed by existing law for mineral lands: Provided further, That no such mineral locations shall be permitted on any lands allotted to Indians in severalty or reserved for any purpose as herein authorized. [Act of Congress approved Dec. 21, 1904 (33 Stat. 595).]

An Act to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation in the State of Wyoming and to make appropriations for carrying the same into effect.

* * * * * * * * * *

Opening of lands to entry—Proclamation—Town-site, coal, and mineral entries.

Sec. 2. That the lands ceded to the United States under the said agreement shall be disposed of under the provisions of the homestead, town-site, coal, and mineral land laws of the United States and shall be opened to settlement and entry by proclamation of the President. * * *

* * * * * * * * * *

* * * Lands entered under the town-site, coal, and mineral land laws shall be paid for in amount and manner as provided by said laws. Notice of location of all mineral entries shall be filed in the local land office of the district in which the lands covered by the location are situated, and unless

entry and payment shall be made within three years from the date of location all rights thereunder shall cease; * * * that all lands, except mineral and coal lands, herein ceded remaining undisposed of at the expiration of five years from the opening of said lands to entry shall be sold to the highest bidder for cash at not less than one dollar per acre under rules and regulations to be prescribed by the Secretary of the Interior. * * * [Act of Congress approved Mar. 3, 1905 (33 Stat., 1016).]

An Act to authorize the sale and disposition of surplus or unallotted lands of the diminished Colville Indian Reservation, in the State of Washington, and for other purposes.

* * * * * * * * * *

Mineral lands.

Sec. 3. That upon the completion of said allotments to said Indians the residue or surplus lands—that is, lands not allotted or reserved for Indian school, agency, or other purposes—of the said diminished Colville Indian Reservation shall be classified under the direction of the Secretary of the Interior as irrigable lands, grazing lands, timber lands, mineral lands, or arid lands, and shall be appraised under their appropriate classes by legal subdivisions, with the exception of the lands classed as mineral lands, which need not be appraised, and which shall be disposed of under the general mining laws of the United States. [Act of Congress approved Mar. 22, 1906.]

Coeur D'Alene Indian Lands.

(Indian appropriation act for fiscal year ending June 30, 1907.)

* * * * * * * * * *

Mineral lands—Coal and oil deposits reserved.

* * * Provided further, That the general mining laws of the United States shall extend after the approval of this act to any of said lands, and mineral entry may be made on any of said lands, but no such mineral selection shall be permitted upon any lands allotted in severalty to the Indians: Provided further, That all the coal or oil deposits in or under the lands on the said reservation shall be and remain the property of the United States, and no patent that may be issued under the provisions of this or any other act of Congress shall convey any title thereto. * * * [Act of June 21, 1906 (34 Stat. 336).]

An Act to amend the laws governing labor or improvements upon mining claims in Alaska.

Alaska—Annual improvements, etc., required on mining claims—Filing affidavits—Contents—Prima facie evidence of performance of work, etc.—Forfeiture—Officer before whom affidavits may be made—Time of filing—Fee.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims

shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days' work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed. [Act of Mar. 2, 1907 (35 Stat., 1243).]

Sec. 2. That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded. [Ibid.]

An Act to encourage the development of coal deposits in the Territory of Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the Secretary of the Interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations by including in a single claim, location, or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated and for this purpose such persons, their heirs or assigns, may form associations or corporations who may perfect entry of and acquire title to such lands in accordance with the other provisions of law under which said locations were originally made: Provided, That no corporation shall be permitted to consolidate its claims under this Act unless seventy-five per centum of its stock shall be held by persons qualified to enter coal lands in Alaska. [Act of Congress approved May 28, 1908.]

Sec. 2. That the United States shall, at all times, have the preference right to purchase so much of the product of any mine or mines opened upon the lands sold under the provisions of this Act as may be necessary for the use of the Army and Navy, and at such reasonable and remunerative price as may be fixed by the President; but the producers of any coal so purchased who may be dissatisfied with the price thus fixed shall have the right to pros-

ecute suits against the United States in the Court of Claims for the recovery of any additional sum or sums they may claim as justly due upon such purchase. [Ibid.]

Sec. 3. That if any of the lands or deposits purchased under the provisions of this Act shall be owned, leased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever so that they form part of, or in any way effect any combination, or are in anywise controlled by any combination in the form of an unlawful trust, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, or of any holding of such lands by any individual, partnership, association, corporation, mortgage, stock ownership, or control, in excess of two thousand five hundred and sixty acres in the district of Alaska, the title thereto shall be forfeited to the United States by proceedings instituted by the Attorney-General of the United States in the courts for that purpose. [Ibid.]

Sec. 4. That every patent issued under this Act shall expressly recite the terms and conditions prescribed in sections two and three hereof. [Ibid.]

APPENDIX B.

LAND OFFICE RULES AND REGULATIONS ON MINING APPROVED MAY 21, 1907.

REGULATIONS.

NATURE AND EXTENT OF MINING CLAIMS.

1. Mining claims are of two distinct classes: Lode claims and placers.

LODE CLAIMS.

2. The status of lode claims located or patented previous to the 10th day of May, 1872, is not changed with regard to their extent along the lode or width of surface; but the claim is enlarged by sections 2322 and 2328, by investing the locator, his heirs or assigns, with the right to follow, upon the conditions stated therein, all veins, lodes, or ledges, the top or apex of which lies inside of the surface lines of his claim.

3. It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, other than the one named in the original location, to such as were not adversely claimed on May 10, 1872, and that where such other vein or ledge was so adversely claimed at that date the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

4. From and after the 10th May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of fifteen hundred linear feet along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of fifteen hundred feet, but in no event can a location of a vein or lode made after the 10th day of May, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

5. With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case exceed three hundred feet on each side of the middle of the vein at the surface, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end lines of such claims to be in all cases parallel to each other. Said lateral measurements can not extend beyond three hundred feet on either

side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet can not be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration where the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

6. By the foregoing it will be perceived that no lode claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken depends upon the local regulations or state or territorial laws in force in the several mining districts; and that no such local regulations or state or territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width unless adverse claims existing on the 10th day of May, 1872, render such lateral limitation necessary.

7. Locators can not exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim.

8. No lode claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of bona fide prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

9. The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery shaft on the claim to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the locus of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district, and should be duly recorded.

10. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery; it being essential that the location notice filed for record, in addition to the fore-

going description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery point.

11. The location notice must be filed for record in all respects as required by the state or territorial laws and local rules and regulations, if there be any.

12. In order to hold the possessory title to a mining claim located prior to May 10, 1872, the law requires that ten dollars shall be expended annually in labor or improvements for each one hundred feet in length along the vein or lode. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed or improvements made thereon annually. Under the provisions of the act of Congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. Where a number of contiguous claims are held in common, the aggregate expenditure that would be necessary to hold all the claims, may be made upon any one claim. Cornering locations are held not to be contiguous.

13. Failure to make the expenditure or perform the labor required upon a location made before or since May 10, 1872, will subject a claim to relocation, unless the original locator, his heirs, assigns, or legal representatives have resumed work after such failure and before relocation.

14. Annual expenditure is not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

15. Upon the failure of any one of several co-owners to contribute his proportion of the required expenditures, the co-owners, who have performed the labor or made the improvements as required, may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent co-owner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his co-owners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving dates and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent co-owner failed to contribute his proper proportion within the period fixed by the statute.

TUNNELS.

16. The effect of section 2323, Revised Statutes, is to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the line thereof and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously

known to exist. The term "face," as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted upon which prospecting is prohibited as aforesaid.

17. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel, the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the locus in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

18. A full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is bona fide their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

PLACER CLAIMS.

19. But one discovery of mineral is required to support a placer location, whether it be of twenty acres by an individual, or of one hundred and sixty acres or less by an association of persons.

20. The act of August 4, 1892, extends the mineral-land laws so as to bring lands chiefly valuable for building stone within the provisions of said law by authorizing a placer entry of such lands. Registers and receivers should make a reference to said act on the entry papers in the case of all placer entries made for lands containing stone chiefly valuable for building purposes. Lands reserved for the benefit of public schools or donated to any state are not subject to entry under said act.

21. The act of February 11, 1897, provides for the location and entry of public lands chiefly valuable for petroleum or other mineral oils, and entries of that nature made prior to the passage of said act are to be considered as though made thereunder.

22. By section 2330 authority is given for subdividing forty-acre legal subdivisions into ten-acre tracts. These ten-acre tracts should be considered and dealt with as legal subdivisions, and an applicant having a placer claim which conforms to one or more of such ten-acre tracts, contiguous in case of two or more tracts, may make entry thereof, after the usual proceedings, without further survey or plat.

23. In subdividing forty-acre legal subdivisions, the ten-acre tracts must be in square form, with lines at right angles with the lines of the public surveys; and the notice given of the application must be specific and accurate in description.

24. A ten-acre subdivision may be described, for instance if situated in the extreme northeast of the section, as the "N. E. ¼ of the N. E. ¼ of the N. E. ¼" of the section, or, in like manner, by appropriate terms, wherever situated; but, in addition to this description, the notice must give all the other data required in a mineral application, by which parties may be put on inquiry as to the land sought to be patented. The proofs submitted with applications must show clearly the character and extent of the improvements upon the premises.

25. The proof of improvements must show their value to be not less than five hundred dollars and that they were made by the applicant for patent or his grantors. This proof should consist of the affidavit of two or more disinterested witnesses. The annual expenditure to the amount of $100, required by section 2324, Revised Statutes, must be made upon placer claims as well as lode claims.

26. Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent and in all the notices. But in all cases, whether the lode is claimed or excluded, it must be surveyed and marked upon the plat, the field notes and plat giving the area of the lode claim or claims and the area of the placer separately. An application which omits to claim such known vein or lode must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses.

27. By section 2330 it is declared that no location of a placer claim, made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

28. Section 2331 provides that all placer-mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and such locations shall not include more than twenty acres for each individual claimant.

29. The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location can exceed twenty acres for each individual participating therein; that is, a location by two

persons can not exceed forty acres, and one by three persons can not exceed sixty acres.

30. The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that all placer mining claims located after May 10, 1872, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, whether the locations are upon surveyed or unsurveyed lands.

REGULATIONS UNDER SALINE ACT.

31. Under the act approved January 31, 1901, extending the mining laws to saline lands, the provisions of the law relating to placer-mining claims are extended to all states and territories and the district of Alaska, so as to permit the location and purchase thereunder of all unoccupied public lands containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, with the proviso, "That the same person shall not locate or enter more than one claim hereunder."

32. Rights obtained by location under the placer-mining laws are assignable, and the assignee may make the entry in his own name; so, under this act a person holding as assignee may make entry in his own name: Provided, he has not held under this act, at any time, either as locator or entryman, any other lands; his right is exhausted by having held under this act any particular tract, either as locator or entryman, either as an individual or as a member of an association. It follows, therefore, that no application for patent or entry, made under this act, shall embrace more than one single location.

33. In order that the conditions imposed by the proviso, as set forth in the above paragraph, may duly appear, the notice of location presented for record and the application for patent must each contain a specific statement under oath by each person whose name appears therein that he never has, either as an individual or as a member of an association, located or entered any other lands under the provisions of this act. Assignments made by persons who are not severally qualified as herein stated will not be recognized.

PROCEDURE TO OBTAIN PATENT TO MINERAL LANDS.

Lode Claims.

34. The claimant is required, in the first place, to have a correct survey of his claim made under authority of the surveyor-general of the state or territory in which the claim lies, such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field notes in each case will be prepared by the surveyor-general; one plat and the original field notes to be retained in the office of the surveyor-general; one copy of the plat to be given the claimant for posting upon the claim; one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor-general to the register of the proper land district, to be retained on his files for future reference. As there is no

resident surveyor-general for the state of Arkansas, applications for the survey of mineral claims in said state should be made to the Commissioner of this office, who, under the law, is ex officio the U. S. surveyor-general.

35. The survey and plat of mineral claims required to be filed in the proper land office with application for patent must be made subsequent to the recording of the location of the claim (if the laws of the state or territory or the regulations of the mining district require the notice of location to be recorded), and when the original location is made by survey of a United States mineral surveyor such location survey can not be substituted for that required by the statute, as above indicated.

36. The surveyors-general should designate all surveyed mineral claims by a progressive series of numbers, beginning with survey No. 37, irrespective as to whether they are situated on surveyed or unsurveyed lands, the claim to be so designated at date of issuing the order therefor, in addition to the local designation of the claim; it being required in all cases that the plat and field notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the locus of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument. Such connecting line must not be more than two miles in length, and should be measured on the ground direct between the points, or calculated from actually surveyed traverse lines if the nature of the country should not permit direct measurement. If a regularly established survey corner is within two miles of a claim situated on unsurveyed lands, the connection should be made with such corner in preference to a connection with a United States mineral monument. The connecting line or traverse line must be surveyed by the mineral surveyor at the time of his making the particular survey and be made a part hereof.

37. (a) Promptly upon the approval of a mineral survey the surveyor-general will advise both this office and the appropriate local land office, by letter (Form 4—286), of the date of approval, number of the survey, name and area of the claim, name and survey number of each approved mineral survey with which actually in conflict, name and address of the applicant for survey, and name of the mineral, surveyor who made the survey; and will also briefly describe therein the locus of the claim, specifying each legal subdivision or portion thereof, when upon surveyed lands, covered in whole or in part by the survey; but hereafter no segregation of any such claim upon the official township-survey records will be made until mineral entry has been made and approved for patent, unless otherwise directed by this office.

(b) Upon application to make agricultural entry of the residue of any original lot or legal subdivision of forty acres, reduced by mining claims for which patent applications have been filed and which residue has been already relotted in accordance therewith, the local officers will accept and approve the application as usual, if found to be regular. When such an application is filed for any such original lot or subdivision, reduced in available area by duly asserted mining claims but not yet relotted accordingly, the local officers will promptly advise this office thereof; and will also report and identify any pending application for mineral patent affecting such subdivision which the agricultural applicant does not desire to contest. The

surveyor-general will thereupon be advised by this office of such mining claims, or portions thereof, as are proper to be segregated, and directed to at once prepare, upon the usual drawing-paper township blank, diagram of amended township survey of such original lot or legal forty-acre subdivision so made fractional by such mineral segregation, designating the agricultural portion by appropriate lot number, beginning with No. 1 in each section and giving the area of each lot, and will forthwith transmit one approved copy to the local land office and one to this office. In the meantime the local officers will accept the agricultural application (if no other objection appears), suspend it with reservation of all rights of the applicant if continuously asserted by him, and upon receipt of amended township diagram will approve the application (if then otherwise satisfactory) as of the date of filing, corrected to describe the tract as designated in the amended survey.

(c) The register and receiver will allow no agricultural claim for any portion of an original lot or legal forty-acre subdivision, where the reduced area is made to appear by reason of approved surveys of mining claims and for which applications for patent have not been filed, until there is submitted by such agricultural applicant a satisfactory showing that such surveyed claims are in fact mineral in character; and applications to have lands asserted to be mineral, or mining locations, segregated by survey, with the view to agricultural appropriation of the remainder, will be made to the register and receiver for submission to the Commissioner of the General Land Office, for his consideration and direction, and must be supported by the affidavit of the party in interest, duly corroborated by two or more disinterested persons, or by such other or further evidence as may be required in any case, that the lands sought to be segregated as mineral are in fact mineral in character; otherwise, in the absence of satisfactory showing in any such case, such original lot or legal subdivision will be subject to agricultural appropriation only. When any such showing shall be found to be satisfactory and the necessary survey is had, amended township diagram will be required and made as prescribed in the preceding section.

38. The following particulars should be observed in the survey of every mining claim:

(1) The exterior boundaries of the claim, the number of feet claimed along the vein, and, as nearly as can be ascertained, the direction of the vein, and the number of feet claimed on the vein in each direction from the point of discovery or other well-defined place on the claim should be represented on the plat of survey and in the field notes.

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

	Acres.
Total area of claim	10.50
Area in conflict with survey No. 302	1.56
Area in conflict with survey No. 948	2.33
Area in conflict with Mountain Maid lode mining claim, unsurveyed	1.48

It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field notes and plat are made a part of the application for patent, and care

should be taken that the description does not inadvertently exclude portions intended to be retained. The application for patent should state the portions to be excluded in express terms.

39. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, the number of the survey, the mining district and county, and the names of adjoining and conflicting claims as shown by the plat survey. Too much care can not be exercised in the preparation of this notice, inasmuch as the data therein are to be repeated in the other notices required by the statute, and upon the accuracy and completeness of these notices will depend, in a great measure, the regularity and validity of the proceedings for patent.

40. After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat and the field notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the notice so posted to be attached to and form a part of said affidavit.

41. Accompanying the field notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, state, or territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.

42. This sworn statement must be supported by a copy of the location notice, certified by the officer in charge of the records where the same is recorded, and where the applicant for patent claims the interests of others associated with him in making the location, or as a purchaser, in addition to the copy of the location notice, must be furnished a complete abstract of title as shown by the record in the office where the transfers are by law required to be recorded, certified to by the officer in charge of the record under his official seal. The officer should also certify that no conveyances affecting the title to the claim in question appear of record other than those set forth in the abstract, which abstract shall be brought down to the date of the application for patent. Where the applicant claims as sole locator and does not furnish an abstract of title, his affidavit should be furnished to the effect that he has disposed of no interest in the land located.[1]

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[1]On December 28, 1907, rule 42 of the Mining Regulations, approved May 21, 1907, was amended to read as follows:

"42. This sworn statement must be supported by a copy of each location notice, certified by the legal custodian of the record thereof, and also by an abstract of title of each claim, completed to the date of filing said statement and certified by the legal custodian of the records of transfers, or by a duly authorized abstracter of titles. The certificate must state that no conveyances affecting the title to the claim or claims appear of record other than those set forth.

"Abstracters will be required to attach to each abstract certified by them a certificate stating that they have filed in the office of the Commissioner of the General Land Office a certified copy of the existing statute by which they are authorized to compile abstracts of title, and evidence in the form of a certificate by the proper State, Territorial, or county officer that they have complied with the requirements of such statute."

43. In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, etc.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

44. Before receiving and filing an application for mineral patent local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any lands embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that a mineral application should not, for these or other reasons, be accepted and filed, they should formally reject the same, giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the Rules of Practice.

Local officers will give prompt and appropriate notice to the railroad grantee of the filing of every application for mineral patent which embraces any portion of an odd-numbered section of surveyed lands within the primary limits of a railroad land grant, and of every such application embracing any portion of unsurveyed lands within such limits (except as to any such application which embraces a portion or portions of those ascertained or prospective odd-numbered sections only, within the limits of the grant in Montana and Idaho to the Northern Pacific Railroad Company, which have been classified as mineral under the act of February 26, 1895, without protest by the company within the time limited by the statute or the mineral classification whereof has been approved).

Should the railroad grantee file protest and apply for a hearing to determine the character of the land involved in any such application for mineral patent, proceedings thereunder will be had in the usual manner.

Any application for mineral patent, however, which embraces lands previously listed or selected by a railroad company will be disposed of as provided by the first section of this paragraph, and the applicant afforded opportunity to protest and apply for a hearing or to appeal.

Notice should be given to the duly authorized representative of the railroad grantee, in accordance with rule 17 of practice. When the claims applied for are upon unsurveyed land, the burden of proving that they are situate within prospective odd-numbered sections will rest upon the railroad.

Evidence of service of notice should be filed with the record in each case.

45. Upon the receipt of these papers, if no reason appears for rejecting the application, the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a weekly newspaper, nine consecutive insertions are necessary; when in a daily newspaper, the notice must appear in each issue for sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

46. The notices so published and posted must embrace all the data given in the notice posted upon the claim. In addition to such data the published

notice must further indicate the locus of the claim by giving the connecting line, as shown by the field notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, and thence the boundaries of the claim by courses and distances.

47. The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

48. The claimant at the time of filing the application for patent, or at any time within the sixty days of publication, is required to file with the register a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors, upon each location embraced in the application, or if the application embraces several contiguous locations held in common, that an amount equal to five hundred dollars for each location has been so expended upon, and for the benefit of, the entire group; that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will, if incorporated in a patent, serve to fully identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof: Provided, that as to all applications for patents made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient, and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

49. The surveyor-general may derive his information upon which to base his certificate as to the value of labor expended or improvements made from the mineral surveyor who makes the actual survey and examination upon the premises, and such mineral surveyor should specify with particularity and full detail the character and extent of such improvements, but further or other evidence may be required in any case.

50. It will be convenient to have this certificate indorsed by the surveyor-general, both upon the plat and field notes of survey filed by the claimant as aforesaid.

51. After the sixty days' period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

52. Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, and no other objection appears, permit the claimant to pay for the land to which he is entitled at the rate of five dollars for each acre and five dollars for each fractional part of an acre, except as otherwise provided by law, the receiver issuing the usual duplicate receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office, after which the complete record will be forwarded to the Commissioner of the General Land Office and a patent issued thereon if found regular.

53. At any time prior to the issuance of patent protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings. Such protest can not, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit. One holding a present joint interest in a mineral location included in an application for patent who is excluded from the application, so that his interest would not be protected by the issue of patent thereon, may protest against the issuance of a patent as applied for, setting forth in such protest the nature and extent of his interest in such location, and such a protestant will be deemed a party in interest entitled to appeal. This results from the holding that a co-owner excluded from an application for patent does not have an "adverse" claim within the meaning of sections 2325 and 2326 of the Revised Statutes. (See Turner v. Sawyer, 150 U. S. 578–586 [14 Sup. Ct. 192, 37 L. Ed. 1189].)

54. Any party applying for patent as trustee must disclose fully the nature of the trust and the name of the cestui que trust; and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

55. The annual expenditure of one hundred dollars in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts.

56. The failure of an applicant for patent to a mining claim to prosecute his application to completion, by filing the necessary proofs and making payment for the land, within a reasonable time after the expiration of the period of publication of notice of the application, or after the termination of adverse proceedings in the courts, constitutes a waiver by the applicant of all rights obtained by the earlier proceedings upon the application.

57. The proceedings necessary to the completion of an application for patent to a mining claim, against which an adverse claim or protest has been filed, if taken by the applicant at the first opportunity afforded therefor under the law and departmental practice, will be as effective as if taken at the date when, but for the adverse claim or protest, the proceedings on the application could have been completed.

Placer Claims.

58. The proceedings to obtain patents for placer claims, including all forms of mineral deposits excepting veins of quartz or other rock in place, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where a placer claim shall be upon surveyed lands, and conforms to legal subdivisions, no further survey or plat will be required. Where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands.

59. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here, it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter, and make such slight modifications

in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims; the price of placer claims being fixed, however, at two dollars and fifty cents per acre or fractional part of an acre.

60. In placer applications for patent care must be exercised to determine the proper classification of the lands claimed. To this end the clearest evidence of which the case is capable should be presented.

(1) If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs; if of mixed placers and lodes, it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333, Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

(2) Mineral surveyors shall, at the expense of the parties, make full examination of all placer claims surveyed by them and duly note the facts as specified in the law, stating the quality and composition of the soil, the kind and amount of timber and other vegetation, the locus and size of streams, and such other matters as may appear upon the surface of the claim. This examination should include the character and extent of all surface and underground workings, whether placer or lode, for mining purposes.

(3) In addition to these data, which the law requires to be shown in all cases, the mineral surveyor should report with reference to the proximity of centers of trade or residence; also of well-known systems of lode deposit or of individual lodes. He should also report as to the use or adaptability of the claim for placer mining; whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose; and, finally, what works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(4) This examination should be reported by the mineral surveyor under oath to the surveyor-general, and duly corroborated; and a copy of the same should be furnished with the application for patent to the claim, constituting a part thereof, and included in the oath of the applicant.

(5) Applications awaiting entry, whether published or not, must be made to conform to these regulations, with respect to examination as to the character of the land. Entries already made will be suspended for such additional proofs as may be deemed necessary in each case.

MILL SITES.

61. Land entered as a mill site must be shown to be nonmineral. Mill sites are simply auxiliary to the working of mineral claims, and as section 2337, which provides for the patenting of mill sites, is embraced in the chapter of the Revised Statutes relating to mineral lands, they are therefore included in this circular.

62. To avail themselves of this provision of law parties holding the possessory right to a vein or lode claim, and to a piece of nonmineral land not contiguous thereto for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may

file in the proper land office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field notes, may include, embrace, and describe, in addition to the vein or lode claim, such noncontiguous mill site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim. The owner of a patented lode may, by an independent application, secure a mill site if good faith is manifest in its use or occupation in connection with the lode and no adverse claim exists.

63. Where the original survey includes a lode claim and also a mill site the lode claim should be described in the plat and field notes as "Sur. No. 37, A," and the mill site as "Sur. No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the mill site to a corner of the lode claim to be invariably given in such plat and field notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill site as well as upon the vein or lode claim for the statutory period of sixty days. In making the entry no separate receipt or certificate need be issued for the mill site, but the whole area of both lode and mill site will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and mill-site claim.

64. In case the owner of a quartz mill or reduction works is not the owner or claimant of a vein or lode claim the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill site at said price per acre.

65. In every case there must be satisfactory proof that the land claimed as a mill site is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of two or more persons capable, from acquaintance with the land, to testify understandingly.

CITIZENSHIP.

66. The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge or upon information and belief, setting forth the residence of each peson forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

67. In case of an individual or an association of individuals who do not appear by their duly authorized agent, the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence, will be required.

68. In case an applicant has declared his intention to become a citizen or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

69. The affidavit of the claimant as to his citizenship may be taken before the register or receiver, or any other officer authorized to administer oaths

within the land districts; or, if the claimant is residing beyond the limits of the district, the affidavit may be taken before the clerk of any court of record or before any notary public of any state or territory.

70. If citizenship is established by the testimony of disinterested persons, such testimony may be taken at any place before any person authorized to administer oaths, and whose official character is duly verified.

71. No entry will be allowed until the register has satisfied himself, by careful examination, that proper proofs have been filed upon the points indicated in the law and official regulations. Transfers made subsequent to the filing of the application for patent will not be considered, but entry will be allowed and patent issued in all cases in the name of the applicant for patent, the title conveyed by the patent, of course, in each instance inuring to the transferee of such applicant where a transfer has been made pending the application for patent.

72. The consecutive series of numbers of mineral entries must be continued, whether the same are of lode or placer claims or mill sites.

73. In sending up the papers in a case the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued. The plat forwarded as part of the proof should not be folded, but rolled, so as to prevent creasing, and either transmitted in a separate package or so enclosed with the other papers that it may pass through the mails without creasing or mutilation. If forwarded separately, the letter transmitting the papers should state the fact.

POSSESSORY RIGHT.

74. The provisions of section 2332, Revised Statutes, will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

75. When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the state or territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides which he may desire to submit in support of his claim.

76. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations

for mining claims in the state or territory as aforesaid other than that which has been finally decided in favor of the claimant.

77. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

ADVERSE CLAIMS.

78. An adverse claim must be filed with the register and receiver of the land office where the application for patent is filed or with the register and receiver of the district in which the land is situated at the time of filing the adverse claim. It must be on the oath of the adverse claimant, or it may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated.

79. Where an agent or attorney in fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

80. The agent or attorney in fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

81. The adverse claim so filed must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator. If the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

82. In order that the "boundaries" and "extent" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict: Provided, however, That if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat. If the claim is not described by legal subdivisions, it will generally be more satisfactory if the plat thereof is made from an actual survey by a mineral surveyor, and its correctness officially certified thereon by him.

83. Upon the foregoing being filed within the sixty days' period of publication, the register, or in his absence the receiver, will immediately give notice in writing to the parties that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived and the application for patent be allowed to proceed upon its merits.

84. When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record

of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be stayed, with the exception of the completion of the publication and posting of notices and plat and the filing of the necessary proof thereof, until the controversy shall have been finally adjudicated in court or the adverse claim waived or withdrawn.

85. Where an adverse claim has been filed and suit thereon commenced within the statutory period and final judgment rendered determining the right of possession, it will not be sufficient to file with the register a certificate of the clerk of the court setting forth the facts as to such judgment, but the successful party must, before he is allowed to make entry, file a certified copy of the judgment roll, together with the other evidence required by section 2326, Revised Statutes.

86. Where such suit has been dismissed, a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient.

87. After an adverse claim has been filed and suit commenced, a relinquishment or other evidence of abandonment of the adverse claim will not be accepted, but the case must be terminated and proof thereof furnished as required by the last two paragraphs.

88. Where an adverse claim has been filed, but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the state court having jurisdiction in the case, and also by the clerk of the circuit court of the United States for the district in which the claim is situated, will be required.

APPOINTMENT OF SURVEYORS FOR SURVEY OF MINING CLAIMS—CHARGES FOR SURVEYS AND PUBLICATIONS—FEES OF REGISTERS AND RECEIVERS, ETC.

89. Section 2334 provides for the appointment of surveyors to survey mining claims, and authorizes the Commissioner of the General Land Office to establish the rates to be charged for surveys and for newspaper publications. Under this authority of law the following rates have been established as the maximum charges for newspaper publications in mining cases:

(1) Where a daily newspaper is designated the charge shall not exceed seven dollars for each ten lines of space occupied, and where a weekly newspaper is designated as the medium of publication five dollars for the same space will be allowed. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates established upon the understanding that they are to be in the usual body type used for advertisements.

(2). For the publication of citations in contests or hearings involving the character of lands the charges shall not exceed eight dollars for five publications in weekly newspapers or ten dollars for publications in daily newspapers for thirty days.

90. The surveyors-general of the several districts will, in pursuance of said law, appoint in each land district as many competent surveyors for the survey of mining claims as may seek such appointment, it being distinctly

understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States. The statute provides that the claimant shall also be at liberty to employ any United States mineral surveyor to make the survey. Each surveyor appointed to survey mining claims before entering upon the duties of his office or appointment shall be required to enter into a bond of not less than $1,000 for the faithful performance of his duties.

91. With regard to the platting of the claim and other office work in the surveyor-general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer or designated depository in favor of the United States Treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor-general duplicate certificates of such deposit in the usual manner.

92. The surveyors-general will endeavor to appoint surveyors to survey mining claims so that one or more may be located in each mining district for the greater convenience of miners.

93. The usual oaths will be required of these surveyors and their assistants as to the correctness of each survey executed by them.

The duty of the surveyor ceases when he has executed the survey and returned the field notes and preliminary plat thereof with his report to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim.

The surveyors-general and local land officers are expected to report any infringement of this regulation to this office.

94. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

95. The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, R. S., par. 9.)

96. At the time of payment of fee for mining application or adverse claim the receiver will issue his receipt therefor in duplicate, one to be given the applicant or adverse claimant, as the case may be, and one to be forwarded to the Commissioner of the General Land Office on the day of issue. The receipt for mining application should have attached the certificate of the register that the lands included in the application are subject to such appropriation, as far as shown by the records of his office.

97. The register and receiver will, at the close of each month, forward to this office an abstract of mining applications filed, an abstract of adverse claims filed, an abstract of mineral lands sold, and a report of receipts from such sales.

98. The fees and purchase money received by registers and receivers must be placed to the credit of the United States in the receiver's monthly and quarterly account, charging up in the disbursing account the sums to which the register and receiver may be respectively entitled as fees and commissions, with limitations in regard to the legal maximum.

HEARINGS TO DETERMINE CHARACTER OF LANDS.

99. The Rules of Practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior will, so far as applicable, govern in all cases and proceedings arising in contests and hearings to determine the character of lands.

100. Public land returned by the surveyor-general as mineral shall be withheld from entry as agricultural land until the presumption arising from such a return shall be overcome by testimony taken in the manner hereinafter described.

101. Hearings to determine the character of lands are practically of two kinds, as follows:

(1) Lands returned as mineral by the surveyor-general.

When such lands are sought to be entered as agricultural under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper nonmineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is not required, notice thereof must first be given by publication for sixty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

(2) Lands returned as agricultural and alleged to be mineral in character.

Where as against the claimed right to enter such lands as agricultural it is alleged that the same are mineral, or are applied for as mineral lands, the proceedings in this class of cases will be in the nature of a contest, and the practice will be governed by the rules in force in contest cases.

[Paragraphs 102 to 104, inclusive, are omitted from this revision of the regulations, as appropriate instructions relative to nonmineral proofs in railroad, state, and forest lieu selections are contained in separate circulars.]

105. At hearings to determine the character of lands the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—Whether of the shallow-surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all.

106. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within

which particular ten-acre subdivision such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

107. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all valuable deposits of minerals were first known to exist on the lands.

108. When the case comes before this office, such decision will be made as the law and the facts may justify. In cases where a survey is necessary to set apart the mineral from the agricultural land, the proper party, at his own expense, will be required to have the work done by a reliable and competent surveyor to be designated by the surveyor-general. Application therefor must be made to the register and receiver, accompanied by description of the land to be segregated and the evidence of service upon the opposite party of notice of his intention to have such segregation made. The register and receiver will forward the same to this office, when the necessary instructions for the survey will be given. The survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section 2320, United States Revised Statutes, as to length and width and parallel end lines.

109. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

110. Upon the filing of the plat and field notes of such survey with the register and receiver, duly sworn to as aforesaid, they will transmit the same to the surveyor-general for his verification and approval, who, if he finds the work correctly performed, will furnish authenticated copies of such plat and description both to the proper local land office and to this office, made upon the usual drawing-paper township blank.

The copy of plat furnished the local office and this office must be a diagram verified by the surveyor-general, showing the claim or claims segregated, and designating the separate fractional agricultural tracts in each 40-acre legal subdivision by the proper lot number, beginning with No. 1, in each section, and giving the area in each lot, the same as provided in paragraph 37 in the survey of mining claims on surveyed lands.

111. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. In order to secure a patent for such land, he must proceed as in other cases, in accordance with the foregoing regulations.

Blank forms for proofs in mineral cases are not furnished by the General Land Office.

DISTRICT OF ALASKA.

112. Section 13, Act of May 14, 1898, according to native-born citizens of Canada "the same mining rights and privileges" in the district of Alaska as are accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada, is not now and never has been operative, for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of Canada

are those of leasing mineral lands upon the payment of a stated royalty, and the mining laws of the United States make no provision for such leases.

113. For the sections of the act of June 6, 1900, making further provision for a civil government for Alaska, which provide for the establishment of recording districts and the recording of mining locations; for the making of rules and regulations by the miners and for the legalization of mining records; for the extension of the mining laws to the district of Alaska, and for the exploration and mining of tide lands and lands below low tide; and relating to the rights of Indians and persons conducting schools or missions, see page 21 of this circular.

MINERAL LANDS WITHIN FOREST RESERVES.

114. The act of June 4, 1897, provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry," notwithstanding the reservation. This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner.

The act also provides that "the Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the state or territory, respectively, where such reservations may be located."

For further instructions under this act see circular of April 4, 1900 (30 L. D., 23, 28–30).

SURVEYS OF MINING CLAIMS.

General Provisions.

115. Under section 2334, U. S. Rev. Stats., the U. S. surveyor-general "may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims."

116. Persons desiring such appointment should therefore file their applications with the surveyor-general for the district wherein appointment is asked, who will furnish all information necessary.

117. All appointments of mineral surveyors must be submitted to the Commissioner of the General Land Office for approval.

118. The surveyors-general have authority to suspend or revoke the commissions of mineral surveyors for cause. Before final action, however, the matter should be submitted to the Commissioner of the General Land Office for approval.

119. Such surveyors will be allowed the right of appeal from the action of the surveyor-general in the usual manner. Such appeal should be filed with the surveyor-general, who will at once transmit the same, with a full report, to the General Land Office.

120. Neither the surveyor-general nor the Commissioner of the General Land Office has jurisdiction to settle differences, relative to the payment of charges for field work, between mineral surveyors and claimants. These are

matters of private contract and must be enforced in the ordinary manner, i. e., in the local courts. The Department has, however, authority to investigate charges affecting the official actions of mineral surveyors, and will, on sufficient cause shown, suspend or revoke their appointment.

121. The surveyors-general should appoint as many competent mineral surveyors as apply for appointment, in order that claimants may have a choice of surveyors, and be enabled to have their work done on the most advantageous terms.

122. The schedule of charges for office work should be as low as is possible. No additional charges should be made for orders for amended surveys, unless the necessity therefor is clearly the fault of the claimant, or considerable additional office work results therefrom.

123. In cases where the error in the original survey is due to the carelessness or neglect of the surveyor who made it, he should be required to make the necessary corrections in the field at his own expense, and the surveyor-general should advise him that the penalty for failure to comply with instructions within a specified time will be the suspension or revocation of his appointment.

124. Mineral surveyors will address all official communications to the surveyor-general. They will, when a mining claim is the subject of correspondence, give the name and survey number. In replying to letters they will give the subject-matter and date of the letter. They will promptly notify the surveyor-general of any change in post-office address.

125. Mineral surveyors should keep a complete record of each survey made by them and the facts coming to their knowledge at the time, as well as copies of all their field notes, reports, and official correspondence, in order that such evidence may be readily produced when called for at any future time. Field notes and other reports must be written in a clear and legible hand or typewritten, in noncopying ink, and upon the proper blanks furnished gratuitously by the surveyor-general's office upon application therefor. No interlineations or erasures will be allowed.

126. No return by a mineral surveyor will be recognized as official unless it is over his signature as a United States mineral surveyor, and made in pursuance of a special order from the surveyor-general's office. After he has received an order for survey he is required to make the survey and return correct field notes thereof to the surveyor-general's office without delay.

127. The claimant is required, in all cases, to make satisfactory arrangements with the surveyor for the payment for his services and those of his assistants in making the survey, as the United States will not be held responsible for the same.

128. A mineral surveyor is precluded from acting, either directly or indirectly, as attorney in mineral claims. His duty in any particular case ceases when he has executed the survey and returned the field notes and preliminary plat, with his report, to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of his application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim. He is not permitted to combine the duties of surveyor and notary public in the same case by administering oaths to the parties in interest. It is preferable that both preliminary and final oaths of assistants should be taken before some officer duly authorized to administer oaths, other than the mineral surveyor. In cases, however, where great delay, expense, or inconvenience would result from a strict compliance with

this rule, the mineral surveyor is authorized to administer the necessary oaths to his assistants, but in each case where this is done, he will submit to the proper surveyor-general a full written report of the circumstances which required his stated action; otherwise he must have absolutely nothing to do with the case, except in his official capacity as surveyor. He will make no survey of a mineral claim in which he holds an interest, nor will he employ chainmen interested therein in any manner.

Survey—How Made.

129. The survey made and returned must, in every case, be an actual survey on the ground in full detail, made by the mineral surveyor in person after the receipt of the order, and without reference to any knowledge he may have previously acquired by reason of having made the location survey or otherwise, and must show the actual facts existing at the time. This precludes him from calculating the connections to corners of the public survey and location monuments, or any other lines of his survey through prior surveys made by others and substituting the same for connections or lines of the survey returned by him. The term survey in this paragraph applies not only to the usual field work, but also to the examinations required for the preparation of affidavits of five hundred dollars expenditure, descriptive reports on placer claims, and all other reports.

130. The survey of a mining claim may consist of several contiguous locations, but such survey must, in conformity with statutory requirements, distinguish the several locations, and exhibit the boundaries of each. The survey will be given but one number.

131. The survey must be made in strict conformity with, or be embraced within, the lines of the location upon which the order is based. If the survey and location are identical, that fact must be clearly and distinctly stated in the field notes. If not identical, a bearing and distance must be given from each established corner of survey to the corresponding corner of the location, and the location corner must be fully described, so that it can be identified. The lines of the location, as found upon the ground, must be laid down upon the preliminary plat in such a manner as to contrast and show their relation to the lines of survey.

132. In view of the principle that courses and distances must give way when in conflict with fixed objects and monuments, the surveyor will not, under any circumstances, change the corners of the location for the purpose of making them conform to the description in the record. If the difference from the location be slight, it may be explained in the field notes.

133. No mining claim located subsequent to May 10, 1872, should exceed the statutory limit in width on each side of the center of vein or 1,500 feet in length, and all surveys must close within 50–100 feet in 1,000 feet, and the error must not be such as to make the location exceed the statutory limit, and in absence of other proof the discovery point is held to be the center of the vein on the surface. The course and length of the vein should be marked upon the plat.

134. All mineral surveys must be made with a transit, provided with a solar attachment, by which the meridian can be determined independently of the magnetic needle, and all courses must be referred to the true meridian. The variation should be noted at each corner of the survey. The true course of at least one line of each survey must be ascertained by astronomical observations made at the time of the survey; the data for determining the

same and details as to how these data were arrived at must be given. Or, in lieu of the foregoing the survey must be connected with some line the true course of which has been previously established beyond question, and in a similar manner, and, when such lines exist, it is desirable in all cases that they should be used as a proof of the accuracy of subsequent work.

135. Corner No. 1 of each location embraced in a survey must be connected by course and distance with nearest corner of the public survey or with a United States location monument, if the claim lies within two miles of such corner or monument. If both are within the required distance, the connection must be with the corner of the public survey.

136. Surveys and connections of mineral claims may be made in suspended townships in the same manner as though the claims were upon unsurveyed land, except as hereinafter specified, by connecting them with independent mineral monuments. At the same time, the position of any public-land corner which may be found in the neighborhood of the claim should be noted, so that, in case of the release of the township from suspension, the position of the claim can be shown on the plat.

137. A mineral survey must not be returned with its connection made only with a corner of the public survey, where the survey of the township within which it is situated is under suspension, nor connected with a mineral monument alone, when situated within the limits of a township the regularity and correctness of the survey of which is unquestioned.

138. In making an official survey, corner No. 1 of each location must be established at the corner nearest the corner of the public survey or location monument, unless good cause is shown for its being placed otherwise. If connections are given to both a corner of the public survey and location monument, corners Nos. 1 should be placed at the corner nearest the corner of the public survey. When a boundary line of a claim intersects a section line, courses and distances from point of intersection to the Government corners at each end of the half mile of section line so intersected must be given.

139. In case a survey is situated in a district where there are no corners of the public survey and no monuments within the prescribed limits, a mineral monument must be established, in the location of which the greatest care must be exercised to insure permanency as to site and construction.

140. The site, when practicable, should be some prominent point, visible for a long distance from every direction, and should be so chosen that the permanency of the monument will not be endangered by snow, rock, or landslides, or other natural causes.

141. The monument should consist of a stone not less than 30 inches long, 20 inches wide, and 6 inches thick, set halfway in the ground, with a conical mound of stone 4 feet high and 6 feet base alongside. The letters "U. S. L. M.," followed by the consecutive number of the monument in the district, must be plainly chiseled upon the stone. If impracticable to obtain a stone of required dimensions, then a post 8 feet long, 6 inches square, set 3 feet in the ground, scribed as for a stone monument, protected by a well-built conical mound of stone of not less than 3 feet high and 6 feet base around it, may be used. The exact point for connection must be indicated on the monument by an X chiseled thereon; if a post is used, then a tack must be driven into the post to indicate the point.

142. From the monument, connections by course and distance must be taken to two or three bearing trees or rocks, and to any well-known and permanent objects in the vicinity, such as the confluence of streams, promi-

nent rocks, buildings, shafts, or mouths of adits. Bearing trees must be properly scribed "B. T." and bearing rocks chiseled "B. R.," together with the number of the location monument; the exact point on the tree or stone to which the connection is taken should be indicated by a cross or other unmistakable mark. Bearings should also be taken to prominent mountain peaks, and the approximate distance and direction ascertained from the nearest town or mining camp. A detailed description of the locating monument, with a topographical map of its location, should be furnished the office of the surveyor-general by the surveyor.

143. Corners may consist of—

First.—A stone at least 24 inches long set 12 inches in the ground, with a conical mound of stone 1½ feet high, 2 feet base, alongside.

Second.—A post at least 3 feet long by 4 inches square, set 18 inches in the ground and surrounded by a substantial mound of stone or earth.

Third.—A rock in place.

A stone should always be used for a corner when possible, and when so used the kind should be stated.

144. All corners must be established in a permanent and workmanlike manner, and the corner and survey number must be neatly chiseled or scribed on the sides facing the claim. The exact corner point must be permanently indicated on the corner. When a rock in place is used, its dimensions above ground must be stated and a cross chiseled at the exact corner point.

145. In case the point for the corner be inaccessible or unsuitable a witness corner, which must be marked with the letters "W. C." in addition to the corner and survey number, should be established. The witness corner should be located upon a line of the survey and as near as possible to the true corner, with which it must be connected by course and distance. The reason why it is impossible or impracticable to establish the true corner must always be stated in the field notes, and in running the next course it should be stated whether the start is made from the true place for corner or from witness corner.

146. The identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, and other objects, as prescribed in the establishment of location monuments, and when no bearings are given it should be stated that no bearings are available. Permanent objects should be selected for bearings whenever possible.

147. If an official mineral survey has been made in the vicinity, within a reasonable distance, a further connecting line should be run to some corner thereof; and in like manner all conflicting surveys and locations should be so connected, and the corner with which connection is made in each case described. Such connections will be made and conflicts shown according to the boundaries of the neighboring or conflicting claims as each is marked, defined, and actually established upon the ground. The mineral surveyor will fully and specifically state in his return how and by what visible evidences he was able to identfy on the ground the several conflicting surveys and those which appear according to their returned tie or boundary lines to conflict, if they were so identified, and report errors or discrepancies found by him in any such surveys. In the survey of contiguous claims which constitute a consolidated group, where corners are common, bearings should be mentioned but once.

148. The mineral surveyor should note carefully all topographical features of the claim, taking distances on his lines to intersections with all streams,

gulches, ditches, ravines, mountain ridges, roads, trails, etc., with their widths, courses, and other data that may be required to map them correctly. All municipal or private improvements, such as blocks, streets, and buildings, should be located.

149. If, in running the exterior lines of a claim, the survey is found to conflict with the survey of another claim, the distances to the points of intersection, and the courses and distances along the line intersected from an established corner of such conflicting claim to such points of intersection, should be described in the field notes: Provided, That where a corner of the conflicting survey falls within the claim being surveyed, such corner should be selected from which to give the bearing, otherwise the corner nearest the intersection should be taken. The same rule should govern in the survey of claims embracing two or more locations the lines of which intersect.

150. A lode and mill-site claim in one survey will be distinguished by the letters "A" and "B" following the number of the survey. The corners of the mill site will be numbered independently of those of the lode. Corner No. 1 of the mill site must be connected with a corner of the lode claim as well as with a corner of the public survey or United States location monument.

151. When a placer claim includes lodes, or when several contiguous placer or lode locations are included as one claim in one survey, there must be given to the corners of each location constituting the same a separate consecutive numerical designation, beginning with corner No. 1 in each case.

152. Throughout the description of the survey, after each reference to the lines or corners of a location, the name thereof must be given, and if unsurveyed, the fact stated. If reference is made to a location included in a prior official survey, the survey number must be given, followed by the name of the location. Corners should be described once only.

153. The total area of each location and also the area in conflict with each intersecting survey or claim should be stated; also the total area claimed. But when locations embraced in one survey conflict with each other such conflicts should only be stated in connection with the location from which the conflicting area is excluded.

154. It should be stated particularly whether the claim is upon surveyed or unsurveyed public lands, giving in the former case the quarter section, township, and range in which it is located, and the section lines should be indicated by full lines and the quarter-section lines by dotted lines.

155. The title-page of the field notes must contain the post-office address of the claimant or his authorized agent.

156. In the mineral surveyor's report of the value of the improvements all actual expenditures and mining improvements made by the claimant or his grantors, having a direct relation to the development of the claim, must be included in the estimate.

157. The expenditures required may be made from the surface or in running a tunnel, drifts, or crosscuts for the development of the claim. Improvements of any other character, such as buildings, machinery, or roadways, must be excluded from the estimate, unless it is shown clearly that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., are essential to the practical development of and actually facilitate the extraction of mineral from the claim.

158. All mining and other improvements claimed will be located by courses and distances from corners of the survey, or from points on the center or

side lines, specifying with particularity and detail the dimensions and character of each, and the improvements upon each location should be numbered consecutively, the point of discovery being always No. 1. Improvements made by a former locator who has abandoned his claim can not be included in the estimate, but should be described and located in the notes and plat.

159. In case of a lode and mill-site claim in the same survey the expenditure of five hundred dollars must be shown upon the lode claim.

160. If the value of the labor and improvements upon a mineral claim is less than five hundred dollars at the time of survey, the mineral surveyor may file with the surveyor-general supplemental proof showing five hundred dollars expenditure made prior to the expiration of the period of publication.

161. The mineral surveyor will return with his field notes a preliminary plat on blank sent to him for that purpose, protracted on a scale of two hundred feet to an inch, if practicable. In preparing plats the top is north. Copy of the calculations of areas by double meridian distances and of all triangulations or traverse lines must be furnished. The lines of the claim surveyed should be heavier than the lines of conflicting claims.

162. Whenever a survey has been reported in error the surveyor who made it will be required to promptly make a thorough examination upon the premises and report the result, under oath, to the surveyor-general's office. In case he finds his survey in error he will report in detail all discrepancies with the original survey and submit any explanation he may have to offer as to the cause. If, on the contrary, he should report his survey correct, a joint survey will be ordered to settle the differences with the surveyor who reported the error. A joint survey must be made within ten days after the date of order unless satisfactory reasons are submitted, under oath, for a postponement. The field work must in every sense of the term be a joint and not a separate survey, and the observations and measurements taken with the same instrument and chain, previously tested and agreed upon.

163. The mineral surveyor found in error, or, if both are in error, the one who reported the same, will make out the field notes of the joint survey, which, after being duly signed and sworn to by both parties, must be transmitted to the surveyor-general's office.

164. Inasmuch as amended surveys are ordered only by special instructions from the General Land Office, and the conditions and circumstances peculiar to each separate case and the object sought by the required amendment, alone govern all special matters relative to the manner of making such survey and the form and subject-matter to be embraced in the field notes thereof, but few general rules applicable to all cases can be laid down.

165. The amended survey must be made in strict conformity with, or be embraced within, the lines of the original survey. If the amended and original surveys are identical, that fact must be clearly and distinctly stated in the field notes. If not identical, a bearing and distance must be given from each established corner of the amended survey to the corresponding corner of the original survey. The lines of the original survey, as found upon the ground, must be laid down upon the preliminary plat in such manner as to contrast and show their relation to the lines of the amended survey.

166. The field notes of the amended survey must be prepared on the same size and form of blanks as are the field notes of the original survey, and the word "amended" must be used before the word "survey" wherever it occurs in the field notes.

167. Mineral surveyors are required to make full examinations of all placer claims at the time of survey and file with the field notes a descriptive report, in which will be described—

(a) The quality and composition of the soil, and the kind and amount of timber and other vegetation.

(b) The locus and size of streams, and such other matter as may appear upon the surface of the claims.

(c) The character and extent of all surface and underground workings, whether placer or lode, for mining purposes, locating and describing them.

(d) The proximity of centers of trade or residence.

(e) The proximity of well-known systems of lode deposits or of individual lodes.

(f) The use or adaptability of the claim for placer mining, and whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose.

(g) What works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(h) The true situation of all mines, salt licks, salt springs, and mill sites which come to the surveyor's knowledge, or a report by him that none exist on the claim, as the facts may warrant.

(i) Said report must be made under oath and duly corroborated by one or more disinterested persons.

168. The employing of claimants, their attorneys, or parties in interest, as assistants in making surveys of mineral claims will not be allowed.

169. The field work must be accurately and properly performed and returns made in conformity with the foregoing instructions. Errors in the survey must be corrected at the surveyor's own expense, and if the time required in the examination of the returns is increased by reason of neglect or carelessness, he will be required to make an additional deposit for office work. He will be held to a strict accountability for the faithful discharge of his duties, and will be required to observe fully the requirements and regulations in force as to making mineral suveys. If found incompetent as a suveyor, careless in the discharge of his duties, or guilty of a violation of said regulations, his appointment will be promptly revoked.

R. A. Ballinger, Commissioner.

Approved May 21, 1907.

James Rudolph Garfield, Secretary.

APPENDIX C.

COAL-LAND LAWS AND LAND OFFICE REGULATIONS OF APRIL 12, 1907, THEREUNDER, WITH AMENDMENTS AND SUPPLEMENTAL CIRCULARS, REPRINTED JULY 11, 1908.

Department of the Interior, General Land Office,
Washington, D. C., April 12, 1907.

The following coal-land laws relating to the public-land states and territories and to the district of Alaska, together with the rules and regulations as now applicable, are herewith published for the instruction of the local land officers and the information of intending applicants. All rules and regulations heretofore issued under said laws are hereby abrogated.

PART I.

[Title XXXII, Chapter Six.]

MINERAL LANDS AND MINING RESOURCES.

Entry of coal lands.

Sec. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road. 3 March, 1873, c. 279, s. 1, v. 17, p. 607.

Pre-emption of coal lands.

Sec. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: Provided, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in

working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements. Ibid., s. 2.

Pre-emption claims of coal land to be presented within sixty days, etc.

Sec. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three. Ibid., s. 3.

Only one entry allowed.

Sec. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant. Ibid., s. 4.

Conflicting claim.

Sec. 2351. In case of conflicting claims upon coal-lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections. Ibid., s. 5.

Rights reserved.

Sec. 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper. Ibid., s. 6.

RULES AND REGULATIONS.

1. The sale of coal lands is provided for—

(a) By ordinary cash entry under section 2347;

(b) By cash entry under a preference right to purchase acquired by compliance with the provisions of section 2348.

2. Coal lands may be entered only after survey and by legal subdivisions. The lands must be vacant and unappropriated and must contain workable deposits of coal and must not be valuable for mines of gold, silver, or copper. Lands containing lignites are included under the term "coal lands."

3. Entry by an individual may be made only by a person above the age of 21 years who is a citizen of the United States or has declared his intention to become such, and shall not embrace more than 160 acres. Entry by an association of persons may embrace 320 acres, but each person composing the association must be qualified as in the case of an individual entryman. A corporation is held to be an association under the provisions of the coal-land law.

4. When an association of not less than four persons, severally qualified as required in the case of an individual entryman, shall have expended not less than $5,000 in working and improving a mine or mines of coal upon the public lands, such association may enter not exceeding 640 acres, including such mining improvements.

5. But one entry of coal lands by any person or association of persons is allowed by the law. No person who, and no association any member of which, either as an individual or as a member of an association, shall have had the benefits of the law may enter or hold any other coal lands thereunder. The right so to enter or hold is exhausted whether an entry embraces in any instance the maximum area allowed by the law or less; also by the acquisition of a preference right of entry unless sufficient cause for the abandonment thereof is shown. Assignment of a preference right of entry under section 2348, Revised Statutes, will not hereafter be recognized.

6. Information will be furnished registers and receivers by the Commissioner of the General Land Office of the price at which all coal lands in their respective districts will be offered. The local land officers will from time to time be furnished with schedules and maps (1) showing lands known to lie without ascertained coal areas and open to entry under the general land laws, according to the character of each particular tract; (2) showing lands known to contain workable deposits of coal, whereon prices will be fixed upon information derived from field examination; and (3) showing lands containing coal of such character as may, from their location at a distance from transportation lines, be sold at the minimum price fixed by the statute as hereinafter stated.

Local land officers will allow coal entries for lands in the first and third classes at the minimum price fixed by the statute, and for those in the second class at the prices stated in the schedules and maps furnished them. Lands listed in classes 2 and 3 are subject to entry under the coal-land laws only, unless shown by the applicant to be of such character as to be subject to entry under some other law. For those lands listed as of the first and third classes (when entered under the coal-land laws) the price is not less than $10 per acre when situated more than 15 miles from a completed railroad and $20 when situated within 15 miles of a completed railroad; and where the lands lie partly without such limit, the higher price must be paid for each smallest legal subdivision the greater part of which lies within 15 miles of such railroad. The term "completed railroad" is construed to mean a railroad actually constructed, equipped, and operating at the date of entry. The distance is to be calculated from the point on such railroad nearest the lands applied for, and the facts in each case must be shown by the affidavit of the applicant, corroborated by the affidavit of some disinterested credible person having actual knowledge thereof.

7. A preference right of entry accrues only where a person or association of persons, severally qualified, have opened and improved a coal mine or mines upon the public lands and shall be in actual possession thereof and not by the filing of a declaratory statement. A perfunctory compliance with the law in this respect will not suffice, but a mine or mines of coal must be in fact opened and improved on the land claimed.

There is no authority under which a coal mine upon public lands, entry not having been made, may be worked and operated for profit and sale of the coal, or beyond the opening and improving of the mine as a condition precedent to a preference right under section 2348 of the Revised Statutes. To preserve a preference right of entry specified in the statute the person or association of persons having acquired the same must present to the register of the proper land district, within sixty days from the date of actual possession and commencement of improvements upon the land, a declaratory statement therefor in all cases where the township plat has been filed. When the township plat is not on file at the date of such improvement such declaratory statement must be presented within sixty days from the receipt of such plat at the district land office.

8. After entry has been allowed the local officers have no authority to order a hearing or make further determination with respect to it, except upon instructions from the General Land Office. They will, however, receive all protests against it and promptly forward them, together with a statement of the facts shown by their records, for consideration and action.

9. Prior to entry it is competent for the local officers to order a hearing on sufficient grounds set forth under oath by any protestant.

10. When it is sought to purchase otherwise than in the exercise of a preference right the party will himself make oath to the following application, which must be presented to the register:

I, ..., hereby apply, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, to purchase the ..... quarter of section ....., in township ..... of range ....., in the district of lands subject to sale at the land office at ....., and containing ..... acres; and I solemnly swear that no portion of said tract is in the possession of any other party or parties who has or have commenced improvements thereon for the development of coal; that I am twenty-one years of age; a citizen of the United States (or have declared my intention to become a citizen of the United States), and have never held, except ..... or purchased any lands under said act, either as an individual or as a member of an association; that I make this application in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any other person or persons whomsoever; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains workable deposits of coal; that there is not to my knowledge within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

11. Where a preference right of entry is sought to be preserved the required declaratory statement must be substantially as follows:

I, ..., do hereby declare my intention to purchase, in the exercise of a preference right, under the provisions of the Revised Statutes of the United

States relating to the sale of the coal lands of the United States, the ..... quarter of section ..... of township ..... of range ....., in the district of the lands subject to sale at the district land office at .....; and I do solemnly swear that I am ..... years of age and a citizen of the United States (or have declared my intention to become a citizen of the United States); that I have never, either as an individual or as a member of an association, held, except ..... or purchased any coal lands under the aforesaid provisions of the Revised Statutes; that I was in possession of, and commenced improvements on, said tract on the ..... day of ....., A. D. 19.., and have ever since remained in actual possession continuously; that I have opened and improved a valuable mine of coal thereon, and have expended in labor and improvements on said mine the sum of ..... dollars, the labor and improvements being as follows: (Here describe the nature and character of the improvements); and I do furthermore solemnly swear that I am well acquainted with the character of said described land and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

12. One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment; but the local officers will allow no party to make final proof and payment except on special written notice to all others who appear on their records as claimants to the same tract. No notice will be given to parties whose declaratory statements have expired by limitation under the law.

13. A declarant will not be permitted to file after the expiration of the sixty days allowed* nor to exercise a preference right of purchase after the expiration of the year.

14. When it is sought to purchase, in the exercise of a preference right, the applicant must himself make the following affidavit, which must be presented to the register:

I, ..., claiming, under the provisions of the Revised Statutes of the United States relating to the sale of the coal lands of the United States, the preference right to purchase the ..... quarter of section ....., in township ..... of range ....., subject to sale at the district land office at ....., hereby apply to purchase and enter the same; and I do solemnly swear that I have not hitherto held, except ..... or purchased, either as an individual or as a member of an association, any coal lands under the aforesaid provisions of the law; that I have expended in developing coal mines on said tract, in labor and improvements, the sum of ..... dollars, the nature of such improvements being as follows: ....; that I am now in the actual possession of said mines, and make the entry in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any person or persons whomsoever; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains workable deposits of coal; that there is not to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said

*But see Charles S. Morrison (On Review) 36 Land Dec. Dep. Int. 319.

land, to my knowledge, any valuable deposits of gold, silver, or copper. So help me God.

15. Where purchase and entry, whether in the exercise of a preference right or otherwise, is made by an association, each member thereof must subscribe and swear to the application or affidavit, the necessary changes being made to cover the joint possession and expenditure and the purchase and entry in their joint interest.

16. Each application, declaratory statement, and affidavit, forms whereof are given above, must be verified before the register or receiver or some officer authorized by law to administer oaths in the land district wherein the lands involved are situate. [Amendment of April 29, 1908.]

17. Upon the filing of an application to purchase coal lands under the provisions of paragraphs 10 or 14 the applicant will be required, at his own expense, to publish a notice of said application in a newspaper nearest the lands, to be designated by the register, for a period of thirty days, during which time a similar notice must be posted in the local land office and in a conspicuous place on the land. The notice should describe the land applied for and state that the purpose thereof is to allow all persons claiming the land applied for, or desiring to show that the applicant's coal entry should not be allowed for any reason, an opportunity to file objections with the local land officers.

Publication must be made sufficiently in advance to permit entry within the year specified by the statute.

18. After the thirty days period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement (including an attached copy of the published notice) that the notice was published for the required period, giving the first and last date of such publication, and his own affidavit, or that of some credible person having personal knowledge of the fact, showing that the notice aforesaid remained conspicuously posted upon the land sought to be patented during said thirty days publication, giving the dates. The register shall certify to the fact that the notice was posted in his office for the full period of thirty days, the certificate to state distinctly when such posting was done and how long continued, giving the dates. In no case shall entry be allowed until the proofs specified have been filed.

The claimant will be required within thirty days after the expiration of the period of newspaper publication to furnish the proofs specified in said paragraph and tender the purchase price of the land. Should the specified proofs and purchase price be not furnished and tendered within this time, the local land officers will thereupon reject the application, subject to appeal. Furthermore, in the exercise of a preference right to purchase, no part of the thirty-day period specified herein may extend beyond the year fixed by the statute. [Amendment of November 30, 1907.]

19. Of the following forms, the one appropriate to the sections of the Revised Statutes under which application is made should be used for publication of all notices of application to enter coal lands:

NOTICE FOR PUBLICATION.

Coal Entry.

(Sec. 2347, R. S.)

..... Land Office, ..., 19..

Notice is hereby given that ....., of ....., county of ..... state (or territory) of ..... has this day filed in this office his application to pur-

chase, under the provisions of section 2347, U. S. Revised Statutes, the ..... of section No. ....., township No. ....., range No. .....

Any and all persons claiming adversely the lands described, or desiring to object for any reason to the sale thereof to applicant, should file their affidavits of protest in this office on or before the ..... day of ....., 19.., otherwise the application may be allowed.

....., Register.

NOTICE FOR PUBLICATION.

Coal Entry.

(Secs. 2348–52, R. S.)

..... Land Office, ..., 19...

Notice is hereby given that ....., of ....., county of ....., state (or territory) of ....., who, on the ..... day of ....., 19.., filed in this office his coal declaratory statement for the ..... of section No. ....., township No. ....., range No. ....., has this day filed in this office his application to purchase said land under the provisions of sections 2348 to 2352, U. S. Revised Statutes.

Any and all persons claiming adversely the lands described, or desiring to object for any reason to the entry thereof by applicant, should file their affidavits of protest in this office on or before the ..... day of ....., 19...

....., Register.

20. When it is sought to purchase, either by ordinary cash entry or in the exercise of a preference right, the register, if he finds the tract applied for is vacant, surveyed, and unappropriated, and that the claimant has complied with all the laws and regulations relating to the acquisition of coal lands, will so certify to the receiver, stating the prescribed purchase price, and the applicant must then pay the same.

21. The receiver will then issue to the purchaser a duplicate receipt, and at the close of the month the register and receiver will make returns of the sale to the General Land Office, whence, if the proceedings are found to be regular, a patent will be issued; and on surrender of the duplicate receipt such patent will be delivered, at the option of the patentee, either by the Commissioner at Washington or by the register at the district land office.

22. An application for cash entry will be subject to any valid adverse right which may have attached to the same land pursuant to section 2348, Revised Statutes.

23. Qualified persons or associations who are lawfully in possession of tracts of coal lands which are still unsurveyed may, under sections 2401, 2402, and 2403, Revised Statutes, as amended by the act of August 20, 1894, apply to the surveyor-general for the survey of the township or townships, or portions thereof, embracing the lands claimed, to be specified as nearly as practicable. Each such application must be accompanied by the affidavit of the applicant or applicants, duly corroborated by at least two competent persons, setting forth the qualifications of the former as claimant or claimants of the land, the facts constituting their possession, the character of the land, and such other facts in the case as are essential in that connection. If the surveyor-general approves the application he will thereupon transmit it to the General Land Office with the affidavits and his report.

24. The "Rules of Practice in Cases before the United States District Land Offices, the General Land Office, and the Department of the Interior" will,

as far as applicable, govern all cases and proceedings arising under the statutes providing for the sale of coal lands.

25. Local officers will report at the close of each month, as "sales of coal lands" all filings and entries in separate abstracts, commencing with No. 1 and thereafter proceeding consecutively in the order of their reception. Where a series of numbers has already been commenced by sale of coal lands they will continue the same without change.

PART II.—COAL LANDS IN ALASKA.

[Act June 6, 1900 (31 Stat., 658).]

An Act to extend the coal-land laws to the district of Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the public-land laws of the United States are hereby extended to the district of Alaska as relate to coal lands, namely, sections twenty-three hundred and forty-seven to twenty-three hundred and fifty-two, inclusive, of the Revised Statutes.

[Act April 28, 1904 (33 Stat., 525).]

An Act to amend an act entitled "An act to extend the coal-land laws to the district of Alaska," approved June sixth, nineteen hundred.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this Act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

Sec. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor-general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty

days, and shall have caused copies of such notice, together with a certified copy of the official plat of survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: Provided, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

Sec. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

Sec. 4. That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this Act shall continue and be in full force in the district of Alaska.

RULES AND REGULATIONS.

1. Persons or associations of persons locating or entering coal lands in the district of Alaska under the provisions of the act of April 28, 1904 (33 Stat. L., 525), amendatory of the act of June 6, 1900 (31 Stat. L., 330), are required to possess the qualifications of persons or associations making entry under the general coal-land laws of the United States, and are subject to the same limitations.

2. The lands must be vacant and unappropriated, and must contain deposits of coal, and must not be valuable for mines of gold, silver, or copper. Lands containing lignites are included under the term "coal lands."

3. Entry by an individual may be made only by a person above the age of 21 years, who is a citizen of the United States, and shall not embrace more than 160 acres. Entry by an association of persons may embrace 320 acres, but each person composing the association must be qualified as in the case of an individual entryman. A corporation is held to be an association under the provisions of the coal-land law.

4. When an association of not less than four persons, severally qualified as required in the case of an individual entryman, shall have expended not less than $5,000 in working and improving a mine or mines of coal upon the public lands, such association may enter not exceeding 640 acres, including such mining improvements.

5. But one entry of coal lands by any person or association of persons is allowed by the law. No person who, and no association any member of which, either as an individual or as a member of an association, shall have had the benefits of the law may enter or hold other coal lands thereunder. The right so to enter or hold is exhausted, whether an entry embraces in any instance the maximum area allowed by the law or less.

6. There is no authority under which a coal mine upon public lands, entry not having been made, may be worked and operated for profit and sale of

the coal, or beyond the opening and improving of the mine as a condition precedent to the right to apply for patent.

7. The requirement of the statute with respect to the form of the tract sought to be entered is construed to mean that the boundary lines of each entry must be run in cardinal directions, i. e., due north and south and east and west lines, by reference to a true meridian (not magnetic), with the exception of meander lines on meanderable streams and navigable waters forming a part of the boundary lines of a location. Those meander lines which form part of the boundary of a claim will be run according to the directions in the Manual of Surveying Instructions, but other boundary lines will be run in true east and west and north and south directions, thus forming rectangles, except at intersections with meandered lines.

8. The permanent monuments to be placed at each of the four corners of the tract located may consist of—

First. A stone at least 24 inches long, set 12 inches in the ground, with a conical mound of stone 1½ feet high, 2 feet base, alongside.

Second. A post at least 3 feet long by 4 inches square, set 18 inches in the ground, and surrounded by a substantial mound of stone or earth.

Third. A rock in place; and, whenever possible, the identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, or other objects, permanent objects being selected for bearings whenever possible.

9. It is further provided by the first section of the act that within one year from the date of the passage of the act or within one year from making the location there shall be filed for record in the recording district and with the register and receiver of the land district in which the land is situated a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same. In other words, the notice should contain a complete description in every particular of the claim as it is marked and monumented upon the ground.

10. By the second section of the act the locator or his assigns is allowed three years from the date of filing the notice prescribed in the first section of the act within which to file an application with the local land officers for a patent for the land claimed. It will thus be seen that persons or associations of persons claiming coal lands in that district at the date of the passage of the act have four years from location or from the date of the act within which to present their applications for patent.

11. Persons or associations of persons who fail to record their notices within the time prescribed by the first section of the act, or fail to file application for patent in the time prescribed by the second section, forfeit their rights to the particular tract located.

12. With the application for patent the claimant must file a certified copy of the plat of survey and field notes thereof made by a United States deputy surveyor or a United States mineral surveyor, duly approved by the surveyor-general for the district of Alaska. Under this clause of the act it will be allowable for the claimant, at his own expense, to procure the making of a survey by one of the officials mentioned without first making application to the surveyor-general, but the survey when made is to be submitted to and approved by the surveyor-general and by him numbered serially.

13. The survey must be made in strict conformity with or be embraced within the lines of the location as appears from the record thereof with the recorder in the recording district, and must be made in accordance with the

regulations relative to lode and placer mining claims so far as they are applicable.

14. Upon the presentation of an application for patent, if no reason appears for rejecting it, it will be received by the register and receiver and the claimant required to publish a notice thereof for the period of sixty days in a newspaper in the district of Alaska published nearest the location of the particular lands, and to cause a copy thereof, together with a certified copy of the official plat of survey, to be posted and remain posted throughout the period of publication in a conspicuous place upon the land applied for, and the register will post a copy of such notice and official plat in his office for the same period. When the notice is published in a weekly newspaper nine consecutive insertions are necessary; when in a daily newspaper, the notice must appear in each issue for sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

15. The notice so published must embrace all the data given in the notice posted upon the claim and in the local land office. In addition to such data, the published notice must further indicate the locus of the claim by giving the connecting line, as shown by the field notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, if there is one, and fix the boundaries of the claim by courses and distances.

The publication in the newspaper and the posting upon the land and in the local land office must cover the same period of time.

16. Upon the expiration of the sixty-day period prescribed the claimant may file in the local land office a sworn statement from the office of publication, to which shall be attached a copy of the notice published, to the effect that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during the sixty-day period of publication, giving the dates. The register will also file with the record a certificate showing that the notice and plat were posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued.

Not earlier than six months after the expiration of the period of publication, if no objections are interposed or adverse claim filed, entry may be allowed upon payment of the price per acre specified by the act, which is $10 per acre in all cases.

17. The proviso to the second section of the act is as follows:

That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

The term "shore" is defined to mean the land lying between high and low water marks of any navigable waters within said district.

18. Section 3 provides for the assertion by any person or association of persons of an adverse claim, and requires that such adverse claim shall be filed during the period of posting and publication or within six months thereafter; that it shall be under oath, and set forth the nature and extent thereof.

19. An adverse claim may be verified by the oath of the adverse claimant or by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated, and when verified by such agent or attorney in fact he must distinctly swear that he is such agent or attorney in fact and accompany his affidavit by proof thereof. The adverse claimant

should set forth fully the nature and extent of the interference or conflict by filing with his adverse claim a plat showing his entire claim and its situation or position with relation to the one against which he claims; whether he claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance or duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or, if the transaction was a merely verbal one, he will narrate the circumstances attending the purchase, the date thereof, and amount paid, which facts will be supported by the affidavits of one or more witnesses, if any were present at the time; and if he claims as locator, he must file a duly certified copy of the location notice from the office of the proper recorder and his affidavit of continued ownership.

20. Upon the filing of such adverse claim within the sixty days period of posting and publication, or within six months thereafter, the party who files the adverse claim shall, under the act, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska.

21. All papers filed should have indorsed upon them the precise date of filing; and upon the filing of an adverse claim within the time prescribed by the statute all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notice and plat and filing the necessary proof thereof, until final adjudication of the rights of the parties. In cases of final judgment rendered the party entitled under the decree must, before he is allowed to make entry, file a certified copy thereof.

22. Where such suit has been dismissed a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient. Where no suit has been commenced against the application for patent within the statutory period, a certificate to that effect by the clerk of the Territorial court having jurisdiction will be required.

23. In connection with the foregoing, it is to be borne in mind that by section 4 of the act it is declared:

That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska.

24. An assignment to a qualified person of a preference right of entry under the act of April 28, 1904, will be recognized when properly executed. Proof and payment by the assignee must be made, however, in the same manner and within the same time as though there had been no assignment.

25. The following forms for notice of location and application for patent should be used:

Notice of Location.

I, ..., of ....., having on the ..... day of ....., 19.., opened and improved a coal mine on the following-described tract (here describe the lands by metes and bounds in rectangular form with north and south boundary lines run according to the true meridian, and a reference to such natural or permanent objects as will readily identify the same), do hereby locate the same as provided by the Alaska coal-land act of April 28, 1904 (33 Stats., 525); and I do solemnly swear that I am a citizen of the United States (or have declared my intention to become a citizen of the United States); that I am over the age of 21 years; that I have never either as an individual or as a member of an association held, except ....., or purchased any coal lands of

the United States; that I have remained in actual possession of said land continuously since the ..... day of ....., 19..; that I have expended in labor and improvements on said mine the sum of ..... dollars, the labor and improvements being as follows (here describe the nature and character of such improvements); and I do furthermore solemnly swear that I am well acquainted with the character of said described lands and with each and every portion thereof; that my knowledge of said lands is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, copper, or other valuable minerals, and that there is not within the limits of said land, to my knowledge, any valuable deposits of gold, silver, or copper or other minerals. So help me God.

.....

Dated ....., 19...
(Jurat.)

APPLICATION FOR PATENT.

I, ..., claiming under the provisions of the act of April 28, 1904 (33 Stats., 525), amendatory of the act of June 6, 1900 (31 Stats., 658), extending the coal-land laws to the district of Alaska, do hereby apply to purchase the lands described in the accompanying field notes and plat and subject to sale at the district land office at ....., Alaska; and do solemnly swear that my title to said tract is as follows: ....., as will more fully appear by the certified copy of location notice and abstract of title filed herewith; that I am above the age of 21 years, and a citizen of the United States; that I have not hitherto held, except ....., or purchased, either as an individual or as a member of an association, any coal lands under the provisions of the coal-land laws; that I have expended in developing coal mines on said tract, in labor and improvements, the sum of ..... dollars, the nature of said improvements being as follows: .....; that I am now in the actual possession of said mines and make the entry in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any person or persons whomsoever; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every portion thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains deposits of coal; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, copper, or other valuable minerals, and that there is not within the limits of said land, to my knowledge, any valuable deposits of gold, silver, copper, or other minerals. So help me God. .....
(Jurat.)

26. The notice of location and the application for patent, the forms of which are given above, may be sworn to by the claimant before any officer authorized by law to administer oaths, but the authority of said officer must be properly shown.

27. Any party duly qualified under the law, after swearing to his notice of location or application for patent, may, by a sufficient power of attorney duly executed under the laws of the state or territory in which such party may be then residing, empower an agent to file with the register of the proper land office the notice of location or application for patent, and also authorize him to make payment for and entry of the lands in the name of such qualified party; and when such power of attorney shall have been filed in the local

land office such agent may act thereunder as indicated, but no person will be permitted to act as such agent for more than four applicants.

28. Where a claimant shows by affidavit that he is not personally acquainted with the character of the land, any qualified person may make the required affidavit as to its character; but whether this affidavit is made by the claimant or by another it must be corroborated by the affidavits of two disinterested and credible witnesses having personal knowledge of the facts.

29. The "Rules of Practice in Cases before the United States District Land Offices, the General Land Office, and the Department of the Interior," will, as far as applicable, govern all cases and proceedings arising under the statutes providing for the sale of coal lands.

30. Local officers will report at the close of each month as "sales of coal lands" all filings and entries in separate abstracts, commencing with number one and thereafter proceeding consecutively in the order of their reception.

Where a series of numbers has already been commenced by sale of coal lands, they will continue the same without change.

R. A. Ballinger, Commissioner.

Department of the Interior, April 12, 1907

Approved.

James Rudolph Garfield, Secretary.

Department of the Interior, General Land Office,

Washington, D. C., June 27, 1908.

Registers and Receivers, United States Land Offices, Alaska.

Sirs: The instructions of the General Land Office, dated March 3, 1908, relative to the time within which applications to purchase coal lands in Alaska under the act of April 28, 1904 [33 Stat., 525], must be perfected, are amended to read as follows:

Your attention is called to the fact that the coal-land law of April 28, 1904 [33 Stat., 525], provides that locators or their assigns may, at any time within three years after filing the notice prescribed by the first section of the act, make application for patent for the land claimed.

This does not mean that if the application is filed at an earlier time than that allowed, the claimant may defer payment for his claim and making entry for a period of time which added to the time between filing the location notice and submitting the application for patent, will equal three years.

When the claimant files his application for patent he waives the unexpired portion of the three years fixed by the statute and must, thereafter, diligently proceed to make publication and submit the proofs prescribed by the statute and the regulations.

Paragraph 16 of the regulations of April 12, 1907 (35 L. D. 673), provides that payment and entry may be made not earlier than six months after the expiration of the period of publication. The law does not contemplate that this time be extended an unreasonable period at the option of the claimant, but that after the filing of the application, the case proceed regularly to entry. Accordingly, should the specified proofs and purchase price be not furnished and tendered within six months from the expiration of the six months within which adverse claims may be filed, or within six months after the final termination of adverse proceedings instituted under section 3 of the act, you will reject the application subject to appeal: Provided, That the period of six months herein fixed within which to perfect entry shall be allowed in case of pending applications which have not been perfected within the ninety days

specified by the instructions of March 3, 1908, the time to run from date hereof.

This is not intended in any way to modify the circular instructions of May 16, 1907, copy inclosed herewith.

Very respectfully, S. V. Proudfit, Acting Commissioner.

Approved June 27, 1908.

Frank Pierce, Acting Secretary.

Department of the Interior, General Land Office,

Washington, D. C., July 11, 1908.

Registers and Receivers, United States Land Offices, and United States Surveyor-General, District of Alaska.

Gentlemen: Herewith is copy of act of Congress approved May 28, 1908, Public No. 151, relating to existing unpatented coal claims in the district of Alaska.

CONSOLIDATION OF CLAIMS, MAXIMUM AREA.

The said act provides a method whereby qualified persons, their heirs or assigns, who initiated coal claims in Alaska prior to November 12, 1906, may consolidate their claims through the means of associations or corporations which may perfect entry and acquire title to contiguous locations, such consolidated claims not to exceed 2,560 acres of contiguous lands nor to exceed in length twice the width of the tract thus consolidated and applied for.

QUALIFICATIONS OF APPLICANTS FOR CONSOLIDATED CLAIM.

When application is made by an association of persons, each member thereof must be shown to be qualified to make entry under the coal-land laws applicable to Alaska, and to be the owner, by location, inheritance, or purchase, of an undivided interest in the consolidated claim. Proof of the qualifications of the applicants may consist of their own affidavits. The application for patent may be executed and filed by the duly authorized agent of the members of the association.

A corporation applying to consolidate its claims must show at date of application that not less than 75 per cent. of its stock is held by persons qualified to enter coal lands in Alaska, and to this end each such application must be accompanied by a list of the stockholders, showing their respective holdings of stock in the corporation, and the personal affidavits of those holding such 75 per cent. of the capital stock, showing their qualifications under the law. Applications by corporations must be signed by the president and secretary and attested by the corporate seal. All applications may be upon Form 4–367, modified to suit conditions.

PENDING ENTRIES.

Claims embraced in unpatented entries, if the entrymen shall so elect, may be consolidated into a single entry under this act, upon presentation of a proper application therefor, within twelve months from date hereof. In the event of such consolidation, no further payment, publication of notice, nor any new or additional survey of the claims embraced in the consolidated entry will be required; but the application must be accompanied by a plat of the claims as

consolidated, by proof of the qualifications of the applicants, and by evidence of the assignment of the claims to the applicants.

ASSIGNMENTS.

Assignments to individuals or corporations under the provisions of the act of May 28, 1908, must be executed in accordance with local requirements, and all applications be accompanied by abstracts of title properly certified.

SURVEYS.

Where locations already surveyed are sought to be consolidated, the application must be accompanied by a plat showing the separate locations included in the consolidation and their relation to each other. One entry may then be made for the consolidated claim. Where unsurveyed claims are consolidated, the survey may describe the exterior limits of the consolidated claim, as in the case of the survey of one location, but the field notes of survey must be accompanied by duly certified copies of the location notices of the included claims, and must show that the survey is made substantially in accordance with the aggregate locations. Consolidated claims need not be surveyed in perfect squares or parallelograms, but the length of the consolidated claim must not exceed twice the width, length and width to be measured in straight lines.

TIME WITHIN WHICH APPLICATION TO ENTER MUST BE MADE.

Application for patent for consolidated claims may be accepted if filed within three years from date of the latest recorded notice of location of the included claims, exclusive of the period of suspension between November 12, 1906, and August 1, 1907 (Circular, May 16, 1907, 35 L. D., 572). In case of consolidation of claims, including both claims for which no application for patent has been filed and claims for which applications have been made, the application under the provision of this act must be filed within three years from date of the latest recorded notice of location of the included claims, exclusive of the period of suspension hereinbefore mentioned. In case of consolidation of claims for all of which applications for patent have already been filed, final proof, payment, and entry must be made within six months after the expiration of the period of six months prescribed by section 3 of the act of April 28, 1904, for the filing of adverse claims has elapsed in case of all the included applications or within six months after the final adjudication of the rights of the parties in adverse suits instituted with respect to any or all of such included applications: Provided that in those cases wherein the time here specified has expired applications to consolidate must be filed within six months from date hereof.

SECTION 3 OF ACT.

Inasmuch as section 3 deals exclusively with such coal lands or deposits as shall have been purchased under this act, its interpretation seems more properly to fall within the province of the Department of Justice, and it is deemed inadvisable for this Department to attempt at this time to define its provisions.

ACT APRIL 28, 1904 (33 STAT., 525).

So far as not in conflict with or superseded by the act of May 28, 1908, the act of April 28, 1904, will govern the survey, application, and entry of the coal claims described in these instructions.

PATENTS.

Patents issued under the provisions of the act of May 28, 1908, will contain recitals of the terms and conditions imposed by sections 2 and 3 of the act.

Very respectfully, S. V. Proudfit, Acting Commissioner.

Approved:

Frank Pierce, First Assistant Secretary.

[Act May 28, 1908, c. 211 (35 Stat. 424).]

An Act to encourage the development of coal deposits in the Territory of Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the Secretary of the Interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations by including in a single claim, location, or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated, and for this purpose such persons, their heirs, or assigns, may form associations or corporations who may perfect entry of and acquire title to such lands in accordance with the other provisions of law under which said locations were originally made: Provided, That no corporation shall be permitted to consolidate its claims under this act unless seventy-five per centum of its stock shall be held by persons qualified to enter coal lands in Alaska.

Sec. 2. That the United States shall, at all times, have the preference right to purchase so much of the product of any mine or mines opened upon the lands sold under the provisions of this act as may be necessary for the use of the Army and Navy, and at such reasonable and remunerative price as may be fixed by the President; but the producers of any coal so purchased who may be dissatisfied with the price thus fixed shall have the right to prosecute suits against the United States in the Court of Claims for the recovery of any additional sum or sums they may claim as justly due upon such purchase.

Sec. 3. That if any of the lands or deposits purchased under the provisions of this act shall be owned, leased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever so that they form part of, or in any way effect any combination, or are in anywise controlled by any combination in the form of an unlawful trust, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, or of any holding of such lands by any individual, partnership, association, corporation, mortgage, stock ownership, or control, in excess of two thousand five hundred and sixty acres in the district

of Alaska, the title thereto shall be forfeited to the United States by proceedings instituted by the Attorney-General of the United States in the courts for that purpose.

Sec. 4. That every patent issued under this act shall expressly recite the terms and conditions prescribed in sections two and three hereof.

INSTRUCTIONS.

Department of the Interior, General Land Office,

Washington, D. C., April 24, 1907.

Registers and Receivers, United States Land Offices.

Sirs: The following instructions are issued for your guidance:

COAL LANDS.

1. Lands heretofore withdrawn from coal entry and not released from such withdrawals shall be entered on the tract books as "coal lands."

2. No entries of lands so noted shall be permitted under the coal-land laws until the maps and lists, as hereinafter mentioned, are filed in the local land office. Provided, however, such lands are now open for location and entry under the general mining laws for valuable deposits of gold, silver, or copper, notwithstanding the fact that they may also contain workable deposits of coal. Lands noted on the tract books as coal lands may, if nonmineral in character, be entered under the appropriate land laws, but no final proof or entry will be allowed until receipt of a report from a field officer, in accordance with instructions from the Commissioner of the General Land Office, unless said lands have been restored to entry as hereinafter provided.

3. You will be furnished, from time to time, township maps showing the coal lands in the respective townships, containing thereon the price at which such coal lands will be sold. Lands not enumerated and priced as "coal lands" in any such township map shall be treated as restored to entry under the general land laws, and you will so note on your tract books. Upon the filing of such maps, coal claims may be received, as provided by the regulations of April 12, 1907, within the townships covered thereby.

All coal filings made within sixty days prior to withdrawals from coal entry may be completed within the time prescribed by the statutes, less the time from date of such withdrawals to date of special written notice of filing of the maps and lists in the local office, as herein provided, such notice to be given by you to all persons entitled thereto. Also persons who had, within sixty days prior to such withdrawal, opened and improved a coal mine upon public surveyed lands may file within the statutory period allowed, less that covered by the withdrawal. Claims upon unsurveyed lands classed as coal lands must be presented for filing within sixty days after the filing of the plat of survey, if the maps and plats are filed before the survey, or, after the lands have been surveyed, within sixty days after the filing of the maps and lists herein required in the local office, if the maps and lists are filed after the survey. However, in cases of valid and existent rights, the price per acre to be paid will be the minimum price fixed by statute.

LANDS NOT "COAL LANDS."

4. Lands not listed as "coal lands," as hereinbefore mentioned, may be entered under any of the public land laws applicable to the particular tract. If any of these lands are found to contain workable deposits of coal they may be entered under the provisions of the coal land circular of April 12, 1907, at the minimum price fixed by the statute.

ACTION REQUIRED BY SPECIAL AGENTS.

5. In all cases of application to make final proof, final entry, or to purchase public lands under any public land law, the Register and Receiver will at once forward a copy thereof to the Chief of Field Division of Special Agents. Such copy will be indorsed "coal lands" or "not coal lands," as the case may be. Where the land is in a National Forest or other reservation, a second copy will be forwarded to the officer in charge thereof.

6. Registers and Receivers will not issue final certificate or its equivalent in any case until the copy of notice mentioned in paragraph 5 is returned with the Chief of Field Division's indorsement thereon. The Chief of Field Division will in every case return the copy of notice prior to date for final proof or purchase.

7. When the copy of notice is returned with an indorsement not protesting the validity of the entry, the Register and Receiver will act upon the merits of the proof as submitted. Where the returned indorsement of Chief of Field Division or other officer protests the validity of the entry, the Register and Receiver will forward all papers to this office without action.

8. The Chief of Field Division, on receipt of such copy of notice, will make a case thereof on his docket, and also make a field examination in the following cases:

(a) Cases wherein he has reason to believe a particular entry is fraudulent.

(b) Cases wherein the Register and Receiver have reason to believe a particular entry is fraudulent and have indorsed that fact upon the copy of notice.

(c) Cases other than coal entries in lands classed as coal lands.

Chiefs of Field Division will exert every effort to make the field examination prior to date for final proof.

9. In cases not within paragraph 8 the Chief of Field Division will return such copy of notice indorsed over his signature "no protest against validity of this entry." In cases under paragraph 8 he will return to the Register and Receiver the copy of notice indorsed "protest against the validity of this entry is filed in this office." If investigation is completed before date for final proof, he will so notify the Register and Receiver, by letter; and if investigation is unfavorable to entry, he will submit his report to this office.

The circulars of January 21, 1907, March 15, 1907, and all parts of the circular of December 7, 1905, in conflict herewith, and all other regulations and circulars in conflict herewith are hereby revoked.

Very respectfully, R. A. Ballinger, Commissioner.

Approved April 24, 1907.

James Rudolph Garfield, Secretary.

Department of the Interior, General Land Office,

Washington, D. C., May 16, 1907.

Register and Receiver, Juneau, Alaska.

Gentlemen: The following instructions are issued for your guidance:

1. Under the order of November 12, 1906, withdrawing lands in Alaska from entry, location, or filing under the coal-land laws, and subsequent modifications of said order, no lands in Alaska known to contain workable deposits of coal can be entered, located, or filed upon while such orders remain in force, except as hereinafter provided.

2. All qualified persons or associations of qualified persons who had within one year prior to November 12, 1906, in good faith made legal and valid locations under the act of April 28, 1904, may file notices of such locations in the manner and within the time prescribed by said act, if such notices have not already been filed and such locations have not been abandoned or forfeited; and they or any other person or persons to whom they may lawfully assign their rights after such notices have been filed may thereafter proceed to make entry and obtain patent within the time and in the manner prescribed by law.

3. In computing the time within which notices of location may be filed under the preceding paragraph, the time intervening between November 12, 1906, and August 1, 1907, will not be taken into consideration or counted, but such notices may be filed within one year from the date of location, exclusive of such time.

4. All qualified persons or associations of qualified persons who may have in good faith legally filed valid notices of location under the act of April 28, 1904, prior to November 12, 1906, and the bona fide qualified assignees of such persons, may make entry and obtain patent under such notices within the time and in the manner prescribed by statute if they have not abandoned their right to do so.

5. In computing the time within which persons or associations of persons mentioned in the preceding paragraph may apply for patent, the time intervening between November 12, 1906, and the day on which they receive the written notices given by you as hereinafter required will not be considered or counted, and such applications may be made at any time within three years from the date on which such notices of location were filed, exclusive of such time.

6. You are directed to at once notify all persons or associations of persons who have filed notices of location in your office, including those who have pending applications for patent, and all persons or associations of persons holding as assignees under such locations who have notified you of such assignments, of their right to proceed in the manner herein prescribed and authorized, and to furnish them with a copy of these instructions. These notices must be served either personally or by registered mail, and you should carefully preserve with the record in each case the registry return receipt or other evidence of such notice.

7. In all cases where you publish notice of applications for entry or patent under the coal-land laws, or under any other law, you will at once mail a copy of said notice to a special agent assigned to duty in Alaska. Should said agent thereafter file in your office a protest against the validity of the location or claim embraced in any such application you will defer action upon

such application until said protest is withdrawn or appropriate action is taken thereon.

Very respectfully, R. A. Ballinger, Commissioner.

Approved May 16, 1907.

James Rudolph Garfield, Secretary.

INSTRUCTIONS.

Department of the Interior, General Land Office,

Washington, D. C., May 20, 1907.

Registers and Receivers, United States Land Offices.

Sirs: The following instructions are issued for your further guidance in cases arising under the coal-land laws:

1. As soon as the maps showing the character of any part of any township or townships within your respective districts have been furnished you as prescribed in the coal-land regulations, approved April 12, 1907, you will at once post in your office a list of such townships, and furnish a copy of such list to the newspapers in your district for publication as a matter of news, but without cost to the government for such publication.

2. You are also directed to mail a copy of these instructions and a copy of the instructions of April 24, 1907, to all persons or associations of persons shown by your records to have or claim any interest in any land covered by any pending application to purchase under the coal-land laws or embraced in any valid unexpired coal declaratory statement.

3. All qualified persons or associations of qualified persons who legally and in good faith went into possession of and improved coal mines within less than sixty days preceding the date when the lands upon which such mines are situated were withdrawn from coal entry, and who have not filed declaratory statements, may at once, or within the time prescribed by statute, namely, within sixty days after the date of actual possession, and the commencement of improvements on the land, not counting the time intervening between date of withdrawal and July 1, 1907, file such declaratory statements and proceed to obtain patent in the manner, at the minimum price, and within the time fixed by law, regardless of the fact that the maps required by the coal-land regulations of April 12, 1907, may not have been filed in your office, and regardless of the fact that a higher price may have been fixed for such lands under said regulations.

4. All qualified persons or associations of qualified persons who in good faith filed legal declaratory statements in your office prior to the date on which the lands covered thereby were withdrawn from coal entry, and all qualified persons legally holding as assignees under any such declaratory statement by assignment made prior to April 12, 1907, may proceed to obtain title in the manner, at the minimum price, and within the time fixed by the statute, namely, fourteen months after the date of actual possession and the commencement of improvements on the land, not counting the period intervening between date of withdrawal and the mailing of copies of regulations as prescribed by paragraph 2 hereof, regardless of the fact that the maps required by the coal-land regulations of April 12, 1907, may not have been filed in

your office at the date upon which application to purchase is presented, and regardless of the fact that a higher price may have been fixed for the lands claimed under said regulations.

All parts of regulations in conflict herewith are hereby revoked.

Very respectfully, R. A. Ballinger, Commissioner.

COAL LANDS.

Department of the Interior, General Land Office,

Washington, D. C., March 21, 1908.

Registers and Receivers, United States Land Offices.

Sirs: Lands noted on the tract books as "coal lands" under direction of circular dated April 24, 1907 (35 L. D., 681), are not subject to disposal under the coal land laws prior to their restoration to such entry by the filing in your office of classification maps and lists of such lands, except as provided in circular of May 20, 1907 (35 L. D., 683); but it is hereby directed that where a qualified person or association of persons has gone upon such lands since their withdrawal and disclosed coal deposits and opened and improved a coal mine or mines thereon, such persons or association of persons will be permitted to file in the proper land office a notice of claim, which notice should briefly give the address of the claimant; the date of actual possession and commencement of improvements; the date upon which the mine was opened and improved; the character, value, and extent of such improvements; the description by legal subdivisions of the land claimed, which should not exceed the maximum area which may be entered and purchased under the coal land laws; and a declaration of intention to claim said tract upon its restoration under and conformably to such coal land laws and regulations and at such price and upon such terms and conditions as may be in force at the time of said restoration.

Upon the filing of any such notice of claim you will make pencil notations thereof upon the plats and tract books of your office, and when classification maps and lists embracing such lands are filed in your office, as provided for in the circular of April 24, 1907 (35 L. D., 681), you will notify such claimant by registered mail, at the address given in his notice of claim, of the restoration, price, terms, and conditions upon which he may file upon, purchase and enter said lands, or the coal deposits therein, allowing him sixty days from the date of such notice within which to assert formal claim thereto under the coal land laws, advising him that upon failure to avail himself of the privilege thus extended the lands and deposits therein will be disposed of without regard to his prior notice of claim filed hereunder.

Very respectfully, Fred Dennett, Commissioner.

Approved:

James Rudolph Garfield, Secretary.

APPENDIX D.

LAND OFFICE REGULATIONS ISSUED JANUARY 25, 1904, ABOUT TIMBER AND STONE LANDS.

TIMBER AND STONE LANDS.

The act of June 3, 1878 (20 Stat. L., 89; Appendix No. 6), provides for the sale of timber lands in the states of California, Oregon, Nevada, and Washington, and the act of August 4, 1892, section 2 (27 Stat. L., 348; Appendix No. 51), extends the provisions of the former act to all the public-land states.

1. The quantity of land which may lawfully be acquired under said acts by any one person or association is limited to not exceeding 160 acres, which must be in one body. (See case of Daniel J. Heyfran, 19 L. D., 512.)

2. The land must be valuable chiefly for timber (or stone) and unfit for cultivation at the time of sale (22 L. D., 647).

3. It must be unreserved, unappropriated, and uninhabited, and without improvements (except for ditch or canal purposes) save such as were made by or belong to the applicant.

4. Lands containing saline or valuable deposits of gold, silver, cinnabar, copper, or coal are not subject to entry under this act.

5. One entry or filing only can be allowed any person or association of persons. A married woman may be permitted to purchase under said act, provided the laws of the state or territory in which the entry is made permit a married woman to purchase and hold real estate as a femme sole; but in addition to the proofs already provided for she shall make affidavit at the time of entry that she purposes to purchase said land with her separate money, in which her husband has no interest or claim; that said entry is made for her sole and separate use and benefit; that she has made no contract or agreement whereby any interest whatever therein will inure to the benefit of her husband or any other person, and that she has never made an entry under said act, or derived or had any interest whatever, directly or indirectly, in or from a former entry made by any person or association of persons.

6. A person applying to purchase a tract under the provisions of this act is required to make affidavit before a duly authorized attesting officer that he has made no prior application under this act; that he is by birth or naturalization a citizen of the United States, or has declared his intention to become a citizen. If native born, parol evidence to that fact will be sufficient; if not native born, record evidence of the prescribed qualification must be furnished. The affidavit must designate by legal subdivisions the tract which the applicant desires to purchase, setting forth its character as above; stating that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes (if any exist), save such as were made by or

belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title he may acquire from the government of the United States shall inure in whole or in part to the benefit of any person except himself.

7. Every person swearing falsely to any such affidavit is guilty of perjury, and will be punished as provided by law for such offense. In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land, or of any right, title, or claim thereto, are absolutely null and void as against the United States.

8. The sworn statement required as above (section 2 of the act) must be made upon the personal knowledge of applicant, except in the particulars in which the statute provides that the affidavit may be made upon information and belief.

9. The attesting officer will in every case read this affidavit to applicant, or cause it to be read to him in their presence, before he is sworn or his signature is attached thereto.

10. The published notice required by the third section of the act must state the time and place when, and name the officer before whom, the party intends to offer proof, which must be after the expiration of the sixty days of publication (circular of September 5, 1889, 9 L. D., 384), and must also contain the names of the witnesses who are to testify. (See case of Sarah L. Bigelow, 20 L. D., 6.) The period of publication is complete when the notice has been inserted for nine successive issues of a weekly newspaper, and the full statutory period has elapsed (28 L. D., 224).

11. The evidence to be furnished to the satisfaction of the register and receiver at time of entry, as required by the third section of the act, must be taken before an officer authorized to take the same under the act of March 11, 1902 (see rule 12), and will consist of the testimony of claimant, corroborated by the testimony of two disinterested witnesses. The testimony will be reduced to writing by the attesting officer upon the blanks provided for the purpose, after verbally propounding the questions set forth in the printed forms. The accuracy of affiant's information and the bona fides of the entry must be tested by close and sufficient oral examination. The attesting officer will especially direct such examination to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use, and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure, in whole or in part, to the benefit of any person or persons except himself. The attesting officer will certify to the fact of such oral examination, its sufficiency, and his satisfaction therewith.

12. The affidavits and proofs required under this act may be taken before the register or receiver, or before any United States commissioner, or commissioner of the court exercising federal jurisdiction in the territory, or before the judge or clerk of any court of record in the land district in which the lands are situated: Provided, that in case the affidavits and proofs are taken out of the county in which the land is located, the applicant must show, by

affidavit satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits and proofs in the land district in which the land applied for is located, but such showing by affidavit need not be made in making final proof if the proof be taken in the county or city where the newspaper is published in which the final proof notice is printed. (Act Mar. 11, 1902, 32 Stat. L., 63; Appendix No. 91.)

13. The entire proof must be taken at one and the same time, and payment must be made at the time of offering proof. Proofs will in no case be accepted in the absence of a tender of the money; and the register's certificate will in no case be given to the party or his attorney, but must be handed directly to the receiver by the register; and no note will be made upon the plats or tract books until the receiver's receipt has been issued. The proof, certificate and receipt must in all cases bear even date when taken before the register or receiver.

14. When an adverse claim, or any protest against accepting proof or allowing an entry, is filed before final certificate has been issued, the register and receiver will at once order a hearing, and will allow no entry until after their written determination upon such hearing has been rendered. They will report their final action in all protest and contest cases, and transmit the papers to this office.

15. After certificate has been issued, contest, applications, and protests will be submitted to this office, as in other cases of contest after final entry.

16. Contests may be brought against timber and stone land applications or entries, in accordance with rule 1 of Rules of Practice, either by an adverse claimant or by any other person, and for any sufficient cause affecting the legality or validity of the filing, entry, or claim.

17. In case of an association of persons making application for an entry under this act, each of the persons must prove the requisite qualifications, and their names must appear in the sworn statement, as in case of an individual person. They must also unite in the regular application for entry, which will be made in their joint names as in other cases of joint cash entry. The forms prescribed for cases of applications by individual persons may be adapted for use in applications of this class, and the sworn statement as to the character of the land may be made by one member of the association upon his personal knowledge.

18. No person who has made an individual entry or application can thereafter make one as a member of an association, nor can any member of an association making an entry or application, be allowed thereafter to make an individual entry or application.

19. Applicants to make timber-land entries, and claimants and witnesses making final proof, must in all cases state their places of actual residence, their business or occupation, and their post-office address. It is not sufficient to name the county and state or territory where a party lives, but the town or city must be named; and if residence is in a city, the street or number must be given.

APPENDIX E.

REVISED REGULATIONS OF APRIL 20, 1908, AND OF JUNE 20, 1908, OF THE INTERIOR DEPARTMENT GOVERNING LEASING OF MINERAL LANDS OF MEMBERS OF THE FIVE CIVILIZED TRIBES.

LEASING REGULATIONS.

OIL AND GAS AND OTHER MINERAL LEASES.

How to Procure Approval of a Lease.

1. Oil and gas and other mineral leases requiring the approval of the Secretary of the Interior shall be made for a period of five years from the date of the approval thereof by the Secretary of the Interior and as much longer thereafter as oil, gas, or other mineral is found in paying quantities; all leases shall be executed upon forms prescribed herein.

2. All leases shall be in quadruplicate, and, with the papers required, shall be filed within thirty days from and after the date of execution by the lessor with the United States Indian agent at Union Agency, Muskogee, Okl.

3. The act of Congress approved March 1, 1907 (35 Stat. 1015), provides:

"The filing heretofore or hereafter of any lease in the office of the United States Indian agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice."

4. Allottees are permitted to execute leases, after formal application for allotment has been accepted.

5. No person, firm, or corporation will be allowed to lease, within the territory occupied by the Five Civilized Tribes, for the purpose of producing oil or gas, more than 4,800 acres of land in the aggregate.

6. Oil and gas leases shall be accompanied, when filed, with application, made under oath, on blank prescribed, Form B; leases for other mineral purposes shall be accompanied by application on Form L. These applications shall state specifically with what other persons, firms, or corporations the lessee is interested, either directly or indirectly, in oil or gas or other mineral leases of lands in the Five Civilized Tribes. The Department in every case reserves the right at any time to make further inquiry as to the standing and business ability of any prospective lessee.

7. Where the lessee is a corporation, its first application must be accompanied by a sworn statement of its proper officer, showing:

The total number of shares of the capital stock actually issued, and spe-

cifically the amount of cash paid into the treasury on each share sold; or, if paid in property, state kind, quantity, and value of the same paid per share.

Of the stock sold how much per share remains unpaid and subject to assessment.

How much cash the company has in its treasury and elsewhere, and from what sources it was received.

What property, exclusive of cash, is owned by the company, and its value.

What the total indebtedness of the company is, and specifically the nature of its obligations.

Subsequent applications of corporations should show briefly the aggregate amounts of assets and liabilities.

8. Corporations, with their first application, shall file one certified copy of articles of incorporation, and, if a foreign corporation, evidence showing compliance with local corporation laws; also a list showing officers and stockholders, with post-office addresses and number of shares held by each. Statements of any changes of officers or any changes in or additions of stockholders shall be furnished to the Indian agent on January 1 of each year, and at any other time when requested; affidavits may be required of individual stockholders setting forth in what companies or with what persons or firms they are interested in oil or gas mining leases or lands in the Five Civilized Tribes, and whether they hold such stock for themselves or in trust. Evidence shall also be given—in a single affidavit (see Form E)—by the secretary of the company, or by the president, showing authority of officers to execute lease, bond, and other papers.

9. Where lessor is a minor there must be filed—

Certified copy of letters of guardianship.

Certified copy of court orders authorizing and confirming lease.

Proof of age of minor, preferably affidavit of parent or parents.

10. Lessee must procure and file with each lease an affidavit of the Indian lessor, made before the district agent, United States Indian agent, Union Agency, if possible, or if not, before a federal judge, clerk of the federal court, United States commissioner, or county or district judge, showing that the lease was understood by the lessor, and bonus agreements, if any. (See Form D prescribed, which also covers lessee's affidavit of bonus and no development.)[1]

11. Except to prevent loss or waste, leases of undivided inherited lands will be approved only in cases where all the heirs join in the lease, and must be accompanied by satisfactory proof that the lessors are the only heirs of the deceased allottee. Minor heirs can lease or join adult heirs in leasing only through guardians under order of court. Proof of heirship shall be given upon Form F, prescribed.

If probate or other court proceedings have established the heirship in any case, or the land has been partitioned, certified copy of final order, judgment, or decree of the court will be accepted in lieu of Form F, mentioned above.

12. Lessees are required to furnish with each oil or gas lease, to be filed at the time the lease is presented, a bond upon Form C, with two or more sureties, or with a surety company duly authorized to execute bonds. Such bond shall be in amount as follows: For leases covering 40 acres and less than 80, $1,000; for those covering 80 acres and less than 120, $1,500; for those covering 120 acres and not more than 160 acres, $2,000; and for each 40-acre tract or fractional part thereof above 160 acres an additional amount of $500: Provided, however, that a lessee shall be allowed to file one bond,

[1] This is section 10 as amended June 20, 1908.

Form H—series 1908, covering all leases to which they are or may become parties instead of a separate bond in each case, said bond to be in the penal sum of $15,000, covering all such leases to which they now are or may hereafter become parties. in lieu of the separate bond as above prescribed.

The right is specifically reserved to increase the amount of any such bond above the sum named in any particular case where the Secretary of the Interior deems it proper to do so. Bonds covering other mineral leases shall be in such sum as may be fixed by the Secretary of the Interior.

13. The Indian agent at Union Agency, or other government officer having the matter in charge or under investigation, may, at any time, either before or after approval of a lease, call for and secure any additional information desired to carry out the purpose of these regulations, and such information shall be furnished within the time specified in the request therefor.

14. When a lessee fails to furnish, within the time specified, papers necessary to put his lease and bond in proper form for consideration, the Indian agent at Union Agency is directed to forward such lease immediately for disapproval.

Royalties.

15 a. The minimum rate of royalty on oil on and after May 1, 1908, shall be 12½ per cent of the gross proceeds of the oil produced from leased premises, and payment shall be made at the time of sale or removal of oil.

b. Any lease approved, delivered, or assigned since October 14, 1907, wherein the royalty on oil is less than 12½ per cent, may, with the approval of the Secretary of the Interior, be subject to all rights, privileges, conditions, and terms of the lease form approved and issued by the Secretary of the Interior April 20, 1908, the same as if written therein at length, and any of the terms and conditions in said executed lease in conflict with the terms and conditions of said lease form of April 20, 1908, will be revoked and canceled, on and in consideration that owner of said lease stipulate in writing to increase the royalty on oil therein to 12½ per cent of the gross proceeds.

c. If the owner of any lease mentioned above in b shall fail to stipulate in writing for the increase of royalty to 12½ per cent, the rate of royalty for said lease shall, on and after May 1, 1908, be 12½ per cent, and said lease shall be free from any further increase in the rate of royalty on oil, but shall not have the rights, privileges, conditions, and terms of the lease form approved and issued by the Secretary of the Interior April 20, 1908, until said stipulation is filed.

d. If the owner of a lease delivered prior to October 14, 1907, wherein the royalty on oil is less than 12½ per cent, stipulates in writing within eight years from the date of said lease to increase the royalty on oil for said lease to 12½ per cent, and shall show that he has notified the lessor in writing, said lease shall thereafter have all the rights, privileges, conditions, and terms of the lease form approved and issued April 20, 1908, the same as if written therein at length, and any of the terms and conditions of said lease as originally executed in conflict with the terms and conditions of said lease form of April 20, 1908, will thereby be revoked and canceled.

e. In all cases notice in writing must be given by owner of lease to owner of leased land of intention to increase royalty on oil and, in consideration thereof, obtain the benefits of the lease form approved by the Secretary of the Interior April 20, 1908, and stipulation of owner of lease agreeing to increase of royalty on oil must be filed with the Secretary of the Interior on or before eight years from date of execution of lease.

f. Any lease heretofore approved, wherein the royalty on oil is 12½ per cent or more, may, on terms and conditions to be approved by the Secretary of the Interior, at any time within eight years from date of the lease, and before removal of restrictions, be made subject to the terms, conditions, rights, and privileges of the lease form approved by the Secretary of the Interior April 20, 1908, as though the terms of said lease form were written in and made part of such lease.

16. From and after July 1, 1907, the royalty on gas-producing wells, irrespective of whether the leases were heretofore or shall hereafter be approved, shall be as follows:

Where the capacity of a well is tested at 3,000,000 cubic feet or less per day of twenty-four hours, $150 per annum in advance, and where the capacity is more than 3,000,000 cubic feet per day, $50 for each additional 1,000,000 cubic feet or major fraction thereof.

The capacity of wells shall be determined, under the supervision of the Secretary of the Interior, before utilized and annually thereafter, the amount of royalty to be based on such determination.

Where the lessee desires to retain the gas-producing privilege of any well, but not to utilize the gas for commercial purposes, he shall pay an annual rental of $50 in advance, beginning from the date of discovery of gas, and to be paid within thirty days therefrom.

Except in cases of emergency, which shall not exceed ten days, not more than 75 per cent of the capacity of any gas well shall be utilized.

Evidence of date of discovery of gas wells and the beginning of utilization must be properly furnished in the form of a sworn statement.

Where wells produce both oil and gas, or gas alone in limited quantities, or gas in any quantity from a stratum which also produces oil or salt water to such an extent that the gas is unfit for domestic purposes, lessee may dispose of such gas at the following minimum rates:

For drilling, 5 cents per foot of drilling done, or a flat rate of $5 per day.

For pumping, $1 per month for each well pumped.

For other purposes, 1 cent per thousand cubic feet, measured through standard meter.

For gas thus disposed of lessee will pay monthly, in the same manner as other royalties are paid, supported by sworn statements, such percentage of the gross proceeds received from the sale of gas as is paid under the same lease for royalty on oil.

17. The royalty on coal shall not be less than 8 cents per ton of 2,000 pounds on mine run, or coal as it is taken from the mines, including what is commonly called "slack."

18. The royalty on asphaltum shall not be less than 10 cents per ton of 2,000 pounds on crude asphalt, or 60 cents per ton on refined asphalt.

19. Application for leasing of gold, silver, iron, shale, limestone, or other mineral not specified in these regulations may be submitted, and the royalty thereon shall be fixed after a special investigation in each particular case by the Secretary of the Interior.

20. All royalties, rents, or payments due under leases which have been or may be approved by the Secretary of the Interior shall be paid to the United States Indian agent at Union Agency, Muskogee, Okl., or to such other person as may be designated by the Secretary of the Interior, for the benefit of the various lessors, or, in cases of minors and incompetents, shall be deposited as hereinafter specified. No royalties on such leases shall be paid by the lessee direct to the lessors or their representatives.

All remittances to the United States Indian agent at Union Agency shall be made in New York, Chicago, St. Louis exchange, except that where same can not be procured, post-office money order will be accepted.

Royalty on oil, coal, or other minerals produced in each month (except yearly payments on gas wells as herein mentioned) shall be paid on or before the 25th day of the month next succeeding.

21. With the consent of the United States Indian agent, lessees may make arrangements with the purchasers of oil for the payment of the royalty to the United States Indian agent by such purchasers, but such arrangement, if made, shall not operate to relieve lessees from the responsibility for the payment of the royalty, should such purchaser fail, neglect, or refuse to pay the royalty when it becomes due.

Where lessees avail themselves of this privilege, division orders, permitting the pipe-line companies or other purchasers of the oil to withhold the royalty interest, shall be executed and forwarded to the Indian agent for approval before wells are brought in, as pipe-line companies are not permitted to accept or run oil from Indian leases until after the approval of division orders showing that the lessee has a lease regularly approved and in effect.

22. In oil and gas leases until a producing well is completed on leased premises and in all other mineral leases advance royalty shall be paid annually in advance from the date of the lease, as follows: 15 cents per acre per annum for the first and second years; 30 cents per acre per annum for the third and fourth years; 75 cents per acre for the fifth year; and in the case of mineral leases other than for oil and gas, 75 cents per acre annually thereafter; the sums thus paid to be credited on the stipulated royalties.

The advance royalty for the first year shall be tendered at the time of the filing of the lease in the office of the United States Indian agent at Union Agency.

On all mineral leases other than for oil and gas, when the annual advance royalty becomes due on a leased tract from which minerals are being produced, the lessee will not be required to pay the advance royalty until the royalty on production during the month within which the advance royalty falls due is accounted for; and if royalty on production equals or exceeds the advance royalty, it will be accepted as covering both items, but if it does not equal the advance royalty due, the lessee shall include the difference with his payment on production.

23. An oil or gas lessee shall drill at least one well on leasehold within twelve months from the date of the approval of the lease by the Secretary of the Interior, or may delay drilling said well for not exceeding five years from the date of such approval by paying to the United States Indian agent, Union Agency, Muskogee, Okl., for the use and benefit of lessor (subject to the limitations and conditions in said lease contained), in addition to said advance royalty the sum of 1 per acre, per annum, for each year the completion of such well is delayed, payable on or before the end of each year. The lessee may be required to drill and operate wells to offset paying wells on adjoining tracts and within 300 feet of the dividing line.

24. Sworn reports accompanying each royalty remittance shall be made by each lessee within twenty-five days from the close of each month for the month preceding, covering all operations, whether there has been production or not, except that where division orders have been approved and the royalty paid by the pipe-line company or other purchaser of oil, lessees need not make monthly reports direct.

A lessee may include within one sworn statement all leases upon which there is no production or upon which dry holes have been drilled.

Quarterly reports, whether or not royalty is paid by pipe-line company or other purchaser, shall be made by lessee within twenty-five days after December 31, March 31, June 30, and September 30 of each year, upon forms provided, showing manner of operations and total production during such quarter.

Sworn reports of gas wells shall be made both when discovered and when utilized.

25. All royalties, rents, or payments accruing under any lease made for or on behalf of any minor or incompetent shall be deposited by the Indian agent or other government officer to whom paid, to the credit of the guardian or curator of such minor or incompetent, in some national bank or banks designated by the Commissioner of Indian Affairs, and may be withdrawn therefrom by such guardian or curator, with the consent of the United States Indian agent, in sums not exceeding $50 per month unless otherwise ordered by the court. Sums in excess of $50 per month may be withdrawn on order of the proper court and not otherwise. Such designated banks shall furnish satisfactory surety bonds, to be approved by the Secretary of the Interior, guaranteeing the safe care and custody of the funds so deposited.

Operations.

26. Operations upon land covered by any lease requiring the approval of the Secretary of the Interior are not permitted until after such lease is regularly approved, delivered and official notice thereof given.

27. Lessees shall not be allowed to drill within 200 feet of the division lines between lands covered by their leases and adjoining lands, except in cases where wells on adjoining tracts are drilled at a less distance, in which case lessees may offset such wells by drilling at an equal distance from the line; and provided further, that in cases where the dimensions of leased tracts do not permit drilling 200 feet from the lines, wells may be drilled at points halfway between lines which are 400 feet or less apart.

28. Lessees shall agree to allow the lessors and their agents, or any authorized representative of the Interior Department, to enter, from time to time, upon and into all parts of the leased premises for the purposes of inspection, and shall further agree to keep a full and correct account of all operations and make reports thereof, as herein required, and their books and records showing manner of operations and persons interested shall be open at all times for the examination of such officers of the Department as shall be instructed in writing by the Secretary of the Interior to make such examination.

29. Lessees or operators using natural gas for outside illumination, or in connection with operations carried on under approved oil and gas leases covering lands within the territory of the Five Civilized Tribes, are required to use the device known as a "Storm burner," or other burner consuming not more than 15 cubic feet of gas per hour. Such lamps shall not be lighted earlier than 5 o'clock in the afternoon and shall be extinguished not later than 8 o'clock each morning, and not more than four such lights shall be used in drilling one well. Stopcocks shall be placed on all pipes used for conveying gas to burning devices of any character, and the gas shall be shut off at all times when not in use. Boilers using gas for fuel shall have smokestacks or chimneys not less than 12 feet in height.

30. Operators upon approved leases within the territory of the Five Civilized Tribes are required to use all possible diligence to prevent any unnecessary waste of natural gas. Operators in possession of any gas well shall, within five days after gas-bearing sand or rock is penetrated, shut in and confine such gas in the well except so much of the product as can be utilized. Lessees or operators shall pay to the United States Indian agent at Union Agency, Muskogee, Okl., the sum of $10 per day for each well during the time such well or wells are allowed to go uncontrolled or uncared for, unavoidable accidents excepted, and a failure on the part of the lessees or operators to prevent a waste of gas will further subject the lease to cancellation by the Secretary of the Interior after due notice.

In cases where oil-bearing strata are found at a greater depth than gas-bearing sand, packers and two strings of casing shall be used, so that waste of the gas from the first sand shall be prevented, thereby securely shutting in and preserving the gas.

31. A lessee producing crude oil or natural gas within the territory of the Five Civilized Tribes shall at time of abandoning a well securely plug the same so as to effectually shut off all water from the oil-bearing stratum, or in the manner required by the laws of the state of Oklahoma. Upon the abandonment of a well in which no oil or gas bearing stratum is encountered, lessee shall fill the bottom of the hole solidly for at least 25 feet with sand pumpings, gravel, and pulverized rock; immediately on top of such filling shall be seated a dried pine plug of not less than 2 feet in length and of a diameter of not less than one-fourth inch less than the inside diameter of the casing; upon this plug another filling of at least 25 feet of sand pumpings or other mineral substance shall be made, upon which there shall be seated a dried pine plug, and the well again filled for at least 25 feet with similar filling material; after the casing has been drawn from such well there shall be immediately seated at the point where such casing was seated a cast-iron ball, or tapered wooden plug at least 2 feet in length, the diameter of which ball or the top of which plug shall be greater than that of the hole below the point where such casing was seated, and above such ball or plug such well shall be solidly filled with the aforesaid filling material for a distance of at least 50 feet; and the hole shall then be closed or marked. Or such abandoned well may be plugged in the manner required by the laws of the state of Oklahoma. Every lessee or operator shall pay to the United States Indian agent, Union Agency, Muskogee, Okl., for the use and benefit of lessor, the sum of $10 per day for each well drilled during the time such well remains uncapped or unplugged as herein provided.

32. Lessees shall provide proper tankage, of suitable shape for accurate measurement, into which all production of crude oil shall be conducted direct from wells through pipes or other closed connections. Where a lease covers a homestead and surplus lands and such surplus lands are sold, separate tankage must be supplied for the homestead tracts and oil extracted therefrom reported separately. If the contents of such tanks are disposed of in any manner other than to a purchaser to whom a division order has been approved, or removed from the leased premises, accurate measurement shall first be made and the production reported and royalty thereon paid to the United States Indian agent in the usual manner.

In cases of emergency, where the capacity of new wells is such that lessees are unable immediately to provide proper tankage, production may be conducted to open ponds, or earthen tanks, but in no case shall any embankment exceed 15 feet in height. Such ponds or tanks shall be so constructed as to

minimize the danger of overflow or collapse, or damage to crops or adjacent property.

Crude oil run into earthen tanks in cases of emergency, as indicated above, shall not be allowed to remain in such earthen tankage for a longer period than fifteen days, except that where lessees desire to so store their oil, and after it has been properly gauged and royalty paid thereon, such tankage may be used when so constructed as to remove all reasonable danger of fire, overflow, and damage to other property. The right is reserved to supervise the construction of earthen tanks where deemed necessary.

Oil to be temporarily held or stored in earthen tankage must be run from the wells into receiving tanks capable of accurate measurement, and then gauged before being turned into earthen tankage.

33. Oil shall not be sold to a pipe-line company until a division order is filed as hereinbefore provided. Should the lessee desire to sell oil or remove it from the leased premises in any other manner, such sale or removal shall not be made until authorized by the Indian agent. Lessee or his representative shall actually be present when oil taken under division orders is run by pipe-line companies, and lessee shall be responsible for the correct measurement and report of oil so run; otherwise, the approval of division order may be revoked.

34. Whenever operators desire to secure from allotted lands timber for rigs, transmission of power, foundations, or for any other purpose, they must first obtain the consent of the allottee and properly compensate the owner of the timber therefor.

35. Lessees shall keep a true and correct record of each well drilled, including a complete log made at the time of drilling, and, whenever requested by properly authorized officers of the Interior Department, shall furnish a copy of such record and log, duly certified.

36. Lessees are required, when so requested, to file a plat of their leases showing exact locations of all producing oil or gas wells, dry wells, proposed locations, tanks, power houses, pumping stations, etc. Such plats, when desired, should also show locations of dry or producing wells upon adjoining tracts, so far as known to lessee.

37. Lessees are not permitted to locate either tanks or wells within 200 feet of any building used as a dwelling, granary, or shelter for stock, except where actually necessary to offset wells upon adjoining tracts.

38. All "B. S." or refuse from tanks or wells shall be drained off into proper receptacles at a safe distance from the tanks, wells, or buildings, to the end that it may be disposed of by being burned or transported from the premises; but in no case shall it be permitted to flow over the surface of the land to the injury of any surrounding property or to the pollution of any stream. Salt water or any other product from any oil or gas well, not marketable, shall not be permitted to run into any tanks or pools used for watering stock.

Assignments.

39 a. No lease or any interest therein, by working or drilling contract or otherwise, or the use of such lease, shall be sublet, assigned, or transferred, directly or indirectly, without the consent of the Secretary of the Interior; and if at any time the Secretary of the Interior is satisfied that the provisions of any lease, or that any of the regulations heretofore or that may be hereafter prescribed have been violated, he reserves authority to terminate

the lease in the manner therein provided, and the lessor shall then be entitled to take immediate possession of the land.

b. All leases hereafter approved, or any interest therein, may be assigned or transferred with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the existing rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the faithful performance of the covenants and conditions of said lease.

c. In all leases heretofore approved where the royalty on oil is now less than 12½ per cent, if the lessee at any time within eight years from the date of the lease shall consent to increase said royalty on oil to 12½ per cent of the gross proceeds, said lease shall thereafter be subject to and have all the rights, privileges, and terms in the lease form approved by the Secretary of the Interior April 20, 1908, and be assignable as provided in "b" hereof.

d. If the present owner of a lease heretofore approved, in which the royalty on oil is less than 12½ per cent, will not stipulate to increase such royalty to 12½ per cent of the gross proceeds produced, and the owner of said lease should hereafter desire to transfer or assign the same, then said owner shall make application to the Indian agent, stating the reasons for the proposed assignment, and when such application is approved by said agent, formal assignment papers in quadruplicate may be entered into and filed with the Indian agent for transmission to the Secretary of the Interior. The acceptance by the proposed assignee and consent of the surety company shall be filed on the form prescribed herein, "G." Financial showing and other papers as required from an original lessee must be furnished by the assignee, and the parts of the lease distributed to the lessee and lessor shall be returned for endorsement. No assignment under this regulation (39d) shall be allowed without notice first having been given to the lessor of the application to assign.

Cancellations.

40. Where a lessee makes an application for the cancellation of an approved lease, all royalties or rentals due up to the date of the application for cancellation must be paid before such application will be considered, and the parts of the lease delivered to the lessor and the lessee should be surrendered.

Forms.

41. Applications, leases, and other papers must be upon forms prepared by the Department, and upon application the Indian agent at Muskogee, Okl., will furnish prospective lessees with such forms at a cost of $1 per set. Copies of such forms are printed herewith.

Set 1.

Form A. Oil and gas lease.
Form B. Application for oil and gas lease, including financial showing.
Form C. Bond.
Form D. Affidavit of Indian lessor, proof of bonus, etc.
Form E. Authority of officers to execute papers.
Form F. Proof of heirship.
Form G. Assignment.

Form H. $15,000 bond.
Form I. Stipulation increasing oil royalty and extending term of lease.
Form J. Stipulation increasing oil royalty, extending term of lease, and rescinding regulations of October 14, 1907.
Form K. Lessor's consent to extension of term of lease.

Set 2.

Form L. Application for mineral lease, other than oil and gas.
Form M. Coal and asphalt lease.
Form N. Lease for minerals, other than oil and gas or coal and asphalt.
Form O. Agricultural lease.
Form P. Grazing lease.
Form Q. Affidavit of personal surety to accompany bond.

Lands from Which Restrictions have been or may be Removed.

42 a. On and after January 1, 1908, all leases of any description whatever executed by an allottee of the Five Civilized Tribes on land from all of which the restrictions against alienation had been removed before such execution, may be executed without any provision for reference to or supervision by the Secretary of the Interior or any official of the Department of the Interior; and the Indian agent shall refuse to accept for consideration any lease executed after January 1, 1908, covering land from all of which restrictions had been removed before such execution.

b. All leases executed before the removal of restrictions against alienation, on land from all of which restrictions against alienation shall be removed after such execution, if such leases contain specific provision for approval by the Secretary of the Interior, whether now filed with the Department or presented for consideration hereafter, will be considered and acted upon by this Department as heretofore.

c. All leases executed and approved heretofore or hereafter on land from all of which restrictions against alienation have been or shall be removed, even if such leases contain provisions authorizing supervision by this Department, shall, after such removal of restrictions against alienation, be operated entirely free from such supervision, and the authority and power delegated to the Secretary of the Interior in said leases shall cease, and all payments required to be made to the United States Indian agent shall thereafter be made to lessor or the then owner of said land, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to such leased land from which said restrictions are removed, except where a bond is required in said lease it shall be furnished with responsible surety, unless the giving of said bond is waived by lessor or the owner of the land.

d. In event restrictions are removed from a part of the land included in a lease for oil, gas, or other mineral purposes, the entire lease shall continue subject to approval and supervision of the Secretary of the Interior, and all royalties thereunder shall be paid to the Indian agent until such time as the lessor and lessee shall furnish the Secretary of the Interior satisfactory information that adequate arrangements have been made to account for the oil, gas, or mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the supervision of the Secretary of the Interior, provided that the unrestricted

portion shall be relieved from such supervision as in the lease or regulations provided.

43. These regulations shall be applicable to leases heretofore made and approved, as well as those hereafter entered into, except as otherwise herein provided

* * * * * * * * * *

C. F. Larrabee,
Acting Commissioner of Indian Affairs.

Department of the Interior,
Washington, D. C., April 20, 1908.

Approved:
James Rudolph Garfield, Secretary.

FORMS.*

[Form A.—Approved April 20, 1908.]

OIL AND GAS MINING LEASE UPON LAND SELECTED FOR ALLOTMENT, ... NATION, OKLAHOMA.

This indenture of lease, made and entered into in quadruplicate on this ..... day of ....., A. D. 19.., by and between ...., of ..... a .....,[1] citizen of the ..... Nation, party of the first part, hereinafter designated as lessor, and .... of ....., party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the act of Congress approved .....,[2] ....., witnesseth:

1. The lessor for and in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations, and conditions hereinafter contained, and hereby agreed to be paid, observed, and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee for the term of five years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, all the oil deposits and natural gas in or under the following-described tract of land, lying and being within the county of ..... and State of Oklahoma, to wit: The .... of section....., township ....., range ....., of the Indian meridian, and containing ..... acres, more or less, with the exclusive right to prospect for, extract, pipe, store, and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing,

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*Only the forms of leases on mineral lands are printed in this Appendix.

[1] Here insert full-blood, mixed-blood, intermarried, or freedman, as shown by the rolls of the Commission to the Five Civilized Tribes.

[2] If a full-blood, insert "April 26, 1906, 34 Stat. L., 137;" if a mixed-blood Creek or Creek freedman, insert "June 30, 1902, 32 Stat. L., 500;" and if a mixed-blood Cherokee or Cherokee freedman, insert "July 1, 1902, 32 Stat. L., 716."

and removing such oil and natural gas, also the right to obtain from wells or other sources on said land, by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to pay or cause to be paid to the United States Indian agent, Union Agency, Muskogee, Okl., for the lessor, as royalty, the sum of ..... per cent. of the gross proceeds of all crude oil extracted from the said land, such payment to be made at the time of sale or removal of the oil. And the lessee shall pay as royalty in advance on each gas-producing well utilized otherwise than as provided herein, where the capacity is tested at three million cubic feet or less per day of twenty-four hours, one hundred and fifty dollars per annum, and where the capacity is more than three million cubic feet per day, fifty dollars for each additional million cubic feet or major fraction thereof. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises, provided there be surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the lessee to use a gas-producing well, which can not profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas-producing privileges, lessee shall pay a rental of fifty dollars per annum in advance on each gas-producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease, the first payment to become due and to be made within thirty days from the date of the discovery of gas.

3. Until a producing well is completed on said premises the lessee shall pay or cause to be paid to the said agent for lessor, as advance annual royalty on this lease, fifteen cents per acre per annum, annually, in advance, for the first and second years; thirty cents per acre per annum, annually, in advance, for the third and fourth years; and seventy-five cents per acre per annum, in advance, for the fifth year; it being understood and agreed that said sums of money so paid shall be a credit on the stipulated royalties.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by this lease, and drill at least one well thereon within twelve months from the date of the approval of this lease by the Secretary of the Interior, and on failure so to do this lease becomes null and void: Provided, however, there is reserved and granted to the lessee the right and privilege of delaying the drilling of said well for not exceeding five years from the date of the approval of the lease by the Secretary of the Interior by paying to the United States Indian agent, Union Agency, Muskogee, Okl., for the use and benefit of the lessor (subject to the limitations and conditions hereinafter contained), in addition to said advance royalty, the sum of one dollar per acre, per annum, for each year the completion of such well is delayed, payable on or before the end of each year; but lessee may be required to drill and operate wells to offset paying wells on adjoining tracts and within three hundred feet of the dividing line.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his occupancy or use, take good care of the same and promptly surrender and return the premises upon the termination of this lease to lessor or whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, but said buildings and improvements shall remain a part of said land and be-

come the property of the owner of the land as a part of the consideration for this lease, excepting the tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, and machinery, and the casing of all dry or exhausted wells, which shall remain the property of the lessee, and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; shall not permit any nuisance to be maintained on the premises under lessee's control, nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; shall not use such premises for any other purpose than those authorized in this lease; and before abandoning any well shall securely plug the same so as effectually to shut off all water from the oil-bearing stratum, or in the manner required by the laws of the state of Oklahoma.

6. The lessee shall keep an accurate account of all oil-mining operations, showing the sales, prices, dates, purchasers, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said property, and upon all of the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may at any time, by paying to the Indian agent all amounts then due as provided herein, and the further sum of one dollar, surrender and cancel this lease and be relieved from all further obligations or liability hereunder: Provided, if this lease has been recorded, lessee shall execute a release and record the same in the proper county recording office: Provided further. In event restrictions are removed from all leased premises, the lessee may surrender all the undeveloped portion thereof, by paying the lessor all amounts then due and the further sum of one dollar, which surrender shall not affect the terms hereof as to each producing well and ten acres of said premises as nearly in square form as possible next contiguous to and surrounding each of said wells, and execute and record a cancellation of premises surrendered.

8. This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease: Provided, however, that no regulations made after the approval of this lease, affecting either the length of term of oil and gas leases, the dates of royalty or payments thereunder, or the assignment of leases, shall operate to affect the terms and conditions of this lease.

9. Upon the violation of any of the substantial terms and conditions of this lease, the Secretary of the Interior (or lessor, in event restrictions are removed as provided in paragraph 12 hereof) shall have the right, at any time after thirty days' notice to the lessee specifying the terms or conditions violated, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

10. Before this lease shall be in force and effect the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian Office.

11. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the faithful performance of the covenants and conditions of this lease.

12. In event restrictions on alienation shall be removed from all leasehold

premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to the United States Indian agent shall thereafter be made to lessor or the then owner of said land; and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

13. Each and every clause and covenant of this indenture shall extend to the heirs, executors, administrators, successors, and lawful assigns of the parties hereto.

14. In witness whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

Attest:

.... [Seal.]
Two witnesses to execution by lessor: ..... [Seal.]
.... [Seal.]
P. O., ...
.....
P. O., ...
Two witnesses to execution by lessee:
.....
P. O., ...
.....
P. O., ...

State of Oklahoma,
County of ....., ss:

..... before me, ...
in and for said county and State, on this ..... day of .....
personally appeared .....
.....
.....
to me known to be the identical person.. who executed the within and foregoing lease, and acknowledged to me that ..... executed the same as ..... free and voluntary act and deed for the uses and purposes therein set forth.

.....

(My commission expires .....)

[The lease must be accompanied by an application for approval, a bond, and various affidavits, for which forms are furnished not printed here.]

[Form M.—For Allottees of the Five Civilized Tribes.]

Transferable only with Consent of the Secretary of the Interior.

COAL AND ASPHALT MINING LEASE, ... NATION.

[Write all names and addresses in full.]

This indenture of lease made and entered into, in quadruplicate, on this ..... day of ....., A. D. 190.., by and between....., of..... ....., part.. of the first part, and .....
.....
.....
.....
of ....., part.. of the second part, under and in pursuance of the pro-

visions of existing law, and the rules and regulations prescribed by the Secretary of the Interior relative to mining leases covering the lands of allottees of the Five Civilized Tribes.

Witnesseth: That the part.. of the first part, for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained and hereby agreed to be paid, observed, and performed by the part.. of the second part, ... heirs, executors, administrators, successors, or assigns, do hereby demise, grant, and let unto the part.. of the second part ..... heirs, executors, administrators, successors, or assigns, the following-described tract of land lying and being within the.....Nation and within Oklahoma, to wit:.....

.....

.....

of section...., of township...., of range...., of the Indian meridian, and containing....acres, more or less, for the full term of....years from the date hereof, for the sole purpose of prospecting for and mining coal and asphalt; the part.. of the second part to occupy so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, mining, storing, and removing such coal and asphalt.

In consideration of the premises the part.. of the second part hereby agree..and bind ....., ..., heirs, executors, administrators, successors, or assigns to pay, or cause to be paid, to the part.. of the first part as royalties the sums of money as follows, to wit:

On asphaltum the sum of ten cents per ton for each and every ton of crude asphalt produced, weighing 2,000 pounds, or the sum of sixty cents per ton on refined asphalt. On the production of all coal mined under this lease the sum of eight cents per ton of 2,000 pounds on mine run, or coal as it is taken from the mines, including what is commonly called "slack."

And the part.. of the second part further agree.. and bind ....., ...,.... heirs, executors, administrators, successors, or assigns, to pay, or cause to be paid, to the lessor.., as advanced annual royalty on this lease, the sums of money as follows, to wit: Fifteen cents per acre per annum, in advance, for the first and second years; thirty cents per acre per annum, in advance, for the third and fourth years, and seventy-five cents per acre per annum, in advance, for the fifth and each succeeding year thereafter of the term for which this lease is to run, it being understood and agreed that said sums of money so paid shall be a credit on the stipulated royalties should the same exceed such sums paid as advanced royalty, and, further, that should the part.. of the second part neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable, such failure or refusal shall work a forfeiture hereof, and, after ten days' notice to the parties, the Secretary of the Interior shall have authority to declare such forfeiture and all royalties paid in advance shall become the money and property of the lessor.

All royalty accruing for any month shall be due and payable on or before the twenty-fifth day of the month succeeding.

It is agreed by the parties hereto that the land described herein shall not be held by the part.. of the second part for speculative purposes, but in good faith for mining the minerals specified; and a failure for one year by the part.. of the second part to do a reasonable amount of development work or of mining shall be held as a want of compliance with the purposes of this lease and shall render it null and void.

The part.. of the second part ..... further agree.. and bind....., ... heirs, executors, administrators, successors, or assigns, to pay, or cause to be paid, to the part.. of the first part the royalty as it becomes due.

The part.. of the second part further covenant.. and agree.. to exercise diligence in the conduct of the prospecting and mining operations .....

.....

.....and to open mines and operate the same in a workmanlike manner and to the fullest possible extent on the leased premises; to commit no waste upon said premises or upon the mines that may be thereon and to suffer no waste to be committed thereon; to leave in the mines proper pillars, columns, or such other permanent supports as will prevent the caving or subsidence of the surface; to take good care of the same and to surrender and return the premises at the expiration of this lease to the part.. of the first part, or to whomsoever shall be lawfully entitled thereto, in as good condition as when received, ordinary wear and tear in the proper use of the same for the purposes hereinbefore indicated and unavoidable accidents excepted, and not to remove therefrom any buildings or improvements erected thereon during said term by .....

..... the part.. of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, in addition to the other considerations herein specified, except engines, tools, boilers, boiler houses, and machinery, which shall remain the property of said part.. of the second part; that ..... will not permit any nuisance to be maintained on the premises, nor allow any intoxicating liquors to be sold or given away for any purpose on the premises, and that ..... will not use the premises for any other purpose than that authorized in this lease, nor allow them to be used for any other purpose; that ..... will not at any time during the term hereby granted assign, transfer, or sublet ..... estate, interest, or term in said premises and land or the appurtenances thereto to any person or persons whomsoever without the written consent thereto of the part.. of the first part being first obtained, subject to the approval of the Secretary of the Interior.

And the said part.. of the second part further covenant.. and agree.. that ..... will allow said lessor.. and ..... agents, from time to time, to enter upon and into all parts of said premises for purposes of inspection, and agree.. to keep an accurate account of all mining operations, showing the whole amount of mineral mined or removed, and make report thereof promptly, under oath, at the end of each month to the lessor.., and to the Secretary of the Interior through such officer as he may designate, and that all sums due as royalty shall be a lien on all implements, tools, movable machinery, and other personal chattels used in said prospecting and mining operations, and upon all the mineral obtained from the land herein leased, as security for the payment of said royalties.

And the part.. of the second part agree.. that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to such mineral leases covering lands of allottees of the Five Civilized Tribes in Oklahoma, and said part.. of the second part expressly agree.. that should ..... sublessees, ... heirs, executors, administrators, successors, or assigns violate any of the covenants, stipulations, or provisions of

this lease, or fail, for the period of sixty days, to pay the stipulated monthly royalty provided for herein, then the Secretary of the Interior shall have authority in his discretion to avoid this indenture of lease and cause the same to be annulled, when all the rights, franchises, and privileges of the part.. of the second part, ... heirs, sublessees, executors, administrators, successors, or assigns hereunder shall cease and end without further proceedings.

If the lessee.. make.. reasonable and bona fide effort to find and mine coal and asphalt in paying quantity, as is herein required of ....., and such effort is unsuccessful, ... may at any time thereafter, with the approval of the Secretary of the Interior, surrender and wholly terminate this lease upon the full payment and performance of all ..... then existing obligations hereunder: Provided, however, that approval of such surrender by the Secretary will be required only during the time his approval of the alienation of the land is required by law.

It is further agreed and understood that before this lease shall be in force and effect the lessee shall furnish a satisfactory bond in accordance with the regulations prescribed by the Secretary of the Interior, which bond shall be deposited and remain on file in the Indian Office.

It is expressly understood and agreed by the parties hereto that if the Secretary of the Interior is at any time satisfied that any of the covenants contained herein, or that any of the provisions of any regulations heretofore or that may hereafter be lawfully prescribed by him, have been or are being violated, he may, after ten days notice to the parties, cancel this lease, and that his declaration of cancellation shall be effective without resorting to the courts and without further proceedings, and that the lessor.. shall be entitled to the immediate possession of the land.

In witness whereof the said parties of the first and second part have hereunto set their hands and affixed their seals the day and year first above written.

Witnesses:[1]

.....
P. O.....
.....
P. O.....
} as to.....[Seal.]

.....
P. O.....
.....
P. O.....
} as to.....[Seal.]

.....
P. O.....
.....
P. O.....
} as to.....[Seal.]

.....
P. O.....
.....
P. O.....
} as to.....[Seal.]

[1]Two witnesses to all signatures.

United States of America, Indian Territory,
.....Judicial District, ss:*

Be it remembered that on this day came before me, the undersigned..... within and for the ..... judicial district of Oklahoma aforesaid, duly commissioned and acting as such,.....
.....
.....
to me personally well known as ..... the part.. lessor.. in the within and foregoing lease, and stated that ..... executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

Witness my hand and seal as such ..... on this ..... day of ....., 190..

.....
.....

(My commission expires .....)

[Form N.—For Allotteees of the Five Civilized Tribes.]

Transferable Only with Consent of the Secretary of the Interior.

FOR OTHER MINERALS THAN COAL, ASPHALT, OIL, AND GAS.

.....Mining Lease..... Nation.

[Write all names and addresses in full.]

This indenture of lease made and entered into, in quadruplicate, on this ..... day of ....., A. D. 190.., by and between .....
.....
.....
.....of.....part.. of the first part, and ..:.....
of ..... part.. of the second part, under and in pursuance of the provisions of existing law, and the rules and regulations prescribed by the Secretary of the Interior relative to mining leases covering the lands of allottees of the Five Civilized Tribes.

Witnesseth: That the part.. of the first part for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained and hereby agreed to be paid, observed, and performed by the part.. of the second part, ... heirs, executors, administrators, successors, or assigns, do.. hereby demise, grant, and let unto the part.. of the second part, ... heirs, executors, administrators, successors, or assigns, the following described tract of land lying and being within the ..... Nation and within the Indian Territory, to wit:.....
.....
.....
of section ...., of township ...., of range ...., of the Indian meridian, and containing ..... acres, more or less, for the full term of ..... years from

---

*This should now be:
State of Oklahoma,
County of ....., ss:

the date hereof, for the sole purpose of prospecting for and mining minerals, as follows: .....
.....
.....
the part.. of the second part to occupy so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, mining, storing, and removing such minerals.

In consideration of the premises, the part.. of the second part hereby agree.. and bind ....., ... heirs, executors, administrators, successors, or assigns, to pay, or cause to be paid, to the part.. of the first part, as royalties, the sums of money as follows, to wit:.....
.....
.....

And the part.. of the second part further agree.. and bind ....., ... heirs, executors, administrators, successors, or assigns, to pay, or cause to be paid, to the lessor.., as advanced annual royalty on this lease, the sums of money, as follows, to wit: ..... per acre per annum, in advance, for the first and second years; ..... per acre per annum, in advance, for the third and fourth years; and ..... per acre per annum, in advance, for the fifth and each succeeding year thereafter of the term for which this lease is to run; it being understood and agreed that said sums of money so paid shall be a credit on the stipulated royalties should the same exceed such sums paid as advanced royalty; and further, that should the part.. of the second part neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable, the Secretary of the Interior, after ten days' notice to the parties thereto, may declare this lease null and void, and all royalties paid in advance shall become the money and the property of the lessor...

All royalty accruing for any month shall be due and payable on or before the twenty-fifth day of the month succeeding.

It is agreed by the parties hereto that the land described herein shall not be held by the part.. of the second part for speculative purposes, but in good faith for mining the minerals specified; and a failure for one year by the part.. of the second part to do a reasonable amount of development work or of mining shall be held as a want of compliance with the purposes of this lease and shall render it null and void.

The part.. of the second part further agree.. and bind ....., ... heirs, executors, administrators, successors, or assigns to pay, or cause to be paid, to the part.. of the first part the royalty as it becomes due.

The part.. of the second part further covenant.. and agree.. to exercise diligence in the conduct of the prospecting and mining operations, and to open mines and operate the same in a workmanlike manner and to the fullest possible extent on the leased premises; to commit no waste upon said premises, or upon the mines that may be thereon, and to suffer no waste to be committed thereon; to leave in the mines proper pillars, columns, or such other permanent supports to prevent the caving or subsidence of the surface; to take good care of the same, and to surrender and return the premises at the expiration of this lease to the part.. of the first part, or to whomsoever shall be lawfully entitled thereto, in as good condition as when received, ordinary wear and tear in the proper use of the same for the purposes hereinbefore indicated and unavoidable accidents excepted, and not to remove

therefrom any buildings or improvements erected thereon during said term by .....
.....
the part.. of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, in addition to the other considerations herein specified, except engines, tools, boilers, boiler houses, and machinery, which shall remain the property of said part.. of the second part; that ..... will not permit any nuisance to be maintained on the premises, nor allow any intoxicating liquors to be sold or given away for any purpose on the premises, and that ..... will not use the premises for any other purpose than that authorized in this lease, nor allow them to be used for any other purpose; that ..... will not at any time during the term hereby granted assign, transfer, or sublet ..... estate, interest, or term in said premises and land, or the appurtenances thereto, to any person or persons whomsoever without the consent and approval of the Secretary of the Interior.

And the said part.. of the second part further covenant.. and agree.. that ..... will allow said lessor.. and ..... agents, from time to time, to enter upon and into all parts of said premises for purposes of inspection, and agree.. to keep an accurate account of all mining operations, showing the whole amount of mineral mined or removed, and make report thereof promptly, under oath, at the end of each month to the lessor.. and to the Secretary of the Interior, through such officer as he may designate, and that all sums due as royalty shall be a lien on all implements, tools, movable machinery, and other personal chattels used in said prospecting and mining operations, and upon all the mineral obtained from the land herein leased, as security for the payment of said royalties.

And the parties hereto expressly agree that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to leases covering lands of allottees of the Five Civilized Tribes; and said part.. of the second part expressly agree.. that should ..... sublessees, ... heirs, executors, administrators, successors, or assigns violate any of the covenants, stipulations, or provisions of this lease, or fail for the period of sixty days to pay the stipulated monthly royalty provided for herein, the Secretary of the Interior, after ten days' notice to the parties hereto, shall be at liberty, in ..... discretion, to cancel and anuul this lease, when all the rights, franchises, and privileges of the part.. of the second part, ... sublessees, executors, administrators, successors, or assigns hereunder shall cease and end without further proceedings.

If the lessee.. make.. reasonable and bona fide effort to find and mine ..... in paying quantity, as is herein required of ....., and such effort is unsuccessful, ... may at any time thereafter, with the approval of the Secretary of the Interior, surrender and wholly terminate this lease upon the full payment and performance of all ..... then existing obligations hereunder: Provided, however, that approval of such surrender by the Secretary will be required only during the time his approval of the alienation of the land is required by law.

It is further agreed and understood that before this lease shall be in force and effect the lessee shall furnish a satisfactory bond in accordance with the regulations prescribed by the Secretary of the Interior.

It is expressly understood and agreed by the parties hereto that if the

Secretary of the Interior is at any time satisfied that any of the covenants contained herein or that any of the provisions of any regulations heretofore or that may hereafter be lawfully prescribed by him, have been or are being violated, he may, after ten days' notice to the parties, cancel this lease, and that his declaration of cancellation shall be effective without resorting to the courts and without further proceedings, and that the lessor.. shall then be entitled to the immediate possession of the land.

In witness whereof the said parties of the first and second parts have hereunto set their hands and affixed their seals the day and year first above written.

Witnesses:[1]

.....
P. O.....
.....
P. O.....
} as to.....[Seal.]

.....
P. O.....
.....
P. O.....
} as to.....[Seal.]

.....
P. O.....
.....
P. O.....
} as to.....[Seal.]

.....
P. O.....
.....
P. O.....
} as to.....[Seal.]

United States of America, Indian Territory,

..... Judicial District, ss:*

Be it remembered that on this day came before me, the undersigned..... within and for the . ..... judicial district of the Indian Territory aforesaid, duly commissioned and acting as such, ...
.....
.....
to me personally known as ..... the part.. lessor.. in the within and foregoing lease, and stated that ..... executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

Witness my hand and seal as such ..... on this..... day of ....., 190..

.....
.....

(My commission expires .....)

---

[1] Two witnesses to all signatures.

*This should now be:

State of Oklahoma,

County of ....., ss:

REGULATIONS OF JUNE 20, 1908.

By an act of Congress, approved May 27, 1908, providing for the removal of restrictions from some of the lands of the Five Civilized Tribes, certain changes in the regulations applying to those tribes were necessitated, and they were made by the regulations of June 20, 1908. The regulations relating to mineral lands were as follows:

REGULATIONS.

The following regulations are hereby prescribed for the purpose of carrying into effect those provisions of the Act of Congress approved May 27, 1908 [Act May 27, 1908, c. 199 (35 Stat. 312)]:

* * * * * * * * * * * *

LEASING.

9. Sections 1 to 43, inclusive, of the Revised Regulations of April 20, 1908, governing the leasing of allotted lands of members of the Five Civilized Tribes, with reference to oil, gas or other mineral leases are, with the following modifications, hereby repromulgated under and in accordance with and made applicable to the provisions of [sections 2, 3, and 11 of] said act, and shall, with said modifications, remain in full force and effect.

* * * * * * * * * * * *

10. To expedite necessary investigation and final action leases should hereafter be presented to the district agent of the district in which the leased land is situate for transmission to the Indian agent at Union Agency.

11. No mineral lease which covers the land of a minor allottee and requires the approval of the Secretary of the Interior shall be for a term extending beyond the minority of such minor unless the court having jurisdiction of the minor's estate and the Secretary of the Interior shall approve such lease.

12. With the approval of the proper court and the Secretary of the Interior, mineral leases covering land of minor allottees made and approved upon forms authorized prior to the revised regulations of April 20, 1908, may be modified to give to the parties thereto any or all of the rights, privileges, conditions or terms of the lease form approved April 20, 1908.

13. From and after July 1, 1908, mineral leases which require the approval of the Secretary of the Interior covering lands of Seminole allottees, as provided in section 11 of the act of May 27, 1908, shall be made under these regulations without the approval of the tribal authorities.

14. Section 10 of the regulations of April 20, 1908, is amended to read as follows:

"Lessees must procure and file with each lease an affidavit of the Indian lessor, made before the district agent, United States Indian agent, Union Agency, if possible, or if not, before a federal judge, clerk of the federal court, United States commissioner or county or district judge, showing that the

lease was understood by the lessor, and bonus agreements, if any. (See form D prescribed, which also covers lessee's affidavit of bonus and nondevelopment.)"

* * * * * * * * * * * * *

C. F. Larrabee,
Acting Commissioner of Indian Affairs.

Department of the Interior,
June 20, 1908.

Approved:
Jesse E. Wilson,
Assistant Secretary.

APPENDIX F.

PHILIPPINE MINING LAWS.

(From the Compilation of Laws and Regulations Relating to Public Lands in the Philippine Islands, Issued by the War Department, Bureau of Insular Affairs, February 1, 1908.)

ACTS OF CONGRESS AND THE PHILIPPINE COMMISSION.

CONGRESSIONAL LEGISLATION.

The act of Congress approved July 1, 1902, entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," granted authority to the Philippine Commission to dispose of the public domain under the conditions set forth therein. The above act was amended in certain sections by the act of February 6, 1905, which changed the original measurements from acres, feet, etc., to the metric system of measurements, and the law as printed herewith includes all the legislation by Congress relative to the lands of the Philippine Islands at present in force.

All the acts and regulations of the Philippine Commission are based upon these two acts of Congress.

[Public—No. 235.]

An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes, approved July 1, 1902, as amended by Public—No. 43, approved February 6, 1905.

* * * * * * * * * *

MINERAL LANDS.

Sec. 20. That in all cases public lands in the Philippine Islands valuable for minerals shall be reserved from sale, except as otherwsie expressly directed by law.

Sec. 21. That all valuable mineral deposits in public lands in the Philippine Islands, both surveyed and unsurveyed, are hereby declared to be free and open to exploration, occupation, and purchase, and the land in which they are found to occupation and purchase, by citizens of the United States, or of said Islands: Provided, That when on any lands in said Islands entered and occupied as agricultural lands under the provisions of this Act, but

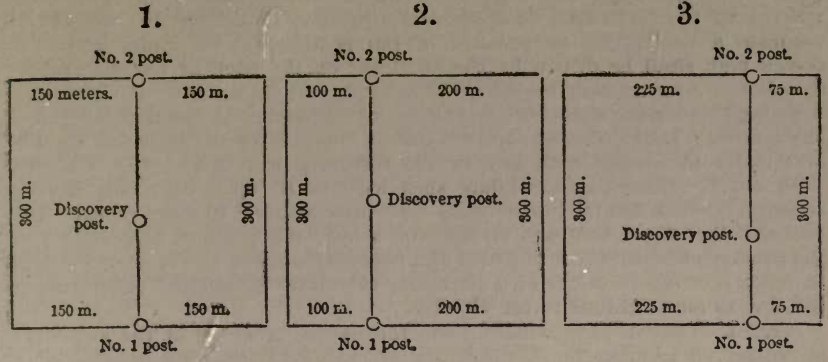
not patented, mineral deposits have been found, the working of such mineral deposits is hereby forbidden until the person, association, or corporation who or which has entered and is occupying such lands shall have paid to the Government of said Islands such additional sum or sums as will make the total amount paid for the mineral claim or claims in which said deposits are located equal to the amount charged by the Government for the same as mineral claims.

Sec. 22. (*As amended by act of Congress approved February 6, 1905.*) That mining claims upon land containing veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits located after the passage of this Act, whether located by one or more persons qualified to locate the same under the preceding section, shall be located in the following manner and under the following conditions: Any person so qualified desiring to locate a mineral claim shall, subject to the provisions of this Act with respect to land which may be used for mining, enter upon the same and locate a plat of ground measuring, where possible, but not exceeding three hundred meters in length by three hundred meters in breath, in as nearly as possible a rectangular form—that is to say, all angles shall be right angles, except in cases where a boundary line of a previously surveyed claim is adopted as common to both claims, but the lines need not necessarily be meridional. In defining the size of a mineral claim it shall be measured horizontally, irrespective of inequalities of the surface of the ground.

Sec. 23. (*As amended by act of Congress approved February 6, 1905.*) That a mineral claim shall be marked by two posts, placed as nearly as possible on the line of the ledge or vein, and the posts shall be numbered one and two, and the distance between posts numbered one and two shall not exceed three hundred meters, the line between posts numbered one and two to be known as the location line; and upon posts numbered one and two shall be written the name given to the mineral claim, the name of the locator, and the date of the location. Upon post numbered one there shall be written, in addition to the foregoing, "Initial post," the approximate compass bearing of post numbered two, and a statement of the number of meters lying to the right and to the left of the line from post numbered one to post numbered two, thus "Initial post. Direction of post numbered two . meters of this claim lie on the right and meters on the left of the line from number one to number two post." All the particulars required to be put on number one and number two posts shall be furnished by the locator to the provincial secretary, or such other officer as by the Philippine Government may be described as mining recorder, in writing, at the time the claim is recorded, and shall form a part of the record of such claim.

Sec. 24. (*As amended by act of Congress approved February 6, 1905.*) That when a claim has been located the holder shall immediately mark the line between posts numbered one and two so that it can be distinctly seen. The locator shall also place a post at the point where he has found minerals in place, on which shall be written "Discovery post:" Provided, That when the claim is surveyed the surveyor shall be guided by the records of the claim, the sketch plan on the back of the declaration made by the owner when the claim was recorded, posts numbered one and two, and the notice on number one, the initial post.

Examples of Various Modes of Laying Out Claims.



Note.—See section 8 of Act No. 624 of the Philippine Commission, which requires corner posts in addition to above.

Sec. 25. (*As amended by act of Congress approved February 6, 1905.*) That it shall not be lawful to move number one post, but number two post may be moved by the deputy mineral surveyor when the distance between posts numbered one and two exceeds three hundred meters, in order to place number two post three hundred meters from number one post on the line of location. When the distance between posts numbered one and two is less than three hundred meters, the deputy mineral surveyor shall have no authority to extend the claim beyond number two.

Sec. 26. That the "location line" shall govern the direction of one side of the claim, upon which the survey shall be extended according to this Act.

Sec. 27. That the holder of a mineral claim shall be entitled to all minerals which may lie within his claim, but he shall not be entitled to mine outside the boundary lines of his claim continued vertically downward: Provided, That this Act shall not prejudice the rights of claim owners nor claim holders whose claims have been located under existing laws prior to this Act.

Sec. 28. That no mineral claim of the full size shall be recorded without the application being accompanied by an affidavit made by the applicant or some person on his behalf cognizant of the facts—that the legal notices and posts have been put up; that mineral has been found in place on the claim proposed to be recorded; that the ground applied for is unoccupied by any other person. In the said declaration shall be set out the name of the applicant and the date of the location of the claim. The words written on the number one and number two posts shall be set out in full, and as accurate a description as possible of the position of the claim given with reference to some natural object or permanent monuments.

Sec. 29. (*As amended by act of Congress approved February 6, 1905.*) That no mineral claim which at the date of its record, is known by the locator to be less than a full-sized mineral claim, shall be recorded without the word "fraction" being added to the name of the claim, and the application being accompanied by an affidavit or solemn declaration made by the applicant or some person on his behalf cognizant of the facts: That the legal posts and notices have been put up; that mineral has been found in place on the

fractional claim proposed to be recorded; that the ground applied for is unoccupied by any other person. In the said declaration shall be set out the name of the applicant and the date of the location of the claim. The words written on the posts numbered one and two shall be set out in full, and as accurate a description as possible of the position of the claim given. A sketch plan shall be drawn by the applicant on the back of the declaration, showing as near as may be the position of the adjoining mineral claims and the shape and size, expressed in meters, of the claim or fraction desired to be recorded: Provided, That the failure on the part of the locator of a mineral claim to comply with any of the foregoing provisions of this section shall not be deemed to invalidate such location if, upon the facts, it shall appear that such locator has actually discovered mineral in place on said location and that there has been on his part a bona fide attempt to comply with the provisions of this Act, and that the nonobservance of the formalities hereinbefore referred to is not of a character calculated to mislead other persons desiring to locate claims in the vicinity.

Sec. 30. That in cases where, from the nature or shape of the ground, it is impossible to mark the location line of the claim as provided by this Act then the claim may be marked by placing posts as nearly as possible to the location line, and noting the distance and direction such posts may be from such location line, which distance and direction shall be set out in the record of the claim.

Sec. 31. (*As amended by act of Congress approved February 6, 1905.*) That every person locating a mineral claim shall record the same with the provincial secretary, or such other officer as by the Government of the Philippine Islands may be described as mining recorder of the district within which the same is situate, within thirty days after the location thereof. Such record shall be made in a book to be kept for the purpose in the office of the said provincial secretary or such other officer as by said Government described as mining recorder, in which shall be inserted the name of the claim, the name of each in meters, the date of location, and the date of the record. A claim which shall not have been recorded within the prescribed period shall be deemed to have been abandoned.

Sec. 32. That in case of any dispute as to the location of a mineral claim the title to the claim shall be recognized according to the priority of such location, subject to any question as to the validity of the record itself and subject to the holder having complied with all the terms and conditions of this Act.

Sec. 33. That no holder shall be entitled to hold in his, its, or their own name or in the name of any other person, corporation, or association more than one mineral claim on the same vein or lode.

Sec. 34. That a holder may at any time abandon any mineral claim by giving notice, in writing, of such intention to abandon, to the provincial secretary or such other officer as by the Government of the Philippine Islands may be described as mining recorder; and from the date of the record of such notice all his interest in such claim shall cease.

Sec. 35. That proof of citizenship under the clause of this Act relating to mineral lands may consist in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in case of a corporation organized under the laws of the United States, or of any State or Territory thereof, or of the Philippine

Islands, by the filing of a certified copy of their charter or certificate of incorporation.

Sec. 36. (*As amended by act of Congress approved February 6, 1905.*) That the United States Philippine Commission or its successors may make regulations, not in conflict with the provisions of this Act, governing the location, manner of recording, and amount of work necessary to hold possession of a mining claim, subject to the following requirements:

On each claim located after the passage of this Act, and until a patent has been issued therefor, not less than two hundred pesos' worth of labor shall be performed or improvements made during each year: Provided, That upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required thereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owners personal notice in writing, or notice by publication in the newspaper published nearest the claim, and in two newspapers published at Manila, one in the English language and the other in the Spanish language, to be designated by the Chief of the Philippine Insular Bureau of Public Lands, for at least once a week for ninety days; and if, at the expiration of ninety days after such notice in writing or by publication, such delinquent shall fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim.

Sec. 37. (*As amended by act of Congress approved February 6, 1905.*) That a patent for any land claimed and located for valuable mineral deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this Act, having claimed and located a piece of land for such purposes, who has or have complied with the terms of this Act, may file in the office of the provincial secretary, or such other officer as by the Government of said Islands may be described as mining recorder of the province wherein the land claimed is located, an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the Chief of the Philippine Insular Bureau of Public Lands, showing accurately the boundaries of the claim, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such office, and shall thereupon be entitled to a patent for the land, in the manner following: The provincial secretary, or such other officer as by the Philippine Government may be described as mining recorder, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such an application has been made, once a week for the period of sixty days, in a newspaper to be by him designated as nearest to such claim, and in two

newspapers published at Manila, one in the English language and one in the Spanish language, to be designated by the Chief of the Philippine Insular Bureau of Public Lands; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter within the sixty days of publication, shall file with the provincial secretary, or such other officer as by the Philippine Government may be described as mining recorder, a certificate of the Chief of the Philippine Insular Bureau of Public Lands that one thousand pesos' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the provincial secretary, or such other officer, as by the Government of said Islands may be described as mining recorder, at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the provincial treasurer, or the collector of internal revenue, of twenty-five pesos per hectare, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this Act: Provided, That where the claimant for a patent is not a resident of or within the province wherein the land containing the vein, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent where said agent is conversant with the facts sought to be established by said affidavits.

Sec. 38. That applicants for mineral patents, if residing beyond the limits of the province or military department wherein the claim is situated, may make the oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any province of the Philippine Islands, or any other official in said Islands authorized by law to administer oaths.

Sec. 39. (*As amended by act of Congress approved February 6, 1905.*) That where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavits thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the provincial secretary, or such other officer as by the Government of the Philippine Islands may be described as mining recorder, together with the certificate of the Chief of the Philippine Insular Bureau of Public Lands that the requisite amount of labor has been expended or improvements made thereon, and the description required in other

cases, and shall pay to the provincial treasurer or the collector of internal revenue of the province in which the claim is situated, as the case may be, twenty-five pesos per hectare for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the provincial secretary, or such other officer as by said Government may be described as mining recorder, to the Secretary of the Interior of the Philippine Islands, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, rightly to possess. The adverse claim may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated: and the adverse claimant, if residing or at the time being beyond the limits of the province wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record, or any notary public of any province or military department of the Philippine Islands, or any other officer authorized to administer oaths where the adverse claimants may then be. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the Chief of the Philippine Insular Bureau of Public Lands, whereupon the provincial secretary or such other officer as by the Government of said Islands may be described as mining recorder shall certify the proceedings and judgment roll to the Secretary of the Interior for the Philippine Islands, as in the preceding case, and patents shall issue to the several parties according to their respective rights. If, in any action brought pursuant to this section, title to the ground in controversy shall not be established by either party, the court shall so find, and judgment shall be entered accordingly. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the office of the provincial secretary or such other officer as by the Government of said Islands may be described as mining recorder or be entitled to a patent for the ground in controversy until he shall have perfected his title. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent or a mining claim to any person whatever.

Sec. 40. That the description of mineral claims upon surveyed lands shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the Chief of the Philippine Insular Bureau of Public Lands in extending the surveys shall adjust the same to the boundaries of such patented claim according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

Sec. 41. That any person authorized to enter lands under this Act may enter and obtain patent to lands that are chiefly valuable for building stone under the provisions of this Act relative to placer mineral claims.

Sec. 42. That any person authorized to enter lands under this Act may enter and obtain patent to lands containing petroleum or other mineral oils and chiefly valuable therefor under the provisions of this Act relative to placer mineral claims.

Sec. 43. That no location of a placer claim shall exceed sixty-four hectares for any association of persons, irrespective of the number of persons composing such association, and no such location shall include more than eight hectares for an individual claimant. Such locations shall conform to the laws of the United States Philippine Commission, or its successors, with reference to public surveys, and nothing in this section contained shall defeat or impair any bona

fide ownership of land for agricultural purposes or authorize the sale of the improvements of any bona fide settler to any purchaser.

Sec. 44. That where placer claims are located upon surveyed lands and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the date of passage of this Act shall conform as nearly as practicable to the Philippine system of public-land surveys and the regular subdivisions of such surveys; but where placer claims can not be conformed to legal subdivisions, survey, and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than sixteen hectares shall remain, such fractional portion of agricultural land may be entered by any party qualified by law for homestead purposes.

Sec. 45. That where such person or association, they and their grantors have held and worked their claims for a period equal to the time prescribed by the statute of limitations of the Philippine Islands, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this Act, in the absence of any adverse claim; but nothing in this Act shall be deemed to impair any lien which may have attached in any way whatever prior to the issuance of a patent.

Sec. 46. That the Chief of the Philippine Insular Bureau of Public Lands may appoint competent deputy mineral surveyors to survey mining claims. The expenses of the survey of vein or lode claims and of the survey of placer claims together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any such deputy mineral surveyor to make the survey. The Chief of the Philippine Insular Bureau of Public Lands shall also have power to establish the maximum charges for surveys and publication of notices under this Act; and in case of excessive charges for publication he may designate any newspaper published in a province where mines are situated, or in Manila, for the publication of mining notices and fix the rates to be charged by such paper; and to the end that the Chief of the Bureau of Public Lands may be fully informed on the subject such applicant shall file with the provincial secretary, or such other officer as by the Government of the Philippine Islands may be described as mining recorder, a sworn statement of all charges and fees paid by such applicant for publication and surveys, and of all fees and money paid the provincial treasurer or the collector of internal revenue, as the case may be, which statement shall be transmitted, with the other papers in the case, to the Secretary of the Interior for the Philippine Islands.

Sec. 47. That all affidavits required to be made under this Act may be verified before any officer authorized to administer oaths within the province or military department where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the proper provincial secretary or such other officer as by the Government of the Philippine Islands may be described as mining recorder. In cases of contest as to the mineral or agricultural character of land the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication at least once a week for thirty days in a newspaper to be designated by the provincial secretary or such other officer as by said Government may be described as mining recorder published nearest to the location of such land and in two newspapers published in Manila, one in the English language and one in

the Spanish language, to be designated by the Chief of the Philippine Insular Bureau of Public Lands; and the provincial secretary or such other officer as by said Government may be described as mining recorder shall require proofs that such notice has been given.

Sec. 48. That where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location of such nonadjacent land shall exceed two hectares, and payment for the same must be made at the same rate as fixed by this Act for the superficies of the lode. The owner of a quartz mill or reduction works not owning a mine in connection therewith may also receive a patent for his mill site as provided in this section.

Sec. 49. That as a condition of sale the Government of the Philippine Islands may provide rules for working, policing, and sanitation of mines, and rules concerning easements, drainage, water rights, right of way, right of Government survey and inspection, and other necessary means to their complete development not inconsistent with the provisions of this Act, and those conditions shall be fully expressed in the patent. The Philippine Commission or its successors are hereby further empowered to fix the bonds of deputy mineral surveyors.

Sec. 50. That whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed, but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Sec. 51. That all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section.

Sec. 52. That the Government of the Philippine Islands is authorized to establish land districts and provide for the appointment of the necessary officers wherever they may deem the same necessary for the public convenience, and to further provide that in districts where land offices are established proceedings required by this Act to be had before provincial officers shall be had before the proper officers of such land offices.

Sec. 53. (*As amended by act of Congress approved February 6, 1905.*) That every person above the age of twenty-one years who is a citizen of the United States or of the Philippine Islands, or who has acquired the right of a native of said Islands under and by virtue of the Treaty of Paris, or any association of persons severally qualified as above, shall, upon application to the proper provincial treasurer, have the right to enter any quantity of vacant coal lands of said Islands, not otherwise appropriated or reserved by competent authority, not exceeding sixty-four hectares to such individual person, or one hundred and twenty-eight hectares to such association, upon payment to the provincial treasurer or the collector of internal revenue, as the case may be, of not less than fifty pesos per hectare for such lands, where the same shall be

situated more than twenty-five kilometers from any completed railroad or available harbor or navigable stream, and not less than one hundred pesos per hectare of such land as shall be within twenty-five kilometers of such road, harbor, or stream: Provided, That such entries shall be taken in squares of sixteen or sixty-four hectares, in conformity with the rules and regulations governing the public-land surveys of the said Islands in plotting legal subdivisions.

Sec. 54. That any person or association of persons, severally qualified as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry under the preceding section of the mines so opened and improved.

Sec. 55. That all claims under the preceding section must be presented to the proper provincial secretary within sixty days after the date of actual possession and the commencement of improvements on the land by the filing of a declaratory statement therefor; and where the improvements shall have been made prior to the expiration of three months from the date of the passage of this Act, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement; and no sale under the provisions of this Act shall be allowed until the expiration of six months from the date of the passage of this Act.

Sec. 56. That the three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of person, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association shall enter or hold any other lands under the provisions therof; and no member of any association which shall have taken the benefit of such section shall enter or hold any other lands under their provisions; and all persons claiming under section fifty-four shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

Sec. 57. That in case of conflicting claims upon coal lands where the improvements shall be commenced after the date of the passage of this Act, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference right to purchase. And also where improvements have already been made prior to the passage of this Act, division of the land claimed may be made by legal subdivisions, which shall conform as nearly as practicable with the subdivisions of land provided for in this Act, to include as near as may be the valuable improvements of the respective parties. The Government of the Philippine Islands is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and preceding sections relating to mineral lands.

Sec. 58. (*As amended by act of Congress approved February 6, 1905.*) That whenever it shall be made to appear to the secretary of any province or the commander of any military department in the Philippine Islands that any lands within the province are saline in character, it shall be the duty of said provincial secretary or commander, under the regulations of the Government of the Philippine Islands, to take testimony in reference to such lands, to ascertain their true character, and to report the same to the Secretary of the Interior for the Philippine Islands; and if upon such testimony the Secretary of the Interior shall find that such lands are saline and incapable of being pur-

chased under any of the laws relative to the public domain, then and in such case said lands shall be offered for sale at the office of the provincial secretary or such other officer as by the said Government may be described as mining recorder of the province or department in which the same shall be situated, as the case may be, under such regulations as may be prescribed by said Government, and sold to the highest bidder for cash at a price of not less than six pesos per hectare; and in case such lands fail to sell when so offered, then the same shall be subject to private sale at such office, for cash, at a price not less than six pesos per hectare, in the same manner as other lands in the said Islands are sold. All executive proclamations relating to the sales of public saline lands shall be published in only two newspapers, one printed in the English language and one in the Spanish language, at Manila, which shall be designated by said Secretary of the Interior.

Sec. 59. That no Act granting lands to provinces, districts, or municipalities to aid in the construction of roads, or for other public purposes, shall be so construed as to embrace mineral lands, which, in all cases, are reserved exclusively, unless otherwise specially provided in the act or acts making the grant.

Sec. 60. That nothing in this Act shall be construed to affect the rights of any person, partnership, or corporation having a valid, perfected mining concession granted prior to April eleventh, eighteen hundred and ninety-nine, but all such concessions shall be conducted under the provisions of the law in force at the time they were granted, subject at all times to cancellation by reason of illegality in the procedure by which they were obtained, or for failure to comply with the conditions prescribed as requisite to their retention in the laws under which they were granted: Provided, That the owner or owners of every such concession shall cause the corners made by its boundaries to be distinctly marked with permanent monuments within six months after this Act has been promulgated in the Philippine Islands, and that any concessions the boundaries of which are not so marked within this period shall be free and open to explorations and purchase under the provisions of this Act.

Sec. 61. That mining rights on public lands in the Philippine Islands shall, after the passage of this Act, be acquired only in accordance with its provisions.

Sec. 62. That all proceedings for the cancellation of perfected Spanish concessions shall be conducted in the courts of the Philippine Islands having jurisdiction of the subject-matter and of the parties, unless the United States Philippine Commission, or its successors, shall create special tribunals for the determination of such controversies.

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ACTS OF PHILIPPINE COMMISSION.

[No. 624.]

An Act prescribing regulations governing the location and manner of recording mining claims, and the amount of work necessary to hold possession of a mining claim, under the provisions of the Act of Congress approved July first, nineteen hundred and two, entitled "An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes."

By authority of the United States, be it enacted by the Philippine Commission, that:

Section 1. The term mineral claim as used in these regulations shall be understood to mean lode claim, and the term mining claim shall be understood

to include both lode and placer claims. A placer claim shall be understood to mean a claim of land more valuable for placer mining, stone quarrying, or for the securing of earth for use in tile, brick, pottery, paint, or other manufacture, or of petroleum, guano, or other mineral product, than for other purposes. The rules and regulations for the securing of claims so defined as placer claims shall be as for placer claims as mentioned in this act.

Sec. 2. Until other officers may be designated by the Government of the Philippine Islands as mining recorders, the provincial secretaries shall act as such in their respective provinces. In provinces or districts where civil government has not been established such military officers as may be designated for that purpose by the commanding general, Division of the Philippines, shall act as mining recorders.

Sec. 3. (*As amended by Acts Nos. 777 and 1134.*) All declarations and affidavits regarding mining claims, and all other documents and instruments in writing, of whatever character or nature, alienating, mortgaging, leasing, or otherwise affecting the possession of mining claims or any right or title thereto or interest therein, shall be recorded in the order in which they are filed for record, and from and after such filing for record all declarations and affidavits regarding mining claims, and all documents and instruments in writing, of whatever kind or nature, alienating, mortgaging, leasing, or otherwise affecting the possession of mining claims or any right or title thereto or interest therein shall constitute notice to all persons and to the whole world of the contents of said declarations, affidavits, documents, and written instruments and of the legal effect thereof, and under no circumstances shall any departure be made from that course.

The form of declaration of location of a mineral claim shall be as follows:

Declaration of Location.

The undersigned hereby declares and gives notice that, having complied with the provisions of the act of Congress approved July 1, 1902, relative to the location of mining claims, he has located ..... linear feet on a lode of mineral-bearing rock, situate in the barrio of ....., within the jurisdictional limits of the municipality of ....., province of ....., district of ....., island of ....., P. I.

That the name of the above location is the ..... mineral claim, and that the same was located by him on the ..... day of ....., A. D. 190...

That there is written on post No. 1 (here insert an exact copy of what is inscribed on post No. 1); and upon post No. 2 (here insert an exact copy of what is inscribed on post No. 2).

That the said claim is situate (here state as accurately as possible, preferably by course and distance, the position of the claim with reference to some natural object or permanent monument).

....., Locator

Witness:

.....

Witness:

.....

Sec. 4. The mining recorder shall note on each instrument filed for record the year, month, and day, and the hour and minute of the day on which the

same was so filed, and after it has been recorded he shall indorse on the back thereof a certificate in the following form:

Office of the Mining Recorder.

..... {District of / Province of} .....

....., ..., 190...

The within instrument was filed for record in this office at ..... o'clock and ..... minutes ..... m., on the ..... day of ....., A. D. 190.., and has been recorded in Book ..... of Records of Mining Claims, at page .....

....., Mining Recorder.

Sec. 5. (*As amended by Acts Nos. 859 and 1399.*) There shall be paid to the provincial treasurer, or in the Moro province to the district treasurer of the proper district, a fee of two Philippine pesos for each declaration of location of a mining claim and for each affidavit accompanying such declaration, and for each document or instrument in writing, of whatever character or nature, alienating, mortgaging, leasing, or otherwise affecting the possession of mining claims or any right or title thereto or interest therein, filed for record, and on the presentation of the receipt of the provincial or district treasurer the said declaration, affidavit, or other document or instrument in writing shall be recorded by the mining recorder, provided all requirements of the law before recording shall have been complied with. These fees shall be accounted for as other collections of the officers receiving them, and deposited for the credit of the proper province or district, in accordance with section six of act numbered six hundred and twenty-four.

Sec. 6. The fees collected by authority of the preceding section shall be turned into the treasury of the province in which the mining claim for the recording of which said fees may be paid is situate, or in provinces or districts where civil government has not been established into the office of the Collector of Internal Revenue.

Sec. 7. The books necessary for the recording of mining claims shall be provided by the provincial authorities of the respective provinces, or in provinces or districts where civil government has not been established, by the Chief of the Bureau of Public Lands.

Sec. 8. In addition to the requirements of sections twenty-three and twenty-four of the Act of Congress approved July first, nineteen hundred and two, in regard to placing posts numbers one and two on the line of location, and marking the line between them, each locator of a mineral claim shall establish each of the four corners of the claim by marking a standing tree or rock in place, or by setting in the ground, where practicable, a post or stone. Each corner shall be distinctly marked to indicate that it is the northeast, southeast, southwest, or other corner, as the case may be, of the claim in question; and the posts or stones used to mark such corners shall be of the dimensions required by these regulations for posts and stones marking corners or angles of a placer claim.

Sec. 9. The locator of a placer claim shall post upon the same a notice containing the name of the claim, designating it as a placer claim, the name of each locator, the date of the location, and the number of hectares claimed. He shall also define the boundaries of the claim by marking a standing tree or rock in place, or by setting a post or stone at each corner or angle of the claim. When a post is used it must be at least five inches in diameter or four inches

on each side by four feet six inches in length, and, where practicable, set one foot in the ground and surrounded by a mound of earth or stone four feet in diameter by two feet in height. When a stone, not a rock in place, is used, it must be not less than six inches on each side by two and one-half feet in length, and must be set so as to project half its length above the ground. Where a stone, a rock in place, is used, a cross must be cut in the stone, the arms of which cross must be at least four inches long, intersecting, approximately, at right angles and in their centers, the cutting to be at least one-half inch deep. The intersection of the arms shall constitute the corner. Each tree, rock in place, stake, or stone used to designate a corner or angle of a placer claim must be so marked as to clearly indicate its purpose, and the objects selected to designate the corners of a claim shall be marked with a series of consecutive numbers, thus: "Cor. No. 1," "Cor. No. 2." "Cor. No. 3," and so forth: Provided, That nothing in this section shall be understood to require the establishment and marking of any corner or angle of a placer claim located upon surveyed public lands at a point where a corner of the Philippine system of public-land surveys has previously been established, in which case it shall suffice in describing said claim for record to correctly describe said corner of the public surveys, and to state that such corner stands for corner number one, corner number two, or corner number three, and so forth, as the case may be, of such placer claim.

Sec. 10. Within thirty days after the location thereof every locator of a placer claim shall record the same with the mining recorder of the province or district in which the claim is situate.

Sec. 11. The record of a placer claim shall consist of a declaration of location reciting all the facts necessary to a perfect identification of the claim, and shall contain a true copy of the notice posted thereon at the date of location, as well as a description of the claim as staked and monumented, showing the length and approximate compass bearing, as near as may be, of each side or course thereof, and stating in what manner the respective corners are marked, whether by a standing tree, rock in place, post, or stone, and giving in detail the distinguishing marks that are written or cut on each, and also stating as accurately as possible, preferably by course and distance, the position of the claim with reference to some prominent natural object or permanent monument.

Sec. 12. No placer claim shall be recorded unless the declaration of location be accompanied by an affidavit made by the applicant or some person on his behalf cognizant of the facts, that the notice required by section nine of these regulations has been posted upon the claim, and that the ground thereby embraced is valuable for placer mining purposes; that the ground applied for is unoccupied by any other person.

Sec. 13. No mining claim shall be recorded unless the declaration be accompanied by proof that the locator, or each of them in case there be no more than one, is a citizen of the United States of America or of the Philippine Islands. The proof of citizenship required by this section may be that set forth in section thirty-five of the Act of Congress approved July first, nineteen hundred and two.

Sec. 14. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original notice or declaration was defective, erroneous, or that the requirements of the law had not been complied with before recording, or shall be desirous of changing his

boundaries so as to include ground not embraced by the location as originally made and recorded, or in case the original declaration of location was made prior to the promulgation of these regulations, and the locator or his assigns shall desire to conform the location and declaration hereto, such locator or his assigns may file an amended declaration of location in accordance with the provisions of the Act of Congress of July first, nineteen hundred and two, and these regulations, with the mining recorder of the province or district in which such claim is situate: Provided, That such amended declaration of location does not interfere at the date of its filing for record with the existing rights of any person or persons, and no such amended location or the record thereof shall preclude the locator or his assigns from proving any such title as he or they may have held under the original location.

Sec. 15. Within sixty days after the expiration of the period fixed by law for the annual performance of the labor or the making of improvements upon a mining claim, the locator thereof, or some person on his behalf cognizant of the facts, shall make and file for record with the mining recorder of the province or district in which the claim is situate an affidavit in substance as follows:

Affidavit of Annual Assessment Work.

Philippine Islands.

Province of } ....
District of }

....., being first duly sworn, deposes and says that he is a citizen of the United States of America (or of the Phillippine Islands, as the case may be) and more than twenty-one years of age; that he resides in.....

province of } ....., P. I., and is personally acquainted with the mining claim
district of }

known as the ..... (lode or placer) claim, situate in the barrio of ....., Province of ....., island of ....., P. I., the declaration of location of which is recorded in the office of the mining recorder of said province (or district), in Book ..... of Record of Mining Claims, at page .....; that between the ..... day of ....., 190.., and the ..... day of ....., 190.., not less than ..... dollars' worth of labor was performed or improvements made upon said claim, not including the work done prior to the date of recording the same. Such work was done or improvements made by and at the expense of ....., the owner of said claim, for the purpose of complying with the laws of the United States relating to annual assessment work, and ..... (here name the miners or other persons who did the work) were the persons employed by said owner who did such work or made such improvements, and that said work or improvements consisted of and are described as follows, to wit: ..... (here describe the work done).

(Signature).....

Subscribed and sworn to before me this ..... day of ..... 190...

.....

(Signature of officer who administers oath.)

Such affidavit, when recorded, shall be prima facie evidence of the performance of such labor or the making of such improvements, and shall be received in evidence by all courts in the Philippine Islands, as shall also the record thereof or a certified copy of the same.

Sec. 16. Actual expenditures and cost of mining improvements by the claimant or his grantors, having a direct relation to the development of the claim,

shall be included in the estimate of assessment work. The expenditures may be made from the surface, or in running a tunnel, drifts, or cross-cuts for the development of the claim. Improvements of any other character, such as buildings, machinery, or roadways, must be excluded from the estimate unless it is clearly shown that they are associated with actual excavations, such as cuts, tunnels, shafts, and so forth, are essential to the practical development of and actually facilitate the extraction of mineral from the claim.

Sec. 17. The public good requiring the speedy enactment of this bill, the passage of the same is hereby expedited in accordance with section two of "An Act prescribing the order of procedure by the Commission in the enactment of laws," passed September twenty-sixth, nineteen hundred.

Sec. 18. This Act shall take effect on its passage.

Enacted, February 7, 1903.

[No. 1,128.]

An Act prescribing regulations governing the procedure for acquiring title to public coal lands in the Philippine Islands, under the provisions of sections fifty-three, fifty-four, fifty-five, fifty-six, and fifty-seven of the Act of Congress approved July first, nineteen hundred and two, entitled "An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes."

By authority of the United States, be it enacted by the Philippine Commission that:

Section 1. Any person above the age of twenty-one years, who is a citizen of the United States or of the Philippine Islands, or who has acquired the rights of a native of said Islands under and by virtue of the Treaty of Paris, or any association of persons severally qualified as above, may purchase any unreserved, unappropriated public land which is chiefly valuable for coal by proceeding as hereinafter directed: Provided, That no individual person shall be entitled to purchase more than sixty-four hectares and no association more than one hundred and twenty-eight hectares: And provided further, That this Act shall be held to authorize but one entry by the same person or association of persons, and no association of persons, any member of which shall have taken the benefit of this Act, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions hereof, and no member of any association which shall have taken the benefit of this Act shall enter or hold any other lands under the provisions hereof: And provided further, That such lands, if previously surveyed by the Government, shall be taken by legal subdivisions, but if unsurveyed shall be taken, wherever possible, in the form of squares which shall contain at least sixteen hectares each.

Sec. 2. A coal claim may be initiated either by filing a declaration of location with the mining recorder of the province in which the land is located, or by actually taking possession of the land and making improvements thereon: Provided, however, That where claims are initiated by occupation, a proper declaration of location must be filed with the mining recorder within sixty days after the date of actual possession and commencement of improvements.

Sec. 3. The declaration of location above mentioned must be executed under oath, and must describe the land occupied in as definite a manner as practicable, and must contain all necessary allegations to show that applicant has the qualifications required under section one of this Act, and that the land is of

the character therein mentioned. In case a right to purchase is based on prior occupation and improvement, that fact must be set out, and the date of occupation and amount of improvements stated.

Sec. 4. It shall be the duty of the mining recorder to record declarations of locations of coal claims in the same manner that declarations of locations of mining claims are recorded; and for such services he shall require the payment of a fee of two pesos, Philippine currency, which shall be paid to the provincial or district treasurer as provided in section five of Act numbered Six hundred and twenty-four as amended by Act numbered Eight hundred and fifty-nine.

Sec. 5. All declarations of locations shall be recorded in the order in which they are filed for record, and the mining recorder shall note on each instrument filed for record the year, month, and day, and the hour and minute of the day on which the same was filed. After recording the declaration, the mining recorder shall make a true copy of the same and without delay forward it to the Chief of the Bureau of Public Lands.

Sec. 6. All persons seeking to acquire public lands under the provisions of this Act must prove their respective rights and pay for the land filed upon within one year from the time prescribed for filing their claims, and they shall not take from the land and sell any coal prior to obtaining a patent.

Sec. 7. A patent for land claimed and located for valuable coal deposits may be obtained in the following manner: Any person or association authorized to locate a coal claim under this Act having claimed and located a piece of land for such purposes, who or which has complied with the terms of this Act, shall file with the Chief of the Bureau of Public Lands an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim made by or under the direction of the Chief of the Bureau of Public Lands, and at applicant's expense, showing accurately the boundaries of the claim, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land described in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such plat and notice have been duly posted. Upon the filing of said application, plat, field notes, notices, and affidavits it shall be the duty of the Chief of the Bureau of Public Lands to publish once a week a notice that such application has been made, for the period of nine consecutive weeks, in a newspaper to be by him designated; also to post a copy of the application in his office, and to require such further publication as he, with the approval of the Secretary of the Interior, may deem advisable. At the expiration of the period of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed in the Bureau of Public Lands during the said period of publication, it shall be assumed that the applicant is entitled to a patent, upon payment to the Chief of the Bureau of Public Lands of fifty pesos per hectare where the land shall be situated more than fifteen miles from any completed railroad, available harbor, or navigable stream, and one hundred pesos per hectare for such lands as shall be within fifteen miles of such road, harbor, or stream, and that no adverse claim exists: Provided, That where the claimant for a patent is not a resident of or within the province wherein the land sought to be purchased is located, the application for patent and the affidavits required to be made in

this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits.

Sec. 8. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the Chief of the Bureau of Public Lands, who, in case the conditions of section seven of this Act have been complied with, shall issue to the claimant a patent for such land as by the decision of the court he appears to be entitled to.

Sec. 9. All patents for lands disposed of under this Act shall be prepared in the Bureau of Public Lands and shall issue in the name of the United States and the Philippine Government under the signature of the Civil Governor; but such patents shall be effective only for the purposes defined in section one hundred and twenty-two of the Land Registration Act, and the actual conveyance of the land shall be effected only as provided in said section.

Sec. 10. The Chief of the Bureau of Public Lands, under the supervision of the Secretary of the Interior, shall prepare and issue such forms and instructions consistent with this Act as may be necessary and proper to carry its provisions into effect, and for the conduct of all proceedings arising hereunder.

Sec. 11. The public good requiring the speedy enactment of this bill, the passage of the same is hereby expedited in accordance with section two of "An Act prescribing the order of procedure by the Commission in the enactment of laws," passed September twenty-six, nineteen hundred.

Sec. 12. This Act shall take effect on its passage.

Enacted, April 28, 1904.

Instructions and Forms.

Under the authority conferred by section 10, supra, the following instructions and forms are issued:

1. Land which may be purchased.—Any unclaimed public land containing valuable deposits of coal is subject to sale under the provisions of this Act. Prospective purchasers will be required to show by affidavit that the land sought to be purchased contains such valuable deposits.

2. Who may purchase.—The following-described persons are entitled under the law to purchase public coal land:

(a) Citizens of the United States over the age of twenty-one years.

(b) Natives of the Philippine Islands or persons who have acquired the rights of natives by virtue of the treaty of Paris of December tenth, eighteen hundred and ninety-eight, and who are over the age of twenty-one years.

(c) Associations of persons the members of which are severally qualified as above.

3. Amount that may be purchased.—An individual may purchase any amount not exceeding sixty-four hectares. An association is limited to one hundred and twenty-eight hectares. A purchaser is entitled to make but one purchase of the maximum amount allowed.

4. Form in which land must be taken.—Where the land sought to be purchased has been previously surveyed under a regular governmental system of surveys dividing the territory into subdivisions, purchase must be made by such subdivisions. But where the land is unsurveyed, it must be taken when possible in squares which shall contain not less than sixteen hectares, but may contain any quantity in excess of sixteen hectares to the amount the purchaser is entitled to purchase.

5. Manner of locating a coal claim.—Any person qualified to purchase public coal land may initiate a claim to any particular tract by taking possession of same and within sixty days thereafter filing a declaration of location thereof with the secretary of the province in which the land is located. This declaration of location must be executed under oath and must give as definite a description of the land as it is possible to state without making a survey. (Form No. 1 should be used.)

In locating a claim locators should exercise great care in marking the corners of same, and should describe the corners with reference to some prominent natural object or landmark—as a tree or rock on the claim—that is, give the approximate direction and distance of each corner from said landmark. Declarations of location of coal claims are recorded in the same manner as like notices for other mining claims, and the same fees are charged. (See Act No. 624.)

The mining recorder will as soon as possible after recording a declaration of location of a coal claim forward a copy of same to the Chief of the Bureau of Public Lands.

6. Manner of acquiring title.—An application to purchase coal land must be filed with the Chief of the Bureau of Public Lands within one year from the date of filing a declaration of location therefor with the mining recorder.

The first step in the procedure for acquiring title is the filing with the Chief of the Bureau of Public Lands of an application for survey of the land. (Form No. 2 should be used in making this application.) The survey is made under the directions of the Chief of the Bureau of Public Lands, at applicant's expense. The Government will take no action on an application for survey until the estimated cost of making same is deposited with the Chief of the Bureau of Public Lands.

After a claim has been properly surveyed and claimant has received a plat thereof and the field notes of survey, he should file his application for a patent (using form No. 3), together with a copy of the plat and field notes of survey, with the Chief of the Bureau of Public Lands. On the same date as that of his application for a patent claimant should post in a conspicuous place on the claim a notice of his application for a patent (using form No. 4), together with a copy of the plat of the claim, and should forward to the Chief of the Bureau of Public Lands an affidavit executed by two disinterested persons showing that said notice and plat have been posted. (Form No. 5 should be used in executing this affidavit.)

At the expiration of nine weeks from the date of posting said notice and plat, the applicant will file another affidavit with the Chief of the Bureau of Public Lands showing that said notice and plat have been posted on the claim

for a period of nine weeks. (Form No. 6 should be used in executing this affidavit.)

Where the claimant for a patent is not a resident of or within the province wherein the land sought to be purchased is located, the application for patent and the affidavits required to be made by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits.

The Chief of the Bureau of Public Lands will cause a notice to be published in the newspapers in which official notices are published, calling attention to each application for a patent, and will cause a like notice to be posted in the office of the secretary of the province in which the land is located. Said notices will be published for a period of nine weeks.

7. Value of coal lands.—The price per hectare is fifty pesos, Philippine currency, where the land is situated more than fifteen miles from any completed railroad, available harbor, or navigable stream, and one hundred pesos, Philippine currency, per hectare where the land is within fifteen miles of such railroad, harbor, or stream. Purchasers will be required to deposit the purchase price with the Chief of the Bureau of Public Lands at the time of filing the application to purchase.

8. Adverse claims.—Any person claiming an interest in land adverse to the interest sought to be acquired by an applicant for a patent thereto, must file a notice of such claim with the Chief of the Bureau of Public Lands prior to the expiration of the period of publication of the notice of application for patent above mentioned. And such person must, furthermore, within thirty days after filing said notice with the Chief of the Bureau of Public Lands, commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do will constitute a waiver of said adverse claim. (See sec. 8, Act No. 1128.)

9. Prospecting.—The land may be thoroughly prospected and coal necessary for tests may be removed for that purpose, but none may be sold or used commercially prior to issuance of patent.

10. Timber.—A gratuitous license to cut and use timber for mining purposes may be had on application to the Bureau of Forestry. Said license will be limited to the claim on which the timber is cut. (See sec. 17, Act No. 1148.)

Manila, P. I., June 10, 1904.

P. S. Black,
Acting Chief Bureau of Public Lands.

Approved August 22, 1904:
Dean C. Worcester, Secretary of the Interior.

Forms for Use in Proceedings to Aquire Title to Public Coal Lands.

Form No. 1.

Declaration of Location of Coal Claim.

The undersigned hereby declares and gives notice that under the provisions of Act No. 1128, Philippine Commission, ... has located a coal claim in the barrio of ....., municipality of ....., province of ....., the boundaries of

which are more particularly described as follows, to wit: (Here give as definite a description as possible of the boundaries of the claim, having reference to monuments erected on the ground.) And ..... further declares that ..... is over the age of twenty-one years and is a citizen of the United States (or of the Philippine Islands) and has never held nor purchased any land under the provisions of said Act, either as an individual or as a member of an association; that said land is unoccupied by any other person, and contains valuable deposits of coal, and that ..... took possession of the same on the ..... day of ....., A. D. 19.., and has made improvements consisting of .....

(Signed) ....., Locator.

(Post-office).....

Subscribed and sworn to before me this ..... day of ....., 19...

(Signature of official).....

(Official title.)

Notice.—Where a claim is located by an association, it will be necessary for the locator to show that the several members of the association are each qualified to make a location.

Form No. 2.

Application for Survey of Coal Claim.

....., 19..

To the Chief of the Bureau of Public Lands, Manila, P. I.

Sir: In compliance with section 7, Act No. 1128, Philippine Commission, I hereby make application for an official survey of a coal claim located by ..... in the barrio of ....., municipality of ....., province of ....., and request that you will send me an estimate of the amount to be deposited in payment therefor, and after such deposit shall have been made, you will cause the said claim to be surveyed.

Respectfully, ...

Form No. 3.

Application for Patent for Coal Land.

To the Chief of the Bureau of Public Lands, Manila, P. I.

Sir: I, ..., hereby apply, under the provisions of Act No. 1128, Philippine Commission, an act relating to the sale of public coal lands in the Philippine Islands, to purchase ..... hectares of coal land located in the barrio of ....., municipality of ....., province of ....., and more particularly described as follows, to wit: (Here give full description.) Which description is set forth in the official field notes of survey of said tract hereto attached, dated ....., and the official plat of survey, a copy of which is filed herewith; there is hereby tendered ..... pesos in payment for said land; and I solemnly swear that I am over the age of twenty-one years, a citizen of the United States (or of the Philippine Islands), and have never held nor purchased lands under said act either as an individual or as a member of an association; and I do further swear that I am well acquainted with the character of said described land, having frequently passed over same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that no portion of said land is in the possession or occupation of any other per-

son, and that it contains valuable deposits of coal and is chiefly valuable therefor; that I located said land as a coal claim on the ..... day of ....., ..., and filed my notice of location with the mining recorder of the province of ..... on the ..... day of ....., ...

(Signed) .....,

(Address).....

(Date).....

Subscribed and sworn to before me this ..... day of ....., A. D. 19...

(Signature of official).....,

(Official title.)

N. B.—Where the applicant for a patent is an association, evidence must be submitted showing that the members of the same are severally qualified to purchase.

Form No. 4.

Notice of Application for Patent for Coal Land.

Notice is hereby given that in pursuance of the provisions of Act No. 1128, Philippine Commission, ... has located a coal claim in the barrio of ....., municipality of ....., province of ....., and has made application for a patent for said claim, which is more fully described as to metes and bounds by the official plat herewith posted and by the field notes of survey thereof, now filed in the Bureau of Public Lands, which field notes of survey describe the boundaries and extent of said claim on the surface as follows, to wit: (Here give full description.)

Any and all persons claiming adversely the said described land, or any portion thereof, are hereby notified that unless their adverse claims are duly filed according to law within nine weeks from the date hereof with the Chief of the Bureau of Public Lands at Manila, P. I., said claims will not be considered by the Government.

(Name of claimant).....,

(Post-office).....

Dated on the ground this ..... day of ....., A. D. 19...

Form No. 5.

Proof of Posting Notice and Plat on Coal Claim.

Province of ....., Municipality of .....

..... and ....., each for himself, and not one for the other, being first duly sworn according to law, deposes and says, that he is over the age of twenty-one years, and was present on the ..... day of ....., A. D., 19.., when a plat representing the ..... coal claim, and certified to as correct by the Chief of the Bureau of Public Lands, and designated by him as Coal Claim No. ....., together with a notice of the intention of ..... to apply for a patent for said claim and premises so platted, was posted in a conspicuous place upon said claim, to wit: Upon a ....., where the same could be easily seen and examined; the notice so conspicuously posted upon said claim being in words and figures as follows, to wit:

Notice of Application for Patent for Coal Land.

Notice is hereby given that in pursuance of the provisions of Act No. 1,128, Philippine Commission, ... has located a coal claim in the barrio of ....., municipality of ....., province of ....., and has made application for a

patent for said claim, which is more fully described as to metes and bounds by the official plat herewith posted and by the field notes of survey thereof now filed in the Bureau of Public Lands, which field notes of survey describe the boundaries and extent of said claim on the surface as follows, to wit: (Here give full description.)

Any and all persons claiming adversely the said described land or any portion thereof so described, are hereby notified that unless their adverse claims are duly filed according to law within nine weeks from the date hereof with the Chief of the Bureau of Public Lands at Manila, P. I., said claim will not be considered by the Government.

(Name of claimant).....,

(Post Office).....

Dated on the ground this ..... day of ....., A. D., 19..

Witness:

.....
(Name.)
.....
(Address.)
.....
(Name.)
.....
(Address.)

Subscribed and sworn to before me, this ..... day of ....., A. D., 19...

(Signature of official).....

(Official title.)

Form No. 6.

Proof that Plat and Notice Remained Posted on Claim During Period of Publication.

....., a resident of the town of ....., province of ....., deposes and says that he is over the age of twenty-one years, and that he is acquainted with the coal claim of ....., particularly described as follows, to wit: .....; that the official plat of such claim, designated as such by the Chief of the Bureau of Public Lands, together with a notice of intention to apply for a patent therefor, was posted thereon on the ..... day of ....., A. D. 19.., as fully set forth and described in the affidavit of ..... and ....., dated the ..... day of ....., A. D. 19.., which affidavit was duly filed in the Bureau of Public Lands at Manila, P. I.; and that the plat and notice so mentioned and described remained continuously and conspicuously posted upon said coal claim from the ..... day of ....., A. D. 19.., to the ..... day of ....., A. D. 19.., including the nine weeks' period during which notice of said application for patent was published in the newspaper.

.....

Subscribed and sworn to before me this ..... day of ....., A. D. 19...

(Signature of official).....

(Official title.)

APPENDIX G.

THE MINING LAWS OF TEXAS.

Two mining acts have been passed by the Legislature, one in 1889 and the other in 1895. The Revised Statutes of 1895 contain both of these acts and they are given in the following pages. For the most part the Texas mining laws follow the United States mining laws, but there are divergencies of greater or less importance.

MINES AND MINING.

Schools lands reserved, except, etc.

Art. 3481. All the public school, university, asylum and public lands containing valuable mineral deposits are hereby reserved from sale or other disposition, except as herein provided, and are declared free and open to exploration and purchase under regulations prescribed by law by citizens of the United States and those who have declared their intention of becoming such. [Acts of 1889, p. 116, § 1.]

To be classified.

Art. 3482. It shall be the duty of the commissioner of the general land office to have a map made showing the location of all public school, university, asylum and public lands which are unsold; and it shall be the duty of the geological and mineralogical survey to examine all such lands as soon as practicable, and to designate such tracts as are apparently mineral bearing as mineral lands for the purpose of this title. If mineral lands are afterwards claimed to exist at other locations than are so designated, they shall also be examined and classified accordingly. [Ib., § 2.]

Mining districts.

Art. 3483. It shall be the duty of the commissioner of the general land office to unite a suitable number of these mineral locations into mining districts, in each of which shall be a surveyor who must either be the surveyor of the district or county or a regularly appointed deputy, and an officer qualified to administer oaths. [Ib., § 3.]

Extent of claims.

Art. 3484. A mining claim upon veins or lodes of quartz or other rocks in places bearing silver, cinnabar, lead, tin, copper or other valuable metals, excluding deposits of iron ore, coal, kaolin, baryta, salt, marble, fire clays, valuable building stones, oil or natural gas, may equal but shall not exceed one thousand five hundred feet along the vein or lode. No such claim shall exceed twenty-one acres in total area. The end lines of each claim shall be parallel to each other, and all claims shall be in the form of a parallelo-

gram or square unless such form is prevented by adjoining rights or boundaries of the section in which the claim lies. The locator under this title shall be entitled to the use of all the superficial area between the enclosing lines of the claim, and to all minerals thereon and between the side and end lines extending downward vertically until the rights secured by posting are forfeited as provided, and in all conflicts priority of location shall decide. [Ib., § 4.]

Notice to be posted by locator.

Art. 3485. The locators of any mining claim shall post up at the center of one of the end lines of the same a written notice, stating the name of the locator and of the claim, and the date of posting, and describe the claim by giving the number of feet in length and width, and the direction the claim lies in length from the notice, together with the section, if known, and the county; and shall place stone monuments at the four corners, and otherwise described corners so that they can be readily found. The notice shall be placed in a conspicuous place so as to be readily seen. [Ib., § 5.]

Preliminaries to application.

Art. 3486. The locators shall, within three months after the date of posting the required notice, sink a shaft at least ten feet in depth by four feet square, or a tunnel of the same dimensions ten feet in length, or an open cross cut twenty feet in length, four feet or more wide and ten feet in depth at its shallowest part, and shall within said time file with the county surveyor or the district surveyor of the county, as the case may be, an application in writing for the survey of their claim, which application shall be accompanied with a fee of twenty dollars, unless its tender is waived, and also with an affidavit attached thereto that the required work, signifying it, has been done, and that the locators have found valuable mineral on the claim; and the affidavit shall state the date of the first posting of the notice on the claim by the applicants; and, further, that the notice has not been post-dated or changed in its date. Upon receiving said application and fee the surveyor shall record the application, together with the affidavit, and he shall thereupon forthwith proceed to survey said claim and forward the field-notes to the commissioner of the general land office within thirty days after filing the application, in default of which he shall pay the aggrieved party such damages as he may sustain, and it shall be the duty of the applicants to see that the field-notes are so returned. The fee of twenty dollars shall cover all the services provided for in this article. In all other cases enumerated in this article the fee shall be the same allowed county clerks for similar services. [Ib., § 6.]

How payments to the state to be regulated.

Art. 3487. Annually after the filing of the application for a survey as herein before provided, the claimant shall, until after application is made for a patent as herein before provided, do one hundred dollars worth of work in developing each claim; but where claims adjoin, the amount of work may be done on one for all belonging to the same party. The value of such shall be estimated at what it could be contracted for at a fair cash price, but the cost of tools and implements and the expense of going to and returning from the mine shall not be included in said estimate. And shall in addition to this amount of work, annually pay to the treasurer of the state the sum of fifty dollars on each and every claim filed upon, which amount shall be credited to the fund to which the land belongs upon which the claim is located; provided, that all amounts so paid shall be a credit upon the final payment

for such land provided for in article 3489 of this title. Within one month after the expiration of each year, the owner shall make and file with the surveyor his affidavit, setting forth specifically what the work consists of in detail and the value thereof, and shall also file with the surveyor at the same time the receipt of the state treasurer for the amount of cash payment provided for herein or a certified copy thereof. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required in this title within the necessary time, the co-owners who have performed the labor or made the improvements, or paid the fees or other expenditures required in this title, may, at the expiration of the year in which the same is to be done, give notice in writing or notice by publication in a newspaper published in the county where the mining is, if any; if none in such county, then in the newspaper published nearest to the mine, for at least once a week for ninety days. If after such personal notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this title, his interest in the claim shall become the property of his co-workers who have made the required expenditures. An affidavit by the co-owners forfeiting the interest of such delinquent shall, when recorded in the office of the proper surveyor, be sufficient evidence of such delinquency. [Ib., 7.]

Ownership of lodes in case of tunnel, etc.

Art. 3488. When a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owner of such tunnel shall have the right of possession of all veins or lodes within two thousand feet from the face of such claim, on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel and while the same is being prosecuted with reasonable diligence, shall be invalid, but failure to prosecute the work in the tunnel for six months shall be considered as an abandonment of the right of all undiscovered veins on the line of said tunnel. [Ib., § 8.]

Patents.

Art. 3489. Whenever the owners of any mining claim shall desire a patent, they shall, within five years after the filing of the application for survey, file their application for a patent upon their claim with the commissioner of the general land office, accompanied with the receipt of the state treasurer, showing that twenty-five dollars per acre has been paid by the applicant for patent to the state treasurer. No patent shall be issued in any case until the expiration of sixty days from the filing of the application. Upon filing said application the applicant shall cause to be published for four successive weeks, one insertion each week, in some newspaper published in the county in which the mine is situated, if there be any, if not, then in some newspaper published in the nearest county to the mine in which a newspaper is published, a notice stating the fact that application has been filed for patent on the claim (or claims), describing them clearly. A copy of the printed notice with affidavit that it has been published as required by this article, and that all the requirements of this title have been complied with, shall be filed with the commissioner of the general land office before the patent shall issue. After the expiration of thirty days after the last insertion of said notice patent shall issue unless protest has been filed. [Ib., § 9.]

Patents not included in article 3495.

Art. 3490. Any person shall have the right to purchase and obtain patent, by compliance with this article, on any public school, university, asylum and public lands, containing valuable deposits of kaolin, baryta, salt, marble, fire clay, iron ore, coal, oil, natural gas, gypsum, nitrates, mineral paints, asbestos, marls, natural cement, clay, onyx, mica, precious stones, and stone valuable for ornamental purposes, or other valuable building material, in legal subdivisions in quantity not exceeding one section; provided, that where any such parties shall have heretofore expended or shall hereafter expend, five thousand dollars in developing the aforesaid mineral resources of any of said lands, such parties shall have the right to buy one additional section and no more, and to include in the purchase any section, or part thereof, on which the work may have been done. The lands so purchased may be in different sections, and all embraced in one or more obligations not to exceed the quantity stated. The purchaser shall pay not less than fifteen dollars per acre where the lands shall be situated ten miles or less of [from] any railroad in operation, and not less than ten dollars per acre where the land is over ten miles from such railroad; one-tenth of the purchase money to be paid in cash to the state treasurer, and the purchaser shall file the treasurer's receipt with the commissioner of the general land office, together with an obligation to pay the state of Texas the remainder in nine equal annual installments, with interest at six per cent per annum from date, subject to a forfeiture as in other cases. And all said lands are reserved from sale or other disposition than under this title; and where application is made to buy any of the lands herein named, except under this title, the purchaser shall swear that there are none of the minerals named in this title on said lands, so far as he knows or has reason to believe, or does believe; provided, further, that any party herein before named who shall, prior to the passage of this article have been the first to work on said lands for the development of said mineral resources, and who has abandoned said work, and is qualified at passage of this article to buy, shall have a prior preference right of doing so for thirty days after this article goes into effect; provided, further, this article shall not authorize the sale of lands containing valuable deposits of gold, silver, lead, cinnabar, copper, or other valuable metal. [Ib., § 10 (Amend., 1893, p. 100).]

Contesting issuance of patent.

Art. 3491. Any person desiring to contest the issuance of a patent may do so by filing with the commissioner of the general land office a protest setting forth the grounds of objection generally, and that protestant has an interest in the subject-matter, which protest shall also state that the same is presented in good faith and not to injure or delay the applicants, or any of them, and the same shall be verified by affidavit; whereupon it shall be the duty of the commissioner to withhold patent until the controversy is ended; provided, that if the protestant shall not, within thirty days after the filing of his protest, institute suit in the court having jurisdiction thereof in the county where the claims are located, his protest shall constitute no further barrier to the issuance of a patent. A certified copy of the petition or a certificate of the clerk of the court where suit is pending shall be sufficient evidence to the commissioner of the pendency of the suit and of the date of filing said suit. When the land in controversy lies partly in two counties, suit may be brought in either. More than one claim shall not be embraced in the same

patent or application. The suits here provided for shall be entitled to precedence of trial on the docket. [Ib., § 11.]

Location on land disposed of since April 14, 1883.

Art. 3492. When a location has been made and land disposed of by the State since the passage of an act for disposition of minerals on the land embraced in article 3481 of this title, if such location was made subsequent to the disposition by the state of such lands, and the locator or his assignees have not abandoned said claim, but are working it in good faith, the locator and his assignees shall nevertheless be entitled to the mineral and to the use of the superficial area as in other cases; and if the case is such that the fee in the land can not pass by patent, a patent may issue to all the minerals in the claims, and shall be a license from the state to enter upon and work said claim and extract the mineral therefrom. In cases provided for in this article when the fee does not pass, the price shall be twenty dollars per acre, and the locator or his assignee shall in addition, pay to the owner of the land in fee the fair value of the land so taken up by his claim, and roads and fences necessary to give him ingress and egress thereto, and be liable for any damages which may result to owner of the land in fee. All other provisions of this title shall apply to said location. (The act referred to is the act of 1883, page 4.) [Ib., § 12.]

Forfeiture of claims, etc.

Art. 3493. All claims upon which patent has not been applied for within five years next after the application for survey, or which have not been surveyed and the field-notes returned to the general land office within the time prescribed therefor as herein before provided, or upon which the assessment work has not been done, an affidavit therefor filed as provided by this title, shall be and are declared forfeited without judicial action of any kind and subject to location as originally, but not by any one interested in the claim at the time of forfeiture; and any location for or on behalf of any such party shall be wholly void. Whenever any such claim shall be re-located, the locators and each of them shall make affidavit that the location is made without any contract or agreement of any kind that any of the parties owning an interest in the location before re-location has or is to have any interest in the same. In all other cases where affidavit is required by this title it may be made by one or more of the parties cognizant of the facts. [Ib., § 13.]

Re-location of forfeited claims.

Art. 3494. No claim which has been forfeited for any cause shall be subject to re-location for a period of thirty days next thereafter; and the party owning the same may apply to the land commissioner within that time for relief, and if it appear to him from the proofs submitted that the forfeiture was not occasioned by the negligence of the owner, but by circumstances which he could not reasonably control, the commissioner may, within that time, in his discretion, grant relief against the forfeiture, and if he grant such relief he shall at once forward his order to that effect to the surveyor, who shall file the same for record in his office. [Ib., § 14.]

Reservation of mineral in sale of lands.

Art. 3495. Whenever any application shall be made to buy or obtain title to any of the lands embraced in article 3481 of this title, except where the application is made under this title, the applicant shall make oath that there

is not, to the best of his knowledge and belief, any of the mineral embraced in this title thereon, and when the commissioner has any doubt in relation to the matter he shall forbear action until he is satisfied. And any sale or disposition of said lands shall be understood to be with a reservation of the mineral thereof to be subject to location as herein provided. [Ib., § 15.]

Placer mining.

Art. 3496. Claims usually called placers, including all forms of metallic deposits, excepting veins of quartz or rock in place, shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims. All placer claims located shall conform as near as practicable with existing surveys and their subdivisions, and no such location shall include more than forty acres for each individual claimant, and shall not exceed three hundred and twenty acres for any association of persons. The price which shall be paid for such placer shall not be less than ten dollars per acre, together with all costs of proceedings as before provided. [Ib., § 16.]

What may be included in patent.

Art. 3497. When non-mineral land, not contiguous to the vein or lode, is used by the prospector of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location of such non-adjacent lands shall exceed ten acres, and payment for the same must be made at the same rate as fixed by this title for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for a mill site as provided in this article. [Ib., § 17.]

Timber—Taking timber on mining lands.

Art. 3498. Any owner or worker of mining claim under this title is authorized to fell and remove for building and mining purposes any timber or any trees growing or being upon unoccupied lands as described in article 3481, said lands being mineral and subject to entry only as mineral lands, under such rules and regulations as may be prescribed for the protection of timber and under-growth upon such lands and for other purposes. [Ib., § 18.]

Reserved lands opened to exploration and purchase, etc.

Art. 3498a. All public school, university, asylum and public lands specially included under the operation of this title, all the lands now owned by the state situated within the reservation known as the "Pacific Reservation," which were taken off the market and reserved from sale by an act approved January 22, 1883, containing valuable mineral deposits, are hereby reserved from sale or other disposition, except as herein provided, and are declared free and open to exploration and purchase under regulations prescribed by law, by citizens of the United States and those who have declared their intention of becoming such; provided, that all who have located and recorded valid claims under previous valid laws and have not abandoned same, but are engaged in developing same, shall have a prior preference right for ninety days after the passage of this title in which to re-locate same under this title. [Acts 1895, p. 197.]

Commissioner to map lands.

Art. 3498b. It shall be the duty of the commissioner of the general land office immediately upon the passage of this title to have a map made showing the location of all public school, university, asylum and public lands which are unsold at that date, and it shall be the duty of the geological and mineralogical survey to examine all such lands as soon as practicable thereafter, and to designate such tracts as are apparently mineral bearing as mineral lands for the purpose of this title. If mineral lands are afterwards claimed to exist at other locations than are so designated they shall also be examined and classified accordingly. [Ib.]

Mining districts created.

Art. 3498c. It shall be the duty of the commissioner of the general land office to unite a suitable number of these mineral locations into mining districts, in each of which shall be a surveyor, who must either be the surveyor of the district or county or a regular appointed deputy and an officer qualified to administer oaths. [Ib.]

Mining claims limited, etc.

Art. 3498d. A mining claim upon veins or lodes of quartz or other rocks in place bearing silver, gold, cinnabar, lead, tin, copper and other valuable metals, excluding deposits of kaolin, baryta, salt, marble, fire clay, iron ore, coal, oil, natural gas, gypsum, nitrates, mineral paints, asbestos, marls, natural cement, clay, onyx, mica, precious stones or any other non-metallic mineral and stone valuable for ornamental or building purposes or other valuable building material, may equal but shall not exceed one thousand five hundred feet along the mine or vein or lode. No such claim shall exceed twenty-one acres in total area. The end lines of each claim shall be parallel to each other, and all claims shall be in the form of a parallelogram or square, unless such form is prevented by adjoining rights or boundaries of the section in which the claim lies. The locator under this title shall be entitled to the use of all the superficial area between the enclosing lines of the claim, and to all minerals thereon, and between the side and end lines, extending downwards vertically, until the rights secured by posting are forfeited as provided; and in all conflicts priority of location shall decide. [Ib.]

Locator to post claim.

Art. 3498e. The locators of any mining claim shall post up at the center of one of the end lines of the same a written notice, stating the name of the location and of the claim and date of posting, and describe the claim by giving the number of feet in length and width and the direction the claim lies in length from the notice, together with the section, if known, and the county, and shall place stone monuments at the four corners and otherwise describe the corners so that they can be readily found. The notice shall be placed in a conspicuous place so it can be readily seen. [Ib.]

Application for survey of claim—Requisites of.

Art. 3498f. The locator shall, within three months after the date of posting the required notice, sink a shaft at least ten feet in depth by four feet square, or a tunnel of the same dimensions ten feet in length, or an open cross cut twenty feet in length, four feet or more wide and ten feet in depth at its shallowest part, and shall within said time file with the county surveyor or the district surveyor of the county, as the case may be, an application in writing for the survey of the claim, which application shall be ac-

companied by a fee of twenty dollars, unless its tender is waived, and also with an affidavit attached thereto that the required work, signifying that it has been done, and that the locators have found valuable minerals on the claim; and the affidavit shall state the date of the first posting of the notice on the claim by the applicants, and further, that the notice has not been posted-dated or changed in its date. Upon receiving said application and fee the surveyor shall record the application, together with the affidavit, and he shall thereupon forthwith proceed to survey said claim, and forward the field-notes to the commissioner of the general land office within thirty days after filing the application, in default of which he shall pay the aggrieved party such damages as he may sustain, and in addition thereto shall be deemed guilty of a misdemeanor, and on conviction fined not less than twenty dollars nor more than one hundred dollars, and it shall be the duty of the applicant to see that the field-notes are so returned. The fee of twenty dollars shall cover all the services provided for in this title. In all other cases enumerated in this title the fee shall be the same allowed county clerks for similar services. [Ib.]

Claimant must do what, pending patent.

Art. 3498g. Annually after the filing of the application for a survey as hereinbefore provided, the claimant shall, until after the application is made for a patent, as hereinafter provided, do one hundred dollars' worth in developing each claim; but where claims adjoin, the amount of work may be done on one for all belonging to the same party. The value of such shall be estimated at what it could be contracted for at a fair cash price, but the cost of tools and implements and the expense of going to and returning from the mine shall not be included in said estimate. Within one month after the expiration of each year the owner shall make and file with the surveyor his affidavit setting forth specifically what the work consists of in detail, and the value thereof. Upon the failure of any one of several owners to contribute his proportion of the expenditures required in this title within the necessary time, the co-owners who have performed the labor or made the improvements or paid the fees or other expenditures required in this title, may at the expiration of the year in which the same is to be done, give notice in writing or notice by publication in a newspaper published in the county where the claim is, if any; if none in such county, then in the newspaper published nearest the mine, for at least once a week for ninety days. If after such personal notice in writing or by publication such delinquent shall fail or refuse to contribute his proportion of the expenditure required by this title, his interest in the claim shall become the property of his co-workers who have made the required expenditures. An affidavit by the co-owners forfeiting the interest of such delinquent shall, when recorded in the office of the proper surveyor, be sufficient evidence of such delinquency. [Ib.]

Rights accruing to the claimant.

Art. 3498h. When a tunnel is run for the development of a vein or lode or for the discovery of mines, the owner of such tunnel shall have the right of possession of all veins or lodes within two thousand feet of the face of such claim on the line thereof, not previously known to exist, discovered in such tunnel to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface made by other parties after the commencement of the tunnel and while the same is being prosecuted with reasonable diligence shall be in-

valid; but failure to prosecute the work in the tunnel for six months shall be considered as an abandonment of the right of all undiscovered veins on the line of said tunnel. [Ib.]

Conditions precedent to issue of patent.

Art. 3498i. Whenever the owners of any mining claim shall desire a patent, they shall, within five years after filing of the application for survey, file their application for a patent upon their claim with the commissioner of the general land office, accompanied by the receipt of the state treasurer showing that twenty-five dollars per acre has been paid by the applicant for patent to the state treasurer. Whereupon such patent shall issue unless protest is filed as hereinafter provided for in article 3498k. [Ib.]

Right of purchase.

Art. 3498j. Within twelve months after the filing of the affidavit hereinafter provided for, any person or association of persons qualified as required by article 3498a, shall have the right to purchase and obtain patent by compliance with this title, or any of the lands of the state which are specified or included in article 3498a, containing valuable deposits of kaolin, baryta, salt, marble, fire clay, iron ore, coal, oil, natural gas, gypsum, nitrates, mineral paints, asbestos, marl, natural cement, clay, onyx, mica, precious stones or any other non-metallic mineral and stones valuable for ornamental or building purposes or other valuable building material, in legal subdivisions, in quantity not exceeding one section; provided, that where any such parties shall have heretofore expended, or shall hereafter expend, five thousand dollars in developing the aforesaid mineral resources of any of said lands, such party shall have the right to buy one additional section and no more, and to include in the purchase any section or part thereof on which the work may have been done. The land so purchased may be in different sections, and all embraced in one or more obligations, not to exceed the quantity stated. The purchaser shall pay not less than fifteen dollars per acre where the land shall be situated ten miles or less of [from] any railroad in operation, and not less than ten dollars per acre where the land is over ten miles from such railroad, one tenth of the purchase money to be paid in cash to the state treasurer on or before the expiration of the twelve months aforesaid; and the purchasers shall file the treasurer's receipt with the commissioner of the general land office, together with an obligation to pay the state of Texas the remainder in nine equal annual installments, with interest at four per cent per annum from date, subject to forfeiture as in other cases; and all said lands are reserved from sale or other disposition than under this title; and where application is made to buy any of the lands herein named except under this title, the purchaser shall swear that there are none of the minerals named in this title on said lands, so far as he knows or has reason to believe or does believe; provided, further, that any party hereinbefore named, who shall prior to the passage of this title have been the first to work on said lands for the development of said mineral resources and who has not abandoned said work, and is qualified at passage of this title to buy, shall have a prior preference right of doing so for thirty days after this title goes into effect; provided, further, this article shall not authorize the sale of lands containing valuable deposits of gold, silver, lead, cinnabar, copper or other valuable metal; provided, further, that any person desiring to acquire any lands under the provisions of this article shall have the right to prospect said land for a period of twelve months before

making any payment thereon, upon condition that said prospector shall file with the proper surveyor his affidavit in writing, setting forth that he has gone upon the land in good faith with the intention of purchasing the same under the provisions of this article, and in said affidavit give a reasonable description of said land. After the filing of said affidavit the said surveyor shall immediately forward same to the commissioner of the general land office, who shall take said section off the market until the expiration of said twelve months after the filing of said affidavit with the surveyor. [Ib.]

Contest of patent.

Art. 3498k. Any person desiring to contest the issuance of patent may do so by filing with the commissioner of the general land office a protest setting forth the grounds of objection generally, and that protestant has an interest in the subject matter, which protest shall also state that the same is presented in good faith and not to injure or delay the applicants or any of them, and the same shall be verified by affidavit. Whereupon it shall be the duty of the commissioner to withhold patent until the controversy is ended; provided, that if the protestant shall not within thirty days after filing his protest institute suit in the court having jurisdiction thereof in the county where the claims are located, his protest shall constitute no further barrier to the issuance of patent. A certified copy of the petition or a certificate of the clerk of the court where suit is pending shall be sufficient evidence to the commissioner of the pendency of the suit, and of the date of filing said suit. When the land in controversy lies partly in two counties suit may be brought in either. More than one claim shall not be embraced in the same patent or application. The suits here provided for shall be entitled to precedence of trial on the docket. [Ib.]

Forfeiture of claims.

Art. 3498*l*. All claims upon which patent has not been applied for within five years next after the application for survey, or which have not been surveyed and the field-notes returned to the general land office within the time prescribed therefor as hereinbefore provided, or upon which the assessment work has not been done, an affidavit therefor filed as provided by this article, shall be and are declared forfeited without judicial action of any kind, and subject to location as originally, but not by any one interested in the claim at the time of forfeiture, and any location for or on behalf of any such party shall be wholly void. Whenever any such claim shall be re-located, the locators and each of them shall make affidavit that the location is made without any contract or agreement of any kind that any of the parties owning an interest in the location before the re-location has or is to have any interest in the same. In all other cases where affidavit is required by this title it may be made by one or more of the parties cognizant of the facts. [Ib.]

Re-location of forfeited claim.

Art. 3498m. No claim which has been forfeited for any cause shall be subject to re-location for a period of thirty days next thereafter, and the party owning the same may apply to the land commissioner within that time for relief, and if it appear to him from the proof submitted that the forfeiture was not occasioned by the negligence of the owner, but by circumstances which he could not reasonably control, the commissioner may within that time, in his discretion, grant relief against the forfeiture, and if he grant such relief he shall at once forward his order to that effect to the surveyor, who shall file the same for record in his office. [Ib.]

Applicant to make oath.

Art. 3498n. Whenever any application shall be made to buy or obtain title to any of the lands embraced in article 3498a, except where the application is made under this title, the applicant shall make oath that there is not, to the best of his knowledge and belief, any of the minerals embraced in this title thereon, and when the commissioner has any doubt in relation to the matter he shall forbear action until he is satisfied. Any such sale or disposition of said lands shall be undersood to be, with the reservation of the minerals thereon, subject to location as herein provided. [Ib.]

Placer claims subject to location.

Art. 3498o. Claims usually called placers, including all forms of metallic deposits, excepting veins of quartz or rock in place, shall be subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims. All placer claims located shall conform as near as practicable with existing surveys and their subdivisions, and no such location shall include more than forty acres for each individual claimant and shall not exceed three hundred and twenty acres for any association of persons. The price which shall be paid for such placer shall not be less than ten dollars per acre, together with all costs of proceedings, as before provided. [Ib.]

Application may embrace non-adjacent non-mineral land.

Art. 3498p. Where non-mineral land not contiguous to the vein or lode is used by the prospector of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location of such non-adjacent lands shall exceed ten acres, and payment for the same must be made at the same rate as fixed by this title for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for a mill site, as provided in this section. [Ib.]

Purposes for which timber may be felled.

Art. 3498q. Any owner or worker of mining claim under this title is authorized to fell and remove for building and mining purposes any timber or tree growing or being upon unoccupied lands as described in article 3498a, said lands being mineral and subject to entry only as mineral lands, under such rules and regulations as may be prescribed for the protection of timber and undergrowth upon such lands and for other purposes. [Ib.]

Vested rights not affected.

Art. 3498r. Nothing in this title shall ever be so construed as to either destroy, invalidate or impair any valid claim, right or interest existing in, to or concerning any lands whatever at the passage of this title, of any preemptor, purchaser, claimant, actual settler, locator, or other person whatsoever. [Ib.]

Proceeds appropriated.

Art. 3498s. The net proceeds of all sales of mining lands under the provisions of this title shall inure to the benefit of the State and the respective funds for which the lands mentioned in article 3498a are now set apart under the constitution and laws of the state, and it shall be the duty of the

comptroller, state treasurer and commissioner of the general land office to see to it and have said proceeds so paid rightly placed to the credit of the particular and proper fund. [Ib.]

Surveyors to administer oaths—Repealing clause.

Art. 3498t. For the purpose of effectually carrying out the provisions of this title all county or district surveyors are hereby especially authorized and empowered to administer oaths, take affidavits and make certificates thereof; provided, further, that all laws and parts of laws in conflict with this title, or any part thereof, are hereby especially repealed. [Ib.]

APPENDIX H.

ILLUSTRATIVE FORMS IN PATENT PROCEEDINGS FOR LODE CLAIMS.

(These forms are taken by permission from the thirteenth edition of Morrison's Mining Rights.)

NOTICE OF APPLICATION FOR PATENT.

Survey No. 11,310.

U. S. Land Office, Pueblo, December 15, 1907.

Notice is hereby given that in pursuance of the act of Congress approved May 10, 1872, C. A. Wolcott, whose post office is Boulder, Colorado, has made application for a patent for 1,500 linear feet on the Bear lode, bearing gold and silver, the same being 365 feet southwesterly and 1,135 feet northeasterly from discovery shaft thereon, with surface mining ground 300 feet in width, situate in Cripple Creek mining district, Teller county, state of Colorado, and described by the official plat and by the field notes on file in the office of the register of Pueblo land district, Colorado, as follows, viz.:

Beginning at corner No. 1, whence the W. ¼ cor. Sec. 22, T. 15 S., R. 69 W. of the 6th principal meridian, bears S. 79° 34′ W. 1378.2 feet.

Cor. No. 1, Gottenburg lode (unsurveyed), Neals Mattson, claimant, bears S. 40° 29′ W. 187.67 feet.

Thence S. 24° 45′ W. 1,500 ft. to cor. No. 2, whence cor. No. 1, sur. No. 2,560, Carnarvon lode, bears N. 88° E. 61.6 ft. Thence N. 65° 15′ W. 300 ft. to cor. No. 3. Thence N. 24° 45′ E. 1,500 ft. to cor. No. 4. Thence S. 65° 15′ E. 300 ft. to cor. No. 1, the place of beginning—containing 8.011 acres (exclusive of survey No. 2,560 and the Gottenburg lode), and forming a portion of the west ½ section 22 in township 15 S., range 69 W. of the sixth principal meridian. The names of the adjoining and conflicting claims as shown by the plat of survey are the Gottenburg lode on the northwest and the Carnarvon lode on the south.

C. A. Wolcott.

Witness:

John C. Clark.

B. F. Pinson.

PROOF OF POSTING NOTICE AND DIAGRAM ON THE CLAIM.

State of Colorado, Teller County—ss.:

John C. Clark and B. F. Pinson, each for himself, and not one for the other, being first duly sworn according to law, deposes and says that he is a citizen of the United States, over the age of twenty-one years, and was present on the 15th day of December, A. D. 1907, when a plat representing the claim of C. A. Wolcott, and certified as correct by the United States surveyor general

of Colorado, and designated by him as lot No. 11,310, together with a notice of the intention of said C. A. Wolcott to apply for a patent for the mining claim and premises so platted, was posted in a conspicuous place upon said mining claim, to wit, upon the outside of the door of the shaft house at the discovery, where the same could be easily seen and examined. A copy of the notice so posted upon said claim is herewith attached and made a part of this affdavit.

JOHN C. CLARK.
B. F. PINSON.

Subscribed and sworn to before me this 15th day of December, A. D. 1907, and I hereby certify that I consider the above deponents credible and reliable witnesses, and that the foregoing affidavit and notice were read by each of them before their signatures were affixed thereto, and the oath made by them.

[Seal.] HENRY MOODY, Notary Public.

APPLICATION FOR PATENT.

State of Colorado, Teller County—ss.:

Application for Patent for the Bear Lode Mining Claim. To the Register and Receiver of the U. S. Land Office at Pueblo, Colorado:

C. A. Wolcott, whose post office address is Boulder, Colorado, being duly sworn according to law, deposes and says: That in virtue of a compliance with the mining rules, regulations, and customs by himself (and his grantors) he, the applicant for patent herein, has become the owner of and is in the actual, quiet, and undisturbed possession of 1,500 linear feet of the Bear vein, lode, or deposit, bearing gold and silver, together with surface ground 300 feet in width, for the convenient working thereof as allowed by local rules and customs of miners; said mineral claim, vein, lode, or deposit and surface ground being situate in Cripple Creek mining district, county of Teller, and state of Colorado, as more particularly set forth and described in the official field notes of survey thereof, hereto attached, dated December 11, 1907, and in the official plat of said survey, now posted conspicuously upon said mining claim or premises, a copy of which is filed herewith. Deponent further states that the facts relative to the right of possession of himself to said mining claim, vein, lode, or deposit and surface ground so surveyed and platted are substantially as follows, to wit: The Bear lode was discovered on or about the 4th day of July, A. D. 1897, by James A. McFadden, who afterwards, and before the 28th day of July, A. D. 1897, completed a location of the same as a mining claim of the length and width aforesaid, having substantially located the same, and otherwise complied with all local rules and regulations, the laws of the state of Colorado and of the United States relating to mining claims.

The said discoverer and locator conveyed all his interest in the claim to Chas. O. Baxter and Frank M. Taylor, who by divers intermediate conveyances transferred the same to applicant, who thereupon took possession and is the sole present owner, all of which will more fully appear by reference to the copy of the original record of location and the abstract of title herewith filed; the value of the labor done and improvements made upon said Bear Lode Mining Claim by the applicant (and his grantors) being equal to the sum of five hundred dollars. Said improvements consist of discovery shaft, an incline, shaft house, a drift, and two-thirds interest in tunnel (but expressly excepting and excluding from this application all that portion of the ground embraced in mining claim or survey designated as lot No. 2,560 and the claim of Neals Mattson on the Gottenburg lode). In consideration of which facts and in conformity with the provisions of chapter VI, title 32, of the Revised Statutes of

the United States, application is hereby made for and in behalf of said C. A. Wolcott for a patent from the United States for the said Bear Lode Mining Claim, vein, lode, or deposit and the surface ground so officially surveyed and platted.

C. A. WOLCOTT.

Subscribed and sworn to before me this 16th day of December, A. D. 1907, and I hereby certify that I consider the above deponent a credible and reliable person, and the foregoing affidavit, to which was attached the field notes of survey of the Bear Lode Mining Claim, was read and examined by him before his signature was affixed thereto and the oath made by him.

[Seal.] HENRY MOODY, Notary Public.

PROOF OF CITIZENSHIP OF NATIVE-BORN CITIZEN.

State of Colorado, County of Teller—ss.:

C. A. Wolcott, being first duly sworn according to law, deposes and says that he is the applicant for patent for the Bear Lode Mining Claim, situate in Cripple Creek mining district, county of Teller, state of Colorado; that he is a native born citizen of the United States, born in the county of ....., state of ....., in the year ....., and is now a resident of Boulder, state of Colorado.

C. A. WOLCOTT.

Subscribed and sworn to before me this 15th day of December, A. D. 1907.

[Seal.] HENRY MOODY, Notary Public.

PUBLISHER'S CONTRACT.

I, the undersigned, publisher and proprietor of the Cripple Creek Star, a weekly newspaper published in Cripple Creek, Teller county, state of Colorado, hereby agree to publish a notice dated U. S. Land Office, Pueblo, Colo., December 15, 1907, required by act of Congress approved May 10, 1872, of the intention of C. A. Wolcott to apply for a patent for his claim on the Bear lode, situate Cripple Creek mining district, county of Teller, state aforesaid, and to hold the said C. A. Wolcott alone responsible for the amount of our bill for publishing the same.

And it is hereby expressly stipulated and agreed that no claim shall be made against the government of the United States, or its officers or agents, for such publication.

Witness my hand this 16th day of December, A. D. 1907.

P. H. KNOWLTON, Publisher.

PROOF OF PUBLICATION.

[Copy of publication notice cut from paper and pasted here.]

I, P. H. Knowlton, do certify that I am publisher of the Cripple Creek Star, a weekly newspaper published in Cripple Creek, in the county of Teller, and state of Colorado, and that the annexed notice was published in said paper once each and every week for nine consecutive weeks; the first publication being on the 18th day of December, A. D. 1907, and the last publication being on the 12th day of February, A. D. 1908.

P. H. KNOWLTON.

[The publisher's receipted bill is commonly attached to this blank.]

Subscribed and sworn to before me this 20th day of February, A. D. 1908.

[Seal.] HENRY MOODY, Notary Public.

PROOF THAT PLAT AND NOTICE REMAINED POSTED ON CLAIM DURING TIME OF PUBLICATION.

State of Colorado, County of Teller—ss.:

C. A. Wolcott, being first duly sworn according to law, deposes and says that he is the claimant of the Bear Lode Mining Claim, Cripple Creek mining district, Teller county, state of Colorado, the official plat of which premises, together with the notice of his intention to apply for a patent therefor, was posted thereon, on the 15th day of December, A. D. 1907, as fully set forth and described in the affidavit of John C. Clark and B. F. Pinson, dated the 15th day of December, 1907, which affidavit was duly filed in the office of the register, at Pueblo, in this state; and that the plat and notice so mentioned and described remained continuously and conspicuously posted upon said mining claim from the 15th day of December, A. D. 1907, until and including the 19th day of February, A. D. 1908, including the sixty days' period during which notice of said application for patent was published in the newspaper.

C. A. Wolcott.

Subscribed and sworn to before me this 20th day of February, A. D. 1908, and I hereby certify that the foregoing affidavit was read to the said C. A. Wolcott previous to his name being subscribed thereto.

[Seal.] D. C. Crawford, Notary Public.

PROOF OF SUMS PAID.

State of Colorado, County of Teller—ss.:

C. A. Wolcott, having been first duly sworn according to law, deposes and says that he is a citizen of the United States, over the age of twenty-one years; that he is the applicant for patent to 1,500 feet upon the Bear Lode, in Cripple Creek mining district, Teller county, Colorado; that in the prosecution of such application he has paid the following sums of money, viz.:

For office work in the surveyor general's office	$ 30
To E. E. Chase, mineral surveyor, for surveying and platting	50
To register and receiver, for filing application in land office	10
To the Cripple Creek Star, for publishing notice of application	20
To the receiver of the local land office, for land	45
	$155

C. A. Wolcott.

Subscribed and sworn to before me this 20th day of February, A. D. 1908.

[Seal.] D. C. Crawford, Notary Public.

APPLICATION TO PURCHASE.

To the Register and Receiver, United States Land Office, at Pueblo, Colorado:

The undersigned, claimant under the provisions of the Revised Statutes of the United States, chapter VI, title 32, and legislation supplemental thereto, hereby applies to purchase that mining claim known as the Bear Lode, located in the west half of section 22, township No. 15 S., range No. 69 west of the sixth principal meridian, designated as lot No. 11,310, said lot No. 11,310 extending 1,500 feet in length along said Bear vein or lode, but expressly excepting and excluding from this application all that portion of the ground embraced in

mining claim or survey designated as lot No. 2,560, the Carnarvon lode, and the claim of Neals Mattson, on the Gottenburg lode, and also all that portion of any vein or lode, the top or apex of which lies inside of said excluded ground, said lode mining claim embracing 8.011 acres, in the Cripple Creek mining district, in the county of Teller, and state of Colorado, as shown by the survey thereof, and hereby agrees to pay therefor forty-five dollars, being the legal price thereof. C. A. WOLCOTT.

Dated Pueblo, February 20, 1908.

REGISTER'S CERTIFICATE OF POSTING NOTICE FOR SIXTY DAYS.

(Attached to Bulletin Copy of the Notice of Application for United States Patent.)

United States Land Office at Pueblo, Colorado, February 21, 1908.

I hereby certify that the official plat of the Bear lode, designated by the surveyor general as lot No. 11,310, was filed in this office on the 16th day of December, A. D. 1907, and that a notice, of which the attached is a copy, of the intention of C. A. Wolcott to apply for a patent for the mining claim or premises embraced by said plat, and described in the field notes of survey thereof filed in said application, was posted conspicuously in this office on the 16th day of December, 1907, and remained so posted until the 19th day of February, 1908, being the full period of sixty consecutive days, during the period of publication as required by law, and that said plat remained in this office during that time subject to examination, and that no adverse claim thereto has been filed. S. A. ABBEY, Register.

REGISTER'S FINAL CERTIFICATE OF ENTRY.

Mineral Entry No. 2,000. Lot No. 11,310.

United States Land Office at Pueblo, Colorado, February 21, 1908.

It is hereby certified that in pursuance of the provisions of the Revised Statutes of the United States, chapter VI, title 32, and legislation supplemental thereto, C. A. Wolcott, whose post office address is Boulder, Colorado, on this day purchased that mining claim known as the Bear Lode, in the west ½ of section 22, in township No. 15 S., range No. 69 W. of the sixth principal meridian, designated as lot No. 11,310, said lot No. 11,310 extending 1,500 feet in length along said Bear vein or lode, expressly excepting and excluding from said purchase all that portion of the ground embraced in mining claim or survey designated as lot No. 2,560, Carnarvon lode, also the claim of Neals Mattson, on the Gottenburg lode, and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground; said lode mining claim, as entered, embracing 8.011 acres in the Cripple Creek mining district, in the county of Teller and state of Colorado, as shown by the plat and field notes of survey thereof, for which the said party first above named this day made payment to the receiver in full, amounting to the sum of forty-five dollars.

Now, therefore, be it known that upon the presentation of this certificate to the Commissioner of the General Land Office, together with the plat and field notes of survey of said claim and the proofs required by law, a patent shall issue thereupon to the said C. A. Wolcott, if all be found regular.

S. A. ABBEY, Register.

ADVERSE CLAIM.

United States Land Office at Pueblo, Colorado.

In the Matter of the Application of C. A. Wolcott for a United States Patent to the Bear Lode Mining Claim, Situate in Cripple Creek Mining District, County of Teller, State of Colorado.

To the Register and Receiver of the United States Land Office and to the Above-Named Claimant:

Whereas, C. A. Wolcott did, on the 16th day of December, A. D. 1907, file in the district land office of the United States, at Pueblo, Colorado, a certain plat of a survey of a certain lode, together with his application for a United States patent for said lode, naming and calling the said lode in said plat and application the Bear Lode, situate in Cripple Creek mining district, county of Teller, state of Colorado, said survey and plat being designated as mineral survey No. 11,310, and consisting of 1,500 linear feet, together with surface ground 300 feet in width; and the said C. A. Wolcott did, at the same time and place, give notice that he would apply for a United States patent for the above-described lode and premises in substance as follows:

[Here attach copy of newspaper publication.]

And whereas, the first publication of said notice of said application appeared in the Cripple Creek Star, a weekly newspaper published at Cripple Creek, in said county and state, on the 18th day of December, A. D. 1907:

Now, therefore, I, Edward F. Bishop, a citizen of the United States over the age of twenty-one years, residing in and my post-office address being Denver, in the county of Denver, in said state, do, on this 3d day of February, A. D. 1908, enter this my protest and adverse claim against the issuing of a patent to the said C. A. Wolcott for his pretended claim upon the so-called Bear Lode, as set forth in his said plat and field notes as aforesaid, for the following reasons, to wit:

1. The surface ground and veins or lodes contained therein as set forth and described in the plat and field notes of the said C. A. Wolcott, or a great portion thereof, are not the property of the said applicant, neither is he entitled to hold the same under or by virtue of the local laws, rules, and customs of miners in said mining district, the laws of the state of Colorado, or the statutes of the United States relating to mining claims.

2. Because a great portion of the premises described in said plat and notice of said applicant, and claimed by him as the so-called Bear Lode, is claimed adversely, and is owned by this protestant, and is in fact a portion of the premises claimed and owned by this protestant as the Elephant Lode, as will appear by reference to an abstract of title herewith filed, made a part of this protest, and marked Exhibit A.

3. Because this protestant (and his grantors) have held, occupied, and possessed a great portion of the premises set forth and described by the said C. A. Wolcott in his plat and notice of the so-called Bear Lode, long prior to the pretended discovery and location of the so-called Bear Lode; such occupation and possession of this protestant (and his grantors) having been under and by virtue of a full compliance with the local laws, rules, and customs of said mining district, and the laws of said state, and of the United States, pertaining to mineral lands.

4. Because this protestant (and his grantors) have held, occupied, and possessed all that portion of the so-called Bear Lode, as represented on the plat of a survey made by Thomas L. Darby, United States mineral surveyor, and colored red, said plat of said survey being herewith filed, marked Exhibit B, and made a part of this protest, and have held, occupied, and possessed the same long prior to the pretended discovery and location of the so-called Bear Lode. And this protestant is the original discoverer and locator of said Elephant Lode (or is a bona fide purchaser for a valuable consideration, from or through the original discoverer and locator of said Elephant Lode, by conveyances) as shown on said abstract. (See Rule 81.)

5. Because a valid discovery, location, and record of said Elephant Lode was made by this protestant (or his grantors), in strict compliance with said local laws, rules, and customs, and the laws of the state of Colorado and of the United States, and while the same was vacant mineral land of the United States open to occupation, long prior to any pretended discovery or location thereof by said C. A. Wolcott (or his grantors), and said Elephant Lode hath been occupied and possessed as aforesaid, ever since its discovery as aforesaid, by this protestant (and his grantors) under and by virtue of such discovery, location, and record.

6. Because the discovery shaft of the so-called Bear Lode was not of the legal depth of ten feet from the lowest part of the rim at the surface, as required by law at the date of the pretended record of the same, and has never been since sunk to that depth.

Wherefore this protestant enters this his protest and adverse claim against the issuance of a patent to the said C. A. Wolcott for his claim upon the so-called Bear Lode. ED. F. BISHOP.

State of Colorado, County of Teller—ss.:

On this 3d day of February, A. D. 1908, before me, the subscriber, a notary public in and for said county, personally appeared the above-named Edward F. Bishop, who, being first duly sworn, saith that he is the adverse claimant named in the foregoing protest and adverse claim above subscribed by him, that he has read the same and knows the contents thereof, that the same is true in substance and in fact and that the said adverse claim is made in good faith and to protect his better and prior title. ED. F. BISHOP.

Sworn and subscribed before me this 3d day of February, A. D. 1908.

[Seal.] E. H. GRUBER, Notary Public.

APPENDIX I.

SAMPLE MINING LAW EXAMINATION QUESTIONS.

MINING LAW.

(February, 1906.)

I.

X. comes to you and says that he has found a small triangular piece of unlocated ground between two well-known mining claims, which he feels sure is on their pay vein. He engages you to help him make a valid location, which shall give him all the rights which any one can get in that piece. State exactly what you have him do and why? Draw a diagram to illustrate. Also state when his annual labor must begin.

II.

Y. comes to you with the following difficulties:

(a) Y. has laid out a claim on the ground so that it is 200 feet longer and 100 feet wider than the law allows. His location notice, however, calls for only the legal length and width. Z., knowing of Y.'s mistake, has located a claim clear across Y.'s in such a way as to include Y.'s discovery shaft, which is in the middle of Y.'s claim. What, if anything, can Y. do?

(b) Y. let the work for 1905 on another claim go undone until December 30th. That day he took some tools on the claim and picked down some ore in a stope, intending to keep on working the claim. December 31st, being Sunday, he did not work; but he left his tools on the claim. At 1:00 a. m. Monday, January 1, 1906, Z. put up a notice of location, and staked off the claim anew. At 7:00 a. m. the same day Y. went on with his work. Z. is now doing the discovery work in Y.'s old shaft. What, if anything, can Y. do?

III.

G. wants to know:

(a) What he has to do to acquire a tunnel site, and what rights, if any, he will get against (1) a prior patented claim; (2) a prior unpatented claim; (3) a subsequent location, which goes to patent before the tunnel gets beneath it, and before the tunnel cuts any veins apexing in it; also, what, if anything, he gets, first or last, that he can patent?

(b) What right, if any, an adjoining lode claimant has to follow the dip of his vein under (1) G.'s prior patented farm; (2) G.'s prior patented placer; (3) G.'s prior patented lode claim?

IV.

K. wants to know about the following matters:

(a) L. owned the John Doe claim, which was unpatented. In 1905 L. did not work on the claim; but he paid a watchman $600 to see that the buildings on it, worth $10,000, and the workings, were not molested. The watchman was employed January 1, 1905, under a three-year contract; L. intending to work the mine again in 1908, but not before. January 1, 1906, K. went to relocate the John Doe claim as the Richard Roe, and put up a location notice, and started to put up stakes and do discovery work, when the watchman forced him to leave. K. wants to know what he can do, and whether, if K.'s attempted relocation is valid, L. can make K. pay for the $10,000 worth of buildings.

(b) What test to apply to determine whether ground is lode or placer, where (1) K. locates it first as a lode, and M. subsequently locates it as a placer; (2) where N. locates it first as a placer, and K., making a discovery subsequently outside the placer lines, projects his lode location over part of the placer, but along the vein.

V.

E. comes to you for advice as to the following:

(a) F. is applying for a patent to a mill site, and the land is mineral. E. has no interest in the land, but wants to know if he can defeat F.'s application, and, if so, how?

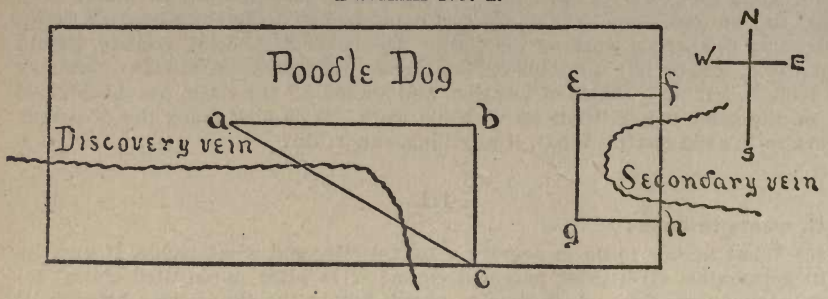
(b) R., a junior locator, is seeking to patent his whole claim, which, as surveyed, overlaps E.'s prior claim. E. wants to know how he can protect himself and get a patent for (1) the conflict area; and (2) the rest of E.'s claim.

VI.

S. has the following difficulties:

(a) T., who owned the Poodle Dog unpatented claim, conveyed to S. a triangular piece a—b—c, shown in Diagram No. 1.

DIAGRAM NO. 1.



The deed was drawn by Eastern lawyers, and was an ordinary real estate quitclaim deed, containing no reference to veins, dips, etc. The triangular piece extended part way over the discovery vein of the Poodle Dog, which vein dipped to the south. The deed was given in 1904, and in 1905 T. did no work on the Poodle Dog; but S. did $100 worth of work on the triangular piece. January 1, 1906, T. relocated the Poodle Dog, and now claims (1) that S. has no interest in the triangular piece; (2) that in any event S. has no extralateral rights.

(b) S. also took from T. a mining deed to piece e—f—g—h, which included part of the apex of the secondary vein shown in the diagram. The north part of that vein in S.'s ground dips north, the west part west, and the south part south. S. wants to know: (1) What extralateral rights, if any, he acquired in that secondary vein; (2) whether the relocation by T. in 1906 destroyed S.'s rights in this second piece.

VII.

(a) A. makes a lode discovery, and puts up his notice, and starts to do discovery work. B. comes there the next day, and makes a discovery on adjoining ground on a separate vein crossing A.'s on the strike. B. then lays out his claim, crossing A.'s. B. completes his location, including record, before A. completes his. A., however, completes his location, except that he does not record his certificate of location for a year after the time fixed by statute.

What are the rights of the parties?

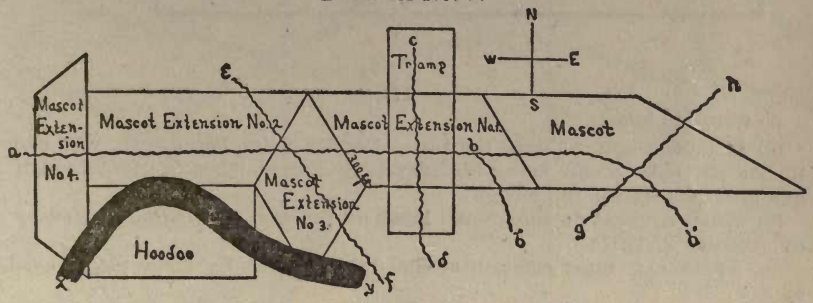
Suppose the senior locator were to abandon his location. What, if anything, would the junior locator have to do to acquire the conflict area?

(b) X. locates a claim on the ground, doing all preliminary work, and records his location notice, but then finds out that what he discovered and worked was a large boulder of float. Y. comes on the ground to make a location, thinking he can discover ore. X. tries to prevent him, but Y. intimidates X. and enters. Y. finds a vein, puts up a notice, and makes location. Before Y. completes his location, X. also discovers another vein within the limits of his original location, and without doing any more locating brings ejectment against Y. Judgment for whom?

VIII, IX, AND X.

In the case of each claim in diagram No. 2, the Mascot being located under the act of 1866, and all the others being located under the act of 1872, state why there are or are not extralateral rights, and, if there are any, what they are; and in the case of the Tramp claim, state what, if any, cross vein rights there are.

DIAGRAM NO. 2.



Explanation: Vein *a-b-b'*, is the original discovery vein on all but the Tramp and the Hoodoo claims. Vein *c-d* is the discovery vein of the Tramp claim, *x-y* is the broad discovery vein of the Hoodoo, but it is partly on the Mascot extensions Nos. 2, 3, and 4. *e-f* and *g-h* are secondary veins. *b-b''* is a broken off part of the vein *a-b-b'*. All the veins except *c-d* dip to the south or southwest, and vein *c-d* dips to the east. The Mascot claims were located in the order indicated by their names; then the Hoodoo, then the Tramp.

MINING LAW.

(February, 1907.)

I.

What is the test of a discovery of

(a) A prior lode claim as against a subsequent attempted placer location of the same ground?

(b) A prior placer as against a subsequent attempted lode location?

(c) A prior mill site as against a subsequent attempted lode location?

(d) Oil as compared with precious metals?

In (b) if a lode location may be made, what surface ground may the lode location occupy?

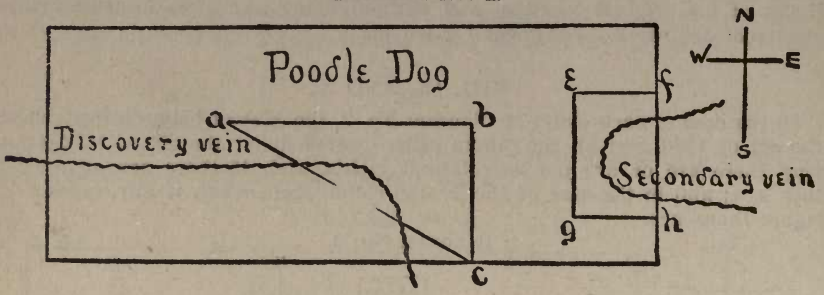
II.

In diagram No. 1 the Poodle Dog was located by X. in 1900. In 1902 X. conveyed the triangular piece a—b—c to Y., and the rectangular piece e—f—g—h to Z. The rectangular piece is nowhere nearer the discovery vein than 500 feet. The questions for you to solve are:

(a) Has Y. any extralateral rights?

(b) Has Z. any extralateral or other rights on the secondary vein?

DIAGRAM No. 1.



III.

A. wants to know:

(a) If he can now relocate the Little Dorritt claim, because B., who owned it, has not paid A. for doing the necessary annual labor in 1906, though A. has often demanded the money?

(b) When A. must do the annual labor on the Rob Roy claim, located by A. on January 2, 1907?

(c) Whether A. must perform annual labor on the Keystone placer located by A.?

(d) Whether anything is gained by filing an affidavit of annual labor, and, if so, what?

(e) Whether a state law requiring $200 annual labor would be valid?

IV, V, VI.

[Same as VIII, IX, and X of preceding paper.]

VII.

(a) What advantages flow from patenting a mining claim that were not possessed prior to patenting? What disadvantages, if any?

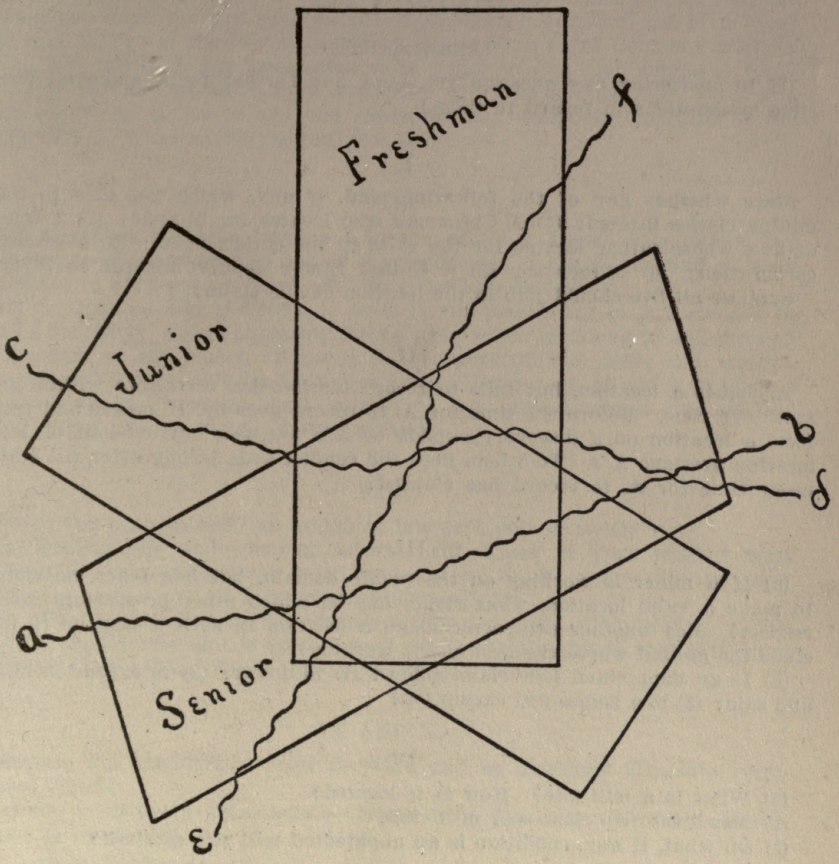
(b) What is the measure of damages where ore is taken from your land, (1) by innocent mistake, and (2) with wrongful intent?

VIII.

X. wants to know whether—having made only one discovery, and having attempted to locate two full lode claims, one running north from the discovery and the other south, so that the south end line of the one which is the north end line of the other cuts across the middle of his discovery shaft—he has any rights as to either or both claims, or any part of them, as against subsequent locators?

IX.

DIAGRAM No. 3.



In diagram No. 3 A. located the Senior claim on vein a—b, then B. located the Junior claim on vein c—d, and then C. located the Freshman claim on vein e—f. Assume (1) that each made a discovery on unoccupied land of the United States, and then (2) that C.'s sole discovery was on Senior ground within the Junior lines, and then advise B. whether in either case he can protest or adverse, and, if so, which, if C. applies for a patent for the whole of the Freshman claim, including all conflict areas, and A. is not going to adverse?

B. also wants to know whether, if he adverses, and it is too late for A. to adverse, A. can defeat B.'s adverse by deeding the conflict area of the Senior to C.?

X.

(a) Give briefly the essential steps in the patenting of a mining claim.

(b) Define (1) the strike of a vein, and (2) the dip of a vein, and explain briefly the law of cross lodes, and of veins uniting on the strike and on the dip.

MINING LAW.

(January, 1908.)

(If in answering any question you need any further facts, make all possible assumptions in regard to them.)

I.

State whether any of the following, and, if any, which get title to the mining claims located: (1) A Chinaman who locates for himself; (2) a child of five, whose father locates for the child in the child's name; (3) a French corporation; (4) a lunatic; (5) a United States deputy mineral surveyor. Suppose all five should join in the location of one claim?

II.

A. makes a location, but fails to record his location certificate within the statutory time. Before the time for A. to record goes by, B. makes and perfects a location on a discovery outside of A.'s location, but one-half of B.'s location overlaps A.'s. To whom does the conflict area belong after the statutory time for A. to record has elapsed?

III.

(a) If a miner is working on the public domain, but has taken no steps to make a valid location, what rights has he which other prospectors must respect? May another prospector make a location in such a way as to include the ground where the first one is working?

(b) Is an unpatented lode claim subject (1) to dower; (2) to execution levy and sale; (3) to a homestead exemption?

IV.

(a) What is a mill site? How is it located?

(b) Name the two classes of mill sites.

(c) On what, if any, condition is an unpatented mill site retained?

V.

(a) If a tunnel site owner discovers a lode in his tunnel, what kind of a lode must it be for him to get title to it?

(b) Within what surface area must the lode apex for him to acquire rights in the lode?

(c) To get title to the lode must he make a surface location?

(d) How far may he follow the lode from the tunnel?

VI.

A. was one of several locators of the High Flyer lode claim. He formed with the others the High Flyer Mining Corporation, the treasury stock of which was sold to get money to work the mine. Nearly all the other stockholders combined to get rid of A., and had a judgment creditor of A. levy on and sell the stock of A. in A.'s absence and without actual notice to him. The stock was bought in for less than it was worth. A., hearing of the sale after it is over, comes to you in December for advice. He tells you that the assessment work for the year on the High Flyer claim has not been done, and that B., one of the few stockholders of the High Flyer Company friendly to A., will fail to do the assessment work which he has been employed to do if A., or any one whom A. may designate, will relocate the High Flyer and then convey to B., or to any one whom B. may designate one-third of the High Flyer. What advice do you give A.?

VII.

(1) A. makes a placer location. In the center a known lode exists, but it is not known to extend to any of the boundaries of the placer, and A. posts warnings to all people to keep off. May the lode be located?

(2) Suppose no lode is known to exist in the placer, but in A.'s absence B. enters the placer, and in exploring finds a lode, which he traces to and through a boundary of A.'s placer. Suppose B. then goes off the placer and, making a location 600 feet wide by 1,500 feet long, a large part of which is on A.'s placer, sinks a discovery shaft outside of A.'s ground which discloses the vein. What are the rights of the parties?

VIII.

(a) Is "an adverse suit" an action at law or a suit in equity?

(b) Explain how and when an adverse suit arises, in what court it must be brought, what allegations must be contained in the complaint, and what kind of a verdict and of a judgment is demanded.

(c) What is the effect on the adverse suit of a nonsuit of plaintiff?

(d) If the adverse suit is decided in favor of the plaintiff in that suit, what must he do to patent title to the land awarded to him?

IX AND X.

Explain the extralateral right doctrine, and by diagrams illustrate extralateral rights:

(1) On a discovery vein, which crosses both the lines which the locator meant to be side lines.

(2) On a discovery vein, which crosses twice one boundary line of the location, but no other line.

(3) On a broad discovery vein, bisected on its strike by the common side line of two locations.

(4) On a secondary or incidental vein, where the discovery vein crosses one side line and one end line of the claim, but the secondary or incidental vein crosses both end lines.

(5) On a secondary or incidental vein, where the discovery vein crosses both end lines, but the secondary or incidental vein crosses one end line and one side line, but after it leaves the side line of the location pursues a course in a second location practically parallel to the discovery vein of the first location.

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