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History
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Bench and Bar
of California

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HISTORICAL SKETCH OF THE MINING LAW IN CALIFORNIA

One of the most interesting chapters in Pliny, who wrote his Natural History shortly after the time of Christ, is that in which he describes the different methods of mining operations in vogue in his time.

"Gold is found in our part of the world," says this classical author, "not to mention the gold extracted from the earth in India by the ants, and in Scythia by the griffins. Among us it is procured in three different ways: the first of which is in the shape of dust, found in running streams, the Tagus in Spain, for instance, the Padus in Italy, the Hebrus in Thracia, the Pactolus in Asia, and the Ganges in India. Indeed, there is no gold found in a more perfect state than this, thoroughly polished as it is by the continual attrition of the current.

"A second mode of obtaining gold is by sinking shafts or seeking it among the debris of the mountains, both of which methods it will be well to describe.. The persons in search of gold in the first place remove the 'segutilum,' such being the name of the earth which gives indication of the presence of gold. This done, a bed is made, the sand of which is washed, and according to the residue found after washing, a conjecture is formed as to the richness of the vein. Sometimes, indeed, gold is found at once in the surface earth, a success, however, but rarely experienced. Recently, for instance in the reign of Nero, a vein was discovered in Dal-

matia, which yielded daily as much as fifty pound weight of gold. The gold that is thus found in the surface crust is known as 'talutium,' in cases where there is auriferous earth beneath. The mountains of Spain, in other respects arid and sterile, and productive of nothing whatever, are thus constrained by man to be fertile, in supplying him with this precious commodity.

"The gold that is extracted from shafts is known by some persons as 'canalicium,' and by others 'canaliense.' It is found adhering to the gritty crust of marble, and altogether different from the form in which it sparkles in the sapphirus of the East, and in the stone of Thebais and other gems, it is seen interlaced with the molecules of the marble. The channels of these veins are found running in various directions along the sides of the shafts, and hence the name of the gold they yield, 'canalicium.' In these shafts, too, the superincumbent earth is kept from falling in by means of wooden pillars. The substance that is extracted is first broken up and then washed, after which it is subjected to the action of fire and ground to a fine powder. This powder is known as 'apitascudes,' while the silver which becomes disengaged in the furnace has the name of 'sudor' given to it. The impurities that escape by the chimney, as in the case of all other metals, are known by the name of 'scoria.' In the case of gold, this scoria is broken up a second time and melted over again. The crucibles used for this purpose are made of 'tasconium,' a white earth similar to potter's clay in appearance, there being no other substance capable of withstanding the strong current of air, the action of the fire, and the intense heat of the melted metal.

"The third method of obtaining gold surpasses the labors of the giants even. By the aid of galleries driven to a long distance, mountains are excavated by the light of torches, the duration of which forms the set times for work, the workmen never seeing the light of day for many months together. These mines are known as 'arrugiae,' and not unfrequently the clefts are formed on a sudden, the earth sinks in, and the workmen are crushed beneath; so that it would

really appear less rash to go in search of pearls and purples at the bottom of the sea, so much more dangerous to ourselves have we made the earth than the water. Hence it is that in this kind of mining, arches are left at frequent intervals for the purpose of supporting the weight of the mountain above. In mining either by shaft or by gallery, barriers of silex are met with, which have to be driven asunder by the aid of fire and vinegar, or more frequently, as this method fills the galleries with suffocating vapors and smoke, to be broken to pieces with bruising machines shod with pieces of iron weighing one hundred and fifty pounds; which done, the fragments are carried out on the men's shoulders, night and day, each man passing them on to his neighbor in the dark, it being only those at the pit's mouth that ever see light. In cases where the bed of silex appears too thick to admit of being penetrated, the miner traces along the sides of it, and so turns. And yet, after all, the labor entailed by this silex is looked upon as comparatively easy, there being an earth—a kind of potter's clay mixed with gravel—'gangadia' by name, which is almost impossible to overcome. This earth has to be attacked with iron wedges and hammers, like those previously mentioned, and it is generally considered that there is nothing more stubborn in existence—except, indeed, the greed for gold, which is the most stubborn of all things.

"When these operations are completed, beginning at the last, they cut away the wooden pillars at the point where they support the roof. The coming downfall gives warning, which is instantly perceived by the sentinel, and by him only, who is set to watch upon a peak of the same mountain. By voice as well as by signals, he orders the workmen to be immediately removed from their labors, and at the same moment takes flight himself. The mountain, rent to pieces, is cleft asunder, hurling its debris to a distance with a crash which it is impossible for the human imagination to conceive; and from the midst of a cloud of dust, of a density quite incredible, the victorious miners gaze upon this downfall of nature. Nor yet even then are they sure of gold, nor,

indeed, were they by any means certain that there was any to be found when they first began to excavate, it being quite sufficient, as an inducement to undergo such perils and to incur such vast expense, to entertain the hope that they will obtain what they so eagerly desire.

"Another labor, too, quite equal to this, and one which entails even greater expense, is that of bringing rivers from the more elevated mountain heights, a distance, in many instances, of one hundred miles, perhaps, for the purpose of washing the debris. The channels thus formed are called 'corrugi' from our word 'corrivatio,' I suppose; and even when these are once made they entail a thousand fresh labors. The fall, for instance, must be steep, that the water may be precipitated, so to say, rather than flow; and it is in this manner that it is brought from the most elevated points. Then, too, the valleys and crevasses have to be united by the aid of aqueducts, and in another place impassable rocks have to be hewn away and forced to make room for hollowed troughs of wood, the persons hewing them hanging suspended all the time with ropes, so that to a spectator who views the operations from a distance, the workmen have all the appearance, not so much of wild beasts as of birds upon the wing. Hanging thus suspended in most instances, they take the levels, and trace with lines the course the water is to take; and thus, where there is no room, even for man to plant a footstep, are rivers traced out by the hand of man.

"The water, too, is considered in an unfit state for washing if the current of the river carries any mud along with it. The kind of earth that yields this mud is known as 'wrium,' and hence it is that in tracing out these channels, they carry the water over beds of silex or pebbles, and carefully avoid this wrium. When they have reached the head of the fall, at the very brow of the mountain, reservoirs are hollowed out a couple of hundred feet in length and breadth and some ten feet in depth. In the reservoirs there are generally five sluices left, about three feet square; so that the moment the reservoir is filled, the flood gates are struck away and the torrent bursts forth with such a degree of violence as to roll

onward any fragments of rock which may obstruct its passage.

"When they have reached the level ground, too, there is still another labor that awaits them. Trenches—known as 'agogoe'—have to be dug for the passage of water; and these, at regular intervals, have a layer of ulex placed at the bottom.

"This ulex is a plant like rosemary in appearance, rough and prickly, and well adapted for arresting any pieces of gold that may be carried along. The sides, too, are closed in with planks, and are supported by arches when carried over steep and precipitous spots. The earth carried onward in the stream, arrives at the sea at last, and thus is the shattered mountain washed away—causes which have greatly tended to extend the shores of Spain by these encroachments upon the deep. It is also by the agency of canals of this description that the material, excavated at the cost of such immense labor by the process previously described, is washed and carried away, for otherwise the shafts would soon be choked up by it.

"The gold found by excavating with galleries does not require to be melted, but is pure gold at once. In these excavations, too, it is found in lumps, as also in the shafts which are sunk, sometimes exceeding ten pounds even. The names given these lumps are 'palagae,' and palacurnae,' while the gold found in small grains is known as 'baluce.' The ulex that is used for the above purpose is dried and burnt, after which the ashes of it are washed upon a bed of grassy turf, in order that the gold may be deposited thereupon."

The glimpse given us by this chapter makes all the keener our regret that the works of Theophrastus and Philo on metals and that of Strabo on machines and methods of parting metals, are unfortunately lost forever. Had the library at Alexandria not been burned, who shall say that we might not have found for our legal doctrine of the "extralateral right" in quartz mining some more ancient prototype than the earlier mining codes of Prussia or the customs of the lead mines of Derbyshire?

DISCOVERY OF GOLD IN CALIFORNIA.

On the 4th day of May, 1846, Thomas O. Larkin, United States consul at Monterey in an official letter to James Buchanan, then secretary of state, wrote as follows: "There is no doubt but that gold, silver, quicksilver, copper, lead, sulphur, and coal mines are to be found all over California, and it is equally doubtful whether, under their present owners, they will be worked." On the 7th of July, 1846, sixty-four days later, Commodore Sloat raised the American flag at Monterey.

James W. Marshall made the discovery of gold in the race of the sawmill at Coloma in the latter part of January, 1848. Thereupon took place an incident of history which demonstrated that Jason and his companions were not the only Argonauts who ever made a voyage to unknown shores in search of the golden fleece. The first news of the discovery almost depopulated the towns and ranches of California and even affected the discipline of the small army of occupation. The first winter brought thousands of Oregonians, Mexicans, Kanakas and Chilenos. The extraordinary reports that reached the East were at first disbelieved, but when the private letters of army officers and men in authority were published an indescribable gold fever took possession of the nation east of the Alleghanies. All the energetic and daring, all the physically sound of all ages, seemed bent on reaching the new El Dorado. The old Gothic instinct of invasion seemed to survive and thrill in the fibre of our people, and the camps and gulches and mines of California witnessed a social and political phenomenon unique in the history of the world, the spirit and romance of which have been immortalized in the pages of Bret Harte. Before 1850 the population of California had risen from 15,000, as it was in 1847, to 100,000, and the average annual increase for six years thereafter was 50,000.

A COMMUNITY WITHOUT CIVIL LAW.

At the time of Marshall's discovery, the United States was still at war with Mexico, its sovereignty over the soil of Cali-

fornia not yet recognized by the latter. The treaty of Guadalupe Hidalgo was not concluded till February 2nd, the ratified copies thereof not exchanged at Queretaro till May 30th, and the treaty not proclaimed till July 4th, 1848.

On the 12th of February, 1848, ten days after the signing of the treaty of peace, and about three weeks after the discovery of gold at Coloma, Colonel Mason did the pioneers a signal service by issuing as Governor the proclamation concerning the mines, which at the time was taken as finality and certainty as to the status of mining titles in their international aspect: "From and after this date, the Mexican laws and customs now prevailing in California, relative to the denouncement of mines, are hereby abolished." Although, as the law was fourteen years afterwards expounded by the United States Supreme Court (U. S. vs. Castellero, 2 Black, 18-371), the act was unnecessary as a precautionary measure, still the practical result of the timeliness of the proclamation was to prevent attempts to found private titles to the new discoveries of gold on any customs or laws of Mexico.

Meantime, and, in fact, until her admission into the Union as a State, California was governed by military authorities (Cross vs. Harrison, 16 How. U. S. 191). Except to provide for the delivering and taking of mails at certain points on the Coast, no federal act was passed with reference to California in any relation; in no act of Congress was California even mentioned after its annexation, until the Act of March 3rd, 1849, extending the revenue laws of the United States "over the territory and waters of upper California, and to create certain collection districts therein." Though in this act incidentally the new acquisition is called a "territory," no act of Congress was ever passed erecting a territorial form of government in California. The Act of March 3rd, 1849, not only did not extend the general laws of the United States over California, but did not even create a local tribunal for its enforcement, but provided that the District Court of Louisiana and the Supreme Court of Oregon should be courts of original jurisdiction to take cognizance of all violations of its

provisions. Not even the Act of the 9th of September, 1850, admitting California into the Union, extended the general laws of the United States over the State by express provision. Not until the Act of September 28th, 1850, establishing a District Court in the State, was it enacted by Congress "that all the laws of the United States which are not locally inapplicable shall have the same force and effect within the said State of California as elsewhere within the United States."

FREE MINING.

Though no general federal laws were extended by Congress over the late acqusitions from Mexico for more than two years after the end of the war, the paramount title to the public lands had vested in the federal government by virtue of the provisions of the treaty of peace, and the public land itself had become part of the public domain of the United States. (The Supreme Court of California did afterward, when first organized, in Hicks vs. Bell, 3 Cal., 219, attempt by certain obiter dicta to put forth the doctrine of the paramount title being in the State of California, but this attempt at judicial legislation was soon after abandoned and reversed.) The army of occupation, however, offered no opposition to the invading army of prospectors. The miners were in 1849 twenty years ahead of the railroad and the electric telegraph, and the telephone had not yet been invented. In the parlance of the times, the prospectors "had the drop on the army." In Colonel Mason's unique report on the situation which confronted him, discretion waits upon valor. "The entire gold district," he wrote, "with few exceptions of grants made some years ago by the Mexican authorities, is on land belonging to the United States. It was a matter of serious reflection with me how I could secure to the government certain rents or fees for the privilege of procuring this gold; but 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 permit all to work freely." It is not recorded whether the resolute Colonel was conscious of the humor of his resolution.

"Persons who have not given this subject special attention," said Senator Stewart of Nevada, addressing the United States Senate in support of the Bill of 1866, "can hardly realize the wonderful results of this system of free mining. The incentive to the pioneer held out by the reward of a gold or silver mine, if he can find one, is magical upon the sanguine temperament of the prospector. For near a quarter of a century a race of men, constituting a majority by far of all the miners of the West, patient of toil, hopeful of success, deprived of the associations of home and family, have devoted themselves, with untiring energy, to sinking deep shafts, running tunnels thousands of feet in solid granite, traversing deserts, climbing mountains, and enduring every conceivable hardship and privation, exploring for mines, all founded upon the idea that no change would be made in this system that would deprive them of their hard-earned treasure. Some of these have found valuable mines, and a sure prospect of wealth and comfort when the appliances of capital and machinery shall be brought to their aid. Others have received no compensation but anticipation—no reward but hope. . . . I assert, and no one familiar with the subject will question the fact, that the sand plains, alkaline deserts, and dreary monuments of rock and sagebrush of the great interior, would have been as worthless today as when they were marked by geographers as the Great American Desert, but for this system of free mining fostered by our own neglect, and matured and perfected by our generous inaction."

CALIFORNIA COMMON LAW OF MINES.

The prospectors and miners, were, then, at the start, simply trespassers upon the public lands as against the government of the United States, with no laws to guide, restrain or protect them, and with nothing to fear from the military authorities. They were equal to the occasion. "Finding themselves far from the legal traditions and restraints of the settled East," says the report of the Public Lands Commission of 1880, "in a pathless wilderness, under the feverish

excitement of an industry as swift and full of chance as the throwing of dice, the adventurers of 1849 spontaneously instituted neighborhood or district codes of regulations, which were simply meant to define and protect a brief possessory ownership. The ravines and river bars which held the placer gold were valueless for settlement or home-making, but were splendid stakes to hold for a few short seasons and gamble with nature for wealth or ruin.

"In the absence of State and Federal laws competent to meet the novel industry, and with the inbred respect for equitable adjustments of rights between man and man, which is the inheritance of centuries of English common law, the miners only sought to secure equitable rights and protection from robbery by a simple agreement as to the maximum size of a surface claim, trusting, with a well-founded confidence, that no machinery was necessary to enforce their regulations other than the swift, rough blows of public opinion. The gold seekers were not long in realizing that the source of the dust which had worked its way into the sands and bars, and distributed its precious particles over the bed rocks of rivers, was derived from solid quartz veins, which were thin sheets of mineral material enclosed in the foundation rocks of the country. Still in advance of any enactments by legislature or congress, the common sense of the miners, which had proved strong enough to govern with wisdom the ownership of placer mines, rose to meet the question of lode claims, and decreed that ownership should attach to the thing of value, namely, the thin, sheet-like veins of quartz, and that a claim should consist of a certain horizontal block of the vein, however it might run, but extending indefinitely downward with a strip of surface, on or embracing the vein's outcrop, for the placing of necessary machinery and buildings. Under this theory, the lode was the property, and the surface became a mere easement.

"This early California theory of a mining claim, consisting of a certain number of running feet of vein with a strip of land covering the surface length of the claim, is the obvious foundation for the federal legislation and present system of public

disposition and private ownership of the mineral lands west of the Missouri River. Contrasted with this is the mode of disposition of mineral-bearing lands east of the Missouri River, where the common law has been the one rule, and where the surface tract has always carried with it all minerals vertically below it.

"The great coal, iron, copper, lead, and zinc wealth east of the Rocky Mountains, have all passed with the surface titles, and there can be little doubt that if California had been contiguous to the eastern metallic regions, and its mineral development progressed naturally with the advance of home making settlements, the power of common law precedent would have governed its whole mining history. But California was one of those extraordinary historic exceptions that defy precedent and create original modes of life and law. And since the developers of the great precious metal mining of the far West have for the most part swarmed out of the California hive, California ideas have not only been everywhere dominant over the field of industry, but have stemmed the tide of federal land policy and given us a statute book with English common law in force over half the land and California common law ruling in the other."

"The discovery of gold in California," says Justice Field, speaking from the Supreme Bench of the United States, "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 canyons and probing the earth in all directions for the precious metals. Wherever they went they carried with them the love of order and system 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, 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 provision 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 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 law-makers, 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. * * * 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. For eighteen years, from 1848 to 1866, the regulations and customs of miners, as enforced and moulded by the Courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands."

Jennison vs. Kirk, 98 U. S. 453.

ORIGIN OF RULES AND REGULATIONS.

There is considerable difference of opinion whether these rules and regulations were the spontaneous creation of the miners of "'49 and the spring of '50." Mr. Gregory Yale, in his valuable treatise on "Mining Claims and Water Rights," contends that they are not, and claims that Senator Stewart of Nevada, in his brilliant letter to Senator Ramsey, of Minnesota, ascribes undeserved merit to the early miners

in pronouncing them the authors of the local rules and customs. He does not, however, criticise the even more positive language of Chief Justice Sanderson in the decision of the case of Morton vs. Solambo Copper Mining Company. He calls attention to the similarity between these rules and regulations and certain features of the Mexican ordinances, of the Spanish Code, of the regulations of the Stannary Convocations among the tin bounders of Devon and Cornwall, and of the High Peak Regulations for the lead mines of Derby. He says in the earlier days of placer digging in California the large influx of miners from the western coast of Mexico and from South America dictated the system of work to Americans; that the latter, with few exceptions from the gold mines of North Carolina and Georgia, and from the lead mines of Illinois and Wisconsin, were almost entirely inexperienced in this branch of industry; that the Cornish miners soon spread themselves through the State, and added largely by their experience, practical sense, and industrious habits, in bringing the code into something like shape. With all deference due to any opinion expressed by Mr. Yale, it appears to me that he has in this chapter failed sometimes to distinguish between the practical work in mining taught the pioneers by their Mexican, Chilenian and Cornish associates and their comrades from the southern gold, and western lead states, and the framing of rules and regulations. The hints and suggestions on the pan and rocker and long tom and sluice do not necessarily include instructions on a code of mining in a situation absolutely as novel to the persons from whom they learned how to mine as it was to the pioneers themselves. The mining land in North Carolina, Georgia, Illinois and Wisconsin is all held under principles founded on the common law of England. Nor is it necessary to hold with Mr. Yale and General Halleck that the Mexican system was the foundation for the rules and customs adopted, for in the matter of lode claims that system is the direct antithesis of the California system, the former recognizing vertical planes through the exterior boundaries and the latter recognizing the extra-lateral right. The mere fact that the Mexi-

can system recognized discovery as the source of title and development as the condition of holding it, need not cause us to jump to the conclusion that in these respects the rules and customs of Californians were a conscious imitation of the Mexican system, especially when the two systems are so radically dissimilar in other points. In a region where the only title could be possessory, and possibly temporary, under the law, what other arrangement in these respects than the one adopted could have suggested itself to the pioneers? May it not be simply another illustration of the fact that, with the same problem and the same environment, the human mind has in different ages often arrived at the same practical solution. Even the idea of the story of the Jumping Frog of Calaveras need not necessarily be deemed a conscious imitation of its Boeotian prototype.

The California pioneers who were Americans did not have to learn the science of organization from their foreign associates. The instinct of organization was a part of their heredity. Professor Macy, of Johns Hopkins University, once wrote: "It has been said that if three Americans meet to talk over an item of business, the first thing they do is to organize." This trait is as characteristic as the one of periodically saving the country by assembling in mass meeting and passing resolutions. Californians were not the first American early settlers upon the public domain of the United States who were left for a time without statutory law, federal or local. The institutional beginnings of more than one western state, notably of Wisconsin and Iowa, furnish a most interesting parallel, and the groundwork of their rules and regulations, except with regard to the extra-lateral right in mining, are in many respects absolutely identical. The lead miners of Dubuque who on the 17th of June, 1830, assembled around an old cottonwood log, stranded on an island, and appointed a committee of five miners to draw up regulations for their government, would have been surprised to be told in after years that the rules they framed had any other source for their inspiration than the courage, the necessities and the resourcefulness of intelligent frontiersmen.

EARLY RULES AND REGULATIONS.

"In the early days of placer mining," says Mr. Hittell, in his 'History of California,' Vol. 3, Page 252, "it was not uncommon to fix the size of a claim at ten feet square; but it was only in very rich ground that this quantity was found to be sufficient. In poorer localities or where ground had been once partially worked, the size was usually one hundred feet square, though there were many variations according to circumstances—the idea in each case being to afford every man a fair chance to accumulate wealth, and with this object in view to give him as much ground as he could possibly use. The next provision—and a remarkable and important one—was that the claim could only be held while it was being reasonably worked. It was usual to provide that when a claim was taken up, stakes should be driven at the corners or written notices of appropriation posted up or an entry made in a record book open to the public; and sometimes several of these modes or others equally efficacious in giving information were required; but in all cases the fee of the land was regarded as belonging to the government, and no person could acquire any ownership beyond the mere use for mining purposes, and that only while being so used. A very common condition was that a certain amount of work should be done within a specified time, sometimes a certain amount every week during the mining season; or otherwise that the claim should be liable to be taken up by anybody else. So, also, if a person went away from his claim without leaving his tools or some other understood evidence of an intention of returning and resuming work. Here, again, it was the same principle of the equality of every man and his right to an equal chance with his fellows; on the one hand securing him in his possession and the fruits of his labor, but on the other hand offering to each of his fellows the same privilege, if he failed to make use of them. The condition under which claims could be held and the circumstances under which they could be forfeited, together with the size of the claims and the manner of settling disputes, constituted the chief points embraced in what

were known as the mining laws or mining customs. There were, of course, variations in different localities. In most cases the first discoverer or locator of a mining region was entitled to more ground than any other miner, generally to twice as much; and in many cases, special provisions were made about sales and purchase of claims and the authentication of bills of sale, which were the usual instruments by which claims were conveyed.

"Obviously no customs or laws could be adopted without some kind of consensus or assent on the part of the mining community. This was at first generally merely the agreement of the particular company or camp, which might have its own separate and distinct rules and regulations different from all its neighbors; but by degrees meetings of the miners of different camps and at length of whole neighborhoods were held, until finally it became common to form what are known as mining districts, embracing large tracts of territory and to adopt laws applicable to and effective throughout the whole territory so included. * * * And there were a great many hundreds of them. Nearly every bar, flat and gulch had its separate rules. Their jurisdictions were ferequently changed, some consolidating into large districts and others dividing into smaller ones—the changes being dependent chiefly upon the character as to homogeneousness or otherwise of the mining region embraced and the convenience for the miners of access to a common place of meeting."

DESCRIPTION OF RULES AND REGULATIONS.

Mr. Ross Browne, in his preliminary report on the Mineral Resources of the West, made in 1867 (p. 226), in describing the nature of these regulations, says:

"It is impossible to obtain, within the brief time allowed for this preliminary report, a complete collection of the mining regulations, and they are so numerous that they would fill a volume of a thousand pages. There are not less than five hundred mining districts in California, two hundred in Nevada, and one hundred each in Arizona, Idaho and Ore-

gon, each with its set of written regulations. The main objects of the regulations are to fix the boundaries of the district, the size of the claims, the manner in which claims shall be marked and recorded, the amount of work which must be done to secure the title, and the circumstances under which the claim is considered abandoned and open to occupation by new claimants. The districts usually do not contain more than a hundred square miles, frequently not more than ten, and there are in places a dozen within a radius of ten miles. In lode mining, the claims are usually two hundred feet long on the lode; in placers the size depends on the character of the diggings and the amount of labor necessary to open them. In hill diggings, where the pay dirt is reached by long tunnels, the claim is usually a hundred feet wide, and reaches to the middle of the hill. Neglect to work a placer claim for ten days in the season when it can be worked is ordinarily considered as an abandonment. The regulations in the different districts are so various, however, that it is impossible to reduce them to a few classes comprehending all their provisions."

The most succinct and accurate description of the rules and regulations of the California miners, and especially of the manner of marking the boundaries of the claims, both placer and lode, is from the pen of Chief Justice Beatty (Report Public Land Commission, p. 396):

"When placer mining began in California there was no law regulating the size of claims or the manner of holding and working them, and local regulations by the miners themselves became a necessity. They were adopted, not because the subject was too complicated or difficult for general regulation, but because they were needed at once as the sole refuge from anarchy. The first and most important matter to be regulated was the size of claims, and the earliest miners' rules contained little else than a limitation of the maximum amount of mining ground that one miner might hold. That being determined, he was left to take possession of his claim and work it as he pleased. It thus

appears that the location of a mining claim was nothing more nor less than the taking into actual possession of a limited quantity of mining ground, and this was accomplished by simply marking its boundaries and going to work inside of them. But in taking possession of their claims miners sometimes failed to mark their boundaries as distinct or to do as much work on them as later comers, desirous of securing claims for themselves, thought essential to an actual possession. Hence arose disputes and violent conflicts. The next and final step in the development of miners' law accordingly was the regulation of the mode of marking the boundaries or otherwise designating the locality and extent of claims and the quantum of work that must be done to hold them. As a fence around a claim was utterly useless, four stakes at the corners or two stakes at the ends of the river boundary of a placer claim were usually allowed to be a sufficient marking of its extent; but, in this connection, a written notice, descriptive of the claim and containing the name of the owner, was sometimes required to be posted on the ground and recorded by the district recorder. Then, as it was frequently impossible to continue work upon a claim on account of scarcity or superabundance of water, and as miners were frequently driven from the vicinity of their claims by the severity of the winter season, the rules went on to prescribe the minimum number of days' work per annum by which a claim could be kept good, or the maximum of time during which the miner might absent himself from his claim without beng deemed to have forfeited or abandoned it. In rare and exceptional instances miners may have attempted to extend their regulations to other matters than those mentioned, but I risk nothing in saying that the above statement embraces the essence of all the miners' law of the Pacific Coast relating to placer claims. After these regulations had been some time in force came the discovery of veins or lodes of gold bearing rock in place, and to them the law of the placers was adapted with the least possible change.

"First—The size of claims was regulated by allowing so many feet along the vein.

"Second—The mode of making out or designating the claim was prescribed; and

"Third—The amount of work necessary to hold it.

"The principal modification of the placer-mining law as adapted to lode claims was upon the second point. The placers were located as surface claims and were best marked by stakes at the corners; notice and record, when required, being deemed of minor importance. In lode claims these conditions were reversed. The exact course or strike of a lode was seldom ascertainable from the croppings at the point of discovery; and as the claim was of so much of the lode in whatever direction it might be found to run, with a strip of the adjacent surface, taken for convenience in working the lode and as a mere incident or appurtenance thereto, it was found to be impracticable to mark the claim by stakes on the surface, and hence the notice and record came to play a more important part in designating the claim. They came in fact to be all-important, locations of lode claims being commonly made by posting a notice in reasonable proximity to the point at which the lode was discovered or exposed, stating that the undersigned claimed so many feet of the vein extending so far and in such direction or directions from the discovery point, together with the amount of adjacent surface ground allowed by the rules of the district. The notice so posted had the effect under the rules of holding the ground described a certain length of time, commonly ten days, within which time it was necessary to have the notice recorded in the district records in order to keep the claim good. This was all that was required under the head of marking or designating the locality and extent of the claim, and it was thereafter held by simply doing the prescribed amount of work. This was the sum total of the California miners' law."

In view of the historical importance of the fugitive records of the local rules and regulations of the various mining districts, and as some of the provisions of many of

them are, under our peculiar federal legislation, still in force, I have, at the risk of being statistical, endeavored to collate the names of the different districts and the dates of adoption of the several codes of rules and regulations, and to point out where authentic records thereof are extant. Where I have not specifically referred to the particular work from which the record is taken, it is in all cases to be found in the invaluable collection of the local rules and regulations of the miners of California contained in the official Report of the United States Census for 1880, Vol. XIV, pages 271 to 345, inclusive. The record is as follows:

EARLY MINING DISTRICTS OF CALIFORNIA.

NEVADA COUNTY—

Neveda county quartz regulations, December 20, 1852. Extend over all quartz mines and quartz mining property within the county.

Gold Mountain mining district, December 30, 1850; continued March 17, 1851; amended September 29, 1851; last amendment repealed October 5, 1851; regulations extended, September 29, 1852; regulations extended December 15, 1853.

Union Quartz Mountain mining district, February 30, 1851; amended May 24, 1851.

Kentucky Hill mining district, May 1, 1851.

Prospect Hill mining district, May 1, 1851.

Saunders Ledge mining district, June 6, 1851.

Day's Ledge mining district, October 21, 1851.

Lafayette Hill mining district, November 10, 1851.

Indian Springs Hill mining district, November 17, 1851.

Jefferson Hill No. 1 mining district, December 16, 1851.

Mary's Diggings mining district, December 31, 1851.

Rebecca's Hill mining district, January 3, 1852.

Weehawken Hill mining district, June 16, 1852.

Rockwell Hill mining district, June 17, 1852.

Brooklyn Hill mining district, June 22, 1852.

Nebold Hill mining district, June 22, 1852.

Mount Olivet mining district, June 25, 1852.

Union Hill No. 2 mining district, June 25, 1852.

Buffalo Hill mining district (no date); transferred to book of Township Recorder, June 15, 1852.

Caledonia Hill mining district, June 29, 1852.

Pecker's Hill mining district, June 29, 1852.

Poppysquash Hill mining district, June 30, 1852.

Pierce's Ledge (formerly Indian Hill) mining district, July 22, 1852.

Sierra Nevada Hill mining district, August 10, 1852.

Blethen Hill mining district, August 21, 1852.

Mount Pleasant mining district, October 11, 1852.

Constitution Hill mining district, October 12, 1852. Jumped and called Iowa Hill, April 17, 1854.

Cedar Hill mining district, October 17, 1852.
Washington Hill mining district, November 15, 1852.
Boston Hill mining district, November 21, 1852.
Norton's Hill mining district, December 9. 1852.
Empire Hill No. 1 mining district, 1852.
Kosciusko Hill mining district, January 1, 1853.
Ben. Franklin Ledge mining district, January 28, 1853.
Jefferson Ledge mining district, February 25, 1853.
Pyrenees Hill mining district, September 23, 1853.
Ione Ledge mining district, August 24, 1854.
Madison Quartz Ledge and Hill mining district, August 18, 1855.
Hoosac Hill mining district, (no date).
Rhode Island Hill mining district (no date).
Sebastopool Ledge mining district (no date).
Ashville Hill mining district. Same regulations as Cedar Hill.
Oak Hill mining district. Same regulations as Cedar Hill.
Sweetland mining district, 1850; amended in 1852; divided into three districts with separate regulations (Hittell's History of California, Vol. III, page 260).
North San Juan Placer regulations, November 5, 1854. (Ross Browne's Mineral Resources of the West, 1867, page 240.)
Albion Hill, Gold Hill No. 2, Independence Ledge, Kentucky Fountain Ledge, Lewis' Lead, North Point Ledge, Oro Fino Hill, Ohio Hill, Pine Hill Ledge, Quimbaugh Hill, Richmond Hill, Squirrel Creek Hill, St. Louis Ledge, Texas Ledge, and Trenton Ledge mining districts are all governed by the county laws.

TUOLUMNE COUNTY—

Jackass Gulch mining district (including Soldier Gulch), 1848; regulations put into writing in 1851. (Hittell's History of California, Vol. III, page 257; Shinn's Mining Camps, page 237.)
Jacksonville mining district, January 20, 1850. (The Public Domain, 1883, page 317; Hittell's History of California, Vol. III, page 130.)
Jamestown mining district (no date); laws repealed and new regulations adopted, 1853. (Hittell's History of California, Vol. III, page 258.)
Springfield mining district, December, 1854. (Yale's Mining Claims and Water Rights, page 84; Hittell's History of California, Vol. III, page 258; Shinn's Mining Camps, pages 238-242.)
Shaw's Flat mining district (no date). (Hittell's California, Vol. III, page 259.)
Sawmill Flat mining district (no date). Hittell's California, Vol. III, page 259.)
Brown's Flat mining district (no date). Hittell's California, Vol. III, page 259.)
Jackson Flat and Tuttletown mining district, November, 1855. (Yale's Mining Claims and Water Rights, page 84; Hittell's California, Vol. III, page 259; Shinn's Mining Camps, pages 240-242.)
Columbia district placer regulations. (Ross Browne's Mineral Resources of the West, 1867, page 238.)

New Kanaka Camp placer regulations. (Ross Browne's Mineral Resources of the West, 1867, page 238.)

Tuolumne county quartz regulations, in force September 1, 1858, extending over and governing all quartz mining property within the county. (Ross Browne's Mineral Resources of the West, 1867, page 237.)

MARIPOSA COUNTY—

Rules adopted at convention of quartz miners at Quartzburg, June 25, 1851.

Coulterville mining district, March 5, 1864.

AMADOR COUNTY—

Drytown mining district, June 7, 1851, consisting of all that portion of the then county of Calaveras south of the divding ridge between the Cosumnes river and Dry creek, and north of the Mokelumne river.

Volcano quartz mining district, February 6, 1858. J. Tullock and F. Reichling the committee that drafted the code.

"Jackson and all other Veins of Metal District," February 7, 1863; amended May 22, 1863.

Puckerville (now Plymouth) mining district, February 11, 1863. B. F. Richtmyer, secretary. E. S. Potter elected recorder; new regulations adopted at store of F. Sheaver, May 23, 1863.

Clinton mining regulations. (Ross Browne's Mineral Resources of the United States, 1868, page 73.)

Pine Grove mining regulations. (Ross Browne's Mineral Resources of the United States, 1868, page 73.)

EL DORADO COUNTY—

Grizzly Flat mining district, February 4, 1852; amended February 26, 1853; none of the books containing records made under the first laws are in existence; amended and name changed to Mount Pleasant mining district.

French Town mining district, November 12, 1854; amended January 3, 1858; amended April 6, 1859; amended March 20, 1863.

Smith's Flat mining district (no date of adoption given); amended February 20, 1855; amended February 12, 1873.

Spanish Camp quartz mining district, April, 1862; name changed to Agra district, June 14, 1866.

Diamond quartz mining district, February 14, 1863.

Placerville mining district, March 21, 1863.

El Dorado (Mud Springs) mining district, April 7, 1863.

Big Canyon quartz mining district, November 11, 1865.

Henry's Diggings mining district, June, 1867.

Kelsey mining district, regulations adopted May 7, 1873; in conformity with the Mineral Law of Congress of May 10, 1872.

Greenwood mining district (no date). No written regulations now in force.

CALAVERAS COUNTY—

Angels mining district, July 20, 1855; amended March 24, 1860. Record of district mining locations burned in 1855.

Murphy's mining district, October 26, 1857.

Lower Calaveritas mining district, November 7, 1857; amended June 28, 1858; amended April 4, 1863.

San Andreas mining district, March, 1866; amended Article XVI (no date).

Pilot Hill placer regulations. (Ross Browne's Mineral Resources of the West, 1867, page 241.)

Copper Canyon regulations, adopted August 3, 1860. (Ross Browne's Mineral Resources of the West, 1867, page 242.)

PLUMAS COUNTY—

Warren Hill mining district, October 22, 1853. Creed Haymond, secretary.

South Placer, quartz regulations. (Ross Browne's Mineral Resources of the United States, 1868, page 108.)

Canada Hill quartz regulations. (Ross Browne's Mineral Resources of the United States, 1868, page 108.)

Lone Star quartz regulations. (Ross Browne's Mineral Resources of the United States, 1868, page 108.)

SIERRA COUNTY—

Saint Louis mining district, July 6, 1856.

Gibsonville mining district, January 8, 1857.

Wet Ravine mining district (no date).

Trigaski Flat mining district. (Yale's Mining Claims and Water Rights, page 75; Prosser vs. Parks, 18 Cal., 47.)

Sierra county quartz mining district, June 6, 1859. Extends over all quartz mining claims in the county.

BUTTE COUNTY—

Rich Gulch quartz mining district, November 15, 1851; further regulations May 22, 1852.

Con Cow mining district, August 28, 1880.

Oregon Gulch mining district, December 20, 1885; placer regulations amended June 17, 1861; quartz regulations amended August 13, (no year specified); both placer and quartz regulations amended February 3, 1872.

Helltown and Centerville mining district, October 11, 1857; amended March 23, 1878.

Cherokee Flat mining district, November 19, 1861; amended September 23, 1871.

Forbestown mining district, June 9, 1863.

Lovelock mining district, April 3, 1865; amended, probably, after May 10, 1872.

Greely Flat mining district, December 12, 1872.

Live Oak Flat mining district, July 5, 1872.

Megalia mining district, since May 10, 1872. Old laws of the district lost and abrogated by custom and usage of the miners.

Forks of Butte mining district, June 1, 1878.

Inskip mining district, May 17, 1879.

Bangor quartz regulations. (Ross Browne's Resources of the United States, 1868, page 162.)

Thompson's Flat mining district, 1851. The books were lost in 1857.

Bidwell's Bar mining district, 1850; reorganized 1863. Original regulations and records destroyed by fire, 1854; regulations of second organization also lost.

YUBA COUNTY—

Upper Yuba mining district, April 11, 1852.

Sucker Flat mining district, January 22, 1855; adjourned meeting January 25, 1855; amended December 31, 1855; amended February 10, 1868.

Ohio Flat mining district, March 8, 1856; laws adopted March 15, 1856; amended November 12, 1857. By-laws adopted May 15, 1858.

Odd Fellows mining district. On account of record book containing laws having been destroyed, new regulations adopted September 24, 1864.

Indiana Ranch quartz mining district, April 18, 1857; amended November 7, 1857; amended March 13, 1864; amended April 25, 1878.

Brownsville mining district, April 7, 1860; amended April 7, 1862.

Empire mining district, January 22, 1863.

Dobbin's Creek mining district, March 26, 1864; approved April 17, 1864.

Oregon Hill mining district (no date). First recording February 17, 1864.

Brown's Valley mining district, February 14, 1852; repealed and new regulations adopted February 14, 1853; amended July 31, 1853; amended August 8, 1853; amended January 4, 1864; amended January 2, 1865; amended January 8, 1866; amended January 7, 1867. (Ross Browne's Mineral Resources of the United States, 1868, pages 155-156; Shinn's Mining Camps, page 249.) Reorganized, May 3, 1870. (Tenth Census of the United States, 1880, Vol. XIV, page 319.)

TRINITY COUNTY—

East Fork of North Trinity mining district, February 17, 1852.

Weaver Creek mining district, June 19, 1852.

Weaverville mining district, June 7, 1853.

Democrat Gulch mining district, September 3, 1856.

SISKIYOU COUNTY—

Lower Humbug Creek mining district, April 7, 1855.

Oro Fino Diggings mining district, February 6, 1856.

Little Humbug Creek mining district, April 8, 1856.

Maine Little Humbug Creek mining district, October 8, 1856.

Hungry Creek Diggngs mining district, October 24, 1857; amended January 27, 1858.

Empire mining district, February 15, 1864.

PLACER COUNTY—

Illinoistown mining district, March 21, 1863; amended Section 4 (no date).

Dutch Flat mining district (no records to be found).

Auburn mining district (no date). The old mining laws are lost or destroyed.

Yankee Jim's mining district. Copies of the old mining laws are still in existence.

Bath mining district (no date). The old mining laws are not to be found.

Forest Hill mining district (no date). "The district is bounded on the north by Shirt-Tail canyon, etc." The mining laws have been burned.

Iowa Hill mining district (no date). The mining laws have not been in use, nor has organization been kept up since about 1865.

SACRAMENTO COUNTY—

Folsom quartz mining district, January 22, 1857. Adopted at the house of Colonel Russ on Prospect Hill, in the town of Russville (Ashland), and "extend over all quartz mines and quartz mining property within the county of Sacramento."

MONO COUNTY—

Bodie mining district, July 10, 1860; amended at the Taylor cabin, August 10, 1861; amended at Burnett's cabin, June 7, 1862; amended at Leach and Monroe's cabin, June 9, 1862; amended November 12, 1862; amended at the house of J. Elnathan Smith, Jr., March 4, 1864; amended at the house of Biderman and Pooler, October 24, 1864, six members present; amended at Wand & Barker's saloon, October 5, 1865, one article being adopted by a vote of five to four; amended at house of E. D. Barker, March 3, 1866; amended at house of Robert Kernahan, March 4, 1867; amended at house of F. Swenson, November 13, 1867; amended in saloon of J. C. Smith at 7 P. M., December 30, 1876.

Blind Springs mining district, March 23, 1865; amended May 4, 1865; amended July 8, 1865; amended November 18, 1865; amended November 25, 1865; amended March 20, 1875; amended March 27, 1875.

Homer mining district, October 9, 1879; "adopted United States mining law of March 10, 1872."

CONTRA COSTA COUNTY—

Marsh Creek mining district, May 27, 1865.

SAN BERNARDINO COUNTY—

Borax Lake mining district, April 28, 1873.
Brier mining district, May 3, 1873.
Cajon mining district, March 19, 1874.
Upper Yreka Creek mining district (no date).

Some of the provisions of these rules and regulations, outside of the general provisions already referred to, are interesting and instructive.

SOME CHARACTERISTIC PROVISIONS.

In the Helltown District, in Butte County, for instance, all kinds of placer mining existed, and the rules and regulations, among other things, define and prescribe as follows:

"First—Claims shall consist of four classes: (1) River claims. (2) Bar, bench or flat claims. (3) Ravine claims. (4) Hill claims.

"Second—River claims shall be all that is drained, except such parts of the ground as may be claimed previous to giving notice of intention to drain such ground.

"Third—Bar, bench or flat claims shall be one hundred feet, facing the river, and shall extend at right angles across such bar, bench or flat, across the supposed channel to the final raise of the bed-rock.

"Fourth—Ravine claims shall extend one hundred and fifty feet up or down the ravine, and not exceed forty feet in width, and may be located in the center or on either side.

"Fifth—Hill, deep or coyote diggings shall consists of one hundred feet to the man, running crosswise of the hill, through it, or to unlimited extent.

"Sixth—Claims or river bars, benches or flats that may be worked by the water from the river or creek shall be considered as wet diggings, and ravines that are dependent on the rainy season for water shall be considered as dry diggings.

"Seventh—Any one holding a claim or claims shall work the same when workable as often as one day in each week, to have them represented by another, or forfeit his right to them unless prevented by sickness."

The following taken from the regulations of Little Humbug Creek Mining District, in Siskiyou County, throws a human side-light on life in the early mining camps:

"Art. VII—Resolved, That no person's claim shall be jumpable on Little Humbug while he is sick or in any other way disabled from labor, or while he is absent from his claim *attending upon sick friends.*"

The ease with which rules and regulations could be repealed or amended is illustrated in the following:

"Sec. VIII—The laws may be altered or amended at any meeting by a majority present, provinding there shall have been notice of such an alteration or amendment given in the notice of the meeting calling it."—*Regulations of Ohio Flat District, Yuba County.*

"Article XII—Any person at any time feeling aggrieved by any of the above Rules and Regulations and desirous to have said Rules and Regulations altered or amended, may call a meeting of the miners by giving at least three days' notice of such intention by placing up at least two notices on the most public places in Gibsonville."—*Regulations, Gibsonville District, Sierra County.*

"Article XII—No amendments or alteration shall be made to these laws unless a meeting of the miners of this district be called by notice posted in three public places within this district, at least before such meeting takes place five days."—*El Dorado (Mud Springs) District, El Dorado County.*

One of the gems in the collection is to be found among the regulations of the Mariposa District, in 1851:

> "Resolved, That we consider all rights claimed in quartz veins, subject to the debts of the claimants or owners, as absolutely as may be other property.
>
> "Resolved, . . . That a copy be furnished to our Senators and Representatives in Congress.
>
> "Resolved, That for the full and faithful maintenance of these Rules and Regulations in our county of Mariposa we sacredly pledge our honors and our lives."

The humor of the last resolution consists not so much in the bombastic yet earnest imitation of the Declaration of Independence as in the stern sincerity of the omitted word. The only reason they did not pledge their fortunes was because they did not have any! Fortunes were what they were hunting.

In some districts the penal regulations were no less explicit than those for the location, holding and working of claims:

> "Article 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 one hundred dollars or over, shall, on conviction thereof, be considered guilty of felony, and suffer death by hanging.
>
> "Article XIII—Should any person wilfully, maliciously and premeditatedly take the life of another, on conviction of murder, he shall suffer death by hanging.
>
> "Article XIV—Any person convicted of stealing tools, clothing or other articles, of less value than one hundred dollars, shall be punished and disgraced by having his head and eyebrows close shaved and shall leave the encampment within twenty-four hours."—*Jacksonville District*, 1850, *Tuolumne County*.

One of the most instructive records of miners' meetings is that of the meeting held Dec. 13, 1853, in the Weaverville District, in Trinity County:

> "Dr. Ware explained the object of the meeting in a few pertinent remarks. He said that McDermott told him on yesterday that unless he gave up one-half of the water in the creek aforesaid, that he, McDermott, would take a body of men and take the water by force of arms and hold the same until he and his men were whipped off the ground. His party as above mentioned have taken possession of the water, and are holding it by force of arms. In this dilemma Dr. Ware calls upon his fellow-miners to assist him in defending his rights, agreeable to the old miners' laws. They said that this was a serious affair, but they were willing to defend the old and established miners' laws and the right."

A committee of five was appointed to investigate the nature of the grievance and examine the law on the subject, and a recess taken. The minutes then proceed:

> "Pursuant to adjournment meeting met at 1 o'clock, were called to order by the chairman, Mr. Cameron. Committee reported as follows, having thoroughly investigated the laws and customs of the miners of Weaver: We fully concur in the opinion that Dr. Ware is fully entitled to all the water in West Weaver, except four tom-heads, which is allowed for the bed of the stream; also that the burning of his reservoir, and the destruction of his dam and other property and the taking of his water from his race by force of arms are malicious acts, and should not be submitted to by those who are in favor of law and order.
>
> "On motion, the report was received and the committee discharged.
>
> "On motion, it was 'Resolved, That we assist Dr. Ware in turning the water into his race and that we sustain him to the last extremity in keeping it in the race.'
>
> "On motion, the meeting then adjourned *for the purpose of carrying this resolution into effect.*"

At this interesting point the minutes end, and the reader is left to imagine what usually takes place when an irresistible force meets an immovable object.

As a sample of regulations concerning the location of quartz claims, that adopted for all the quartz mines in Nevada County, Dec. 20, 1852, will suffice:

> "Article II—Each proprietor of a quartz claim shall hereafter be entitled to one hundred feet on a quartz ledge or vein; and the discoverer shall be allowed one hundred feet additional. Each claim shall include all the dips, angles and variations of the vein."

In other counties the length of a claim was usually greater than in Nevada, but the dips, spurs, angles and variations always went with the ledge, and if not expressly set forth in the rules and regulations were always included in the "customs" of the district. This was also true of the use of sufficient surface ground for the convenient working of the claim.

THE DOCTRINE OF "CUSTOMS."

This doctrine of "customs," in its technical sense, as applied to early California mining operations, must not be confused with the written "rules and regulations" of miners. Though very serviceable to the early miner for obvious rea-

sons, its possible and actual misuse at a later day often came back to plague him. "These (customs)," says Mr. Yale, "grow up by self-creation, and are not the subjects of invention or provision. They may be superseded when once observed as obligatory, and the customs of one district may have controlling force in another. They are not the ancient customs of the common law, which, to have force, must be immemorial, merely traditional, and not originating within living memory. But they are the usages which grow out of the regulations by practice, are appurtenant to them, and must be regarded and enforced as an inherent part of them, as explaining, enlarging and defining them. Their force is greater because they are within living memory, and as no generation has elapsed since they have existed, are as ancient as circumstances will conveniently admit." Their growth in a community where pen, pencil and paper were not exactly implements of mining, where everyone knew his neighbor, and where everyone knew what transpired in camp each day, was perfectly natural; and their recognition by courts into whose presence the rules and regulations of the miners themselves came in the guise of custom, in the generic sense of the word, was equally natural.

STATE LEGISLATIVE RECOGNITION.

In 1851 Stephen J. Field, then a member of the Assembly from Yuba County, introduced into the legislature and had passed what is commonly known as the Practice Act, section 621 of which (since re-enacted as section 748 of the Code of Civil Procedure) was as follows: "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, uses or regulations, when not in conflict with the constitution and laws of this State, shall govern the decision of the action." This was the first statute to take notice of these customs, usages and regulations, and its enactment recognized and, in a sense, adopted them as the common law of mines and mining in California.

The act of April 13, 1860, relating to the conveyance of mining claims, also expressly recognizes the "lawful local rules, regulations or customs of the mines in the several mining districts in this State." This is the only other statutory recognition of these rules and customs in California before the federal mining law of 1866.

"These usages and customs," said Chief Justice Sanderson, in 1864, in construing Section 621 of the Practice Act, in the case of Morton vs. Solambo Copper Mining Co., "were the fruit of the times, and demanded by the necessities of communities who, though living under 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."

STATE SUPREME COURT RECOGNITION AND CONSTRUCTION.

The State courts gave full recognition to the rules, regulations and customs of miners, and a large body of our law is made up of the judicial interpretation and application of these rules and customs, a summary of the chief points of which will not be amiss. The elastic construction given to these rules and regulations and the sympathetic construction given to the customs and usages were in accord with the spirit of their creation, and effectively promoted justice in the Arcadian days; but some of the principles then laid down became in later days, under other circumstances, a very Pandora's box of troubles.

To have the force of law, a regulation must be in force at the time of the location. It does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of miners following its enactment. It likewise becomes void by disuse; this disuse, however, must be general; it is not sufficient that the rule has

been disregarded or violated by a few persons. Whether it has fallen into disuse is a question of fact, and, therefore, must go to the jury.

Where a regulation has fallen into disuse, a custom reasonable in itself and generally observed, though contrary to the regulation, may be proved. But the written rules are presumed to be in force, and proof of a contrary custom must be clear. The existence of mining regulations is a fact, and must be proved as a fact. Judicial notice will not be taken of them. Upon the person relying on them lies the burden of proving them. This is done by producing the original rules when in writing. When it is proved that the rules were adopted and recognized, they become admissible in evidence. The fact that the meeting at which they were adopted was held upon a day different from that named in the notice thereof, does not, in the absence of fraud, render them inadmissible. And an alteration in one article of the regulations after their adoption does not change the legal effect of the other articles.

When the written regulations are deposited with some authorized officer, or recorded in his office, they may not be proved by parol evidence. Other evidence, however, besides proof of the written record or of the acts of a miners' meeting is admissible as tending to prove the existence of a particular rule. This may be done by establishing a custom or usage in the district. The custom of recording claims in a district, while not proving absolutely the existence of a rule requiring such a record, tends to establish it. So on a subject as to which the written rules, when proven, are silent, a custom prevailing in the district may be proved; but regulations or customs of another district are not admissible to vary such a custom or the written rules.

The admissibility of mining regulations is not affected by the shortness of the time that they have been in force. The common law rule as to customs has no application on this point. A single extract from the written rules of a district may not be proved; the whole body of rules of a district must be offered in evidence.

When regulations have been proved, their construction, like that of other writings, is for the court. But where good faith is shown, a substantial compliance with them is sufficient. There is a distinction between the local rule made by a few miners within a district and a mining regulation enacted by the whole district, or a custom in universal force throughout the district. The former is not binding upon the locator, unless he had actual notice of its existence or assisted in its enactment.

Barringer and Adams on Mines, pp. 281-190, 290.

In an action for possession of a mining claim, where plaintiff relied upon a location under certain written rules adopted by the miners of the district, which contained no requirements that notices should be posted on the claims at the time of the location, defendant may prove a custom in the district requiring such posting of notices. No distinction is made by the statute (Practice Act, sec. 621) between the effect of a "custom" or "usage," the proof of which must rest in parol, or a "regulation," which may be adopted at a miners' meeting and embodied in a written local law. The custom or regulation must not only be established, but must be in force. A custom reasonable in itself and generally observed will prevail as against a written mining law which has fallen into disuse. Whether the law is in force at any given time is for the jury.

Harvey vs. Ryan, 42 Cal. 626.

FEDERAL SUPREME COURT RECOGNITION.

The Supreme Court of the United States gave full recognition to the binding force of the local rules, regulations, usages and customs before the sanction of federal statutory enactment, and to the doctrine that they constitute the American common law of mines.

Sparrow vs. Strong, 3 Wall. 97, decided in 1865.

Jennison vs. Kirk, 98 U. S. 453, decided in 1878.

EFFECT OF UNCERTAINTY OF TENURE.

The rules, regulations and customs of the miners were the work of men who were prospectors, and were admirably adapted for the mining operations that called them into being. Each man and his partner or partners worked their own claim. When the early placers were worked out, however, and the development of the mining industry demanded not so much accessibility to the public domain as capital for the successful exploitation of quartz mines, security of title and a declaration of federal policy with reference to the public mineral lands became paramount. The uncertain character of the tenure of the land, too, reacted upon the mining population, made their future uncertain and shifty, and prevented the home-building so essential to the settling up and development of the mining sections of the State. "Their enterprises," says Ross Browne, "generally were undertaken for the purpose of making the most profit in a brief time. There was no proper care for a distant future; and without such care no society is sound, no State truly prosperous. If a claim could, by hastily washing, be made to pay $10 per day to the hand for three months, or $6 for three years by careful washing, the hasty washing was preferred. If a fertile valley that would have yielded a revenue of $5 per acre for century after century to a farmer could be made to yield $5 per day to a miner for one summer, its loam was washed away, and a useless and ugly bed of gravel left in its place. The flumes, the ditches, the dwellings, the roads and the towns were constructed with almost exclusive regard to immediate wants. * * * The claims were made small, so that everybody should have a chance to get one; but the pay-dirt was soon exhausted, and then there must be a move. In such a state of affairs miners generally could not send for their families or make elegant homes. Living alone and lacking the influences and amusements of home-life, they became wasteful and wild. Possessing no title to the land, they did nothing to give it value, and were ready to abandon it at any moment. The farmers, merchants, and other fixed

residents of the mining counties were agitated and frightened nearly every year by the danger of migration of the miners to some distant place. One year it is Peru; another it is British Columbia, Idaho, Reese River, Pahranagat or Arizona; and it may next be Brazil, Liberia, or Central Africa, for all we know."

EXECUTIVE RECOMMENDATIONS FOR CONGRESSIONAL ACTION.

Meanwhile congress steadily pursued its policy of "generous inaction." The great battle of whether California should be admitted as a slave or a free state had to be fought out, and all things else had to wait. It took longer to admit California into the Union than to fight the Mexican War. The executive branches of the government, however, never lost sight of the necessity of some definite federal legislative action.

On December 4, 1849, President Taylor, in his inaugural message, after stating that he thought the establishment of a branch mint in California would afford facilities to those engaged in mining "as well as to the government in the disposition of the mineral lands," says:

"In order that the situation and character of the principal mineral deposits in California may be ascertained, I recommend that a geological and mineralogical exploration be connected with the linear surveys, and that the mineral lands be divided into small lots suitable for mining, and be disposed of, by sale or lease, so as to give our citizens an opportunity of procuring a permanent right of property in the soil. This would seem to be as important to the success of mining as of agricultural pursuits."

These recommendations, so simple and so just, were, however, not the burden of the official report of Mr. Ewing, the Secretary of the Interior, who had evidently had some smattering of the Spanish code of mining, and according to whom the division, disposition and management of the mines would require much detail. It was due to the nation, he

claimed, that this rich deposit of mineral wealth should be made so productive, as, in time, to pay the expense of its acquisition. He advocated the expediency of the government furnishing scientific aid and directions to the lessees and purchasers of the mines and establishing a mint in the mines, so that the gold collected could be delivered into the custody of an officer of the mint, and out of the amount so collected and deposited a percentage could be deducted, and the balance paid to the miner in coin, stamped bullion, or in drafts on the treasury, at his option. "The gold in the mine, after it is gathered, until brought into the mint, should be and remain the property of the United States."

Senator Fremont, five days after the admission of California into the Union, introduced the first federal mining bill concerning the public lands of the new acquisition. The bill was a complicated one, and, in principle, contemplated the ganting of permits, by agents appointed by the government, to work mines of limited and specified quantities, upon the payment of a stipulated sum. The bill passed the Senate, but failed of passage in the House. Senator Felch, chairman of the committee on public lands, in the course of the debate on the Fremont bill, offered a substitute which championed the principles of free mining, but it was defeated in the Senate. Both in the permit to be obtained under the Fremont bill, and in the land to be acquired under the Felch bill, a placer was limited to thirty feet square, and a quartz mine to two hundred and ten feet square, the lines to be cardinal points.

President Taylor died in the fall of 1850, and on December 2, 1850, President Fillmore, in his message to Congress, said: "I also beg leave to call your attention to the propriety of extending at an early day our system of land laws, with such modifications as may be necessary, over the State of California and the territories of Utah and New Mexico. The mineral lands of California will, of course, form an exception to any general system which may be adopted. Various methods of disposing of them have been suggested. I

was at first inclined to favor the system of leasing, as it seemed to promise the largest revenue to the government, and to afford the best security against monopolies; but further reflection and our experience in leasing the lead mines and selling lands upon credit, have brought my mind to the conclusion that there would be great difficulty in collecting the rents, and that the relation of debtor and creditor between the citizens and the government would be attended with many mischievous consequences. I therefore recommend that instead of retaining the mineral lands under the permanent control of the government, they be divided into small parcels and sold, under such restrictions as to quantity and time as will insure the best price and guard most effectually against combinations of capitalists to obtain monopolies." The first glimmer of congressional action with reference to the mineral lands in California was by the Act of March 3, 1853, "for the survey of public lands in California, the granting of pre-emption rights therein, and for other purposes," directing that "none other than township lines shall be surveyed where the lands are mineral or are deemed unfit for cultivation," excluding in express terms "mineral lands" from the pre-emption act of September 4th, 1841, and further interdicting "any person" from obtaining "the benefits of this act by a settlement or location on mineral lands."

The Secretary of the Interior, Caleb B. Smith, in his annual report for 1861 (The Public Domain, page 318), called the attention of Congress to the subject in the following words:

"The valuable and extensive mineral lands owned by the government in California and New Mexico have hitherto produced no revenue. All who chose to do so have been permitted to work them without limitation. It is believed that no other government owning valuable mineral lands has ever refused to avail itself of the opportunity of deriving a revenue from the privilege of mining such lands. They are the property of the whole people, and it would be obviously just and proper to require those who reap the ad-

vantages of mining them to pay a reasonable amount as a consideration of the advantages enjoyed."

The Commissioner of the General Land Office, in his annual report of 1862 (The Public Domain, page 318), after a review of the area of the precious metal bearing territory and the yield from the mines, gave the following opinion:

"An immense revenue may readily be obtained by subjecting the public mines either to lease under quarterly payments or quarterly tax as seigniorage upon the actual product, under a well-regulated and efficient system, which would stimulate the energies of miners and capitalists by securing to such classes an undisputed interest in localities so specified, and, when the conditions as to payment for the usufruct are complied with, for unlimited periods, and while effecting this beneficial result to them would relieve the necessities of the Republic."

In 1863, the Commissioner of the General Land Office again called attention to the mineral lands (The Public Domain, pages 318-319), recommending legislation for—"opening the mines and minerals of the public domain, the property of the nation, to the occupancy of all loyal citizens, subject, as far as compatible with moderate seigniorage, to existing customs and usages, conceding to the discoverer for a small sum a right to one mine, placer or lead (quartz), with a pre-emptive right in the same district to an additional claim, both to be held for the term of one year, for testing the value." Collectors of internal revenue were to be the collectors of the royalty.

In his message of December 6, 1864, President Lincoln called the attention of Congress to the mineral lands:

"As intimately connected with and promotive of this material growth of the nation, I ask the attention of Congress to the valuable information and important recommendations relating to the public lands . . . and mineral discoveries contained in the report of the Secretary of the Interior, which is herewith transmitted."

The ~~Commissioner of the General Land Office~~ Secretary of the Interior, in his report for 1865, after referring to the fact that the organiza-

tion of a bureau of mining was recommended in his last annual report, and stating that there can be no sufficient reason for withholding these mineral lands from the market (The Public Domain, in 1883, page 319), says:

"Congress has not legislated with a view to securing an income from the product of the precious metals from the public domain. It is estimated that two or three hundred thousand able-bodied men are engaged in such mining operations on the public lands, without authority of law, who pay nothing to the government for the privilege, or for permanent possession of property worth, in many instances, millions to the claimants.

"The existing financial condition of the nation obviously requires that all our national resources and the product of every industrial pursuit, should contribute to the payment of the public debt. The wisdom of Congress must decide whether the public interest would be better promoted by a sale in fee of these mineral lands, or by raising a revenue from their annual product."

In the annual report of the Secretary of the Treasury for the year 1865, the substitution of an absolute title in fee for the indefinite possessory rights or claims under which the mines were held by private parties was earnestly recommended:

"The attention of Congress is again called to the importance of early and definite action upon the subject of our mineral lands, in which subject are involved questions not only of revenue, but social questions of a most interesting character. Copartnership relations between the government and the miners will hardly be proposed, and a system of leasehold, (if it were within the constitutional authority of Congress to adopt it, and if it were consistent with the character and genius of our people,) after the lessons which have been taught of its practical results in the lead and copper districts, cannot of course be recommended.

"After giving the subject as much examination as the constant pressure of official duties would permit, the Secretary has come to the conclusion that the best policy to be

pursued with regard to these lands is the one which shall substitute an absolute title in fee for the indefinite possessory rights or claims now asserted by miners. The right to obtain 'a fee simple to the soil' would invite to the mineral districts men of character and enterprise; by creating homes (which will not be found where title to property cannot be secured), it would give permanency to the settlements, and, by the stimulus which ownership always produces, it would result in a thorough and regular development of the mines.

"A bill for the subdivision and sale of the gold and silver lands of the United States was under consideration by the last Congress, to which attention is respectfully called. If the enactment of this bill should not be deemed expedient, and no satisfactory substitute can be reported for the sale of these lands to the highest bidder, on account of the possessory claims of miners, it will then be important that the policy of extending the principle of preemption to the mineral districts be considered. It is not material, perhaps, how the end shall be attained, but there can be no question that it is of the highest importance in a financial and social point of view, that ownership of these lands, in limited quantities to each purchaser, should be within the reach of the people of the United States, who may desire to explore and develop them."

FIRST FEDERAL LEGISLATIVE RECOGNITION.

No action by Congress even indirectly recognized the conditions under which the miners had taken possession of the mines until the Act of February 27, 1865, providing for a District and Circuit Court for the district of Nevada, the ninth section of which provides as follows:

"No possessory 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 adjudged by the law of possession."

The only other two instances before the general law of 1866, where Congress recognized possessory rights or rules of miners, or granted a fee in mineral lands, were local in their character and application; one was section 2 of the Act of May 5, 1866, (14 U. S. Stat. at Large, 43), concerning boundaries of the State of Nevada; and the other was the Act of Juy 25, 1866, (14 U. S. Stat. at Large, 242), commonly known as the Sutro Tunnel Act.

INTRODUCTION OF LODE LAW OF 1866.

On May 28, 1866, Senator Conness, chairman of the committee on mines and mining in the United States Senate, reported back to that body Senate bill No. 257, entitled "An Act to regulate the occupation of mineral lands, and to extend the right of pre-emption thereto," and recommended the passage of a substitute. In his report, he took strong grounds against all measures for the sale of the mines to the highest bidders and for the taxation of those engaged in working them. He claimed that it was the first duty of Congress to set at rest all doubts and apprehensions affecting mining property by the promulgation of a policy which should give full and complete protection to all existing possessory rights upon liberal conditions, with full and complete legal guarantees, and which should provide the most generous conditions looking toward further explorations and developments. He especially commends the features of the bill recognizing the rules and regulations of the miners:

"Another feature of the bill recommended," says the report, "is, that it adopts the rules and regulations of the miners in the mining dstricts where the same are not in conflict with the laws of the United States. This renders secure all existing rights of property, and will prove at once a just and popular feature of the new policy. Those 'rules and regulations' are well understood, and form the basis of the present admirable system in the mining regions; arising out of necessity, they became the means adopted by the people themselves for establishing just protection to all.

"In the absence of legislation and statute law, the local courts, beginning with California, recognize those 'rules and regulations,' the central idea of which was priority of possession, and have given to the country rules of decision, so equitable as to be commanding in their national justice, and to have secured universal approbation. The California reports will compare favorably, in this respect, with the history of jurisprudence in any part of the world. Thus the miners' 'rules and regulations' are not only well understood, but have been construed and adjudicated for now nearly a quarter of a century. It will be readily seen how essential it is that this great system, established by the people in their primary capacities, and evidencing by the highest possible testimony, the peculiar genius of the American people for founding empire and establishing order, shall be preserved and affirmed. Popular sovereignty is here displayed in one of its grandest aspects and simply invites us not to destroy, but to put upon it the stamp of national power and unquestioned authority."

LEGISLATIVE HISTORY OF THE BILL.

The legislative history of the passage of this bill, which, after certain amendments went upon the statute-book as the general lode mining law of July 26, 1866, under a very anomalous title, is the history of a battle royal in the favor of the lasting interests of the Western gold-producing regions. I have taken the account of it from Yale's valuable work on "Mining Claims and Water Rights," pages 10 to 12, but have not had the opportunity to verify from the original official records the account there given.

"The miners of California," says Mr. Yale, writing in 1867, "and the States and Territories adjacent thereto, have but a very inadequate idea of the imminent peril in which the pursuit in which they are engaged was placed at the commencement of the Thirty-ninth Congress. Two years ago there was a strong dispositon in Congress and the East, generally, to make such a disposition of the mines as would

pay the national debt. The idea of relieving the nation of the payment of the enormous taxes which the war had saddled upon us by the sale of the mines in the far distant Pacific Slope, about which few people here have any knowledge whatever, was the most popular that was perhaps ever started —compelling other people to liquidate our obligations, has been in all ages and in all nations a highly comfortable and popular proceeding. There were some at the time of which I write who would not be satisfied with the sale of the mines. They held that even after the sale the government should be made a sharer in the proceeds realized from them. The first bill on the subject was introduced in the Senate by Mr. Sherman, of Ohio, and in the House by Mr. Julian, of Indiana. Both of these bills contained the most odious features. Sherman's bill went to the committee on public lands, of which Mr. Stewart was a member. After much consideration, it was understood that the committee would report adversely. Julian's bill received a much more favorable consideration in the House. In fact, the House went so far as to pass a resolution endorsing legislation substantially of the character contemplated in Julian's bill. After much canvassing, Mr. Conness and Mr. Stewart came to the conclusion that it was no longer safe to act on the defensive, and that it was necessary to determine what legislation would be acceptable, and to make a bold move to obtain it. The Secretary of the Treasury was then one of the strongest advocates of the sale of the mines, and appeared to be under the impression that it would yield a large revenue. The movement thus far had been encouraged by him, and it was thought that a partial success of his views would be more satisfactory to him than an entire defeat. Mr. Conness accordingly suggested to him to have a bill prepared in his department, which would avoid the odious provisions of the other two propositions, and get some Senator to introduce it, assuring him that a liberal measure would receive the favorable consideration of the Pacific delegation. The result was that the secretary had prepared the

second bill, introduced by Mr. Sherman, which was a great gain on the first bill. This bill went to the committee on mines, of which Mr. Conness was chairman and Mr. Stewart a member. After much discussion, these two Senators were appointed a committee to draft a substitute, which, after several weeks of close study, resulted in the reporting of a bill substantially the same as the one which is now the law. At this time it was not expected that it would be possible to do more than to get a report of the committee in favor of the measure, which it was thought would be an advanced affirmative position, from which the granting, selling or other calamitous disposition of the mines could be successfully withstood. Upon making the report, however, it was determined to put on the boldest front possible, and try and pass it through the Senate. It came up on the 18th day of June, 1866, and at first had but two warm advocates—its authors. The discussion occupied the entire day, Mr. Stewart supporting the bill. Mr. McDougall first favored the bill, and then made a speech against it. Mr. Williams, of Oregon, was opposed to all bills of the kind. Nesmith contented himself with voting against it. Nye opposed it, and said it would be good policy to let the whole subject alone, and not legislate upon it at all. This speech left his real position somewhat indefinite. In the course of the debate, however, it became manifest from the remarks of Senators Sherman, Buckalew and Hendricks, that the real merits of the bill were beginning to be appreciated by the Senate. The two authors of the bill congratulated themselves on this sign of progress, and resolved to try again. It was called up again on the 28th by Mr. Stewart, and was debated by Senators Stewart, Conness, Sherman, Hendricks and others. After being amended slightly by Mr. Stewart, the bill passed the Senate. When it was first introduced, the bill had no friends in the House, but after it passed the Senate some of the Pacific delegation began to regard it favorably. It should have gone in the House to the committee on mines, of which Mr. Higby was chairman; but Mr.

Julian, who is an old member, and was then chairman of the committee on public lands, seized on the bill at once, and had it transferred to his committee. Then the struggle came to get it out of that committee. Mr. Stewart addressed himself to the members of it, and got every one of them but Julian, but he was intractable. He wanted his bill to go first, and would not let this supersede it. The House, too, was canvassed, and was found to be favorably disposed, but there was no way of getting at the bill. In the meantime, Higby had passed a bill from the committee on mines in regard to ditches. It contained only three provisions, and bore no resemblance to the bill in question, but it related to the same subject. When this bill came into the Senate, the mining bill was tacked on as a substitute, and was passed. It was then sent back to the House, and went on the Speaker's table. In that condition it required a majority to refer it. To get this majority, Julian exerted all his strength, but failed. The bill was passed in the House without amendment, and became a law. This accounts for its being entitled 'An Act granting the right of way to ditch and canal-owners through the public lands, and for other purposes.' I have been particular about hunting up all the facts bearing upon this struggle, for the reason that the bill evolved from it is the most important, so far as California is concerned, that has ever been passed by Congress. . . . The result of the whole fight is the grant of all the mines to the miners, with some wholesome regulations as to the manner of holding and working them, which are not in conflict with the existing mining laws, but simply gave uniformity and consistency to the whole system. The escape from entire confiscation was much more narrow than the good people of California ever supposed. If either of the bills originally introduced had been passed, the Pacific States and Territories would have received a blow from which they would never have recovered. The government could only have receded after the most irreparable and widespread damage had been done."

The passage of this law was heralded by the press of the whole Pacific slope as the greatest legislative boon conferred upon it by Congress since the admission of California into the Union. The passage of the bill certainly marked an epoch in the history of the State. Probably the most just and sensible comment upon it is that of the San Francisco Bulletin in its issue of July 31st:

"No measure of equal consequence to the material and, we may add, to the moral interests of the Pacific States, was ever before passed by Congress. * * * The passage of the bill, whatever defects it may develop when more critically examined and enforced, marks a change in the public land policy equal in importance to the adoption of the pre-emption and homestead system; indeed, its practical effect will be to extend the now unquestionable benefits of that system to the vast field of the mineral regions which have hitherto been largely excluded from those benefits. * * * It was one of the greatest evils of the negative policy of Congress regarding the mineral lands that, while it prevented our own people from acquiring titles to them, it opened their treasures freely to the transient adventurers from abroad, who only came to take them away without leaving any equivalent. As a measure calculated to give homogenity and fixedness to our population, security to titles, and encouragement to capital and labor, the new mining law is full of promise. We believe it will have the effect also to stimulate exploration and production in the mining districts. Its good features are apparent; its bad ones will appear in time and can be easily remedied."

LODE LAW OF 1866.

The most salient features of the Lode Law of 1866 are contaned in its first two sections:

> "Sec. 1. That the mineral lands of the public domain, both surveyed and 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 intentions to become citizens, subject to such regulations as may be pre-

scribed 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.

"Sec. 2. That whenever any person, or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners, in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

The remaining sections, for the most part, prescribe methods for giving effect to the above, and in Section 4 it is provided that "the surveyor-general may, in extending the surveys, vary the same from rectangular form to suit the circumstances of the country and the local rules, laws and customs of miners; provided, that no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional caim for discovery to the discoverer of the lode, with right to follow such vein to any depth, with its dips, variations and angles, together with a reasonable quantity of surface for the convenient working of the same, as fixed by the local rules; and provided, further, that no person may make more than one location on the same ode, and no more than three thousand feet shall be taken in any one claim by any association of persons."

This law of 1866 was more important as marking an era in the land policy of the government than as an effective means of settling mining titles. In fact, we are sometimes tempted to believe that was the only good that came of it. It banished forever the specters of governmental licenses, leases, taxes on industry, royalties, and confiscation. The miner drew a long breath. Where before he had been legally a trespasser he was now free to explore and occupy the public domain and had a free right to mine. All the rights

which he had acquired under his system of local rules, regulations and customs were explicitly recognized as property, as the possessory right to mine, and were confirmed to him. The local rules, regulations and customs which limited, defined and accompanied all the rights he claimed were adopted. And he could, whenever he desired, transform this possessory right to mine (except as to placers) into a perpetual estate in the mineral lodes themselves, together with sufficient land, for the convenient working thereof.

The method provided for obtaining a patent was simple enough. No provision, however, was made as to how a mining claim should be located, no uniform rule established as to what work should be done to hold possession of a claim. Those matters, as well as the amount of surface ground, were to be fixed by the local rules and customs. The extra-lateral right was given without mention of top of apex of the vein or lode. No mention was made of end lines. Were any needed, and, if so, how must they be drawn? Was there any relation between the surface granted for working and the boundaries of the lode? If patent could issue for only one lode, what comprised the lode? Ignorance of geology sometimes on the part of the land department, sometimes on the part of the judiciary, and sometimes on the part of the miner, had more to do with the confusion that came of the law of 1866 than perhaps any other cause.

ONE-LODE AND MANY-LODE THEORIES.

What is the lode? The fights between the champions of the one-lode theory and the many-lode theory, both before and after the passage of the act of 1866, have caused the expenditure of millions of dollars in the most vexatious litigation. The incorporation of that one word "lode" into the statute of 1866 brought with it all the undetermined controversies concerning it. One of the main sources of the lawsuits was the doubt whether the Comstock lode had at its side a number of branches, or whether it was one of a series of independent and parallel lodes within a distance

of two hundred yards. The one-lode theory finally prevailed. The definition of a lode given in the Eureka-Richmond case (4 Sawy. 302), a case involving the construction of rights accruing under the law of 1866, is as follows: "We are of the opinion that the term [lode] 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 includes * * * all deposits of mineral matter found through a mineralized zone, or belt, coming from the same source, impressed with the same forms, and appearing to have been created by the same process." When the width of the Mother Lode of California varies from that of a knife-blade to eight hundred feet, and more, we realize what kind of an inconstant variable instead of a straight line a surveyor has to deal with, something of which the land department did not seem to have had the slightest conception.

Under section three of the act no patent could in any case issue for more than one vein or lode. As there was nothing in the statute to prevent another from locating within a certain distance of the original locator, there was no legal method of preventing the presence of undesirable neighbors. A blackmailer might locate an adjacent outcrop of the same lode, and the original locator might have upon his shoulders a suit involving all the horrors of a one-lode and many-lode contest. The only alternative would be to buy out the subsequent locator. The original locator might, through ill-luck, locate some spur of a valuable lode and thus attract to make a location in his immediate neighborhood some one who would otherwise never dream of locating there. The latter might show by underground workings his to be the lode proper and the original location only a spur, and then, under some facile proof of local rule or custom giving him all "spurs" as well as dips, angles and variations, oust the prospector but for whose discovery he would himself never have located. There being no provision for side lines, this clause of the law of 1866 was also an open

invitation to men with wealth and without conscience to locate in the immediate neighborhood alongside of a valuable ledge located by a man who was poor, offer him their own price for his claim, and, if he refused to accept, deliberately sink a shaft more or less vertical to take what did not belong to them, and while they were enriching themselves offer to give up the ledge upon the geological proof of its ownership which the law required and which they knew was utterly beyond the financial power of their victim to supply.

RELATION OF SURFACE TO LODE.

The law of 1866 intended to carry out the idea of the early rules and customs that the lode was the principal thing and the surface a mere incident. It provided, however, that the patent should issue, among other things, "upon the payment to the proper officer of five dollars per acre." That word "acre" is the first shadow of the cloud no bigger than a man's hand. If the statute had prescribed that the lode was to be a gift, and that five dollars an acre must be paid for any incident surface ground, or if it had placed a fixed price upon every so many linear feet of lode, together with so many dollars an acre on any incident surface ground, it would have disclosed a more conscious purpose to keep the two properties absolutely distinct. But to prescribe that the mine should be paid for at five dollars an acre was to bring an English common-law habit of thought unnoticed into a strange environment. Inasmuch as there was no relationship whatever between the surface and the dimensions of the lode, most of the district rules had no provisions whatever for the size of the tract of surface land to be used. By custom or rules in most districts the miner simply used what surface he needed and claimed a possessory right to only so much as he actually occupied. The land department honestly made an attempt to carry out this provision of the law, and in doing so, while itself showing an ignorance of the topography of the country in its instructions concerning end lines, laid down a rule for the computaton of areas that

would have required every deputy mining surveyor to be an expert geologist. The instructions provided for the establishment of end lines at right angles to the ascertained or apparent general course of the lode, and permitted the applicant to apply for patent to a lode without any inclosing surface, the estimated quantity of superficial area in such cases being equal to a horizontal plane, bounded by the given end lines and the walls on the side of the lode. Why at right angles, gentlemen? Simply to facilitate an arithmetical calculation.

As a result of these instructions, patents were issued describing a small area of surface, which was occupied by the miner in connection with his improvements, within which area a portion of the lode was included, the remainder of linear feet claimed being indicated by a straight line extending beyond the defined surface and in the direction and to the extent claimed. The patents issued for the Idaho mine at Grass Valley, and the Maximillian mine at Sutter Creek are examples. The patents, like the statute, did not provide for bounding planes at the end of the lode,—they simply ignored the difficulty. When the courts of last resort came to construe these patents, however, they ignored the jealousy with which the miner always divorced property in the lode from any relation to the measurements of surface areas occupied, ruled that both end and side surface lines were contemplated by the provisions of the law of 1866, and that the miner under the patent was not permitted to follow the vein on its strike beyond the surface boundaries. The cloud had already grown considerably larger than a man's hand. Under this ruling the direction of the surface end lines became of enormous interest to the locator, because through them hereafter were to be drawn his end-line boundary planes. The miner had been learning something of lode mining himself in the meantime, and had come to realize the extreme importance to him of the direction of those end-line boundary planes as the only means of saving the "rake" of his ore shoots, while here was a land department placidly directing

its surveyors to establish end lines at right angles to the lode, in seeming utter geologic ignorance of the very existence of rake or ore-shoot. Under instructions from the land department, and, in many instances, through the ignorance of the miners themselves, patents were under the law of 1866 issued in many a fantastic shape, from that of a horseshoe to that of an isosceles triangle, with heroic attempts in many instances to draw the end lines not simply at right angles to the general course of the lode, but at right angles to the local trend at the respective ends of the linear measurement on the lode. In the case of such patents the resultant extreme convergence, or unthinkable divergence of the end lines produced constrained the courts, although they granted extra-lateral rights in all other ordinary cases of divergence, to deny extra-lateral rights altogether. The same result took place where the miner, through mistake, as in the case of the Flagstaff mine in Utah, made his location across, instead of with, the strike of his lode.

Under the decisions of the courts, the extent of the surface tract became of an importance never dreamed of at the time of the passage of the act. It is idle to speculate now whether it was ever necessary at all on the part of the courts to establish any relation between the surface and the extent of the lode in order to give the miner the full benefit of the terms of the act. For good or for evil, the judicial legislation had been done. It is very doubtful whether the significance of what had been done was fully realized at the time. The size of the tract was still, however, under the terms of the act, dependent upon the local rules and customs, and, under the circumstances, the very facility with which these could be changed or wiped out altogether, which had been one of their main recommendations in the days of shifting placer and early lode mining, now became one of the chief dangers. Customs could be established to affect the very size of the tracts asked to be patented. All provisions about how a mining claim could be located at all were still dependent on these transient and unstable rules and customs. It

was one thing to recognize by law the locations already made and the rights already accrued under these rules and customs operating naturally, but it was quite another thing to make them the basis for future locations to be recognized by the law. "What are these mining customs to which the law pays such sweeping respect?" bursts out Dr. Raymond in 1869 (Mineral Resources, page 221). "They are edicts passed at twenty-four hours' notice by mass meetings of from five to five hundred men; it requires no more formalities to abolish or amend them than it did to make them—a notice posted on a door, a 'mass meeting' next day, and the thing is done. The records of titles are kept by an officer called the recorder, not known to the law, nor answerable for malfeasance in office, except that if he were known to tamper with the books in his charge his life might be taken by the party wronged. The records are kept in a few districts in fire-proof offices and in suitable form, but more frequently in small blank-books, pocket-books, or scraps of paper, stowed away under the counter or behind the flour-barrel or the stove of a store or bar-room."

NO UNIFORMITY OF CONDITIONS OF POSSESSION.

Moreover, there was no uniformity of the conditions upon which possessory titles depended, especially in the matter of the necessary work to be done to hold the claim. This again was all made to depend on the local rules and customs, and they were, upon this subject, very lax and of all varieties. The report of a committee made to the Senate of the State of Nevada on February 23, 1866, as accurately described the situation in California as that in Nevada:

"In one district the work required to be done to hold a claim is nominal; in another exorbitant; in another abolished; in another adjourned from year to year. A stranger, seeking to ascertain the law, is surprised to learn that there is no satisfactory public record to which he can refer; no public officer to whom he may apply who is under any bond or obligation to furnish him information or guar-

antee its authenticity. Often in the newer districts, he finds there is not the semblance of a code, but a simple resolution, adopting a code of some other district, which may be a hundred miles distant."

PLACER LAW OF JULY 9, 1870.

Obviously, the law of 1866 needed amending in many particulars, if it was to be of any other practical good than the declaration of a governmental policy. There was in the statute no provision providing for the patenting of placer claims. The first amendment was the statute of July 9, 1870, providing for the patenting of placer claims. This amendment consisted in adding six new sections to the Act of July 26, 1866. The first section of the amendment contains the pith of the new Act:

> "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 under this act, under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims; provided, that where the lands have been previously surveyed by the United States, the entry, in its exterior limits, shall conform to the legal subdivision of the public lands, no further survey or plat in such case being required, and the lands may be paid for at the rate of two dollars and fifty cents per acre; provided, further, that legal subdivisions of forty acres may be subdivided into ten-acre tracts; and that two or more persons, or association of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; and, provided, further, that no location of a placer claim hereafter made, 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 pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser."

The further sections of the amendment simply provide for the effective carrying out of these purposes. The land is patented under the "square location" theory, including all contained within planes drawn vertically through the exterior boundaries. No difficulties of construction have ever been experienced under this law, or any of its amendments. (The provisions of this amendment were by the Federal Act of February 11, 1897, expressly extended over public lands

containing petroleum and other mineral oils, in order to overcome the incorrect rulings of Secretary of the Interior Hoke Smith, excluding such lands from its operation).

LAW OF MAY 10, 1872.

There was no amendment of the Lode Law of 1866 with reference to lode claims, however, until the general mining law of May 10, 1872, entitled "An Act to promote the development of the mining resources of the United States." This statute re-enacted, with slight change, the provisions concerning placer mines. The idea sleeping in that inadvertent word "acre" had borne fruit, however, and in the matter of lode claims the new law made a radical departure. The new legislation was afterwards, 1878, codified in sections 2318 to 2346 inclusive, of the Revised Statutes, and in that form it constitutes the present mining law of the United States with reference to the public domain.

The salient features of the law are contained in three sections and a portion of a fourth:

"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.

"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 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.

"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.

"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. . . . "

RADICAL DEPARTURE FROM LAW OF 1866.

The expressions "all valuable mineral deposits and the lands in which they are found," in section 2319, and "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," in section 2322, disclose the radical change, which leaves no question of the relationship between surface and extent of lode, but in express language

of the statute rivets them together. It is not merely that "lead, tin or other valuable deposits" are added to the list of minerals; that the maximum length of vein or lode is 1500 linear feet, and the maximum width of surface 300 feet on each side of the middle of the vein; that the location must be marked on the ground so that it can be readily traced; that it is prescribed what the record shall contain when recording is required under the local rules; that not less than one hundred dollars' worth of labor shall be performed, or improvements made on each claim each year. These changes are important, and cured many of the troubles encountered under the law of 1866, but their significance is not to be compared with that introduced by the doctrine of apex. There was now no longer any question of the absolute dependence of the extent of the lode upon the conformation of the surface lines. The language is (section 2320): "No claim shall extend more than three hundred feet on each side of the center of the vein," not "no incidental surface shall extend," etc. "The end lines of each claim shall be parallel to each other," and the courts have since decided that the miner would lose all extra-lateral rights of the lode on the dip unless the end lines are parallel. That settled the question of a relation between surface and lode. There could be no mistaking the size of the cloud now.

By this law all patentees of one-lode under the law of 1866 became the owners of all other lodes within the surface area of their claims, with the same extra-lateral rights as to such adjacent lodes as could have been acquired under the new law. The danger of blackmail, through lateral locations, too, was removed to a distance of 300 feet. What, however, were to be the rights of a locator on a lode whose width was actually more than the six hundred feet allowed as the surface width of a claim? Is the adherence to the doctrine of the relation of surface area to the lode to be so absolute as to actually shut off a portion of the lode itself, or in such case is the effect of the courses of the boundary lines to be limited simply to the question of the end-line planes?

THE LAW OF THE APEX.

I am not going to discuss the doctrine of the apex or attempt to point out any great number of new and important questions that have come up, and must yet necessarily come up for construction under it, arising out of the geological and other conditions that will have to be met. That would mean an exposition of the law, instead of a history of it. A full discussion of the law itself will be found in Dr. R. W. Raymond's masterly monograph on "The Law of the Apex," and Judge Curtis H. Lindley's conscientious and scholarly treatise on "The Law of Mines." I am trying to point out the historical fact that there was a change, and the historical significance of that change. In other words, to obtain any rights under the law of 1872, a prospector must not simply find or attempt to locate a lode. The apex of that lode must be within his surface boundaries, or he gets no rights whatever, and whenever, through his mistake, no matter how natural, the apex crosses any of the surface boundaries, he loses rights that he would otherwise own. The position of the apex with reference to the bounding lines becomes the touchstone of almost all his rights.

In view of these facts, it will not be without profit to note some of the immediate difficulties that were inevitable from the working of the law, when it is remembered that in the early workings of a lode it is, in many instances, impossible at once to determine the top or apex, course or strike, or angle or direction of the dip, of the lode. The apex, as intended to be understood in the Revised Statutes, is, roughly speaking, the end or edge of the vein on or nearest the surface. In the ideal lode the locator would have no trouble, provided he get his apex inside his boundary lines and his side lines follow the general course of the lode. This general course, however, he cannot always determine exactly, and, under the short time allowed for locating, especially if he must hurry to head off other possible locators, he must often take for granted. The apices of a narrow lode, especially in certain conformations of country, often deviate

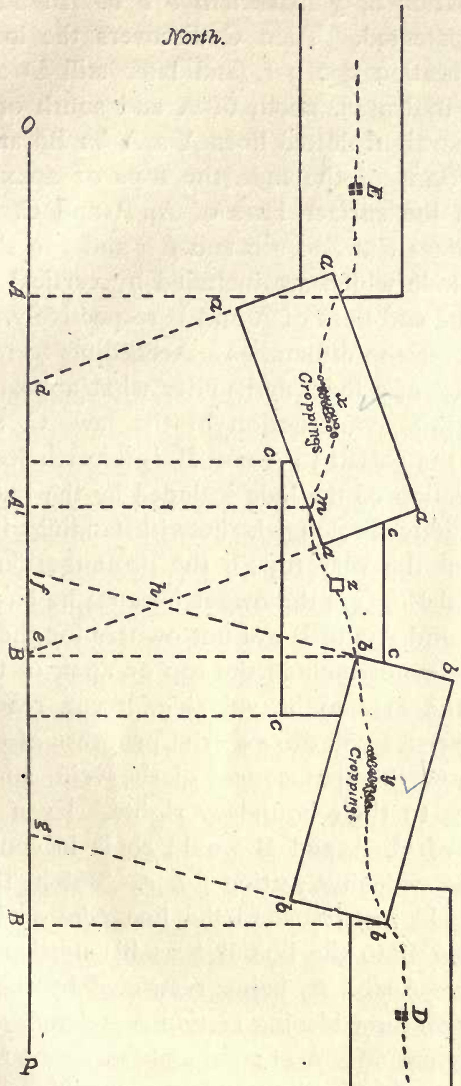
considerably from a straight line, and it is often easy at first to mistake their course, which is such as to pass beyond the side lines of a claim. We would then not have to look far for complications.

SOME PROBLEMS OF LAW OF APEX.

Chief Justice W. H. Beatty, than whom no one in the United States is more entitled to be listened to with the highest respect in questions of this kind, early suggested a number of such difficulties, many of which were not long in coming. Writing upon this point in his testimony before the public lands commission, November 21, 1879, while still Chief Justice of Nevada, he said (Report, page 402):

"Mining locators are granted the exclusive rights of possession of their surface claims, and all veins, etc., the tops or apexes of which lie inside of their surface lines extended downward vertically, although such veins in their downward course may extend beyond the side lines of the surface claim. No locator, however, has the right to go outside of vertical planes conforming to his end lines, notwithstanding the true dip of his lode would carry him beyond. In every patent of mining ground a right is reserved to other locators to follow their lodes on their downward course into the ground so conveyed. (Revised Statutes, section 2322.)

"This being the law, the annexed diagram illustrates a few of the numberless difficulties that will occur in applying it to surface locations that have not been made in exact conformity to the true and ultimately ascertained course of the lode. The line O P represents the course of a lode extending due north and south, and is supposed to be drawn between its extremities at the depth of a thousand feet from the surface. The dip of the lode is to the west, and the outcrop appears at two points, *x* and *y*. The top of the apex of the lode where it does not reach the surface is indicated by the dotted line connecting *x* and *y* and extending beyond in either direction. Long before any better means exist of ascertaining the true course of the lode than is furnished by


North.
O
A
A'
B
B'
P
E
D
Croppings
Croppings

its outcrop, A makes a location at *x* marked *a a a a,* and B makes a location at *y* marked *b b b b.* In due time their claims are patented. Then C discovers the lode at *z* and makes his location *c c c c,* and later still D and E make locations as indicated, north of A and south of B, respectively. The straight dotted lines A *a* A *'m* B*b* and B *'b* indicate the sections of the lode the tops or apexes of which are inside of the surface lines of A, B and C, respectively. The dotted lines *d a* and *e a* and *f b* and *g b* show the sections of the lode which are included by vertical planes conforming to the end lines of A and B respectively.

"Now come the difficulties. According to my definition of top or apex of a lode, and under what appears to me the only admissible construction of the law, C, although he locates after the patent to A and B, is nevertheless the owner of all that section of the lode included by the lines A *'m* and B *b,* indefinitely prolonged, notwithstanding it is mainly included from the very top in the prolongation of the end lines of A and B. C is the owner because he has located the top or apex, and A and B are not owners for the reason that their claims do not include the top or apex of this section. Supposing the lode to be valuable, it can readily be seen what controversies will arise as the progress of development begins to show the true course of the vein, and enlightens the parties as to their boundary rights. Even without the intervention of C, A and B would come in conflict at *h* in regard to the widening section *f h e.* But in the case supposed, C would restrict A to the line A'*m* as his southern boundary, and B to the line B *b* as his northern boundary. By this means A and B, being restricted by their end lines from mining on the widening section A *a d* and *g b* B', would be completely cut off—A at 2000 and B at 3000 feet from the surface. Then this further difficulty would arise, that the entire top or apex of the lode being included in the various surface locations of A, B, C, D and E, there would be no means under the law by which the widening sections A *a d* and *g b* B' could be located or granted. The only rem-

edy would be to cancel the patents of A and B, and allow them to readjust their surface lines. Before this, however, another controversy would have arisen between B and C, and still another between B and D, in regard to the excessive claim of B on the course of the lode, which it will be seen extends to a length of about 1600 feet, whereas the law allows him at the utmost but 1500 feet. These hints will suffice to indicate the nature of the task which the commission have before them; and having no plan to suggest for meeting the difficulties in their way, I take my leave of the subject."

REASONABLE TIME NEEDED FOR MARKING.

In the provision for the marking of exterior boundaries upon the ground, under the present provisions of the law of 1872, the rights of the discoverer of a vein are not fully protected. Unless he be given a reasonable time to mark his boundaries upon the ground, either under a State statute, or a local rule, or the decision of the Supreme Court of the United States, he may make many mistakes vital to his interests. As a matter of fact, the trend of the California decisions on this point is against him, though at the same time against the trend of the decisions of almost all the other States and territories except Oregon (Lindley, sections 339, 371, 372), and of the Supreme Court of the United States (Erhardt vs. Boaro, 113 U. S., 527). What is a reasonable time? Even the decision of the United States Supreme Court favoring a reasonable grant of time is for but a short grace at best. A statute of this State was passed in 1897, the best point in which was that the discoverer was granted sixty days after his preliminary location in which to mark his boundaries, but it contained other provisions, which were considered cumbersome in practical working, and under pressure of the sentiment in the mining counties, was repealed in the session of 1899. As the marking of his boundaries is a part of the act of location, *without which the act of location is not complete,* can the discoverer afford to wait, lest some one else effect a complete location before him? It has been shown

that unless he is given a reasonable time he may mistake the position of his apex and the course of his vein. But how much would be a reasonable time to ascertain the *rake of his pay shoots,* in order that he might slant his end lines so as to save as much of them as possible? Many a mine has developed a pay-shoot near either end, and that was all there was of the mine, and unless the discoverer had a chance to draw his end lines properly, he might lose the whole of it in a few hundred feet. Whatever is wanting in the law in this respect can be cured by amendment of the statute itself.

ABOLITION OF RULES, REGULATIONS AND CUSTOMS ADVOCATED.

"The principal, the vital defect in the existing law," says Chief Justice Beatty (Report, page 396), "is this permission to make local rules. There are, I have reason to believe, other important defects in the law, but as to most of these there are more competent judges, and I leave it to them to point out the evil and suggest a remedy. But as to the practical workings of the local rules and customs of miners, when allowed the force of law, I have very decided opinions, which I feel that my means of knowledge justify me in stating with some confidence in their correctness. I believe that the whole subject of mining locations is an extremely simple one, which may easily, and certainly therefore ought to be, regulated by one general law, the terms and existence of which shall be established by public and authentic records, and not left to be proved in every case by the oral testimony of witnesses, or by writing contained in loose papers or memorandum-books, such as are often dignified by the name of 'mining records.' I am convinced, moreover, that the tainting of every mining title in the land at its very inception with the uncertainty which results from the actual or possible evistence of rules affecting its validity, perfectly authentic evidence of which is nowhere to be found, is a stupendous evil. Experience has demonstrated that such an uncertain state of the law is a prolific source of litigation, and no experience is required to convince any man of ordinary intelligence that

it must have the effect of depreciating the value of all unpatented claims by deterring the more prudent class of capitalists from investing in them. That the subject is simple enough to be embraced in one general law is proved by the fact that the laws of the various districts, although differing in details, are in substance identical, and are substantially contained in the existing acts of Congress.

"What room is left, then, for any local regulations upon the only points that the miners have ever assumed to regulate? Just this: The miners may:

"First—Restrict themselves to smaller claims than the Act of Congress allows.

"Second—Require claims to be more thoroughly marked than would be absolutely necessary to satisfy the terms of the Act.

"Third—Require more work than the law requires.

"Fourth—Provide for the election of a recorder and the recording of claims.

"As to the first three points, it may be safely assumed that no such regulations will be adopted in any district hereafter organized. Mining districts are organized by those who discover valuable ore bodies outside of the limits of existing districts, and these first comers will be sure to take all the law allows them to take, and will do nothing on their part to increase the difficulty of holding what they have got. Later comers, not being able to deprive their predecessors of rights already vested, will find their advantage in claiming any new discoveries on terms as liberal as others have enjoyed, and it will inevitably happen that the privileges of the law will be in no wise abridged. Permission to abridge them is therefore wholly superfluous.

"In some of the older organized districts the local rules do restrict the size of claims; but in no case within my knowledge do they exact as much as the statute in regard to marking and working claims. Under the regulations restricting the size of claims in these old districts rights have vested which ought to be protected; but in amending the law, with

a view to its prospective operation in old as well as new districts, nothing is to be gained by permitting miners any longer to regulate either the size of claims or the mode of marking them, or the amount of work to be done on them. The only effect of such permission is to make the terms of the law upon these important points everlastingly uncertain, without the least prospect of its ever being improved.

"The fourth point at present left open to regulation by the miners remains to be noticed. All the district rules with which I am acquainted provide for mining recorders and the recording of claims; but under existing legislation such rules are worse than useless. The statute, it will be observed, does not make any notice or record obligatory, or define their effect. If the miners themselves made no regulation on the subject, claims would be located by simple compliance with the terms of the statute, which contains in itself ample provision for every essential to a location; i. e., size of claim and marking and working. Under the statute the vein is located by means of a surface claim, which not only can be, but must be, marked on the ground. When this is done all that the notice and record were ever intended or expected to accomplish is effected in a manner far more satisfactory and complete. In place of a very imperfect and often misleading description of the claim, there is a plain and unambiguous notice to the world of its exact position and extent. No reason exists, therefore, for retaining in the law a provision under which it may be made obligatory, by local regulations, to post and record a notice in addition to the marking of the ground. The monuments on the ground do well and completely what the notice and record do only imperfectly and in part.

"It may be asked why, if this is so, do the miners, who ought to understand their own business, persist in requiring a notice and record. The answer is, that marking locations by such means has with a majority of miners become an inveterate habit; and the custom, like many other customs, outlives the causes which called it into existence. For twenty years—from 1852 to 1872—lode claims were located with-

out reference to surface lines, and, as above explained, their locality and extent could only be indicated by means of a notice. Notice and record were therefore an essential part of the system. Now, however, since the law has applied the system of surface locations to lode claims, they have ceased to be of any importance as independent and substantial requirements. But the miners have generally failed to perceive that there has been any radical change in the system of making locations. They cannot divest themselves of the notion that the surface is still a mere incident to the vein, and that they must hold by means of their notice fifteen hundred feet of the vein, wherever it is found to run, notwithstanding their surface lines, as marked on the ground, may not include so much.

"But another evil remains. In the nature of things there must always exist the necessity in the assertion of any mining title of proving compliance with the law prescribing the conditions upon which it may be acquired; but there is no necessity for leaving the terms and existence of the law itself to be the subject of proof by evidence, the best of which is always open to dispute. As long as there are local regulations anywhere, and *as long as there may be local regulations everywhere* affecting the validity of mining titles, no man can ever know the law of his title until the end of a trial in which it is involved. In districts where the rules are in writing, where they have been some time in force and generally recognized and respected, the law may be tolerably well settled. But there is often a question whether the rules have been regularly adopted or generally recognized by the miners of a district. There may be two rival codes, each claiming authority and each supported by numerous adherents; evidence may be offered of the repeal or alteration of rules, and this may be rebutted by evidence that the meeting which undertook to effect the repeal was irregularly convened or was secretly conducted in some out-of-the-way corner, or was controlled by unqualified persons; customs of universal acceptance may be proved which are at variance with the

written rules; the boundaries of districts may conflict, and within the lines of conflict it may be impossible to determine which of two codes of rules is in force; there may be an attempt to create a new district within the limits of an old one; a district may be deserted for a time, and its records lost or destroyed; and then a new set of locators may reorganize it and relocate the claims. This does not exhaust the list of instances within my own knowledge in which it has been a question of fact for a jury to determine what the law was in a particular district. Other instances might be cited, but I think enough has been said to prove that local regulations being of no use ought to be abolished.

"The magnitude of the evil resulting from the uncertainty of mining titles will, perhaps, be appreciated when I say that after a residence of seventeen years in the State of Nevada, with the best opportunity for observing, I cannot at this moment recall a single instance in which the owners of really valuable mining ground have escaped expensive litigation, except by paying a heavy blackmail." This defect in the law, like the one concerning a want of a reasonable time to mark boundaries in making a location, can be cured by an amendment of the law itself, and, in this instance all that is necessary is a provision that all future occupation, location, or purchase of public mineral lands shall be governed by laws of Congress, to the exclusion of all local customs, rules and regulations and State and territorial law.

THE EXTRA-LATERAL RIGHT AND THE SQUARE LOCATION.

A discussion of any remedy for the remaining source of litigation resulting from the provisions of the statute would bring to the parting of the ways. Probably any system that allows the miner the right to follow his lode on the dip outside vertical planes drawn through the surface lines of his location must bring in its train more or less litigation. Where the miner who has sunk upon his lode has become the defendant at the instance of some one who has located upon his dip, he ought generally without difficulty by means of his underground workings to be able to prove his title to his lode,

though the expense is often great on account of the necessity of reopening old works. Where, however, he has opened his mine through a vertical shaft and cross-cut to his lode, he might, in such a case, be compelled to expend thousands and thousands of dollars in work that is utterly useless to him for all other purposes, simply to prove the identity of the lode he is working beneath his neighbor's surface with the one he located. He cannot escape the burden of this positive proof for the judicial construction that has brought us the law of the surface has brought with it the English common-law accompaniment that each locator has the prima facie right to all vertically beneath his surface. Where another is mining upon the dip of his lode, and he is seeking affirmative relief against the conscious or unconscious trespasser, he may not be able in the environment of his own operations to make the satisfactory proof, but will have to push on, against his other plans and interests, and do an immense amount of "dead" work until he breaks in upon the trespass. On account of peculiar surface boundaries he might be compelled, on the analogy of a bill of discovery, to apply to the court for permission to enter the works of the trespasser and, at his own cost, make ruinously expensive upraises to the surface, a permission in many jurisdictions impossible to obtain, in order to prove the identity of the lode. I have made no mention of the vexatious delays, delays which are sometimes used by the scoundrelly corporation trespassing to manifest its consciousness of guilt by efforts of reorganization and the like, nor to the enormous damage often caused by the cessation of operations in other portions of the mine rendered necessary by the expense of the abnormal amount of dead work useful alone for the purposes of the litigation. The expenses rendered necessary by these cases and by those arising from mistakes in the location of the apex and of the strike of the lode are mounting into millions. Only the wealthy, whether corporations or individuals, can indulge in this luxury.

These considerations have brought despair to many mining men and doubt as to advisability of any system providing

for "the extra-lateral right." They point to the tranquility under the English common law titles of the lead and copper mines east of the Rocky mountains and of the placer mines in our own State, where an exact adjustment of boundary rights depends simply upon exact surveying. The increasing familiarity of many of our prominent mining men with the "square location" system of Mexico and its results has had much to do with fostering a sentiment in its favor. The agitation has already begun for the adoption of the system of "square locations." As early as 1880, B. C. Whitman, of Nevada, and Judge Hallett, of Colorado, openly advocated it, and the public land commission urged it upon Congress, while Chief Justice Beatty and Dr. R. W. Raymond, though pointing out where the present law must be amended, strenuously contended for the extra-lateral right, at any rate until the era of active prospecting shall have actually passed away (Report public land commission, of 1880).

I do not intend to enter into the merits of the controversy between the champions of the extra-lateral right and square locations. In an article upon the history of mining law in California we would be led too far apace. If, possibly under conditions analogous to those that obtained in Prussia at the time, the extra-lateral right shall ever be abolished, then its abolition will be history,—but not till then. The extra-lateral right is, moreover, a vested right at present in all lode patents fulfilling the conditions of the present law, and in all the numberless locations duly made under the lode rules, customs or regulations. No amendment can take that vested right away. In all lode mines that at present exist where compliance has been had with the condition of substantial parallelism of end lines, the extra-lateral right is indefeasible, unless the abandonment of the possessory ownership by the owner shall throw the mine itself back into the public domain. Any legislation on the subject, could at most, then, only affect future locations.

After all, no matter how honestly the advocates of the two systems contend, the conclusions reached depend largely

upon the point of view. The large mine operator, who buys and opens, but who does not discover or locate mines, upon whose shoulders falls the burden of the costs of litigation,—he, with his lawyers and his surveyors and his experts, usually leans toward the "square location." The prospector and the discoverer feels in his every fibre, no matter what fictitious sacredness judicial construction or the statute may have thrown about the idea of the surface, that the lode itself is the only real property, as it is the only thing he has been hunting, and when he finds the lode his desire "to stay with it till it reaches hell" is a passion that cannot be understood by one who has never owned a lode mine and worked in it, or who has never lived in a mining community. The discoverer is not of the class that has usually had to bear the costs of mighty law-suits, and therefore he loses no sleep over the possible litigation. And, even if he does take the chance of losing the mine, he is willing to do so with the same cheerfulness with which he spent the greater part of his life on the chance of finding it. As long as the law recognizes his right, he is willing to take his chances of being able to hold on to the lode. He has long learned to look upon mining with the same game philosophy with which John Oakhurst looked upon life, as at best an uncertain game, and to "recognize the usual percentage in favor of the dealer."

SUGGESTED AMENDMENTS OF LAW OF 1872.

The act of 1872, with further congressional amendment putting all matters concerning location in the terms of the act itself, abolishing all local rules, regulations and customs and superseding all State and territorial enactments, arranging for the discoverer to have a reasonably liberal time within which to mark his boundaries before he shall be bound by them, and regulating effectively the performance of the work necessary to hold the possessory right to the claim, will be immensely improved. The mistakes incident to hurried location and consequent ignorance of the details to give it effec-

tiveness will be reduced to a minimum. The law has already stood many a severe geological test. It has had to undergo the test of the flat wavy veins of the neighborhood of Nevada City. It may have to deal with lodes like the Royal Consolidated in Calaveras County, where one can walk down the shaft, or with the abnormal width of the mother lode in some portions of Amador County. The law that could stand Carson City-North Star, South Scotia-New Idea, Wyoming-Champion, Providence-Champion, Argonaut-Kennedy, and many another problem already solved, will have no trouble in California. The mountains and gulches of California will probably never try it with anything so hard as Leadville.

CERTAIN STATE MINING LEGISLATION.

It would be manifestly beyond the scope of an article of this kind to stop to point out all the different laws that were passed and repealed in California with reference to the exclusion of Chinese from the mines, and the attempts to levy and collect a Foreigners' Tax. There would be no use in relating the history of the enactment of any acts, whether in general or codified form, providing under the law of eminent domain for the condemnation of sites for tunnels, ditches, flumes, pipes, and dumping places for working mines, or for outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from the mines, for the reason that in all instances where any attempt has been made under the provisions of the act, the Supreme Court of this State has foiled the attempt by holding that mining is not a public use. The act establishing a system of mine bell signals introduced by Senator Voorheis, of Amador and Calaveras Counties, and approved March 8, 1893, cannot be said to belong to the law of mining in California, in the sense in which I have been discussing that subject. It is significant, however, as indicating the immense strides in the industry of lode mining, and the large scale of lode mining operations as distinguished from its small beginnings, that such a system of bell signals

was found necessary and convenient. Likewise, the act for the protection of stockholders in mining companies, approved April 23, 1880, and its amendment, more properly belongs to the law of corporations than that of mining. The peculiar associations, too, known as mining partnerships, which arise where several owners of a mine engage in the actual working of it, belong properly to a treatise on partnership, though their law of today is but the statutory enactment of a distinctive California common law, which, though in many respects similar to the "cost-book system" of Cornwall and Devon, blossomed out of the tenderest relationship of the days of '49, the days of Tennessee and his "pardner." They spread out into all the states and territories, where went the California law of mining properly so-called, were early crystallized in decisions of the courts, and enacted into statutes, which were, with all their features distinctive from ordinary partnership, re-enacted into the Civil Code, Sections 2511-2520, in 1872.

HYDRAULIC MINING AND CALIFORNIA DEBRIS COMMISSION ACT.

One of the most interesting phases of the mining law in California is the federal statute creating the California Debris Commission, following the closing down of the hydraulic mines in the Sacramento and San Joaquin watershed as a result of the federal injunction in the test case of Woodruff vs. The North Bloomfield. The act was the work of Mr. Caminetti, of Jackson, then congressman from the Second District, and deserves a more detailed notice than I shall be able to give it in this article, as it is a unique example of governmental intervention. The government had sold the agriculturalists in the valley their land and the miners in the mountains their placer claims, had given each patents with equal covenants "to have and to hold," and had collected from each side the fees for the land at the land office with equal urbanity. It had been decided in the North Bloomfield case that the debris from that mine, the result of mining by the well-known hydraulic process, was injuring the lands

adjacent to the navigable streams below. The magnitude of the extent of hydraulic mining had been its undoing. The choking up of the overtaxed channels of the rivers, the covering up of valuable adjacent lands, and the injury to navigation brought all parties down upon the offending industry. Private individuals invoked the doctrine "*ut non laedas,*" the State protested against interference with its water highways, and the federal government, despite the covenant in the deed, objected to the obstruction to navigation. The bitter feeling engendered between the interests injured and the industry was so great that for some years no effort was made towards any rehabilitation of hydraulic mining.

In the decision of the Woodruff vs. North Bloomfield case, brought by an individual, and the People vs. Gold Run case, brought by the State, the hydraulic process in and of itself had not been declared unlawful, but hydraulic mining as theretofore conducted where it contributed or threatened to contribute in a material degree to the filling up of river channels, injuring navigation, or covering the lands adjacent to the navigable streams with debris, was declared a public nuisance and prohibited. Judge Sawyer, who decided the Woodruff-Bloomfield case, realized the awful damage to entire sections of the State by the closing down of these mines, and left a fair opening, making certain suggestions of possible conditions under which the injunction might be dissolved. The North Bloomfield Company constructed the suggested impounding works, and the United States then brought its action for an injunction against the North Bloomfield Company. The injunction was denied, the Court holding that by reason of the impounding works constructed the light matter floating over the dam was harmless, that danger to be apprehended from the operation of the North Bloomfield mine, with its impounding reservoirs as constructed and used and intended to be used, was too remote to justify the Court in issuing an injunction.

Thereafter, the California Debris Commission Act was passed. The government could not afford to admit any

moral responsibility, and it did not desire avowedly to pass any legislation in aid of any special industry, but it could, on the theory of aiding navigation, carry out a certain patrol of the navigable streams. The Act was approved March 1, 1893, and provides for the creation of a commission of three members, to be known as the California Debris Commission, and to be selected by the President, by and with the advice and consent of the senate, from officers of the Corps of United States Army engineers, which commission has its authority and exercises its powers under the supervision of the chief of engineers and direction of the Secretary of War. The jurisdiction of the commission with reference to hydraulic mining extended to all such mining in the territory drained by the Sacramento and San Joaquin Rivers. Hydraulic mining, as defined in section eight thereof, directly or indirectly injuring the navigability of said river systems carried on in said territory other than as permitted under the provisions of this act, was prohibited and declared unlawful.

It was made the duty of the commission to mature and adopt such plans as would improve the navigability of all the rivers comprising the system, deepen their channels, and protect their banks, with a view of making the same effective as against the encroachment of, and damage from, debris resulting from mining operations, natural erosion, or other causes, and permitting mining by the hydraulic process to be carried on, provided the same might be accomplished without injury to the navigability of the rivers, or to the lands adjacent thereto. The commission was also empowered to examine, survey and determine the utility and practicability of storage sites for the storage of debris, with a view to the ultimate construction of impounding dams and reservoirs, and permitting hydraulic mining to be carried on behind them. It prescribed a complete system for application of those desiring to submit themselves to the jursdiction of the commission, of the necessary notices, publication, examinations, hearings, etc. The works are to be constructed under the direct supervison of the commission, but at the ex-

pense of the parties, and the permit to commence mining is not issued until after inspection and approval of the completed work. This permission may, for cause, be revoked, or its terms modified from time to time. It will be noticed how absolutely hydraulic mining is placed under the thumb of the commission. The terms of the act contain, moreover, the drastic provision that the petition to the commission to be permitted to mine

> "shall be accompanied by an instrument duly executed and acknowledged, as required by the law of the said State, whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, *or any law that may hereafter be enacted,* or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the debris resulting from the working of said mine or mines shall be restrained, and what amount shall be produced therefrom."

Under the provisions of this act a number of permits have been granted and a number of mines have started again. The courts are being again appealed to, however, for injunctions; the Red Dog hydraulic mine has already been closed down by injunction from the Superior Court of Sutter County; the Polar Star mine is closed down under a temporary restraining order from the same court, and suits have been begun and are threatened against many other mines operating under the jurisdiction of the commission.

While this act was pending in congress there was being crowded through the legislature of California an act introduced by Attorney General Tirey L. Ford, then State senator from Sierra, Plumas and Nevada counties, which, as Sections 1424 and 1425 of the Civil Code was approved March 24, 1893, the terms of which are as follows:

> "1424. The business of hydraulic mining may be carried on within the State of California wherever and whenever the same can be carried on without material injury to the navigable streams, or the lands adjacent thereto.
>
> "1425. Hydraulic mining, within the meaning of this title, is mining by means of the application of water, under pressure, through a nozzle, against a natural bank."

Section 1424, it will be seen, is in direct conflict with the provisions of the Debris Commission Act. It is also in

conflict with the judicial interpretation given to the provisions of that act, and is, therefore, probably nugatory in the Sacramento and San Joaquin watershed, though in full force and effect in the remainder of the State. Section 1425 will be of value as defining the sense in which the words "hydraulic mining" were used in California prior to its enactment only in case it is really the codification of a definition actually accepted at the time and before the federal act was passed.

The North Bloomfield Company, as has been seen, had constructed its restraining works before the creation of the commission and those restraining works had been decided in a case by the United States against the Company in the United States Circuit Court to be sufficient, and application of the government for an injunction denied. It, therefore, did not submit itself to the jurisdiction of the commission. Several years after the act was passed the government again brought an action against the North Bloomfield Company, adding to the old allegations supplemental averments of the passage of the Debris Commission Act, and the failure of the company to submit itself to the jurisdiction of the commission and secure from it a permit to conduct its mining operations behind its dam. While conceding that the mine was being operated without injury to the navigable streams, as found at the former trial, Judge Ross nevertheless granted the injunction, holding that until the debris commission appointed under the act should find that such mining can be carried on without causing the prohibited injury, *all* hydraulic mining within the territory drained by the Sacramento and San Joaquin River systems, is unlawful. This decision was afterwards affirmed on appeal to the Circuit Court of Appeals. Here was the constitutionality of the Act as a quasi-police regulation upheld in favor of the government and against a hydraulic mine. There is no doubt, moreover, of the constitutional right of the government to appropriate money or build dams to keep debris out of its navigable streams.

Such a test of the constitutionality of the measure on the point indicated is, however, of no benefit to the miners. The

single comforting obiter dictum in the whole decision of Judge Ross is the following: "The power to absolutely prevent the use of such waters for the objectionable purposes necessarily includes the power to prescribe the terms and conditions upon which they may be so used." (81 Fed. Rep. 254.) Taken in connection with the facts of the case, however, this language would simply mean: "The power to absolutely prevent the use of such waters for the objectionable purposes necessarily includes the power to prescribe the terms and conditions without which they may not be so used." The decision simply decides the constitutional right of the government to protect the navigability of the streams by closing down, through legislation, any hydraulic mine in these watersheds which has not submitted itself to the jurisdiction of the commission. The miner will not be heard to say in resistance that he is being deprived of his property without due process of law. That is settled, but that is all that is settled, by the judicial construction thus far given to the Act. Is the working of the Act reciprocal? The miner is bound with hooks of steel; but how about the farmer—is he likewise bound? Is the State of California bound? For the purposes of any miner who desires to take his chances under the act, the test of its constitutionality should be made in some case brought against a company or person operating under a duly obtained permit from the commission, and not in a case against a company or person not operating under such permit. Moreover, the test should be made in defending a case where a farmer attacks the Act on the ground that some constitutional right of his is being abridged, or where the people of the State of California (on relation of the Attorney-General) attack it on the ground that some of their constitutional rights are being abridged, by the action of a miner operating under a duly obtained permit from the commission. No other test will settle the point. The permit of the commission is already a finality as far as the miner is concerned. Is it a finality as far as the farmer and the State are concerned? To settle this point, the ques-

tions to be presented by a farmer or by the State, under the two sets of cases above set forth, are the following: Is, or is not, the act contrary to the provisions of the fifth amendment to the Constitution of the United States? Does, or does not, the act, directly or indirectly, deprive any person of property without due process of law? Is the State deprived by the Act of any right guaranteed to it in the Constitution of the United States, or therein implied? It is contended in behalf of the miner that neither the farmer nor the State is deprived by the Act of any property or right without due process of law; that, inasmuch as the commission has complete jurisdiction to modify or revoke its permit at any time, the farmer and the State are not necessarily deprived by the Act of any "day in court" either may desire. Obviously, unless the permit of the commission contemplated by the Act is a finality as far as the courts are concerned, the statute is an injury instead of a boon to the miner. If, however, the permit is such a finality, and the Act is declared constitutional in such a case as the above, then the farmer and the State will, instead of going into the courts, have to submit to the jurisdiction of the commission equally with the miner, and the present threatened interminable litigation would be at an end. The sooner the question is conclusively settled the better, if there is to be any practical resumption of hydraulic mining in the basins of the Sacramento and San Joaquin Rivers.

In the basins of the Klamath and the Trinity, on the other hand, hydraulic mining is happily free. Nature, that has handicapped the industry in one section of the State, has favored it in another. These rivers are non-navigable, and their banks for the most part precipitous. In these river basins the only foe the industry has to contend with is the occasional blackmailer. The courts have, however, mitigated the power of these people for evil in two well-considered decided cases. The rule of the decisions with reference to hydraulic mining or navigable streams is separated by a district cleavage from the rule with reference to non-

navigable running streams. Judge Field, always the friend of mining, in a decision of the Supreme Court of the United States (Atchison vs. Peterson, 20 Wallace, 507), upheld the refusal of the lower court (in Montana) to issue a writ of injunction where a prior appropriator of water claimed his water was injured by tailings from a hydraulic mine, pointed out the extreme reluctance that should guide courts in the issuance of this writ, and held that the question whether, upon a petition or bill, asserting the prior rights of the first appropriator have been invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend on the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations.

Nor is the adjoining mine owner permitted to become a dog in the manger. The Supreme Court of this State on March 18, 1896, rendering its decision in the case of Jacob vs. Day, (111 Cal. 571), held that the use of water for the purpose of carrying off the tailings, and the construction of a ditch to aid therein, are as essential to the successful conduct of hydraulic mining, as is the first use to which the water is put in washing down the natural bank; and that the title to an adjoining mine passes under patent from the United States subject to the easement of the right of way for a ditch used, in accordance with local mining customs, as a tailrace from a hydraulic mine across the patented ground prior to the patent under the provisions of sections 2339 and 2340 of the Revised Statutes of the United States. That the easement for the tailrace of a hydraulic mine is not an easement for drainage within the meaning of section 2338 of the Revised Statutes of the United States, excluding easements for drainage from the purview of the act of Congress; but it is a right to the use of water for mining purposes and for the construction of ditches for such purposes within the meaning of sections 2339 and 2340 of said statutes. That an ease-

ment must be used in such a manner as to impose as slight a burden and damage as possible; but where a tailrace of a hydraulic mine is an easement upon patented mining ground, the fact that the running of tailings through the tailrace in the ordinary course of mining caused a small portion of the ground alongside of the ditch to cave down and wash away, and caused the tailrace to cut farther into the bedrock, but without material and appreciable injury to the plaintiff, does not entitle the owner of the patented ground to an injunction.

While the law of mining has through enactment and decision gradually become settled, until there remains but comparatively few doubtful points to be still construed, and but few amendments to better the legislation we already have, mining itself in the great ledges of California is little more than begun. It is true that, except where some ancient river channel is occasionally found, the days of the placers are passing with the romance and the glamour of the Pioneers. Quartz mining is destined, however, to be a permanent industry of the State. New men, new methods, and increased facilities for operations have made of it a recognized business instead of a gamble. The history of the law of mining in the future will more and more partake of the general features incident to litigation growing out of other industries, and the element of uncertainty will be confined more and more to that element of uncertainty found in all litigation; that which is produced by the shifting sands of evidence.

—JOHN F. DAVIS.

Jackson, Cal., Dec. 9, 1901.