A TREATISE

ON THE

AMERICAN LAW RELATING TO MINES AND MINERAL LANDS

WITHIN THE

PUBLIC LAND STATES AND TERRITORIES

AND

GOVERNING THE ACQUISITION AND ENJOYMENT OF MINING RIGHTS IN LANDS OF THE PUBLIC DOMAIN

BY

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Of the San Francisco Bar

THIRD EDITION

IN THREE VOLUMES

VOLUME I

"I hold every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereto."

Bacon's Tracts.

"Et opus desperatum, quasi per medium profundum euntes, cœlesti favore jam adimplevimus."

—From Dedication of Justinian's Institutes.

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PREFACE TO THIRD EDITION.

In the general conflagration following the San Francisco earthquake of April, 1906, the plates and stock in hand of the second edition of this treatise, as well as the author's private library, were destroyed. It was the desire of the publishers at that time that the second edition should be reprinted, but they were dissuaded from this course by the author's promise that he would, when the opportune time should arrive, prepare for publication a new edition which would give to the profession the latest expression of the courts and the law-making bodies on the many important subjects embraced within the scope of the work.

Since the second edition appeared a number of important questions have been settled which were theretofore involved in some uncertainty, and new ones have arisen and been adjudicated. There has been a marked change in governmental policy, evidenced by the various national conservation measures, particularly with reference to lands containing the nonmetallic minerals, such as coal, oil, gas and phosphates. These circumstances, together with the courteous and cordial reception of the former editions accorded by both the Bench and Bar, encourages the author to believe that the time has arrived for the new edition to make its appearance. It is therefore presented in the hope that it will meet with the approval of the profession, and serve as an aid to the solution of the many and intricate problems arising out of the mining and cognate laws.

It is not only proper but just that I should take this opportunity of publicly expressing my appreciation of the conscientious, painstaking and able assistance I have received from my office staff—the young men who while engaged with me in somewhat exacting professional activities have found the time and the spirit to contribute to the ultimate bringing

out of this edition. These are entitled to share in whatever success the work may have. Among those deserving special mention and my sincere gratitude are William E. Colby, Robert M. Searls, Emil Pohli, Grant H. Smith, Edward W. Rice, Russell T. Ainsworth, and Samuel Spring. Probably the larger compensation enjoyed by all of us who have been associated in the work has been the joy of laboring together for a common purpose in a meritorious cause, and guided only by a sincere desire to aid the profession to which we all owe so much—to state the law as we have found it without fear, favor or prejudice.

For many of the illustrations supplied for this edition the author expresses his acknowledgment to Mr. E. C. Uren, M. E., and Curtis Lindley, Jr.

CURTIS H. LINDLEY.

San Francisco, January 5, 1914.

PREFACE TO SECOND EDITION.

A second edition of this treatise seems opportune. The original edition was not stereotyped and has been out of print for three years. Since the work first appeared, some questions of large importance have been passed upon by the courts, requiring in some instances modification, in others elaboration of the text. The publishers report a constant demand for the work. These considerations have induced the author to present this edition, in the hope that it will measurably, at least, meet the desires of the profession at whose hands the former one was accorded so gracious a reception.

The work has been entirely revised, and in some of its parts rewritten. The original section numbers have not been changed. The new adjudications have been assimilated to the old sections, and where new subjects have been incorporated, supplemental ones have been appropriately grafted into the treatise without disturbing the general plan of arrangement or the logical sequence of the sections. Wherever the subject under consideration would seem to justify or require it, additional diagrams and illustrations have been utilized. In the citation of cases in the notes to the text the official report is given, followed by a reference to the American Reports, American Decisions, or American State Reports, if the case cited appears in any of this series. Also, the report of the case in the National Reporter System. In the table of cases will be found a reference to all standard reports where the case reappears.

The author desires to publicly express his obligations to those whose assistance have enabled him to present the work in its present form—to Mr. Ross E. Browne, M. E., for his collaboration and illustrations on the subjects of definitions of mining terms employed in the acts of congress, and identity and continuity of veins involved in the exercise of the extralat-

eral right; to Mr. Myron A. Folsom, of the Spokane Bar; Messrs. Henry M. Hoyt, B. L. Quayle, and C. S. Chandler, of the San Francisco Bar, all of whom are entitled to the author's grateful acknowledgment for their patient and intelligent assistance in many of the laborious details involved in the preparation and publication of the treatise. The author is also indebted to many members of the Bar in the mining states and territories for valuable suggestions and criticisms, to each of whom he returns his sincere thanks. In submitting this edition to the profession the author also desires to express his sense of obligation to the publishers for their uniform kindness and consideration, and for their painstaking effort to present the treatise in a form commensurate with the importance and dignity of the subject.

CURTIS H. LINDLEY.

San Francisco, May, 1903.

PREFACE TO FIRST EDITION.

The United States cannot be said to possess a National Mining Code, in the sense that the term is used and understood among the older nations of the earth.

The system of rules which sanctions and regulates the acquisition and enjoyment of mining rights, and defines the conditions under which title may be obtained to mineral lands within the public domain of the United States, is composed of several elements, most of which find expression in positive legislative enactment. Others, while depending for their existence and application upon the sanction of the general government, either express or implied, are in a measure controlled by local environment, and are evidenced by the expressed will of local assemblages embodied in written regulations, or rest in unwritten customs peculiar to the vicinage.

American mining law may therefore be said to be found expressed—

(1) *In the legislation of congress;*

(2) *In the legislation of the various states and territories supplementing congressional action, and in harmony therewith;*

(3) *In local rules and customs or regulations established in different localities not repugnant to federal legislation, or that of the state or territory wherein they are operative.*

This system, as thus constituted, is deemed national only in a restricted sense. As a rule of property, it has no application or force in many of the states of the Union.

Generally speaking, its operation is limited geographically to the area acquired by the general government by cession from the original states, or by treaty with or purchase from foreign powers subsequent to the organization of the general government, or perhaps, more logically stated, its operation is coextensive with the area of the public domain, the primary ownership and right of disposal of which resides in the general government.

It does not seek to regulate or control mines or mining, within lands held in private ownership, except such only as are acquired directly from the government under the mining laws, and then only forming a muniment of the locator's or purchaser's title, and measuring his rights.

It does not require the payment of either tribute or royalty as a condition upon which the public mineral lands may be explored or worked.

It treats the government simply as a private proprietor holding the paramount title to its public domain, with right of disposal, upon such terms and conditions, and subject to such limitations, as the law-making power may prescribe.

The national government acquired no rights of property within the present boundaries of the thirteen original states; nor in the states of Vermont, Kentucky, Maine, or West Virginia, which were severally carved out of territory originally forming a part of some one of the original states; nor in Texas, as by the terms of its admission into the Union the state retained all the vacant and unappropriated public lands lying within its limits, for the purpose of liquidating its debt contracted while it was an independent republic.

The entire area of Tennessee was originally public domain, but the United States donated the same to the state, after deducting the lands necessary to fill the obligations in the deed of cession of North Carolina.

In Arkansas, Illinois, Missouri, Iowa, Michigan, Minnesota, and Wisconsin, lands of the government containing the baser metals (lead and copper) were ordered sold under special laws, prior to the discovery of gold in California.

By acts of congress, passed at different times, Alabama, Michigan, Wisconsin, Minnesota, Missouri, and Kansas were excepted from the operation of the general mining laws.

The system is inoperative in Oklahoma, as by congressional law all lands within that territory are declared to be agricultural.

With the exception, perhaps, of lands containing deposits of coal, and some of the baser metallic substances, the system is practically confined in its operation to those states and

territories lying wholly or in part west of the one hundredth meridian, embracing the states of California, Colorado, Oregon, Washington, Nevada, Idaho, Montana, North Dakota, South Dakota, Wyoming, and Utah, the territories of Arizona and New Mexico, and the district of Alaska. These comprise the precious metal bearing states and territories of the "Public Domain."

As thus defined and limited, "American Mining Law" is the subject of this treatise.

While in the treatment of the subject, and in the discussion of the origin and growth of the system, as we understand it, we shall at times encounter the earmarks of an older civilization and find lodged in what we might term a primitive custom, the experience of ages, yet wherever its rules depart from the doctrine of the common law, the system, as such, is of recent birth and modern development. It is an evolution from primitive and peculiar conditions, a crystallization of usages which do not appeal to antiquity for either their force or wisdom.

It is the principal design of this work to treat of this system as it is at present constituted. But as it is in itself an evolution out of antecedent and somewhat complex conditions, some space will be devoted to a consideration of an historical nature concerning the policy of the government in dealing with its mineral lands prior to the enactment of general laws affecting them, and to trace the growth of the system through its various stages of development.

As an appropriate introduction to a treatise of this nature, the author has inserted a chapter epitomizing the different systems of mining jurisprudence in force at different periods in the countries from which the United States acquired its public domain. We may reasonably expect to find in the growth and development of our own system the influence of those laws. It has also been deemed advisable to insert a brief review of the systems adopted in the states of the Union wherein the federal government acquired no property, and where the regulation of the mining industry falls exclusively within the jurisdiction of state legislation.

This comparative review of the mining laws, foreign and state, will at least be of historical interest, if it should serve no other or higher purpose.

As state and territorial legislation supplementing the acts of congress is permitted, if not in fact contemplated, by the federal laws, careful consideration will be given to these local statutes and the decisions of courts in construing them. The value of a decision as a precedent often depends on local conditions. The legitimate scope of this permissive local legislation is a fruitful subject of controversy.

The existing legislation of each state and territory supplementing the federal laws, together with references to legislation on cognate subjects, will be found in the appendix, with citations under each section indicating where the subject matter has been discussed and generally treated in the text.

The appendix also contains the various acts of congress upon the subject of mineral lands, and the regulations of the land department, with back references to the text; also such forms as in the author's judgment might be serviceable to the profession.

In citing authorities the author has adopted the rule of citing the case from the original report only; but in the table of cases will be found the date of the decision, and a citation to every standard report, including the "National Reporter" system, wherein the case appears.

Realizing the importance of a comprehensive and exhaustive index, the author has himself undertaken the work of its preparation.

While the treatise is in the main devoted to a consideration of the federal mining system, to meet the general expectation of the profession we deem it advisable to devote some space to cognate subjects, including rights and liabilities arising out of the conduct of mining ventures, mining partnerships, cotenancy, and obligations flowing from contractual relation.

The necessity for a comprehensive treatise on American mining law is conceded. The literature on this branch of jurisprudence is limited. Most of the works which have been

presented to the profession, while possessing great merit, have not attempted a systematic or philosophical treatment of the subject.

The preparation of a work which will fulfill the requirements of the profession and prove measurably satisfactory, is a matter of great moment, involving much time and patient labor.

While not anticipating that the result of his efforts will fully meet the wants of the profession, the author expresses a hope that it will be found of value to those who are interested in the study of the many intricate questions arising out of the mining laws.

When in the preparation of the text he has been instructed or guided by the original work of others, it has been the aim of the author to give due credit in the appropriate place. Yet he has derived so much benefit and assistance in so many ways from various authors and writers upon mining subjects, that he deems it a duty as well as a pleasure to here specifically express his acknowledgments.

Professor Rossiter W. Raymond, lawyer, scholar, and scientist of national renown, has contributed in a marked degree to the literature on mining subjects. His extended experience in the field of practical mining, his connection with much of the important mining litigation in the west, his thorough knowledge of the ever-varying geological conditions, to which are to be applied the unyielding terms of congressional laws, have made him pre-eminent in the field of mining literature. His reports as Commissioner of Mining Statistics abound with fruitful suggestions, and contributed in no small degree to the adoption of the act of 1872. His monograph, "Relations of Governments to Mining" (in "Mineral Resources West of the Rocky Mountains," 1869); his article on "Mines" (appearing in Labor's "Cyclopedia of Political Science"); his numerous papers read before the American Institute of Mining Engineers, notably, "Law of the Apex," "Lode Locations," "End-Lines and Side-Lines," "The Eureka-Richmond Case"; and his occasional contributions to the "En-

gineering and Mining Journal," have afforded the author great and valuable aid.

Professor Raymond's immediate predecessor in the work of collecting Mining Statistics, Mr. J. Ross Browne, rendered valuable service to the mining industry, and his reports to the government contain much that is valuable and important, giving as they do the early history of mining in the west, and the customs, rules and regulations of miners, which formed the basis of our first mining statutes.

The author has also derived great assistance from previous works on the subject, notably "Mining Claims and Water Rights," by Hon. Gregory Yale, the pioneer work on the subject of American mining law; "Mining Rights in the Western States and Territories," by Hon. R. S. Morrison, of the Colorado Bar; Weeks on "Mineral Lands," Copp's "U. S. Mineral Lands," and Wade's "American Mining Laws."

As the closing chapters of the work were being printed, the "Mineral Law Digest," of Messrs. Clark, Heltman, and Consaul, a conscientious and valuable contribution to mining literature, made its appearance.

The author is under special obligations to the Hon. Wm. H. DeWitt, late judge of the supreme court of Montana, Edwin Van Cise, Esq., of Deadwood, South Dakota, Hon. Jacob Fillius, and Harvey Riddell, Esq., of the Colorado Bar, for many valuable and timely suggestions.

The numerous diagrams illustrating the important subjects of "Dip" "Strike," and the "Extralateral Right," are the handiwork of Mr. J. W. D. Jensen, of San Francisco, to whom all credit is due. These figures, except those used for hypothetical purposes, were all reduced by scale from officially authenticated maps and surveys.

With these grateful acknowledgments, the author submits his work to a critical but ever-indulgent profession.

CURTIS H. LINDLEY.

San Francisco, 1897.

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MINING LAWS OF FOREIGN COUNTRIES.

§ 1. **Introductory.**—To the student of the system of mining laws in force in the United States, a comparative review of the mining jurisprudence of the different countries of the world is not of controlling importance. The evolution and development of the American system have their parallels in the history of older nations; other countries have recognized and established by written codes the customs of mining communities, and it is by no means difficult to discover in some of the details of our own system the earmarks of ancient mining regulations; yet in construing our laws and applying them to existing conditions we will receive but little material aid from the experience or legal literature of other countries. While this is true, we must consider that the common law of England was

to a certain extent grafted into our legal system when we separated from the mother country, and was, and still is, the rule of action in the absence of legislation,[1] and that, at least in the earlier history of our government, English precedents were of controlling force. In this light, not only the English common law, but the rules governing the subject of mines in Great Britain, are worthy of at least passing comment.

When we also consider that, approximately, all of our public mineral domain within the states and territories subject to the general federal mining laws was originally acquired by treaty or purchase from France and Mexico, wherein the civil law was the basis of jurisprudence, and that at the time of cession both of these nations had well-established and defined codes of mining law, it is apparent that a brief presentation of the laws of these ceding nations will not be out of place. We may confidently expect to find in the growth and development of our own system the influence of these laws. These considerations justify the author in presenting such a brief outline of the mining jurisprudence of these several countries as will enable us to note the theories of government upon which the laws are based, their salient features, and to observe to what extent, if any, they have left their impress upon the American law of mines.

§ 2. **Property in mines under the common law.**—As a general rule, under the common law, minerals were the property of the owner of the land, the property in the surface carrying with it the ownership of everything beneath and above it.[2]

1 Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 60, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; Doe v. Waterloo M. Co., 54 Fed. 935, 938.

2 Blackstone's Commentaries, p. 18; Arundel on Mines, p. 3; Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 60, 18 Sup. Ct. Rep.

Therefore, the ownership of the surface was the best *prima facie* title to the ownership also of the mines.[3]

This *prima facie* ownership continued until rebutted, by showing either—

(1) That the land contained "royal mines"; or—

(2) That it was subject to some particular custom that defeated the *prima facie* ownership, as in the case of the tin mines of Cornwall and Devon and the lead mines of Derbyshire; or—

(3) That the ownership of the mines and minerals had become in fact, from divers causes, several and distinct from the ownership of the soil and surface.[4]

§ 3. **Royal mines.**—By the term "royal mines" was meant mines of gold and silver. These belonged exclusively to the crown, by prerogative, although in lands of subjects. In this respect, the rule was the same as under the civil law. It was at one time contended that mines or mineral deposits containing the baser metals in combination with either gold or silver were royal mines. This contention, however, was set at rest by statutes enacted during the reign of William and Mary,[5] wherein it was declared that no mine should be deemed royal by reason of its containing tin, copper, iron, or lead in association with gold or silver. Thus, those mines only came to be classed as royal in which were found the precious metals in the pure state. There is no authentic record of any such ever having been known to exist in England, unless we ac-

895, 43 L. ed. 72; Montana Ore Purchasing Co. v. Boston & M. C. & S. M. Co., 27 Mont. 536, 71 Pac. 1005, 1007.

[3] Bainbridge on Mines, 5th ed., p. 109; MacSwinney on Mines, p. 27; Rogers on Mines, p. 247; Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 60, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; Bogart v. Amanda Cons. G. M. Co., 32 Colo. 32, 74 Pac. 882, 883.

[4] Bainbridge on Mines, 4th ed., p. 27.

[5] 1 William and Mary, ch. 30; 5 William and Mary, ch. 6.

cept the traditional accounts of the Roman invasion as establishing their existence.

In certain reigns the crown claimed a right to mines of alum and saltpeter; but the asserted prerogative was rarely exercised, and then only in an arbitrary way.[6]

Mines and minerals of all descriptions underlying the beds of navigable streams belonged to the crown.

As to mines under the sea or its shores, generally speaking, the rule of proprietorship of the soil obtained. The crown owned the sea-bottom adjoining the coasts of the United Kingdom and that part of the seashore from low-water mark to the line of the neap tides. Mines underneath the seashore belonged *prima facie* to the littoral owner or to the crown, as the superjacent soil belonged to the one or the other.[7]

The right of the crown to royal mines, as a branch of the royal prerogative, is said to have had its origin in the king's right of coinage.[8] But, as Mr. Bainbridge observes, it is more probable that the royal right arose in Roman times, and was transmitted to successive sovereigns. As regards imperial mining rights in mines of gold and silver, there is no difference between the Roman or civil law and the English mining laws.

A mine royal was not an incident inseparable from the crown, but might be severed from it by apt and precise words. But a grant by the crown of lands would not pass gold or silver mines, unless they were expressly named, and this applied to a grant of lands in the colonies.[9]

6 Bainbridge on Mines, 4th ed., p. 133.

7 MacSwinney on Mines, pp. 30, 31; Bainbridge on Mines, 4th ed., p. 171; Rogers on Mines, p. 178.

8 Bainbridge on Mines, 4th ed., p. 120.

9 MacSwinney on Mines, p. 40.

Briefly stated, the regalian right to mines, as recognized in England, was confined to those of the precious metals—gold and silver. The baser substances belonged to the owner of the soil, except in certain localities where immemorial custom had modified the rule.

§ 4. **Local customs.**—In certain parts of England and Wales so-called "local customs" were recognized which modified the general rule of the common law.[10] In these excepted localities the ownership of the baser mineral substances continued in the crown, subject to certain so-called customary rights in the subject, which customary rights have been from time to time recognized and defined by statute.[11]

These excepted districts were the Forest of Dean (including the hundred of St. Briavels), in the county of Gloucester, certain parts of Derbyshire, Cornwall, and Devon, and other places of minor importance.

These customs undoubtedly had their origin during the Roman occupation; but they were recognized and established by acts of parliament upon the theory that they existed by virtue of some antecedent grant or concession made by the crown. These customs are of more than passing interest, not only on account of the antiquity of their origin, but because it has been asserted by early writers on the federal mining system that they afforded to the early miners of California, in many particulars, valuable precedents to guide them in framing their primitive local rules. A brief consideration of them will not be out of place.

§ 5. **The tin mines of Cornwall.**—The right of working tin mines was conferred upon all "free tin-

[10] Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 60, 18 Sup. Ct. Rep. 895, 43 L. ed. 72.

[11] Bainbridge on Mines, 4th ed., p. 113.

ners," upon the render of a certain proportion of the minerals raised to the owner or lord of the soil. This proportion was called "dish," or "toll," tin, and was usually one-fifteenth of the product. Any tinner was allowed to "bound" any unappropriated waste lands, or inclosed lands which had formerly been waste lands, subject to the custom. He "bounded" the same by delivery of toll tin to the lord of the soil. A tin bound generally consisted of about an acre of land, the four corners of which were marked by turfs or stones at each corner. A side bound of triangular form was also allowed.[12]

The bounder was required to proclaim his bounds at the next ensuing stannary courts, announcing the limits of his bounds and the names of his coadventurers, if any. This proclamation was repeated at the two ensuing stannary courts; and if no opposition appeared, a writ of possession issued from the court commanding the bailiff to put him in possession. Possession was then delivered, and the tinner became entitled to search for and extract ore.

Bounds were required to be annually renewed, by re-marking the corners. The tinner failing to renew his bounds within the year might, however, be restored to his estate by renewing them at any time before others should enter and bound.[13]

Tin bounds might be sold or demised, were frequently farmed out for a render called "farm tin," and were liable to the payment of debts and legacies. The estate was in the nature of a chattel real, and passed to the executor.[14]

12 Bainbridge on Mines, 4th ed., p. 149.

13 MacSwinney on Mines, p. 431.

14 Id., p. 432.

If the owners of bounds left them unworked for a year, other tinners might enter and work them, if they gave the owners notice of their desire to work, and the owners did not within two months resume operations.

A bounder was not compelled to prosecute his work continuously with absolute strictness. He was allowed a reasonable time for consideration, preparation, and selection of places; but he should not cease to pursue in good faith his original object. If he did, the owner of the soil might resume his exclusive rights.[15]

Stannary courts were local tribunals, existing from time immemorial, and recognized by royal charters. They were courts of record, with both common law and equity jurisdiction, wherein controversies concerning miners or their property rights were adjusted.

§ 6. **Tin mines in Devonshire.**—Tin-bounding in Devonshire was governed generally by customs similar to those of Cornwall. The estate, however, of the bounder was that of fee simple, and descended to the heir at law.[16]

§ 7. **Coal, iron, and other mines in the Forest of Dean and the hundred of St. Briavels.**—The "free miners" within the hundred of St. Briavels (which embraces the Forest of Dean) were entitled by immemorial custom to have granted to them "gales" of the mines of coal and iron and leases of the quarries of stone within the lands of the crown, and within inclosed lands under certain restrictions. By the term "free miner" was meant all male persons born and

[15] MacSwinney on Mines, p. 432.

[16] Id., p. 438.

abiding within the hundred, of the age of twenty-one and upward, who had worked a year and a day in the mines within the hundred.

All free miners are required to register with the gaveler of the forest or his deputy, the gaveler being the representative of the crown.

A "gale" was the name given to the holding of mines of coal or iron and quarries of stone, the free miner acquiring a gale being styled the "galee," and the rentals paid were called "galeage."[17]

A gale was acquired by application in writing to the gaveler, setting forth the situation of the proposed gale and the name of the vein proposed to be worked. After obtaining the approval of the commissioner of the woods, the gaveler set out the metes and bounds, and a grant thereof was made and entered in the gaveler's book, and subsequently enrolled in the office of land revenue.

The estate thus granted to a galee was in the nature of an estate in fee simple, and descended to the heir.[18]

The galee was obliged to work in a fair, orderly, and workmanlike manner, and not to desist from working for five years at any one time after the vein in question had been gained.[19]

Gales might be assigned and disposed of by deed or will. Transfers were required to be entered within three months in the books of the gaveler, and unregistered transfers were void. Nonpayment of galeage and failure to comply with the rules subject to which gales were held worked a forfeiture.

§ 8. **The lead mines of Derbyshire.**—The customs recognized and established in certain portions of Der-

17 MacSwinney on Mines, p. 482.
18 Id., p. 483.
19 Id., p. 489.

byshire were confined to lead mines. Under these regulations, any subject of the realm might enter and search for ore in all lands and places within the district, excepting churches, burial grounds, dwelling-houses, and highways. The first discoverer of a vein was entitled to have assigned to him two "meers" of ground. If the vein was a "rake" vein,—that is, one having an inclination from the horizontal,—the meer was from twenty-seven to thirty-two yards, measured along the vein. If the vein, or stratum, was bedded, or flat, the meer was fourteen square yards, or thereabouts. The meers were measured and set out by the "barmaster," an official who acted as an agent of the crown or its lessees, and also looked after the interest of the miner and enforced the customs of the manor.

The miner was entitled to so much surface land in connection with his vein as was thought necessary by the barmaster and two of the grand jury, for the purpose of laying rubbish, dressing ore, buddling, etc. This was called the "quarter-cord," as originally in the "Low Peak" it consisted of a quarter of a meer in breadth.

Whether this was to be measured from the middle of the vein or the walls was a mooted question.

Before any ground was set apart, however, ore was required to be raised and the meer freed. "Freeing the meer" was accomplished by delivering to the crown or its lessee the first "dish" of ore.

This dish, called the "freeing dish," was provided by the barmaster, and was of sufficient size to contain fifteen pints of water.

In like manner, each successive meer allotted on the vein must have been "freed." This ceremony was equivalent to the livery of seisin, and without it title did not pass.

The "duties," or royalties, exacted from the miner were called "lot and cope." "Lot" was usually one-thirteenth part of all the ore raised, payable to the crown or its lessees.[20] "Cope" was four pence for every load of ore, a load consisting of nine dishes.

It was always necessary that the mine should continue to be fairly worked. Originally, if it was capable of being worked, and was suffered to remain idle for several weeks, the barmaster was required to "nick the spindle" once a week—the spindle being a stake fixed in the ground, marking the boundaries of the meer, and the nick was a notch. An examination of the spindle disclosed the number of notches, and the mine became forfeited a few weeks after the third "nicking," unless the warning was heeded and work resumed. This ceremony was equivalent to an entry after breach of condition, by which the lord or lessor was restored to his former estate. Under the regulations now in force, forfeiture is worked by notice to resume given by the barmaster. If resumption does not take place within three weeks, the claim is forfeited, and may be assigned by the barmaster to any person willing to work it.

The right of possession and enjoyment was guaranteed so long as the regulations were complied with.

Once freed, and kept in lawful possession, the mine was declared to be an estate of inheritance liable to dower and capable of absolute disposition.[21]

While we do not find anything in the authorities expressly defining the extent to which the miner might follow his "rake vein" in depth, it is quite manifest that the vein was the principal thing acquired, and that the surface ground allotted by the barmaster was

20 These duties were usually farmed out.

21 Bainbridge on Mines, 4th ed., p. 141.

a mere incident, and that the miner might pursue his vein on its downward course, even under excepted lands, provided no injury resulted to the surface. The working might be suspended or regulated by the steward and grand jury.[22]

A quaint little volume published in 1681 by Thomas Houghton, entitled "The Compleat Miner," dealing with "the Liberties, Laws and Customs of the Lead-Mines within the Wapentake of Wirksworth in Derbyshire, etc.," throws much light on these ancient customs. The following provisions are of historical interest:

Article I. Provided that the "finder" or discoverer of any "new Rake or Vein" was entitled to have delivered to him by the Barmaster (Officer of Mines), two meers of Ground in the same Vein; each Meer in a Rake or Pipe-work containing 29 yards in length, etc.

Article II. Provided that in taking up an old Work the miner was entitled to "one meer of ground, on either side his Shaft half a meer."

Article VI. Provided that a claim could not be lawfully staked until "ore be gotten in the same ground to free it withall."

Article VII. Provided that the claim stakes or "stows" must be kept up, otherwise a forfeiture would take place.

Article VIII. Required diligence in prosecuting the work of mining.

Articles XXI–XXXII. Provided for trial of the right of possession of mining claims in the Barmoot or Miners' Court.

[22] MacSwinney on Mines, p. 509.

Article XXXV. Provided for the right of inspection of adjoining properties to enable a miner to determine the position of the Vein.

Article XXXVI. Provided that where another miner encroached on a lawful meer or claim, pretending that he was following a "cross vein, or some other thing," the party suspecting a trespass had the right to summon the Grand Jury to view the place in question, and if they found "by their best skill, the Thing in all probability, to be one and the same," the party suspected to be working wrongfully was ordered to give "security for all the ore got at the work in question, till time and workmanship make the truth appear to whom the Vein belongs."

Article XXXVIII. Provided that "if any Rake or Vein (go) cross through another Rake or Vein, he that comes to the Pee (intersection) first shall have it etc."

Article XXXIX. Provided that "when two Veins go together, parted with a Rither, that it be scarce discernible whether it be two Veins, or but one; in this case, so long as the Rither may be taken down by firing on the one side, it is to be taken and reputed but for one Vein; but in case the Rither be so thick that it can not be taken by firing on the one side, and the Veins go so asunder, for half a meer in length, then they are serviceable to the Miner, as two distinct Veins."

Article XLI. Provided that if any Miner "underbeat his neighbour's meer, and work out of his own length into another man's Ground, the party so grieved" had his remedy in damages.

These laws, based on the ancient customs prevailing in Derbyshire, are similar in so many respects to the customs and rules of the early mining districts of Cali-

fornia, that it affords some plausibility for the assertion that the Derbyshire customs played some part in determining the character of the early California mining customs. The King's Field and other similar districts in Derbyshire may be likened to our public domain, especially as it was mined prior to 1866. The mineral lands in each were open to exploration by "subjects of the realm" and "citizens" respectively.

In each case the miners made their own rules and regulations; in Derbyshire, electing their own barmaster, and in this country electing their own recorder, who exercised many of the functions of the barmaster.

In each the discoverer was usually entitled to two claims. Diligence in working and perpetuation of stakes were usual requirements in the early districts and disputes were referred to a miners' court.

The vein was considered the principal thing. The vein was measured off in length with stakes placed along the course of the vein on the surface in both jurisdictions, and the surface right incident to the vein was usually only such width on either side of the vein as was necessary for convenient working of the vein. It is also interesting to note that the common length along the vein granted in early days in California was one hundred feet, which corresponds very closely to a meer (twenty-nine to thirty-one yards) in length. More striking than any other resemblance between these customs was the extralateral feature or right to follow the vein indefinitely on the dip, but with rigid limitation as to length. The senior locator took the entire vein below its junction with another vein. Under the early customs in California and the act of congress of 1866, a locator was only entitled to the one

vein. A rival locator could locate a cross or parallel vein wherever it had existence distinct from a vein already located.

We have in these mining laws of Derbyshire the closest analogy to the theory of locating veins and the exercise of the extralateral right that prevailed in the mining regions of the west in early days that exists in any of the mining laws of the world. Any direct relation between the two systems has not been positively traced, and we are forced to resort to inference to explain the similarity. It is well known that miners from Cornwall played a prominent part in the early history of lode mining in California. It is quite possible that these ideas were brought to this country and injected into the early customs by these Cornishmen.[23]

§ 9. **Severance of title.**—Under the English law, rights of property in the surface and in the underlying mines might be shown to be in different owners. Nothing was more common than to sell or demise a piece of land excepting the mines.[24]

In like manner, the different strata of the subsoil might be shown to be the subject of different rights.[25]

And there might be also in one mine different minerals which were the property of different persons.[26]

Thus, one person might be entitled to the iron, and another to the limestone. One seam or stratum of coal, if in the same lands, might belong to a third person, and another distinct seam to a fourth owner.[27]

23 Yale on Mining Claims, p. 58.

24 Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 60, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; Smith v. Jones, 21 Utah, 270, 60 Pac. 1104, 1106.

25 MacSwinney on Mines, p. 27; Cox v. Glue, 5 Com. B. 549; Arundel on Mines, p. 5; Bainbridge on Mines, 4th ed., p. 28.

26 Arundel on Mines, p. 5.

27 Bainbridge on Mines, 4th ed., p. 28.

When the surface and underlying mines or the different strata of the subsoil were differently owned, they were separate tenements, with all the incidents of separate ownership [28]—a distinct possession and distinct inheritance; [29] and the mines of each stratum might be held in fee simple,[30] or fee tail,[31] or otherwise, as in the case of surface property.[32]

§ 10. **Existing English laws.**—The legislation in England on the subject of mines, except as to the particular districts heretofore noted, is limited, generally speaking, to acts providing for official inspection and regulations concerning manner of working. England has no general mining laws. Legal questions governing the ownership of mines and minerals have been determined upon the general principles of the common law, except in the localities where ancient customs have been recognized and established by acts of parliament. As we have seen, under the common law, generally speaking, the owner of the soil is the owner of the minerals. The owner of the minerals may deal with them as he pleases, subject only to the general rule governing all classes of property, that he shall injure no one else.

[28] MacSwinney on Mines, p. 27 (citing Rombotham v. Wilson, 8 E. & B. 142; Hamilton v. Graham, L. R. 2 Sc. & D. 166; Seaman v. Vaudray, 16 Ves. 392; Guest v. East Dean, L. R. 7 Q. B. 377).

[29] Bainbridge on Mines, 4th ed., p. 28; Cullen v. Rich, Bull. N. P. 102; 2 Strange, 1142, *sub nom.* Rich v. Johnson. See, also, Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 99 Pac. 483, 486, 20 L. R. A., N. S., 211.

[30] Stoughton v. Leigh, 1 Taunt. 402.

[31] Port v. Tuston, 2 Wils. 172.

[32] MacSwinney on Mines, p. 27.

A discussion of the law in the United States on the subject of severance of title will be found in a later portion of this treatise (§§ 812–814).

§ 11. Mines under the civil law.—Under the Roman law, the ownership proper of all lands was vested in the state. This was the *dominium strictum.* The individual subject could acquire the possessory ownership, with the right to extract minerals, upon the payment of royalties. This was the *dominium utile.*

Under a decree of the Emperor Gratian (A. D. 367–383), the right of the crown in mines of gold and silver was exclusive; that is, the *dominium strictum* and *dominium utile* were united in the state. As to other mines, the crown had a right to receive a proportion of the produce, which proportion, or the measure thereof, was called the *canon metallicus.*

This decree of the Emperor Gratian was embodied in an imperial constitution, which was recognized and adopted by subsequent emperors, and thus became the expression of the measure of Roman imperial rights in mines.[33]

Gamboa, in his commentaries on the mining ordinances of Spain, thus states the rule of the civil law:

> By the civil law, all veins and mineral deposits of gold or silver ore, or of precious stones, belonged, if in public ground, to the sovereign, and were part of his patrimony; but if in private property, they belonged to the owner of the land, subject to the condition, that if worked by the owner, he was bound to render a tenth part of the produce to the prince as a right attaching to his crown; and if worked by any other person, by consent of the owner, the former was liable to the payment of two-tenths, one to the prince and one to the owner.
>
> Subsequently, it became an established custom in most kingdoms, and was declared by the particular laws and statutes of each, that all veins of the precious metals, and the produce of such veins, should vest in the crown, and be held to be a part of the patrimony of the king or sovereign prince.[34]

[33] Bainbridge on Mines, 4th ed., p. 116.

[34] Commentaries of Gamboa—Heathfield Trans., vol. i, p. 15.

Mr. Arundel Rogers thus states his conclusions from the various authorities consulted:

> Under the civil law, in its purest times, gold, silver, and other precious metals usually belonged to the state, whilst all other minerals, mines, and quarries belonged to the owner of the soil, subject in some cases to a partial, and in others to a more general, control of the *fiscus* (treasury).

This feature of the civil law underlies most of the continental systems, as well as those of the Spanish-American republics. It is the regalian doctrine, which also prevails as to royal mines (gold and silver), under the common law of England.[35]

The equitable estate, the *dominium utile*, which was vested in the subject, was permanent in its character, and has been defined as an ownership which the possessor could describe and claim as such against all the world, save and except his lord the emperor.

This estate was analogous to the tenancy by copyhold under the English common law, the tenant being seised thereof as against all the world, saving and excepting only his lord.[36]

It also bears a striking resemblance to the tenure by which a mining claimant holds a perfected but unpatented mining location upon the public mineral lands of the United States.

The theory of the civil law is thus clearly stated by Mr. Halleck:

> All continental publicists who have written upon the subject lay down the fundamental rule, that mines, from their very nature, are not a dependence of the ownership of the soil; that they ought not to become private property in the same sense as the soil is private property; but that they should be held

[35] Bainbridge on Mines, 4th ed., p. 117.

[36] Bainbridge on Mines, 4th ed., p. 200.

and worked with the understanding, that they are by nature public property, and that they are to be used and regulated in such a way as to conduce most to the general interest of society.[37]

§ 12. Mining laws of France.—From the earliest times, the French law placed all mines, whether in public or in private lands, at the disposition of the nation, and made the working of them subject to its consent and to the surveillance of the government.[38]

The French law divided the subject of mining into three classes—*mines*, *minières*, and *carrières*.

Mines, properly speaking, were those wherein the substances were obtained from underground workings, the extraction of which required extensive development and elaborate machinery. In the language of De Fooz,—

> Mines of this kind constitute a part of the domain of the state: they are to be ranked as the property of society, and should be confided to the sovereign authority; and this authority should have a general control over their extraction. In this consists the system of the regalian rights of mines.[39]

Taking the act of April 21, 1810, as the basis of the French law, as it existed during the period presently under consideration, we give the following outline of its general features:

Mines.—Those were considered as mines which were known to contain, in veins, beds, or strata, gold, silver, platinum, quicksilver, lead, iron (in veins or beds), copper, tin, zinc, bismuth, arsenic, manganese, antimony, molybdenite, plumbago, or other metallic substances; sulphur, coal, fossilized wood, bituminous

[37] Introduction to De Fooz on the Law of Mines, p. x, § 2.

[38] Id., p. xv, § 8.

[39] Halleck's De Fooz on the Law of Mines, p. 10.

substances, alum, or sulphates. To this category, by law of June 17, 1840, salt springs and salt mines were added.

Mines could only be worked in virtue of an act of concession, which vested the property in the *concessionaire*, with power to dispose of and transmit the same like other property, except that they could not be sold in lots or divided without the consent of the government, given in the same form as the concession. Royalties were payable to the owners of the surface and to the government. No one could make searches for the discovery of mines in land which did not belong to him, unless with the consent of the proprietor of the surface, or with the authorization of the government, subject to a previous indemnity to the proprietor and after he shall have been heard. The proprietor might make searches without previous formality; but he was required to obtain a concession before he could establish a mine-working. From the moment a mine was conceded, even to the proprietor of the surface, this property was distinguished from that of the surface, and was thereafter considered as a new property. Concessions were obtained by petition, addressed to the prefect, who registered it, and posted notice thereof for a period of four months. Proclamations were required to be made at certain places and times at least once a month during the continuation of the postings. Investigations were required to be made by the prefect of the department on the opinion of the engineer of mines, the results being transmitted to the minister of the interior. In the absence of opposition, concessions were granted by an imperial decree, deliberated upon in council of state. The act of concession determined the extent, which was to be bounded by fixed points taken on the surface

of the soil, and by passing vertical planes from the surface into the interior of the earth to an indefinite depth. The engineers of mines exercised, under the orders of the minister of the interior and the prefects, a surveillance of police, for the preservation of edifices and the security of the soil. Royalties were payable to the government proportional to the yield, in addition to a fixed tax, called "ground tax." Forfeiture of the privilege granted by the concession resulted from a failure to comply with its terms, or from suspension of the works, if by such suspension the wants of consumers were affected, or if the suspension had not been authorized by the mining authorities.

Minières included the iron ores called alluvial, pyritous earths suitable for being converted into sulphate of iron, aluminous earths and peats, and such substances as could be worked by open pits or temporary subterranean works. The ownership of *minières* was in the surface proprietor; but they could not be worked by subterranean works except by permission. When worked by open workings, a declaration was required to be made to the prefect of the department. No royalties were paid to the government.

Carrières (quarries) included slates, building-stones, marble, limestones, chalks, clays, and all varieties of earthy or stony substances, including pyritous earths, regarded as fertilizers, all worked in open cut or with subterranean galleries.

Workings of *carrières* in open cut were made without permission, under the simple surveillance of the police. When the working was carried on by means of subterranean galleries, it was subject to surveillance as in the case of mines. No royalties were paid to the government.

The underlying principle of the French Law of Mines was the severance of the mine from the surface. As Mirabeau argued, "There is scarcely any mine which responds physically to the soil of such owner (of the surface). The oblique direction of a mine, say from east to west, touches within a short distance a hundred different properties."[40] Jousselin added: "Mines can be worked with advantage only when they are treated in mass, or in sections of a certain extent, without reference to surface boundaries."[41] The law of 1791 merely reaffirmed what was already the law of the land. Napoleon refused to adopt this idea and for some time contended "that in France mines are not subject to any regalian right," and insisted that ownership of the surface carried with it the right to what is below the surface. He was finally won over by the Council of State, which gave the matter exhaustive consideration. The enactment of the famous law of 1810 followed, which, out of respect for Napoleon's views, did not proclaim a definite public property of mines, but resorted to the fiction of a new property in mines which did not exist prior to concession. According to it, mines constitute a special creation. The proprietor of the surface has a certain right that is recognized giving him preference in the grant of a concession or by payment if he does not elect to work the mine himself. By the solemn act of governmental concession, mines become a thing totally distinct from the soil.[42]

After the concession of a mine, two distinct properties exist in the same perimeter. One composed of the surface belonging to the proprietor of the soil and

[40] De Fooz, p. 10, n. 4.
[41] De Fooz, p. 12.
[42] De Fooz, ch. iv.

which he continues to enjoy and the other, a subterranean property, which has associated with it, by virtue of a quasi expropriation of the property of the soil, that portion of the surface which is made an appurtenance to the mine as necessary for working purposes and for which loss of surface area the surface owner is entitled to compensation.[43] The act of concession fixes the perimeter within which the mine may be worked. In general this perimeter is determined by fixed points on the surface, through which are passed vertical planes. "The limitation need not necessarily follow vertical planes; there is nothing to prevent their being inclined according to the formation of the land. . . . . The government may, without doubt, make concessions by beds, but in general the land is granted from the surface to the center; that is, mining by beds is not regarded as regular."[44] While working within a zone of one hundred meters of habitation is prohibited, this has been interpreted not to prevent mine workings from being extended underneath the reserved surface areas at such a depth as not to compromise the surface structures.[45]

The concession extended only to the one mine or mineral deposit. Other concessions might be granted for mineral deposits of another nature existing within the same perimeter. Ordinarily, these were granted to the same person, and the grantee of a concession was ordinarily given a preference over others in granting extensions of his concession, and when he had established the fact that his mine extended outside of his limits, he was considered the discoverer of the mine extension accessory to his own.[46]

[43] De Fooz, sec. ix.
[44] De Fooz, p. 120.
[45] De Fooz, pp. 186, 267.
[46] De Fooz, chs. xiii, iii.

These references indicate quite clearly that the mining laws of France recognized and established a severance of the mine or vein from the surface which, for all practical purposes, was as complete and independent of the surface as in the case of our own extralateral right. In France the mine was limited by vertical boundaries marked on the surface largely for convenience and to determine the area of the surface for the purpose of computing the amount of the *redevances* or taxes payable to the surface proprietor who still retained full control over the surface, only excepting such portion as was necessary for the actual mine working. In exceptional cases, as we have seen, inclined locations or concessions were also granted.

§ 13. **Mining laws of Mexico.**—We have no immediate concern with the present mining laws of Mexico. The existing code of that republic is a substantial departure from the old order of things, and furnishes the best example of a liberal and progressive system of mining laws of any which has heretofore been adopted in any country.[47] But we are dealing with matters of history, and are called upon to consider the state of the Mexican law of mines at the time of the discovery of gold in California and the acquisition by our government of the territory ceded by the treaty of Guadalupe Hidalgo.

Upon the establishment of the independence of Mexico (1821), it adopted, in reference to mining, the laws existing previous to its separation from Spain,

[47] For an interesting and accurate synopsis of the mining laws of Mexico as they existed in 1901, the reader is referred to a monograph of Mr. Richard E. Chism, M. E., contributed at the Mexican meeting of the American Institute of Mining Engineers, November, 1901. It is published as a part of the transactions of that society. While in recent years there have been some changes in these laws, they are relatively unimportant.

with such modifications only as were rendered necessary by the alteration from a monarchical to a republican form of government.[48]

Questions concerning mines and mining rights in the republic depended, in a great measure, during the period which engages our present attention, upon the provisions of the Spanish ordinance of the 23d of May, 1783; and, in fact, until a comparatively recent period, these ordinances were still in force, and constituted the principal Mexican code on that subject.[49]

The following is an epitome of such parts of these ordinances as are germane to the present inquiry:

Nature and conditions of mining concessions.—Mines were declared to be the property of the royal crown. Without being separated from the royal patrimony, they were granted to subjects in property and possession in such manner that they might sell, exchange, pass by will, or in any other manner dispose of all their property in them upon the terms on which they themselves possessed it, and to persons legally capable of acquiring it. This grant was made upon two conditions: First, that the grantees should pay certain proportions of the metal obtained to the royal treasury; second, that they should carry on their operations in the mines subject to the provisions of these ordinances, on failure of which at any time the mines of persons so making default should be considered as forfeited, and might be granted to any person who should denounce them.

Rights of discoverer—Pertenencia.—The discoverers of new mineral districts were permitted to acquire three *pertenencias*, or claims, on the principal vein, a

[48] Rockwell's Spanish and Mexican Law, p. 21.

[49] Castillero v. United States, 2 Black, 371, 17 L. ed. 448.

pertenencia being two hundred *varas*, or yards, along the course of the vein.[50]

The discoverer of a new vein in a district known and worked in other parts was entitled to two *pertenencias*, either contiguous or separated.

Right to mine, how acquired.—The organization of district tribunals was provided for, called deputations of miners, to whom, within ten days after discovery, the discoverer should present a written statement. This statement was required to contain the discoverer's name and those of his associates, his place of birth, residence, and occupation, together with the most particular and distinguishing features of the tract, mountain, or vein discovered, all of which were noted in the registry of the deputation. Notices of this statement, its object and contents, were required to be fixed to the doors of the church, the government houses, and other public buildings of the town to secure public notice. Within ninety days thereafter, the discoverer was required to make in the vein or veins so registered an opening a yard and one-half wide and ten yards in depth, that one of the deputies, with an expert and two witnesses, might inspect it and determine the course and direction of the vein, its size, its dip, or inclination from the horizon, and the principal species of mineral found therein.

The report of the deputy was added to the registry, together with the act of possession, which must be given to the discoverer, measuring off his *pertenencias*, and requiring him to mark their boundaries. A copy of the entries in the register constituted his "*titulo de posesion*," or evidence of his possessory right.

[50] The term "claim" is here used as the equivalent of the Spanish word *pertenencia* (literally, a portion), without regard to the technical definition of the word given by some of the American courts in later years.

If during the period of ninety days any adverse claimant appeared and claimed the property, as being a prior discoverer, a brief judicial hearing was granted, and judgment given in favor of him who best proved his claim. If a question arose as to who had been the first discoverer of a vein, he was considered as such who first found metal therein, even though others might have made an opening previously; and in case of further doubt, priority of registration established a priority of right.

Denouncement of abandoned mines.—Restorers of ancient mines which had been abandoned enjoyed the same privileges as discoverers. In case of such abandoned mines, the party desiring to acquire them was called upon to present to the deputation a statement similar to that required of a discoverer, showing, in addition, the name of the last possessor and those of the neighboring miners, all of whom should be lawfully summoned. If no one appeared within ten days, the denouncements were required to be publicly declared on the three following Sundays. This meeting with no opposition, the denouncer was required within sixty days to clear and reinstate the abandoned workings to some considerable depth, or at least ten yards perpendicular and within the bed of the vein, in order that it might be inspected and the facts ascertained as required in case of original discoveries. These things being done, the *pertenencias* were measured, boundaries marked, and possession given as in other cases.

Right to denounce mines in private property.—Anyone might discover or denounce a vein, not only on common land, but also on the property of any individual, provided he paid for the overlying surface and compensated the owner of the soil for the damage

caused by exploration, the amount of such damage to be fixed by arbitration, in case of disagreement between the parties.

Rights of one not a discoverer.—One not a discoverer was prohibited from denouncing two contiguous mines upon one and the same vein; but there was no limit to the number he might acquire by purchase, gift, inheritance, or just title.

Placers.—Placers and other deposits in beds of gold and silver, precious stones, copper, lead, tin, quicksilver,[51] antimony, zinc, bismuth, rock salt, or fossils, perfect or mixed metals, bitumen, mineral tar, asphaltum, etc., might also be registered and denounced.

Foreigners and religious orders.—Foreigners were originally prohibited from working the mines; but by decree (October 27, 1823) they were permitted to supply miners with capital and hold shares (*acciones*) in the enterprise, and later (March 16, 1842), foreigners resident in the republic might acquire ownership of mines. Religious orders of both sexes were prohibited from acquiring mines, "as being contrary to the sanctity and exercise of their profession."

Extent of pertenencia—Surface limits—Rights in depth.—With reference to surface ground in connection with the vein, and the extent to which the vein might be worked, it would seem that prior to promulgation of the "new ordinances" it was "one of the greatest and most frequent causes of litigation and dissension among the miners." To avoid this, it was

[51] As to quicksilver, it was originally provided that the government should have the preferential right of working the mines, indemnifying the discoverer in some equitable way; or the discoverer might work them, but was required to deliver the product to the agents of the royal treasury, and receive therefor a stipulated price. These provisions, however, became obsolete and inoperative in Mexico.

decreed that the lateral extent of a *pertenencia* on a vein was to be regulated according to the inclination of the vein. To illustrate: A *pertenencia* was two hundred yards along the vein. The miner was to have a parallelogram two hundred yards long by one hundred yards wide, the lateral measurement to be at right angles to the former. The inspection of the preliminary work by the deputy and expert was supposed to determine the position of the vein in the earth. If it was perpendicular, the one hundred yards was to be measured on either side of the vein, or divided on both sides, as the miner might prefer. If the vein was not perpendicular,—as it never was,—the miner was allowed lateral measurement proportionally to the inclination of the vein, the maximum being two hundred yards on the square, on the declivity, or "pitch," of the vein. So that a *pertenencia* on a vein might equal, but could never exceed, "the square of two hundred level yards." Ordinarily, the miner was limited to vertical planes drawn through his surface boundaries,[52] and was therefore compelled to stop the pursuit of his vein upon reaching his bounding plane, unless the ground outside was unclaimed (*terreno virgen*), in which case he was called upon to denounce the adjoining ground.

As to placers and other kindred deposits, the size of the *pertenencias* was regulated by the district deputations of mines, attention being paid to the extent and richness of the place and to the number of applicants for the same, with preference to the discoverers.

Marking boundaries.—The *pertenencias* having been regulated by the deputation, the miner was required

[52] Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 61, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; Flagstaff S. M. Co. v. Tarbet, 98 U. S. 463, 468, 25 L. ed. 253.

to mark his boundaries by permanent stakes or landmarks such as should be secure and easy to be distinguished, and to enter into an obligation to keep and observe them forever, without being able to change them, though he may allege that his vein has varied in course or direction; "but he must content himself with the lot Providence has decreed him, and enjoy it without disturbing his neighbors." If he had no neighbors, he might alter his boundaries, with the consent and under the authority of the deputation.

Right to all veins found within boundaries of pertenencia.—The mine owner was entitled to possess not only the principal vein in the *pertenencia* denounced by him, but likewise all those which in any form or manner whatever were to be found in his property; so that if a vein took its rise in one property, and, passing on, was found in another, each proprietor was entitled to enjoy the part of it which passes through his particular limits, and no one was entitled to claim entire possession of a vein from having its source in his portion, or on any other pretense whatever.

Forfeiture for failure to work.—With reference to working the mine, stringent regulations were established, compelling the mine owner to work at least four paid workmen in "some exterior or interior work of real utility" for eight months during each year, counting from the day of his coming into possession.

Royalties.—A certain percentage of the product of mines was payable to the government, the amount of which varied at different periods.

§ 13a. **Historical evidence of extralateral or "dip" rights under Spanish-Mexican system.**—An interesting discussion of the assertion of an extralateral right in

Mexico while under the rule of Spain is found in the Commentaries of Gamboa on the Mining Ordinances of Spain (Heathfield translation), volume II, chapter XIV. Extensive litigation involving several very important mines arose over the question as to who was entitled to the underlay (or dip) of the vein outside of the vertical boundaries of the *pertenencias* underneath adjoining properties. The royal audiency of Mexico finally determined

> that each of the mine owners should be maintained in the possession of the ground he had occupied beyond his own limits, not being at the same time within the limits of any other mine, but being in common ground unoccupied by any other party; and it was ordered, that wherever the workings should meet, a pillar should be set up as a *guarda-raya* (boundary mark), and that each should be at liberty to work freely through the virgin ground or the works already driven, upon the underlay of the vein.

In the mining district of Guanajuato a famous suit arose in which one of the owners insisted that the underlay of the vein, which took its course from his mine of Santa Anita, was infinite in its extent, or that, at any rate, the vein was his property as far as it extended upon the underlay, as being one and the same vein; and that as, when the vein, being what is called a deep vein, proceeds perpendicularly downward, the miner may work on to the antipodes, or to the infernal regions, as Amaya says, so if the vein be inclined, its whole extent upon the underlay is granted to the miner. The royal audiency decreed

> that both parties should be at liberty to work freely through the untouched ground, upon the underlay of the vein, until they should happen to meet, in which case *guarda-rayas* should be set up, etc.

The same question was presented to the senate of Granada, which determined

> that although the underlay be part of the same vein, the mine must be confined to its proper length and breadth; beyond which the miner can only acquire so much of the interior as he may occupy before any other person, but he cannot prevent others from doing the same.

Under Ordinance XXX of the new code (1584 A. D.) a miner might even enter within the vertical boundaries of an adjoining mine, provided he were working upon the vein; and was entitled to all the ore he extracted before the workings of the two mines met, after which he had to vacate his neighbor's ground. This right was conferred as a reward for diligence.

A *pertenencia* could not be lawfully acquired where the discovery shaft had not been "opened upon a vein and upon ore" and sunk "upon the vein." Where this was attempted the "pretended miner" acquired no property in the ore he extracted from the dip of another vein entering from adjoining ground and "the fraudulent mine or *boca ladrona* must be stopped up." Under such circumstances, the owner of the adjoining *pertenencia* could not be prevented from making his way within the *pertenencia* of the pretended miner where "the neighbor's ore should take its course within his *pertenencia.*"

The same rule applied when a miner located a barren vein or branch or even a vein of medium quality and after following down on his vein, he left the vein and drove a cross-cut through barren ground in the direction of a known vein of value being worked in adjoining ground. Such a working was deemed fraudulent, and if such a cross-cut intercepted the workings of his neighbor even in his own ground, he could not compel his neighbor to withdraw, for

the communication occurs not whilst prosecuting the works upon the proper vein of his mine, but whilst wrongfully endeavoring to intercept his neighbor, and to prevent him from enjoying the returns of his diligence and merit.

While not granted a distinct extralateral right, the owner of the apex of the vein for all practical purposes seems to have enjoyed such a right, provided he used industry.

§ 14. Authorities consulted.—In the preparation of the foregoing chapter, the author has availed himself of the painstaking labor of jurists and writers on the subject of foreign mining laws, whose works should be specially mentioned. That due credit may be given and to the end that those desiring to pursue the study of comparative mining jurisprudence beyond what we consider the legitimate scope of this treatise may be invited into broader fields of investigation, we take pleasure in here enumerating the various authors whose works we have been so fortunate as to possess.

The monographs of Dr. Rossiter W. Raymond, at present secretary emeritus of the American Institute of Mining Engineers, scientist, scholar, and lawyer, one of the ablest living contributors not only to the literature of mining jurisprudence, but to mining subjects generally, have been freely consulted. Such of the productions of his pen as deal directly with the subject of foreign mining laws are, his treatise on "Relations of Governments to Mining," forming part II of his first report as commissioner of mining statistics,[53] and his contribution to Lalor's "Cyclopedia of Political Science," under the title of "*Mines*."[54]

[53] Mineral Resources, 1869, pp. 173–256.

[54] 1883, vol. ii, pp. 844–854.

General H. W. Halleck's introduction to "De Fooz on the Law of Mines,"[55] and Hon. Gregory Yale's "Mining Claims and Water Rights,"[56] contain valuable contributions on the subject of foreign mining systems, and have been freely consulted.

Arundel Rogers, Esq., in his work on the "Law of Mines, Minerals, and Quarries,"[57] devotes considerable space to a discussion of foreign systems, including a chronological review of legislation on mining subjects in the United States.

From the standpoint of practical utility, the work of Oswald Walmesley, Esq., barrister at law of Lincoln's Inn, "Guide to the Mining Laws of the World,"[58] is commended.

Mr. Walmesley has gathered and grouped together a vast amount of valuable authentic information. While written principally as a guide to persons seeking mining investments in foreign countries, it is the work of a trained lawyer, and valuable to the professional student of comparative mining jurisprudence.

Other authorities which have been consulted on this subject will be found in the notes.

[55] San Francisco, 1860.
[56] San Francisco, 1867.
[57] London, 1876.
[58] London, 1894.

CHAPTER II.

LOCAL STATE SYSTEMS.

§ 18. Classification of states.—Many of the states of the Union have enacted laws governing the mining industry. These states may be grouped into three classes:

(1) Those states wherein the federal government acquired no public mineral land, and for that reason were not included in the scope of federal mining legislation;

(2) Those states which are public land states, but are exempted from the operation of the congressional mining laws (with the exception of those relating to the disposal of saline lands), either for the reason that the mineral lands therein were sold under special laws prior to the enactment of general laws on the subject of mining, or because congress has by later laws in terms excluded them from the operation of these general laws;

(3) Those public land states and territories wherein the federal system is in full force, and wherein supplemental state and territorial legislation is authorized by the expressed terms of the federal laws.

§ 19. **First group.**—In states falling within the first group, such as the thirteen original states, and those carved out of the territory claimed by them, it is quite manifest that no federal legislation touching mining tenures is possible, and that such regulations as

are found must be sought in the laws of the several states. The individual states comprised within this group, being the paramount proprietors of their mineral lands, could alone prescribe the terms upon which mining rights could be acquired thereon. To this class the states of Tennessee and Texas may be added.

In most of these states there is no distinction between the methods of acquiring mineral lands and lands that do not fall within this designation. Some of them, particularly those where coal mining is carried on extensively, have elaborate systems in the nature of police regulations, prescribing the manner in which mines shall be worked, providing for their official inspection, proper ventilation, means of escape in case of accident, and provisions looking to the protection of the miners. Pennsylvania,[1] Kentucky,[2] West Virginia,[3] Tennessee,[4] New York,[5] New Jersey,[6]

1 Brightley's Purdon's Digest, 1894, vol. ii, pp. 1340 to 1386; Stewart's Purdon's Digest, 1905, vol. iii, pp. 2546 to 2607; also Supplement, vol. v, pp. 5673 to 5681. And see Laws of 1897, pp. 157, 279, 287, 475; 1899, pp. 66, 68, 180; 1901, pp. 342, 535–545.

In the act to establish the department of forestry is a provision empowering the commissioners to execute leases for the mining of "any valuable minerals" in the forest reservation. Laws of 1901, p. 12; Stewart's Purdon's Digest, 1905, vol. ii, p. 1740.

For an article on "Mine legislation and inspection in the anthracite coal regions of Pennsylvania," see Mining and Scientific Press, July 23, 1898, vol. lxxvii, p. 84.

2 Laws of 1891–92, p. 54; 1894, p. 55; Gen. Stats. of 1887, pp. 267, 1130; Id. 1909, §§ 2456–2489.

3 Laws of 1897, ch. 59, p. 117; 1893, ch. 22, p. 336; 1891, ch. 15, p. 22; 1891, ch. 35, p. 60; 1891, ch. 82, p. 209; 1889–90, p. 161; Code of 1899, p. 1047; Laws of 1901, ch. 106, p. 224; Code of 1906, §§ 400 to 477; Supp. 1909, pp. 45 to 63.

4 Laws of 1887, ch. 206, p. 336; Code of 1884, pp. 75, 327 et seq.; Laws of 1891, p. 203; Acts of 1901, ch. 37, p. 51; ch. 172, p. 306; Code of 1896, §§ 326–341; Acts of 1903, ch. 237; Acts of 1907, ch. 540.

5 Gen. Laws (1900), vol. 3, ch. 32, art. ix, §§ 120–129, pp. 2630–2633; Consol. Laws of 1909, vol. iii, ch. 31, §§ 120–136.

6 Laws of 1894, p. 66; Gen. Stats. (1895), p. 1904; Revisal of 1908, ch. 103, §§ 4930–4957.

North Carolina,[7] and Maine,[8] have more or less elaborate codes, confined, however, in the main to regulating the manner of working the mines. No mining legislation of a general character is found in Delaware, Georgia, Connecticut,[9] Massachusetts, Rhode Island, Vermont,[10] Virginia,[11] New Hampshire,[12] or Maryland.[13]

Some of the states, such as Massachusetts,[14] Kentucky,[15] Georgia,[16] and North Carolina[17] regard the

7 Laws of 1897, ch. 251, p. 423. See, also, as to rights of lessees in certain cases, Code (1883), § 1763; Gen. Stats. of 1895, p. 1904; Laws of 1899, p. 269.

8 Rev. Stats. Supp. of 1895, p. 294; Laws of 1893, p. 348; Rev. Stats. of 1903, pp. 268, 403; Laws of 1907, ch. 77. See, also, ten years' exemption of mines from taxation. Rev. Stats. (1883), p. 128, § 6. Rev. Stats. of 1903, p. 156; Laws of 1907, ch. 16.

9 Connecticut has a provision for the taxation of mines. Rev. Stats. of 1902, § 2322. Also an act concerning mining and oil companies. Laws of 1903, ch. 196.

10 Vermont provides for the exemption from taxation of mines and quarries. Stats. of 1894, § 365; Laws of 1900, pp. 10–12.

11 Virginia has a statute authorizing owners of land adjoining coal mines to enter the coal mines at intervals to determine encroachments. Code (1904), §§ 2570–2572. See, also, as to liens of laborers, Id., 2485, 2487, as amended, Supp. 1890, and payment of wages. Code 1904, § 3657d. Local regulation of mining is forbidden by the Virginia Constitution, art. iv, § 63. But provisions are found regulating child labor in coal mines (Code of 1904, § 3657bb), as well as laws for the formation and taxation of mining companies. Id., §§ 485, 1103b, 1294d.

12 New Hampshire exempts mines from taxation until they become a source of profit. Pub. Stats. of 1901, p. 203.

13 Maryland has an act concerning mining companies, their organization and powers, and regulating the building and operation of railroads by such companies. Pub. Gen. Laws of 1888, pp. 289, 291, 343–346; Pub. Gen. Laws of 1904, pp. 549, 550; Laws of 1906, p. 259. Also an act requiring mining companies to pay their employees semi-monthly. Laws of 1896, p. 212; Pub. Gen. Laws of 1904, p. 920. Also an act regarding trespass on mineral rights. Pub. Gen. Laws of 1904, p. 1677.

14 Pub. Stats. of 1882, ch. 189, §§ 19–28; Rev. Laws of 1902, pp. 1688, 1689.

15 Gen. Stats. (1887), pp. 1130, 1131; Stats. of 1909, p. 2468.

16 Code (1895), §§ 650–657; Amended Laws of 1897, p. 21. See, also, concerning mining interests in leases of land, Code (1895), § 3114.

17 Code (1883), §§ 3292–3301; Revisal of 1908, §§ 4953–4957.

industry of mining as in the nature of a public use, and permit private property to be condemned for purposes of rights of way and drainage.

South Carolina has enacted some special legislation affecting phosphatic deposits in navigable waters, marshes, and creeks belonging to the state, and providing for a system by which licenses may be granted to extract them upon payment of royalties to the state;[18] but no distinction is made between the method of acquiring mineral lands and other lands, or in the tenures by which they are held. The legislature of Tennessee in 1845 passed an act providing that the discoverer of any mines or minerals on vacant unappropriated land north and east of the congressional reservation line shall have a preference of entry on such land for a period of six months, making it unlawful for others to enter during that period, and providing that an entry made thereafter by others is unlawful and void unless preceded by a thirty days' written notice to the discoverer of an intention to make such entry.[19] With this exception, the law governing the acquisition of title to mineral land seems to be the same as that to other land. Of all the states found within the first group, New York[20] and Texas[21] are the only ones having anything like a general mining code.

[18] S. C. Rev. Stats., 1893-94, vol. i, pp. 36–38; Code of 1902, §§ 130–145; Code of 1912, §§ 138–160.

[19] Stats. of 1845, ch. 38; Whitney's Land Laws, p. 335. The code of 1896 recognizes this statute as still in force. Code of 1896, § 59.

[20] Gen. Laws (1900), vol. i, p. 667; Laws of 1894, vol. i, ch. 317, p. 589 et seq.; Id., vol. ii, ch. 745, p. 1852; Consol. Laws 1909, vol. 4, ch. 50, §§ 80–85.

[21] Sayle's Civ. Stats. Supp., 1888–93, tit. 64b, art. 3361b, p. 612; Id. 1898, tit. 71, arts. 3481–3498t. Also Supp. 1897–1906, pp. 354–356, and Laws of 1910, pp. 305, 306.

New York.—New York has from the earliest period of its history asserted its ownership of mines of the precious metals by virtue of its sovereignty. A history of the legislation in this state would serve no useful purpose in this treatise. Briefly stated, the existing laws contain the following declaration as to the state's ownership.

The following mines are the property of the people of the state in their right of sovereignty:

(1) All mines of gold and silver discovered or hereafter to be discovered;

(2) All mines of other metals discovered upon lands owned by persons not being citizens of the United States;

(3) All mines of other metals discovered upon lands owned by a citizen of the United States, the ore of which on an average shall contain less than two equal third parts in value of copper, tin, iron, and lead, or any of these metals;

(4) All mines and all minerals and fossils discovered, or hereafter to be discovered, upon lands belonging to the state.[22]

It is not our purpose to either analyze or criticise this law,[23] but simply to outline it. As will be observed, its fundamental theory bears a striking analogy to that of the civil law. Citizens of the state discovering mineral upon lands in the state are required to give notice of the discovery to the secretary of state, who is required to register the notice, and

[22] Laws of 1894, vol. i, ch. 317, p. 589; General Laws (1900), vol. i, p. 667; as amended, Laws of 1901, vol. ii, p. 1104; Consol. Laws 1909, vol. 4, ch. 50, §§ 80–85.

[23] For review of the New York mining laws, see Dr. Raymond's monographs—Trans. Am. Inst. M. E., vol. xvi, p. 770, and vol. xxiv, p. 712; Eng. and Min. Journal, vol. lviii, p. 560.

is allowed a fee of one dollar therefor.[24] The simple filing of this notice inaugurates the right to work, and to secure the sole benefit of the products of the mine upon payment into the state treasury of a royalty of two per centum of their market value. There are no statutory provisions fixing the area or extent of the property which may be worked under this notice; nor is there any direction as to marking of boundaries. The discoverer, his executors, administrators, and assigns, are exempted from paying any royalty for the term of twenty-one years, and after the end of that period he or his heirs or assigns are to have the sole benefit of all products therefrom on the payment of a royalty of one per centum on their market values.

Mining corporations are authorized under certain conditions and restrictions, if the written consent of the owner cannot be obtained, to condemn so much of the land in or upon which mines are situated as are necessary to operate the same. A similar right is given to the discoverer, his executors, administrators, or assigns, upon depositing money or securities with the county treasurer as security for the payment of any damages that may be awarded to the owner under the condemnation law. The county clerks are required to record copies of the location notice when presented by the locator and certified by the secretary of state, and it is provided that priority of locations shall be determined by the priority of the record with the county clerk of the notice thereof.

Texas.—Texas has a general mining law,[25] which in the main follows the congressional laws, with the ex-

[24] Laws of 1899, vol. i, p. 361; Gen. Laws (1900), p. 554; Consol. Laws of 1909, vol. 4, ch. 50, § 81.

[25] Sayle's Civ. Stats., §§ 3481–3498; Id., Supp. 1906, §§ 3498f–3498m; Id., Supp. 1910, tit. 71, p. 305. Texas has also a law concerning the

ception that no extralateral right is conferred, and the miner is not granted anything beyond vertical planes drawn through his surface boundaries. Patents are issued if applied for within five years, the price being twenty-five dollars per acre for lode claims, and ten dollars per acre for placer claims. Prior to patent, one hundred dollars must be expended on each claim annually, and fifty dollars per claim per annum must be paid to the state treasurer, the amount of such payments to be credited upon the purchase price when patent is obtained. The state after patent exacts no royalty, and does not concern itself with the manner of working the mines. After title passes from the state, the tenure by which mining property is held is the same as other property.

§ 20. **Second group.**—Public lands of the United States which were subject to the legislative control of the federal congress were included within the present boundaries of the following states and territories: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indian Territory, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming. To these may be added Hawaii,[26] Porto

casing and operation of oil wells. Sayles and Willison's Stats. Supp. (1906), tit. 75½, p. 377. Also an act prescribing police regulations. Laws of 1907, pp. 331–335; Am'd Supp. of 1910, tit. 71, p. 305.

[26] None of the public land laws of the United States have been extended to Hawaii, the former laws of the republic being continued in force. There is no local legislation on the subject of mineral lands, and it is extremely doubtful if the islands contain any deposits which might render mining legislation necessary or expedient.

Rico,[27] and the Philippine Islands.[28] By acts of congress passed at different times the following were excepted from the operation of the federal mining laws: Alabama,[29] Kansas,[30] Michigan, Minnesota,[31] Missouri,[32] and Wisconsin.[33]

These laws were never in practical operation in either Illinois, Indiana, Iowa, or Ohio, owing to the fact that most of the public domain embraced therein had been disposed of prior to the enactment of the general mining laws. In Illinois, Iowa, Arkansas, Missouri, Michigan, Minnesota, and Wisconsin lands of the government containing lead, and, in Michigan and Wisconsin, copper and other valuable ores, were ordered sold under special laws prior to the discovery of gold in California.[34] It would seem that the federal mining laws are still operative in lands of the public

[27] By act of congress July 1, 1902 (32 Stats. at Large, p. 731), all public lands passing to the United States by treaty have been ceded to the government of Porto Rico, to be held and disposed of for the use and benefit of the people of the island. There is as yet no mining legislation passed by the territorial legislature, nor are we advised as to the necessity for any such legislation.

[28] By act of congress, July 1, 1902 (32 Stats. at Large, p. 691), a complete mining code for these islands was passed. It is framed partially on the lines of the federal mining laws and to a large extent on the British Columbia statute and the laws in force in the Australian colonies. A discussion of this act will be found in a later portion of this treatise (*post*, § 879), and the act itself is printed in full in the appendix.

[29] 22 Stats. at Large, p. 487; Comp. Stats. 1901, p. 1439; 5 Fed. Stats. Ann. 54; Commissioners' letter to district land officers, 1 L. D. 655.

[30] 19 Stats. at Large, p. 52; Comp. Stats. 1901, p. 1439; 5 Fed. Stats. Ann. 54.

[31] 17 Stats. at Large, p. 465; United States v. Omdahl, 25 L. D. 157, 158.

[32] 19 Stats. at Large, p. 52; Comp. Stats. 1901, p. 1439; 5 Fed. Stats. Ann. 54.

[33] 17 Stats. at Large, p. 465; United States v. Omdahl, 25 L. D. 157, 158.

[34] See *post*, § 35.

domain in Arkansas as to minerals other than lead. It is so treated by the land department,[35] and that state has enacted legislation supplemental to the federal laws concerning the acquisition of title to public mineral lands.[36]

These laws are also in force in Florida, Mississippi, and Louisiana.[37]

The federal mining laws, so far as they relate to the acquisition of title to saline lands, are operative in all the states wherein the public domain remains to any extent undisposed of. By act of congress the states above enumerated, which were exempted from the operation of the federal mining laws, were again brought under the operation of such laws so far as deposits of salt, salt springs, and saline lands are concerned.[38]

By act of congress all lands in Oklahoma were declared to be agricultural,[39] but by the act of June 6, 1900, congress extended the mining laws over the lands in the territory of Oklahoma ceded to the United States by the Comanche, Kiowa, and Apache tribes of Indians.[40]

[35] Norman v. Phoenix Zinc M. & S. Co., 28 L. D. 361.

[36] See appendix.

[37] Commr. G. L. O., 31 L. D. 131.

[38] Act of Jan. 31, 1901 (31 Stats. at Large, p. 745; Comp. Stats. 1901, p. 1435; 5 Fed. Stats. Ann. 48); Circular instructions, 31 L. D. 130, 131. As to laws governing public saline lands, see *post*, §§ 513–515.

[39] 26 Stats. at Large, p. 1026; Comp. Stats. 1901, p. 1617; 6 Fed. Stats. Ann. 419.

[40] 31 Stats. at Large, pp. 672, 680. And see the instructions of Secretary Hitchcock to the commissioner of the general land office, Dec. 6, 1901 (31 L. D. 154), as to the limitations to be placed upon the operative force of this statute. See, also, Bay v. Oklahoma S. Gas Co., 13 Okl. 425, 73 Pac. 936, 938. The act admitting Oklahoma into the Union gave to that state sections 16 and 36 in the "Cherokee strip" for school purposes. These school sections are not subject to United States mining laws. In re Shirley, 35 L. D. 113.

The following states, therefore, fall within the second class enumerated in section eighteen: Alabama, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Ohio, and Wisconsin.

The extent of the power of these states over the mining industry on lands of the public domain other than saline lands is limited to regulating the manner in which mines may be worked with regard to the safety of the miners; that is to say, police regulations such as are found in Pennsylvania.[41]

This power has been exercised in Alabama,[42] Illinois,[43] Indiana,[44] Iowa,[45] Kansas,[46] Michigan,[47] Mis-

41 Brightley's Purdon's Digest of 1894, vol. ii, p. 1340 et seq.; Stewart's Purdon's Digest (1905), vol. iii, pp. 2546–2607; Id., Supp., vol. v, pp. 5673–5681.

42 Civ. Code (1896), §§ 2899–2936; Acts of 1896–97, pp. 1099–1112; Gen. Acts of 1898–99, p. 86; Pol. Code (1907), §§ 999–1038; Crim. Code (1907), §§ 7418–7420. Re mining companies in Alabama, see Civ. Code (1907), § 3481, subd. 15.

43 Starr & Curtiss' Revision, 1885, p. 1618 et seq.; Starr & Curtiss' Supp. of 1885, ch. 92, p. 872; Laws of 1895, p. 252 et seq.; Amended Laws of 1899, p. 300; Rev. Stats. (1899), ch. 93, p. 1156; Laws of 1901, p. 247; Hurd's Rev. Stats. (1908), ch. 93, pp. 1423–1450; Laws of 1909, pp. 284–286.

44 Horner's Annot. Stats. (1896), §§ 5458–5480y; Burns' Annot. Stats. (1894), §§ 7429–7483; Acts of 1897, pp. 127, 269; Acts of 1899, pp. 246, 382; Acts of 1901, pp. 170, 548, 571; Annot. Stats. (1908), §§ 8569–8624; Acts of 1909, pp. 259, 260.

45 Acts of 1894, p. 95; Acts of 1890, p. 71; Revision of 1888, § 2449 et seq.; Code (1897), §§ 1967–1974, 2031, 2478–2502; Laws of 1898, ch. 59, p. 38; Laws of 1900, chs. 79–82, pp. 61, 62; Supp. to Code (1907), pp. 548–554; Laws of 1909, p. 141.

46 Gen. Stats. of 1889, vol. i, § 3835 et seq.; Laws of 1893, p. 270; Gen. Stats. of 1897, pp. 813–827; Laws of 1899, p. 331; Laws of 1901, p. 475; Gen. Stats. (1909), §§ 4975–5059, 9035; Laws of 1909, pp. 320–323. Re mining companies in Kansas, see Gen. Stats. (1909), §§ 1926, 1927.

47 Howell's Annot. Stats. (Supp. of 1890), p. 3205, §§ 2887 d 2–2287 d 9; Pub. Acts of 1897, p. 140; Id., 1899, p. 93; Id., 1903, p. 147; Id., 1905, 142, 147; Id., 1909, p. 657; Comp. Laws (1907), §§ 5494, 5498. Michigan has also numerous provisions concerning the organiza-

souri,[48] and Ohio,[49] where codes more or less elaborate are found.

The legislature of Michigan, by an act approved April 28, 1846,[50] adopted a mining code for that state, the validity of which may be open to question, so far as it attempts to deal with minerals on the public domain, particularly when it is remembered that the federal mining laws applied to public lands in Michigan prior to February 17, 1873.[51] The act seems to be an assertion of the regalian theory, based upon the idea that the states have succeeded to the rights of the king in respect to the minerals found within their boundaries. The main provisions of the act, briefly stated, are as follows:

The property in the following mines is vested in the people of the state of Michigan in their right of sovereignty,—

(1) All mines of gold and silver or either of them within the territorial limits of the state;

(2) All mines of other metals or minerals connected with or containing gold in any proportion.

tion and powers of mining and smelting corporations and associations (Howell's Annot. Stats. (1882), §§ 3984–4121; Comp. Laws of 1897, §§ 7035, 7036; Laws of 1899, p. 96; Id., 1903, pp. 39, 381; Id., 1905, pp. 11, 44, 153; Id., 1907, p. 214; Id., 1909, p. 405) and a provision for the inspection of coal mines by adjoining owners to determine as to encroachments (Id., §§ 4122–4126). Street railway companies get no title to minerals in lands acquired by eminent domain. Laws of 1905, pp. 182, 183.

[48] Rev. Stats. of 1889, vol. ii, § 7034 et seq.; Laws of 1895, p. 225; Rev. Stats. of 1899, vol. ii, § 8766 et seq.; Laws of 1901, pp. 211–215; Annot. Stats. 1906, §§ 8770–8828; Laws of 1909, pp. 463, 695.

[49] Bates' Annot. Stats. of 1897, §§ 290–306a, 4374–4379, 4379-1 to 4379-6, 6871; Laws of 1898, pp. 33, 163, 164, 237; Laws of 1900, p. 180; Code (1910), §§ 898–978, 12563, 12647. Regarding the formation of mining companies see Code (1910), §§ 10135–10143.

[50] Howell's Annot. Stats. (1882), §§ 5475–5479; Comp. Laws (1897), §§ 1526, 1527.

[51] See *post*, § 249.

This right of the people to mines and minerals shall not be enforced against any citizen of the state who has or may hereafter acquire the ownership in fee of the land containing such mines or minerals by a *bona fide* purchase from either the general or state government. The act shall not affect the lessees of the United States government, when the lands leased by them shall be proved to belong to the state.

State mineral lands are reserved from sale until further direction of the legislature. A specific tax of four per cent is imposed upon all ores and products of all mines within the state (to be in lieu of all state taxes), whether the lands containing them have been sold to *bona fide* purchasers of the general government or not, but the tax on the product of iron mines is limited to two per cent. Annual statements of the yield of the mines are required, and the state is authorized to seize the ore or products when the tax is not paid on legal demand being made therefor.

By a subsequent act,[52] the state mineral lands reserved from sale are authorized to be leased upon certain conditions. And, later, provision is made for the sale of the mineral lands in the Upper Peninsula.[53]

Minnesota has several statutes relating to state mineral lands. These consist of provisions,—

(1) For the reservation by the state of all the iron, copper, coal, gold, and other valuable minerals in state lands, for the granting of permits to prospect for the same and for the leasing of mineral rights upon payment of royalties.[54]

[52] May 18, 1846; Howell's Annot. Stats. (1882), §§ 5480–5490; Comp. Laws (1897), §§ 1528–1530, 1411–1421.

[53] June 22, 1863; Id., §§ 5355–5358; Comp. Laws (1897), §§ 1411–1421.

[54] Rev. Stats. (1905), §§ 2483–2495. Amended in Supplement of 1909, pp. 661, 662.

(2) For similar reservations and leases by counties of mineral rights in county lands.[55]

(3) Enacting police regulations regarding child labor, safety appliances, and inspection of mines.[56]

(4) Prescribing a method by which an owner or owners of at least one-half of any lands containing minerals which belong to a plurality of owners may have mines thereon legally opened and operated.[57]

(5) Concerning organization and powers of companies for mining and smelting ores and manufacturing metals.[58]

(6) Concerning mine laborer's lien.[59]

(7) Making unmined minerals real estate for purposes of taxation, and creating a lien for taxes on the same.[60]

(8) Concerning the recording of instruments relating to minerals.[61]

Wisconsin has certain mining statutes that are worthy of notice.[62] These, in brief, are as follows:

(1) Providing rules to govern in mining contracts and leases in the absence of contract to the contrary,—viz.: (*a*) A license or lease to a miner is not revocable after valuable discovery, unless forfeited by the miner's negligence; (*b*) The discoverer of a crevice[63] or range containing ores or minerals is entitled

[55] 1909 Supp. to Rev. Laws, § 409.

[56] Rev. Laws (1905), §§ 1804, 1910; Id., Supp. (1909), §§ 1811–1824.

[57] 1909 Supp. to Rev. Laws, § 4456, pp. 899–901.

[58] Rev. Laws (1905), §§ 2844–2887, 3070, 3071; Id., Supp. (1909), pp. 760–765.

[59] Laws of 1897, p. 617; Rev. Stats. (1905), § 3520.

[60] Laws of 1899, p. 268; Rev. Stats. (1905), §§ 796, 975–979; Am'd Supp. of 1909, pp. 234, 250, 251.

[61] Rev. Laws (1905), § 3359.

[62] For brief summary of these laws, see Engineering & Min. Journal, vol. 87, p. 861.

[63] Construed to be synonymous with vein or lode. St. Anthony M. & M. Co. v. Shaffra, 138 Wis. 507, 120 N. W. 238.

thereto, subject to payment of rent to his landlord; but cannot recover the value of ores from a person digging on his range in good faith and known to be mining thereon, until he shall have given such person notice of his claim; (*c*) Usages and customs may be proved in explanation of mining contracts to the same extent as usage may be proved in other branches of business;[64]

(2) Providing that in case of conflicting claims to a crevice or range bearing ores or minerals the court may continue the action for the purpose of allowing parties to prove up their mines; and may in the mean time appoint a receiver to take charge of the mine;[65]

(3) Providing for forfeiture of his lease by a lessee who conceals or disposes of ore or mineral for purposes of defrauding his lessor of rent;[66]

(4) Authorizing the condemnation by a miner of the right to conduct water across the land of another, and prescribing the procedure therefor;[67]

(5) Requiring smelters and purchasers of ores and minerals to keep a record thereof in a book to be kept open for inspection by all persons, at all reasonable times, and prescribing penalty for failure so to do;[68]

(6) Regulating employment of children in mines;[69]

(7) Providing for condemnation by a miner of right of way for ditch or drain from mine across land of another, and prescribing the procedure therefor;[70]

[64] San. & B. Stats. (1898), § 1647; Am'd Id. Supp. (1906), p. 752.
[65] Id., § 1648.
[66] Id., § 1649.
[67] San. & B. Stats. (1898), §§ 1650–1654.
[68] Id., §§ 1656, 1657.
[69] Id., § 1728a; Id. Supp. (1906), p. 812.
[70] Id., §§ 1379-1 to 1379-10.

(8) Imposing a penalty for digging and carrying away ore from land of another or of the state;[71]

(9) Providing for the taxation of mineral rights.[72]

This is the extent of the mining legislation of any importance found in the states of this group.

§ 21. Third group.—This group includes what may be generally called the precious metal-bearing states and territories, and will be fully considered when dealing generally with the federal system, as by that system supplemental state and territorial legislation is permissive. This local legislation, where found, is essentially a part of the national law, as administered in the respective local jurisdictions. These state and territorial laws, to a large extent, supplant the local rules and customs, and in some of the states and territories are quite elaborate, embodying so many elements that they demand individual treatment in another portion of this work, after we shall have laid the foundation therefor.

It may be of historical interest to note that it was at one time held in California that the mines belong to the state, in virtue of her sovereignty, and that the state alone could authorize them to be worked. The doctrine was asserted that the several states of the Union, in virtue of their respective sovereignties, were entitled to the *jura regalia* which pertained to the king at common law.[73]

In support of this view, the rules followed in the states of New York and Pennsylvania were cited. Of course, in those two states the national government owned no lands. The primary ownership was in the

71 Id., §§ 4441, 4442. Statute involved and construed in St. Anthony M. & M. Co. v. Shaffra, 138 Wis. 507, 120 N. W. 238.

72 Id., Supp. (1906), p. 418.

73 Hicks v. Bell, 3 Cal. 219.

states, and not in the general government. Therefore, the states were at liberty to determine for themselves the policy to be pursued with reference to their own property.

This early California doctrine was subsequently repudiated.[74]

The legislature of Michigan in its early legislation upon this subject asserted the same regalian doctrine as first announced by the California courts, and such legislation still remains upon the Michigan statute-books.[75]

§ 22. Limit of state control after patent.—It may not be out of place to here remark that the government of the United States does not concern itself with mining lands or the mining industry after it parts with the title. This title vests in the patentee absolutely, to the extent of the property granted. No royalties are reserved; nor is any governmental supervision (except, perhaps, in the isolated case of hydraulic mines in certain parts of California) attempted. Upon the issuance of the deed of the government, the mineral land becomes private property, subject to the same rules as other property in the state with reference to the transfer, devolution by descent, and all other incidents of private ownership prescribed by the laws of the state. The federal law remains, of course, a muniment of title; but beyond that it possesses no potential force. Its purpose has been accomplished, and, like a private vendor, the government loses all dominion over the thing granted. The state may not increase, diminish, nor impair the rights con-

[74] Moore v. Smaw, 17 Cal. 199, 217, 79 Am. Dec. 123; Doran v. C. P. R. R., 24 Cal. 245.

[75] See *ante*, § 20.

veyed by a federal patent, but may, of course, and frequently does, exercise its police power and regulate the manner of working the mines, in the same manner that it might regulate any other industry. Briefly stated, property in mines, once vested absolutely in the individual, becomes subject to the same rules of law as other real property within the state.

TITLE II.

HISTORICAL REVIEW OF THE FEDERAL POLICY AND LEGISLATION CONCERNING MINERAL LANDS.

CHAPTER I.

INTRODUCTORY.

§ 25. Introductory—Periods of national history.—Positive law is the result of social evolution. Its development keeps pace with the intellectual and industrial progress of a nation. The history of a nation's laws is the history of the economic forces of which they are but the resultants, or, as aptly stated by a distinguished writer, "Each nation has evolved its existing economy as the outcome of its history, character, environment, institutions, and general progress."

A brief historical review of the growth of our nation, its policy and legislation on the subject of mineral lands, and the discovery and development of its mineral resources, will materially aid us in arriving at a proper interpretation of the existing system of laws governing the acquisition and enjoyment of property rights and privileges on the public mineral domain of the United States.

This branch of national history logically divides itself into four distinct periods, marked either by the occurrence of important events or emphasized by a distinctive change of national policy. These periods may be defined as follows:

First—From the foundation of the government to the discovery of gold in California;

Second—From the discovery of gold in California until the passage of the lode law of 1866;

Third—From the passage of the lode law of 1866 to the enactment of the general law of May 10, 1872;

Fourth—From the enactment of the general law of May 10, 1872, to the present time.

CHAPTER II.

FIRST PERIOD: FROM THE FOUNDATION OF THE GOVERNMENT TO THE DISCOVERY OF GOLD IN CALIFORNIA.

§ 28. Original nucleus of the national domain.— The national government acquired no rights of property within the present boundaries of the thirteen original states, nor in the states of Vermont, Kentucky, Maine, or West Virginia, which were severally carved out of territory originally forming a part of some of the original states.

The first acquisition of national domain which became subject to the disposal of congress was by cessions of territory claimed by seven of the original states. These cessions, commencing with that by the state of New York (March 1, 1781), and ending with that of Georgia (April 24, 1802), brought within the jurisdiction and control of the federal government all that portion of the present area of the United States now comprising the states of Tennessee, Illinois, Indiana, Ohio, Michigan, Wisconsin, those portions of Alabama and Mississippi lying north of the thirty-first parallel, and that portion of Minnesota lying east of the Mississippi river.[1]

1 Public Domain, pp. 65–88.

This area, with the exception of Tennessee (in which the public lands were practically absorbed by the claims of North Carolina, the surplus being subsequently ceded to the state),[2] constituted the original nucleus of our national domain.[3]

§ 29. Mineral resources of the territory ceded by the states.—In this period of our national history but little was known of the mineral resources of the country, and economic minerals were but little known or used.[4]

Gold had been found in moderate quantities in use among the Indian tribes of the present southern states,[5] and the Spaniards, under the leadership of De Soto, were supposed to have discovered gold in North and South Carolina and Georgia; but the existence of this royal metal in any considerable quantity was purely legendary.[6]

Copper was known to exist in the Lake Superior region. The Jesuit priests had made extensive explorations on the upper peninsula, and had given glow-

[2] Id., p. 83.

[3] Florida was ceded to us in 1821 by Spain (Public Domain, 116), but until a very recent period was not known to contain any substances commercially classed as mineral. Its phosphate and other mineral deposits on public lands are subject to the general mining laws of congress.

[4] Public Domain, p. 306.

[5] Gold was produced in the southern states before the Revolutionary War by the Cherokee Indians and others. The first gold minted by the United States government in 1793 was mined in North Carolina. Estimates compiled from reports of the United States mints established in the southern states prior to 1848, at New Orleans, Louisiana, Dahlonega, Georgia, and Charlotte, North Carolina, and from state reports, show that the gold and silver productions of the southern states from 1799 to 1908 amounted to $49,900,000. Of this, North Carolina is credited with $23,000,000; Georgia with $18,000,000; the rest came from South Carolina, Virginia, Alabama, Tennessee and Maryland. Engineering & M. Journal, vol. 87, p. 293.

[6] Century of Mining—Trans. Am. Inst. M. E., vol. v, p. 166.

ing accounts of the abundance of copper there found. Other explorers confirmed these discoveries, and brought back legends of gold and precious stones.[7]

In 1771, when this region had passed from the dominion of France, a company was organized in London, the Duke of Gloucester being one of the incorporators, to mine copper on the Ontonagon river. What little metal was obtained was shipped to England; but nothing resulted from the venture.[8]

The definitive treaty of peace between Great Britain and the United States, concluded at Paris, September 3, 1783, practically settled our northern boundary, although this was a subject of controversy for several years afterward. When the lake region became subject to the unquestioned jurisdiction of the United States, the territory was in the occupancy of the Indians, and no settlements were attempted in that section until a much later period.

This was practically the extent of public information upon the subject at the time congress passed its first ordinance on the subject of mineral lands.

§ 30. First congressional action on the subject of mineral lands.—The first legislative declaration of congress with reference to mineral lands is found in the ordinance of May 20, 1785, entitled "An ordinance for ascertaining the mode of disposing of lands in the western territory."

Under this ordinance surveyors were to be appointed from each state, to act under the direction of the geographer. The territory was to be divided into townships six miles square, and these townships subdivided into sections one mile square (six hundred and forty

[7] Century of Mining, Trans. Am. Inst. M. E., vol, v, p. 166.
[8] Trans. Am. Inst. M. E., vol. xix, p. 679.

acres). Meridian and base lines were to be established, and the rectangular system of surveys, which has ever since been in general use, was adopted.

In making these surveys, the surveyors were required to note all mines, salt licks, and mill seats that should come to their knowledge.

Reservations were made of four sections in each township for the use of the United States, one section (the sixteenth) for the maintenance of schools in that township, and a certain proportion, equal to one-seventh of all the lands surveyed, was to be distributed to the late Continental army.

There was also reserved, to be sold or otherwise disposed of as congress should thereafter direct, one-third of all gold, silver, lead, and copper mines.

The unreserved sections or lots were to be allotted to the several states, according to their *pro rata*, and the lands thus allotted were to be sold at public vendue by the commissioners of the loan offices of the several states, by whom deeds were to be given. Each of these deeds was to contain a clause, "excepting therefrom and reserving one third part of all gold, silver, lead, and copper mines within the same."[9]

Considering the then state of public information as to the mineral resources of the newly acquired national domain, it is manifest that the reservations in the ordinance were not based upon any economic reasons. The impression undoubtedly existed, as it had from the period of the earliest discoveries and explorations in America, that the newly acquired territory was rich in precious and economic metals, and that some day they might prove a source of national revenue. But it is apparent that the policy of thus reserving a portion of this class of lands was but an adaptation of the

[9] Journals of Congress, vol. x, p. 118.

system pursued by the mother country in dealing with her colonies, and following the example set by the crown, to whose rights the American Confederation had succeeded.[10]

§ 31. Reservation in crown grants to the colonies. In almost all of the crown grants to the colonies, clauses were inserted reserving to the sovereign a certain fixed proportion of the royal metals discovered.

The charter of North Carolina (1584), granted to Sir Walter Raleigh by Elizabeth, contained the following reservation:

> Reserving always to us, our heirs and successors, for all services, duties, and demands the fifth part of all the ore of gold and silver that from time to time and at all times after such discovery, subduing, and possessing, shall be there gotten and obtained.[11]

This form of reservation is found, with few exceptions, in all of the succeeding grants,—viz., the three charters of Virginia (1606, 1609, 1611),[12] the first of which also reserved one-fifteenth of all copper; Massachusetts bay (1629);[13] the grant of New Hampshire by the president and council of New England to Captain John Mason (1629—confirmed 1635);[14] the charter of Maryland to Lord Baltimore (1632), upon whom was imposed the additional burden of rendering annually two Indian arrows;[15] the grant of the province of Maine to Sir Ferdinando Gorges (1639);[16] Rhode

[10] See Northern Pacific Ry. v. Soderberg, 188 U. S. 526, 530, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

[11] Charters and Constitutions, pt. ii, p. 1380.

[12] Id., pt. ii, pp. 1890, 1898, 1904.

[13] Id., pt. i, p. 932.

[14] Id., pt. ii, pp. 1271, 1274.

[15] Id., pt. i, p. 812.

[16] Id., pt. i, p. 776.

Island and Providence plantations (1643);[17] Connecticut (1632).[18] The charter of Carolina, granted by Charles the Second to the Earl of Clarendon, Duke of Albemarle, and others (1663, 1665), reserved a royalty of one-fourth of the royal metals and the annual payment of twenty marks.[19]

The grant of the province of Maine by Charles the Second to James, Duke of York (1664), was an exception.[20]

In this grant, "our dearest brother" covenanted and promised to yield and render to his sovereign annually forty beaver skins when they shall be demanded, and in return received a grant of all the mines and minerals.

William Penn was required to yield and pay "two beaver skins, to be delivered at our castle of Windsor on the first day in January of every year,"[21] in addition to the one-fifth part of all gold and silver ores.

It was but natural that the United States in its first dealings with its public lands should follow these precedents and provide for similar reservations. It was the force of precedent rather than considerations of public and economic policy that suggested those provisions of the ordinance reserving a part of the mineral lands for the use of the government.[22]

§ 32. No development of copper mines until 1845. By resolution of April 16, 1800, congress authorized the president to employ an agent to collect informa-

[17] Id., pt. ii, p. 1602.

[18] Id., pt. i, p. 257.

[19] Id., pt. ii, p. 1383.

[20] Charters and Constitutions, pt. i, p. 784.

[21] Id., pt. ii, p. 1510.

[22] See Northern Pacific Ry. v. Soderberg, 188 U. S. 526, 530, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

tion relative to copper mines on the south side of Lake Superior, and "to ascertain whether the Indian title to such lands as might be required for the use of the United States, in case they should deem it expedient to work the said mines, be yet subsisting, and, if so, on what terms the same can be extinguished."[23]

It is a matter of history that the Indian title was not extinguished until the treaty with the Chippewas in 1837,[24] and it was not until 1845 that systematic mining in the copper regions was commenced. In 1845, the total production of copper in the United States was estimated at one hundred tons.[25] The total production from 1776 to 1851 is estimated at six thousand tons.[26] It is needless to remark that the government never deemed it expedient to embark in mining enterprises on its own account in any portion of its public domain.

§ 33. The Louisiana purchase and legislation concerning lead mines.—In 1803, the territory acquired by purchase from France,[27] commonly called "the Louisiana purchase," added over a million square miles to the national domain, embracing parts of Alabama and Mississippi, the states of Louisiana, Arkansas, Missouri, Iowa, Kansas (except a portion in the southwest corner), Nebraska, all of Colorado east of the Rocky mountains and north of the Arkansas river; North and South Dakotas; the greater part of Montana; a part of Wyoming; and the Indian territory.[28]

23 2 Stats. at Large, p. 87.

24 7 Stats. at Large, p. 536.

25 Mineral Industry, vol. i, p. 108.

26 Trans. Am. Inst. M. E., vol. xi, p. 8.

27 See Treaty, 8 Stats. at Large, p. 200.

28 As to whether Oregon, Washington, and Idaho were included in this cession has been the subject of considerable argumentative discussion. The current of authority, however, excludes these states from the Louisiana purchase. The area covered by them was acquired either through

Lead mining was begun in what is now the state of Missouri as early as 1720, while that section of country belonged to France, and under the patent granted to Law's famous Mississippi colony. Mine La Motte was one of the earliest discoveries (1702), and has been in operation at intervals ever since.[29] In 1788, Dubuque obtained from the Indians the grant under which he mined.[30]

The total production of lead in Missouri from 1720 to 1803 is estimated at sixteen thousand and ninety-five tons.[31]

From 1776 to 1824, it is estimated at four thousand four hundred and thirty-two tons.[32]

On March 3, 1807, congress passed a law wherein it was provided:

> That the several lead mines in the Indiana territory . . . . shall be reserved for the future disposal of the United States; and any grant which may hereafter be made for a tract of land containing a lead mine which had been discovered previous to the purchase of such tract from the United States shall be considered fraudulent and null, and the president of the United States shall be and is hereby authorized to lease any lead mine which has been or may hereafter be discovered in the Indiana territory for a term not exceeding five years.[33]

This legislation inaugurated the policy of the United States of leasing mineral lands.[34] These leases were

the discovery of the Columbia river by Captain Gray (1792), the exploration by the Lewis and Clarke expedition (1805), the grant from Spain which ceded the Floridas (1819), or the Astoria settlement (1811), —or practically the United States derived title through all these sources.

29 Century of Mining—Trans. Am. Inst. M. E., vol. v, p. 170.

30 Century of Mining—Trans. Am. Inst. M. E., p. 170.

31 Mineral Industry, vol. ii, p. 387.

32 Trans. Am. Inst. M. E., vol. v, p. 194.

33 2 Stats. at Large, p. 488, § 5.

34 Public Domain, p. 307.

given under the supervision of the war department. Where given, they covered tracts, at first three miles, afterward one mile, square, and bound the lessees to work the mines with due diligence and return to the United States six per cent of all the ores raised.[35]

Hon. Abram S. Hewitt[36] gives the following interesting summary of the practical operation of this law and the policy inaugurated by it:

> No leases were issued under the law until 1822, and but a small quantity of lead was raised previous to 1826, from which time the production began to increase rapidly.
>
> For a few years the rents were paid with tolerable regularity, but after 1834, in consequence of the immense number of illegal entries of mineral land at the Wisconsin land office, the smelters and miners refused to make any further payments, and the government was entirely unable to collect them. After much trouble and expense, it was, in 1847, finally concluded that the only way was to sell the mineral land and do away with all reserves of lead or any other metal, since they had only been a source of embarrassment to the department.[37]
>
> Meanwhile, by a forced construction (afterward declared invalid) of the same act, hundreds of leases were granted to speculators in the Lake Superior copper region, which was from 1843 to 1846 the scene of wild and baseless excitement. The bubble burst during the latter year; the issue of permits and leases was suspended as illegal, and the act of 1847, authorizing the sale of the mineral lands and a geological survey of the district, laid the foundation of a more substantial prosperity.[38]

[35] Century of Mining—Trans. Am. Inst. M. E., vol. v, p. 180.

[36] In an address before the Am. Institute of Mining Engineers.

[37] Quoting from Professor Whitney's work on the Metallic Wealth of the United States.

[38] Century of Mining—Trans. Am. Inst. M. E., vol. v, p. 180.

§ 34. Message of President Polk.—President Polk, in his first message to congress (December 2, 1845) made the following special mention of these lands and the system of leasing them authorized by the act of March 3, 1807:

> The present system of managing the mineral lands of the United States is believed to be radically defective. More than a million acres of the public lands, supposed to contain lead and other minerals, have been reserved from sale, and numerous leases upon them have been granted to individuals upon a stipulated rent. The system of granting leases has proved to be not only unprofitable to the government, but unsatisfactory to the citizens who have gone upon the lands, and must, if continued, lay the foundation of much future difficulty between the government and the lessees. According to the official records, the amount of rents received by the government for the years 1841, 1842, 1843, and 1844, was $6,354.74, while the expenses of the system during the same period, including salaries of the superintendents, agents, clerks, and incidental expenses, were $26,111.11, the income being less than one-fourth of the expense. To this pecuniary loss may be added the injury sustained by the public in consequence of the destruction of timber, and the careless and wasteful manner of working the mines. The system has given rise to much litigation between the United States and individual citizens, producing irritation and excitement in the mineral region, and involving the government in heavy additional expenditures. It is believed that similar losses and embarrassments will continue to occur while the present system of leasing these lands remains unchanged. These lands are now under the superintendence and care of the war department, with the ordinary duties of which they have no proper or natural connection. I recommend the repeal of the present system, and that these lands be placed under the superintendence and management

of the general land office as other public lands, and be brought into market and sold upon such terms as congress in their wisdom may prescribe, reserving to the government an equitable percentage of the gross amount of mineral product, and that the pre-emption principle be extended to resident miners, and settlers upon them, at the minimum price which may be established by congress.

§ 35. Sales of land containing lead and copper under special laws.—The first sale of mineral lands was that of the reserved lead mines and contiguous lands in the state of Missouri, under the act of March 3, 1829.[39] They were to be exposed for sale as other public lands, at two dollars and fifty cents per acre; but lead and other mineral lands on the public domain, elsewhere than in Missouri, were still reserved from sale.

The act of July 11, 1846,[40] ordered the reserved lead mines and contiguous lands in Illinois, Arkansas,[41] and the territories of Wisconsin and Iowa, to be sold as other public lands, after six months' public notice, following the Missouri act of 1829, with the addition of the provision that the lands should be offered and held subject to private entry before pre-emptions were allowed. The register and receiver were to take proof as to character of lands, whether mineral (i. e., containing lead) or agricultural.

The act of March 1, 1847,[42] opened for sale lands in the Lake Superior land district, state of Michigan, containing copper, lead, or other valuable ores, after

39 4 Stats. at Large, p. 364.

40 9 Stats. at Large, p. 37.

41 But as to lands containing other minerals the general mining laws are in force. Norman v. Phoenix Zinc M. and S. Co., 28 L. D. 361. And see legislation of the state of Arkansas, appendix.

42 9 Stats. at Large, p. 146.

geological examination and survey, and provided that there should be public advertisement for six months, and then public sale at not less than five dollars per acre, those not disposed of at public auction to be subject to private sale at five dollars per acre. This act also transferred the management and control of "the mineral lands" from the war department to the treasury department.

The act of March 3, 1847,[43] authorized the sale of lands in Chippewa district, in Wisconsin, containing copper, lead, and other valuable ores. The language of the act follows closely that of March 1, 1847 (*supra*).

It will be thus observed that from the period of 1785 to the discovery of gold in California, in 1848, the legislation of the congress of the United States as to survey, lease, and sale of mineral lands had been for lead, copper, and other base metals, and applied to the territory in the region of the great lakes, in the now states of Michigan, Wisconsin, Minnesota, Iowa, and Illinois, and the present state of Missouri. Under these various laws the copper, lead, and iron lands of the above-mentioned regions were sold.[44]

§ 36. Reservation in pre-emption laws.—During this period numerous laws were passed granting pre-emption rights to settlers upon the public lands. These laws, as a general rule, excepted from their operation lands previously reserved from sale by former acts; but no specific reservation of mineral lands, or lands containing mines, was incorporated into any of them until the pre-emption act of September 4, 1841, was passed. This act[45] contained the provision that

[43] Id., p. 179, § 10.
[44] Public Domain, p. 319.
[45] 5 Stats. at Large, p. 453.

"no lands on which are situated any known salines or mines shall be liable to entry under and by virtue of the provisions of this act." It also embodied the limitation that its terms should not extend to lands reserved for salines, "or other purposes."

At the time of the passage of this act, the only mines that could have been in contemplation of congress were those of lead and other base metals in the region of the Mississippi valley and the copper mines in the regions of the great lakes.[46]

As to salines, until a very recent period [47] the policy of the government, since the acquisition of the northwest territory and the inauguration of our land system, to reserve salt springs from sale has been uniform,[48] with the exception of the act of March 3, 1829,[49] passed on the same day with the act exposing for sale the lead lands of Missouri,[50] which authorized the sale, in the same manner as other public lands, of "the reserved salt springs and contiguous lands in the state of Missouri, belonging to the United States, and unclaimed by individuals."

[46] See Northern Pacific Ry. v. Soderberg, 188 U. S. 526, 531, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

[47] By act of congress passed January 31, 1901 (31 Stats. at Large, p. 745; Comp. Stats. 1901, p. 1435; 5 Fed. Stats. Ann. 48), public saline lands are classified as mineral, and are sold and disposed of under the general mining laws. *Post*, § 514a.

[48] See Morton v. State of Nebraska, 88 U. S. 660, 22 L. ed. 639, wherein legislation as to salines is reviewed. The court, however, seems to have overlooked the act of March 3, 1829.

[49] 4 Stats. at Large, p. 364.

[50] See *ante*, § 35.

CHAPTER III.

SECOND PERIOD: FROM THE DISCOVERY OF GOLD IN CALIFORNIA UNTIL THE PASSAGE OF THE LODE LAW OF 1866.

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

The discovery of gold and reports of its extensive distribution throughout the foothill regions of the Sierra Nevadas brought to the shores of the Pacific a tide of immigration from all parts of the world. All nationalities, creeds, and colors were soon represented

1 The Gadsden purchase added to the public domain 45,532 square miles, and formed part of the present states of Arizona and New Mexico.

and swarmed into the mineral regions of the golden state, which thenceforward became a beehive of gold-seekers, with their attendant camp-followers.

§ 41. Origin of local customs.—No system of laws had been devised to govern the newly acquired territory. By virtue of the treaty, the title to the lands containing the newly discovered wealth was vested in the federal government.

Until March 3, 1849, no attempt was made by congress to extend the operation of any of the federal laws over California, and on this date the revenue laws only were so extended.[2]

Until the admission of the state into the Union, California was governed by the military authorities. Colonel Mason on February 12, 1848, issued a proclamation as military governor, wherein he attempted to put an end to local uncertainty on this delicate subject of international law, by decreeing that "From and after this date the Mexican laws and customs now prevailing in California relative to the denouncement of mines are hereby abolished."[3]

Whether the power to abolish laws if they had a potential existence was confided to a military commandant or not, the force of the proclamation was recognized for the time, and the mining population found itself under the necessity of formulating rules for the government of the several mining communities, and establishing such regulations controlling the occupation and enjoyment of mining privileges as the exigencies of the case demanded and as the disorganized condition of society required. Of course, these pioneer miners were all trespassers. They had no war-

[2] 9 U. S. Stats. at Large, p. 400; Yale on Mining Claims, p. 16.
[3] Yale on Mining Claims, p. 17.

rant or license from the paramount proprietor. Colonel Mason, who, in connection with Lieutenant W. T. Sherman, visited the scenes of the earliest mining operations, thus pictures the situation:

> The entire gold district, with very 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 country, the character of the people engaged, and the small scattered force at my command, I resolved not to interfere, but permit all to work freely.[4]

Thus left to "work freely," some show of order was brought out of chaos by the voluntary adoption of local rules or general acquiescence in customs whose antiquity dated from the discovery of the "diggings."

Thus originated a system which, in the course of time, extended throughout the mining regions of the west as new discoveries were made, and subsequently came to be recognized as having the force of established law.

Naturally, these regulations varied in the different districts as local conditions varied.

§ 42. **Scope of local regulations.**—Some of the primitive codes were quite comprehensive in their scope, and undertook to legislate generally on the subject of civil rights and remedies, crimes and punishments, as well as providing rules for the possession and enjoyment of mining claims. For example, those adopted at Jacksonville, California, provided for the election of an alcalde, who propounded the law in a court from whose judgment there was no appeal, and

[4] Public Domain, p. 314.

wherein the rule of practice was "to conform as nearly as possible to that of the United States; but the forms of no particular state shall be required or adopted."

To steal a mule or other animal of "draught or burden," or to enter a tent or dwelling and steal therefrom gold-dust, money, provisions, goods, or other valuables amounting in value to one hundred dollars or over, was considered a felony, and on conviction thereof the culprit should suffer "death by hanging."

Should the theft be of property of less value, the offender was to be "disgraced" by having his head and eyebrows close-shaved, and by being driven out of camp.

The willful and premeditated taking of human life was an offense of the same grade as stealing a mule, death being the penalty.

A sheriff was elected to carry judgments into effect, and, generally, to enforce the decrees of the judge and preserve the peace.

When we consider the conditions under which these rules were framed, we can readily appreciate their virtue. Generally speaking, however, the miner's code confined itself to regulating the mining industry. At first the miner's labor and research were confined to surface deposits, and to the banks, beds, and "bars" of the streams,—that is, to the claims usually called "placers,"—quartz or lode mining not having been inaugurated until a later period.

A detailed review of the rules and customs adopted and in force in the various districts would serve no useful purpose. A unique collection of them will be found in the interesting and valuable report made by Mr. J. Ross Browne while acting as commissioner of mining statistics.[5]

[5] Mineral Resources, 1867, pp. 235–247.

Mr. Yale, in his work on mining claims and water rights,[6] also gives a full and accurate synopsis of the local mining codes.

The main object of the regulations was to fix the boundaries of the district, the size of the claims, the manner in which the claims should be marked and recorded, the amount of work which should be done to hold the claim, and the circumstances under which the claim was considered abandoned and open to occupation by new claimants.[7]

Of these rules and customs, Mr. Yale thus sums up his views:

> Most of the rules and customs constituting the code are easily recognized by those familiar with the Mexican ordinances, the continental mining codes, especially the Spanish, and with the regulations of the stannary convocations among the tin bounders of Devon and Cornwall, in England, and the High Peak regulations for the lead mines in the county of Derby. These regulations are founded in nature, and are based upon equitable principles, comprehensive and simple, have a common origin, are matured by practice, and provide for both surface and subterranean work, in alluvion, or rock *in situ*. In the earlier days of placer diggings in California, the large influx of miners from the western coast of Mexico, and from South America, necessarily dictated the system of work to Americans, who were almost entirely inexperienced in this branch of industry. With few exceptions from the gold mines of North Carolina and Georgia, and from the lead mines of Illinois and Wisconsin, the old Californians had little or no experience in mining. 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 system. The Spanish-

[6] Mining Claims and Water Rights, p. 73.

[7] J. Ross Browne in Mineral Resources, 1867, p. 226.

American system which had grown up under the practical working of the mining ordinances for New Spain, was the foundation of the rules and customs adopted. . . . . They reflect the matured wisdom of the practical miner of past ages, and have their foundation, as has been stated, in certain natural laws, easily applied to different situations, and were propagated in the California mines by those who had a practical and traditional knowledge of them in their varied form in the countries of their origin, and were adopted, and no doubt gradually improved and judiciously modified, by the Americans.

Halleck aptly states the main source and underlying theory of these local regulations:

The miners of California have generally adopted, as being best suited to their peculiar wants, the main principles of the mining laws of Spain and Mexico, by which the right of property in mines is made to depend upon *discovery* and *development;* that is, *discovery* is made the source of title, and *development*, or *working*, the condition of the continuance of that title. These two principles constitute the basis of all our local laws and regulations respecting mining rights.[8]

§ 43. Dips, spurs, and angles of lode claims.—With respect to lode, or "quartz," claims, as they were then locally termed, in contradistinction to gravel claims, the miners' rules and customs established a rule of property at total variance with the then existing Mexican laws. We refer to the right to work the vein to an indefinite depth, regardless of the occupation or possession of the surface underneath which it might penetrate, and to hold in connection with the main vein, without regard to any inclosing surface boundaries, the "dips, spurs, angles, and variations" of the located vein. Neither the form nor extent of the sur-

[8] Introduction to De Fooz on the Law of Mines, p. vii.

face area controlled the rights in the located lode. It did not measure the miner's rights, either to the linear feet upon its course or to follow the dips, angles, and variations of the vein.[9] The lode was the principal thing, and the surface a mere incident.[10]

This departure from the rule of vertical planes drawn through surface boundaries may possibly be traced to the customs then in vogue among the lead miners of Derbyshire with reference to "*rake veins.*" [11]

We find no trace of such an innovation in any other of the contemporaneous mining systems. Under the early German codes of the sixteenth and seventeenth centuries, what may be called an inclined location (*gestrecktfeld*) was sanctioned, which gave the right to follow the vein to an indefinite depth, and to work within planes parallel to the downward course of the vein, thirty feet from the hanging-wall and thirty feet from the foot-wall of the vein, forming a parallelopipedon.[12] As we have heretofore noted, there is historical evidence of the existence of right to follow a vein in its downward course outside of the vertical boundaries of the claim in the lead mines of Derbyshire,[13] as well as under the French [14] and Spanish-Mexican [15] systems. But these systems had become obsolete long before the discovery of gold in California.[16]

This feature of the miners' rules and customs as adopted in California was embodied in the first min-

9 Eureka Case, 4 Saw. 302–323, Fed. Cas. No. 4548.

10 Johnson v. Parks, 10 Cal. 447.

11 See *ante*, § 8.

12 Dr. R. W. Raymond—Mineral Resources, 1869, p. 195.

13 *Ante*, § 8.

14 *Ante*, § 12.

15 *Ante*, § 13a.

16 Klosterman, in his treatise on the Prussian mining laws (Berlin, 1870), says that the abolition of inclined locations was brought about principally by the "interminable lawsuits inherent in the system."

ing legislation of congress,[17] and was the basis of what is now termed the extralateral right under the existing system.

A further discussion of this subject will be reserved for a succeeding chapter, where it will be dealt with in connection with the present laws.

§ 44. Legislative and judicial recognition by the state.—California was admitted as a state of the Union, September 9, 1850. The act of admission contained no reference to mineral lands, and the new state came into existence with the local systems in full force and operation in the mining districts.

The legislature of the state in 1851 gave recognition to the existing conditions and the controlling force of the local system by inserting a provision in the civil practice act to the effect that the "customs, usages, or regulations, when not in conflict with the constitution and laws of the state, shall govern the decision of the action."

As to the effect of this legislative declaration, and generally with reference to the attitude of the state and federal government, upon the subject of mineral lands in California, during this interesting period, the supreme court of California, speaking through Chief Justice Sanderson, thus announced its views:

> The six hundred and twenty-first section of the practice act provides that "In actions respecting mining claims proof shall be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claims; and such customs, usages, or regulations, when not in conflict with the constitution and laws of this state, shall govern the decision of the action."

17 Act of July 26, 1866.

At the time the foregoing became a part of the law of the land, there had sprung up throughout the mining regions of the state local customs and usages by which persons engaged in mining pursuits were governed in the acquisition, use, forfeiture, or loss of mining ground (we do not here use the word *forfeiture* in its common-law sense, but in its mining-law sense, as used and understood by the miners, who are the framers of our mining codes). These customs differed in different localities, and varied to a greater or less extent, according to the character of the mines. They prescribed the acts by which the right to mine a particular piece of ground could be secured and its use and enjoyment continued and preserved, and by what nonaction on the part of the appropriator such right should become forfeited or lost, and the ground become, as at first, *publici juris* and open to the appropriation of the next-comer. They were few, plain, and simple, and well understood by those with whom they originated. They were well adapted to secure the end designed to be accomplished, and were adequate to the judicial determination of all controversies touching mining rights. And it was a wise policy on the part of the legislature, not only not to supplant them by legislative enactments, but, on the contrary, to give them the additional weight of a legislative sanction. These usages and customs were the fruit of the times, and demanded by the necessities of communities who, though living under the common law, could find therein no clear and well-defined rules for their guidance applicable to the new conditions by which they were surrounded, but were forced to depend upon remote analogies of doubtful application and unsatisfactory results. Having received the sanction of the legislature, they have become as much a part of the law of the land as the common law itself, which was not adopted in a more solemn form. And it is to be regretted that the wisdom of the legislature in thus leaving mining controversies to the arbitrament of mining laws has not always

been seconded by the courts and the legal profession, who seem to have been too long tied down to the treadmill of the common law to readily escape its thraldom while engaged in the solution of a mining controversy. These customs and usages have, in progress of time, become more general and uniform, and in their leading features are now the same throughout the mining regions of the state; and, however it may have been heretofore, there is no reason why judges or lawyers should wander with counsel for the appellant in this case back to the time when Abraham dug his well, or explore with them the law of agency or the statute of frauds, in order to solve a simple question affecting a mining right; for a more convenient and equally legal solution can be found nearer home in the "customs and usages of the bar or diggings embracing the claim" to which such right is asserted or denied.[18]

Mr. Justice Field, who was the author of the provision of the California civil practice act referred to in the decision above quoted, and who was recognized as the "end of the law" on mining subjects, in speaking for the supreme court of the United States, thus presents his views upon that branch of the law, as to which he was so peculiarly fitted to speak:

> The discovery of gold in California was followed, as is well known, by an immense immigration into the state, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed and not open by law to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and canyons, and probing the earth in all directions for the precious metals.

[18] Morton v. Solambo M. Co., 26 Cal. 527.

Wherever they went they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, 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 lawmakers, as respects mining upon the public lands in the state. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. . . . . 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 molded 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.[19]

[19] Jennison v. Kirk, 98 U. S. 453, 25 L. ed. 240; cited in Northern Pac. R. R. v. Sanders, 166 U. S. 620, 17 Sup. Ct. Rep. 671, 41 L. ed. 1139.

This exposition of the law governing mining rights, as it existed in the early history of the mining industry in the west, leaves nothing to be added by the author. The decision stands as a forensic classic. Judge Field was a part of the history of which he wrote. He served as an alcalde during the chaotic period antedating the admission of California as a state. He served his state in its first legislatures, and was the author of many of its early laws. As chief justice of its supreme court, his was the task to solve the great and overshadowing questions which arose over land titles in a new state coming into the Union under peculiar and novel conditions, and he carried to the supreme bench of the United States not only the practical knowledge acquired by personal contact with the mining communities, but a trained judicial mind.

These local systems are said to have constituted the American common law of mines,[20] and their binding force has been recognized from the beginning by the legislation of the states and by a uniform line of decisions in the state and territorial courts.[21]

§ 45. **Federal recognition.**—The federal judiciary followed the rules thus adopted.[22] Congress has always recognized their binding force.[23]

The land department of the government and the supreme court of the United States have uniformly acted

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

[21] Carson City G. M. Co. v. North Star M. Co., 83 Fed. 658, 667, 28 C. C. A. 333.

[22] Sparrow v. Strong, 3 Wall. 97, 18 L. ed. 49; Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 62, 18 Sup. Ct. Rep. 895, 43 L. ed. 72.

[23] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875; Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. Rep. 428, 28 L. ed. 452; Golden Fleece G. and S. M. Co. v. Cable Cons. Co., 12 Nev. 313; King v. Edwards, 1 Mont. 235.

upon the rule that all mineral locations were to be governed by the local regulations and customs in force at the time of the location, when such location was made prior to the passage of any mineral law made by congress.[24]

§ 46. Local rules as forming part of present system of mining law.—To a limited extent, local regulations have still a place in our legal system. They are permitted to have controlling force in certain directions and under certain restrictions; but they are gradually becoming superseded by statutory enactments, which, of course, are but another form of expressing local rules. In many parts of the mining regions the right to supplement congressional laws by the adoption of local codes is not exercised. In other places we still find the right asserted to a limited extent. In this aspect district laws and regulations, as well as state and territorial enactments, form an integral part of the present system, and will be dealt with in their appropriate place. The purpose of this chapter has been largely historical, and enough has been said to show the origin, development, scope, and legal *status* of local rules to enable us to award them their proper place in the evolution of the existing system.

§ 47. Federal legislation during the second period. On March 3, 1849, congress passed an act creating the department of the interior,[25] and thereupon the supervision of mineral lands was transferred to the general land office in that department.

[24] Glacier Mt. S. M. Co. v. Willis, 127 U. S. 471, 8 Sup. Ct. Rep. 1214, 32 L. ed. 172; Broder v. Natoma Water Co., 101 U. S. 274, 25 L. ed. 790; Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. Rep. 301, 27 L. ed. 990; Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. Rep. 428, 28 L. ed. 452.

[25] 9 Stats. at Large, p. 395.

The act of September 26, 1850,[26] ordered the mineral lands in the Lake Superior district in Michigan to be offered at public sale, in the same manner, at the minimum, and with the same rights of pre-emption, as other public lands, but not to interfere with leased rights.[27]

This is the extent of affirmative action by congress during the second period touching its mineral lands, with the exception of the act providing for a district and circuit court for the district of Nevada, approved February 27, 1865.[28]

Section nine of this act provided:—

> That 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 same provision is perpetuated in the Revised Statutes.[29] This act was the first formal recognition by congress of the possessory rights of mineral occupants of the public lands.

In all general laws granting the right of pre-emption to settlers upon public land, mineral lands were reserved from their operation. The act of September 4, 1841, excepts from its operation all lands on which are situated any "known salines or mines." Whenever, upon the admission of a new state into the Union, the provisions of this general pre-emption law were extended to it, this reservation was emphasized, if not enlarged. Thus, by the act of congress passed March 3, 1853, it was provided that all the public lands in the state of California, whether surveyed or unsurveyed,

[26] Id., p. 472.
[27] Public Domain, p. 308.
[28] 13 Stats. at Large, p. 440.
[29] Rev. Stats., § 910.

excepting mineral lands, should be subjected to the provisions of the act of 1841; and it was further provided that no person should obtain the benefits of the act by a settlement or location on *mineral lands*.

In grants to the several states, and in aid of the construction of railroads, similar reservations were made. The language of the reservation is not always precisely the same, but there is no departure from the established policy, that mineral lands were uniformly reserved for the use of the United States, or to be disposed of by such special laws as congress might see fit to enact.

In another portion of this treatise the extent and operation of the several excepting clauses contained in the different classes of grants will be considered. Sufficient historical data has here been given justifying the conclusion reached by the courts in announcing the doctrine that, prior to 1866, it had been the settled policy of the government in disposing of the public lands to reserve the mines and mineral lands for the use of the United States. Prior to that date, the uniform reservation of mineral lands from survey, from sale, from pre-emption, and from all grants, whether for railroads, public buildings, or other purposes, fixed and settled the policy of the government in relation to such lands.[30]

§ 48. Executive recommendations to congress.— Colonel Mason, in August, 1848, had made a graphic and interesting report to the war department, announcing officially the discovery of gold, giving a glowing

[30] Silver Bow M. & M. Co. v. Clarke, 5 Mont. 378, 410; Ivanhoe M. Co. v. Keystone Cons. M. Co., 102 U. S. 167, 172, 26 L. ed. 126; U. S. v. Gratiot, 14 Pet. 526, 536, 10 L. ed. 573; Morton v. State of Nebraska, 21 Wall. 660, 667, 22 L. ed. 639; Jennison v. Kirk, 98 U. S. 453, 458, 25 L. ed. 240; Deffeback v. Hawke, 115 U. S. 392, 401, 6 Sup. Ct. Rep. 95, 29 L. ed. 423.

account of the extent and richness of the deposits. He recommended the establishment of a mint at San Francisco, the survey of the districts into small parcels, and their sale at public auction to the highest bidder.

On December 2, 1849, President Fillmore, in his annual message to congress, referred to the subject in the following terms:—

> 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.

On the day following, Hon. Thomas Ewing, then secretary of the interior, laid before congress an elaborate report concerning the discovery of gold in California, wherein he called attention to the fact that no existing law gave the executive power to deal with the mines or protect them from intrusion, and some legal

provision was necessary for their protection and disposition. He recommended a transfer by sale or lease, reserving a part of the gold collected as seigniorage.

Nothing, however, came of these recommendations. Senator Fremont, on September 24, 1850, introduced a bill in the United States senate "to make temporary provision for the working and discovery of gold mines and placers in California, and preserving order in the mines," and contemplated a system of licenses to be granted upon payment of a nominal monthly rental. This bill passed the senate, but not the house.[31]

§ 49. **Coal land laws—Mining claims in Nevada—Sutro tunnel act.**—There were several minor attempts made to pass a general mining law applicable to the gold regions, but they met with no success. While all admitted something should be done, sentiment was divided on questions of policy.

Laws were passed regulating the sale and disposal of coal lands; one on July 1, 1864,[32] and one on March 3, 1865;[33] and two laws, special and local in their nature —viz., the act of May 5, 1866,[34] concerning the boundaries of the state of Nevada, wherein it was provided that:—

31 Yale on Mining Claims and Water Rights, pp. 340–349.

32 13 Stats. at Large, p. 343.

33 Id., p. 529. These two acts provided for the disposal of coal lands and the sale of town property upon the public domain. The act of March 3, 1865, section 2, contains the following proviso, with reference to the sale of town lots:

Provided, further, That where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such possession and the recognized use thereof. *Provided,* however, that nothing herein shall be construed as to recognize any color of title in possessors for mining purposes as against the government of the United States.

34 14 Stats. at Large, p. 43.

All possessory rights acquired by citizens of the United States to mining claims discovered, located, and originally recorded, in compliance with the rules and regulations adopted by miners in the Pah Ranagat and other mining districts in the territory incorporated by the provisions of this act into the state of Nevada, shall remain as valid, subsisting mining claims; but nothing herein contained shall be so construed as granting a title in fee to any mineral lands held by possessory titles in the mining states and territories.

The second was the Sutro tunnel act, approved July 25, 1866,[35] which granted the right of way and other privileges to Adolph Sutro and his assigns to aid in the construction of a draining and exploring tunnel to the Comstock lode in the state of Nevada. This act conferred upon Sutro the right of pre-emption as to lodes within two thousand feet on each side of the tunnel, cut or discovered by the tunnel, excepting the Comstock lode and other lodes in the actual possession of others. The act also recognized the mining rules and regulations prescribed by the legislature of Nevada.[36] On the day following, congress passed the law generally known as the "lode and water law of 1866," to which we will now devote our attention.

[35] 14 Stats. at Large, p. 242.

[36] Yale on Mining Claims and Water Rights, pp. 351, 352.

CHAPTER IV.

THIRD PERIOD: FROM THE PASSAGE OF THE LODE LAW OF 1866 TO THE ENACTMENT OF THE GENERAL LAW OF MAY 10, 1872.

§ 53. The act of July 26, 1866.—This act was entitled "An act granting the right of way to ditch and canal owners through the public lands, and for other purposes." The title gives no clue to the scope of the act. As a matter of fact, the title belonged to another act which had passed the house, and for which the mining act was substituted in the senate, without any attempt to change the title, and in this form passed both houses.[1]

It was the first general law passed under which title might be acquired to any of the public mineral lands within what are known as the precious metal bearing states and territories.[2] While most of the provisions of this act have been repealed and superseded by subsequent legislation, it remains a muniment of title to

[1] Yale on Mining Claims and Water Rights, p. 12.

[2] Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 62, 18 Sup. Ct. Rep. 895, 43 L. ed. 72.

many mining properties, rights to which attached prior to its repeal. To this extent it is still operative.[3]

§ 54. Essential features of the act.—No one has ever claimed that this act was a model piece of legislation. It is faulty and crude in the extreme, and the embarrassments surrounding its proper interpretation are still encountered in the courts, where property rights arising under it come in conflict with those acquired under the later laws. Yet the mining communities accepted it as being a step in the right direction. Mr. Yale says of it:—

> As the initial act of the legislation which must necessarily follow, it is more commendable as an acknowledgment of the justice and necessity which dictated it, and its expediency as a means to the advancement of the material interests of the state and nation, than for the perfection of its provisions or their exact adaptation to the accomplishment of the object intended. We must not, however, find fault with the law on account of its imperfections or the introduction of objectionable features in the mode to be followed in acquiring a title under it. These imperfections can be remedied, the rights of the parties amplified in many particulars, and the system so changed as to work with more facility than now anticipated.[4]

It is certainly due to Senators Stewart and Conness, the authors of the bill, to explain that at the time of its passage it was extremely difficult to secure the consideration of any measure touching the subject of mineral lands. Eastern sentiment was divided on questions of governmental policy, and the delegations from the western states were not harmonious. If subsequent experience has shown defects to exist in the law, the authors and friends of the measure are entitled to

[3] The full text of the act will be found in the appendix.

[4] Yale on Mining Claims and Water Rights, pp. 9, 10.

the gratitude of those engaged in the mining industry for the establishment of at least three important and beneficent principles:—

First—That all the mineral lands of the public domain should be free and open to exploration and occupation.

Second—That rights which had been acquired in these lands under a system of local rules, with the apparent acquiescence and sanction of the government, should be recognized and confirmed;[5]

Third—That titles to at least certain classes of mineral deposits or lands containing them might be ultimately obtained.

§ 55. Declaration of governmental policy.—By the first of these provisions, the government, for the first time in its history, inaugurated a fixed and definite legislative policy with reference to its mineral lands. It forever abandoned the idea of exacting royalties on the products of the mines,[6] and gave free license to all its citizens, and those who had declared their intention to become such, to search for the precious and economic minerals in the public domain, and, when found, gave the assurance of at least some measure of security in possession and right of enjoyment. What had theretofore been technically a trespass became thenceforward a licensed privilege, untrammeled by governmental surveillance or the exaction of burdensome conditions. Such conditions as were imposed were no more onerous than those which the miners had imposed upon themselves by their local systems. That such a declaration of governmental policy stimulated and encouraged the

[5] Jennison v. Kirk, 98 U. S. 453, 458, 25 L. ed. 240; Blake v. Butte S. M. Co., 101 U. S. 274, 25 L. ed. 790.

[6] Ivanhoe M. Co. v. Keystone Cons. M. Co., 102 U. S. 167, 173, 26 L. ed. 126.

development of the mining industry in the west is a matter of public history.

§ 56. Recognition of local customs and possessory rights acquired thereunder.—As was observed in the preceding chapter, the federal government had practically acquiesced from the beginning in the system of local rules established in the various mining districts. That is to say, no overt act was done by the government to overthrow or repudiate the system. No attempt was made to interfere with mining upon the public domain. The process by which these primitive systems came to be recognized, first by the states, and then by the national government, was natural. When mineral discoveries were made in other territories and states, the system inaugurated in California was adopted to govern and regulate the new mining districts.[7]

Local legislatures and local courts followed the precedent set in California, by enacting and upholding laws confirming the right in the newly discovered mineral districts to establish rules governing the mining industry. As the supreme court of the United States said, before the act of 1866 was passed:—

> We cannot shut our eyes to the public history which informs us that under the legislation (state and territorial), not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital and contributing largely to the prosperity and improvement of the whole country.[8]

The unqualified legislative recognition of these local systems was a simple act of justice. Any other course would have involved a practical confiscation of prop-

7 St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 650, 26 L. ed. 875.

8 Sparrow v. Strong, 3 Wall. 97, 104, 18 L. ed. 49. See, also, Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 62, 18 Sup. Ct. Rep. 895, 43 L. ed. 72.

erty acquired and developed by the tacit consent of the government. That this act was such unqualified recognition has been abundantly established by the highest judicial authority.[9]

§ 57. Title to lode claims.—It may seem strange that the first mining law under which title to mining property could be absolutely acquired was limited in its operation in this direction to lode, or vein, claims. All mineral lands, whatever the forms in which the deposits therein occurred, were thrown open to exploration; but only lode claims could be patented. We are at a loss to understand the reason for this, unless it is accounted for by the state of the industry at the time the act was passed. Placer mining, which had occupied the attention exclusively of the early miners of California, was on the decline, and the quartz, or lode, mining was in the ascendency. The auriferous quartz veins of California were being developed to an important extent. Nevada, with its great Comstock lode, was attracting the attention of the civilized world. Much expensive litigation had arisen there,[10] and the necessity for some law giving a degree of certainty to mining titles was urgent. In addition to this, important quartz veins of great value had been discovered in other portions of Nevada, and in Colorado, Idaho, Montana, and other of the precious metal bearing states and territories. All these facts considered,

[9] Jennison v. Kirk, 98 U. S. 453, 459, 25 L. ed. 240; Broder v. Natoma Water Co., 101 U. S. 274, 25 L. ed. 790; Chambers v. Harrington, 111 U. S. 350, 352, 4 Sup. Ct. Rep. 428, 28 L. ed. 452; N. P. R. R. Co. v. Sanders, 166 U. S. 620, 629, 17 Sup. Ct. Rep. 671, 41 L. ed. 1139; Titcomb v. Kirk, 51 Cal. 288, 289, 294.

[10] The surveyor-general for the state of Nevada, in his report for 1865, expressed the belief that one-fifth of the output of the Comstock, estimated up to that date by Mr. J. Ross Browne at forty-five millions of dollars, was spent in litigation. (Mineral Resources of the West, 1867, p. 32.)

it is safe to assume that the lode-mining industry was the one which was uppermost in the public mind, and which was most in need of national statutory regulation. At all events, until the passage of the placer law of 1870, no ultimate title to any mineral lands could be acquired, except to a "vein, or lode, of quartz or other rock in place, bearing gold, silver, cinnabar, or copper."

The method of obtaining this title provided for in the act was simple; but the nature of the thing granted, the relationship of the surface and its boundaries to the lode, the extent of the dip or extralateral right, and some of the terms used in the act were, and still are, matters of serious contention and controversy.

The historical importance of the act of July 26, 1866, consists in the establishment of the three important principles enumerated in section fifty-four.

§ 58. Relationship of surface to the lode.—Under local rules, as well as under the act of 1866, the lode was the principal thing, and the surface was in reality an incident.[11] The manifest purpose of section two of the act of 1866 was a conveyance of the vein, and not the conveyance of a certain area of land in which was the vein.[12] Nowhere in the act of 1866 was there any express limitation as to the amount of land to be conveyed. Obviously, the statute contemplated the patenting of a certain number of feet of the particular vein claimed by the locator, no matter how irregular its course. No provision was made as to the surface area, leaving the land department in each particular case to grant so much of the surface "as was fixed by

[11] Johnson v. Parks, 10 Cal. 447; Patterson v. Hitchcock, 3 Colo. 533, 544; Wolfley v. Lebanon, 4 Colo. 112; Walrath v. Champion M. Co., 63 Fed. 552.

[12] Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 63, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 26, 59 Pac. 607, 612, 50 L. R. A. 209, 218.

local rules" or was, in the absence of such rules, in its judgment necessary for the convenient working of the mine.[13]

While in some districts the precise quantity of surface allowed in connection with a lode was fixed by local rules, in many others no fixed quantity was mentioned. The lode only was located, the claims being staked, if at all, at the ends only. The notice of location usually called for so many feet on the vein, and a misdescription as to its course did not vitiate the location. The locator had a right prior to patent to follow it wherever it ran.[14]

Neither the form nor extent of the surface area claimed controlled the rights on the located lode. It did not measure the miner's rights either to the linear feet upon its course or to follow the dips, angles, and variations of the vein.[15]

The local rules fixed no bounding planes across the course of the vein, and end lines were not in terms provided for, although they were, according to the decision in the Eureka case, implied. But there was no implication that they should be parallel.[16]

Under the local rules, there was no question raised as to any side lines, for there were none provided for.[17] A locator could hold but one lode, or vein,[18] even if

13 Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 63, 18 Sup. Ct. Rep. 895, 43 L. ed. 72.

14 Johnson v. Parks, 10 Cal. 446, 448; Larned v. Jenkins, 113 Fed. 634, 635, 51 C. C. A. 344.

15 Eureka Case, 4 Saw. 302, 323, Fed. Cas. No. 4548; Golden Fleece G. and S. M. Co. v. Cable Cons. Co., 12 Nev. 312, 328.

16 Eureka Case, 4 Saw. 302, 319, Fed. Cas. No. 4548; Iron S. M. Co. v. Elgin, 118 U. S. 196, 208, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98.

17 Carson City G. M. Co. v. North Star M. Co., 83 Fed. 658, 666, 28 C. C. A. 333.

18 Eureka Case, 4 Saw. 302, 323, Fed. Cas. No. 4548; Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304, 305; Walrath v. Champion M. Co., 63 Fed. 552, 553; Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 26, 59 Pac. 607, 612, 50 L. R. A. 209, 218.

his claim had fixed surface boundaries. But the fact that two ledges existed within the bounds was required to be first established before the subsequent claimant had any lawful right to invade the surface boundaries of the senior locator.[19]

In all patents issued under the act, a recital was inserted restricting the grant to the one vein, or lode, described therein, and providing that any other vein, or lode, discovered within the surface ground described should be excepted and excluded from the operation of the grant.

§ 59. **Construction of the act by the land department.**—Shortly after the passage of the act the commissioner of the general land office issued "circular instructions" for the guidance of the registers, receivers, and surveyors-general in carrying the law into effect.[20] These instructions provided for the establishment of end lines at right angles to the ascertained or apparent general course of the vein, and permitted the applicant to apply for patent to a vein 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 sides of the vein. As was said by the commissioner of the general land office, an applicant for a patent under this act might include surface ground lying on either or both sides of the vein as part of his claim, or he might apply for a patent for the vein alone. His rights upon the vein and in working it were precisely the same, whatever might be the form of his surface ground, or whether he had any or none.[21]

As might be expected, the patents issued under this statute described surface areas very different

19 Atkins v. Hendree, 1 Idaho, 107.

20 January 14, 1867—Copp's Min. Dec., p. 239.

21 Mt. Joy Lode—Copp's Min. Dec., p. 27.

and sometimes irregular in form. Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom. This strip might be straight or in a curved or irregular line, following, as was supposed, the course of the vein. Sometimes the surface claimed and patented was a tract of considerable size, so claimed with a view of including the apex of the vein, in whatever direction subsequent explorations might show it to run. And, again, where there were local rules giving to the discoverer of a mine possessory rights in a certain area of surface, the patent followed those rules, and conveyed a similar area.[22]

As to the effect of such patent, when issued, the department took the view that the patentee was fully invested with the title to his lode for the linear extent specified in the grant, whatever course the vein might be found to pursue underground;[23] and that he might follow the particular lode named in the patent to the number of feet expressed in the grant, although the ledge in its course should leave the surface ground described in the patent.[24] In other words, the department inclined to the opinion that the right of a lode claimant to pursue the vein to the extent of the number of linear feet claimed, whatever might be its course, was the same after patent as before.

Under this construction of the law, patents were issued in several instances describing a small area of surface, upon which the improvements were erected, within which surface a few hundred linear feet of the lode only was included, the remainder of the feet

[22] Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 64, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; and see Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 26, 59 Pac. 607, 612, 50 L. R. A. 209, 218.

[23] Flagstaff Case—Copp's Min. Dec., p. 61.

[24] Commissioner's letter—Copp's Min. Dec., pp. 154, 201.

claimed being indicated by a line extending beyond the defined surface area in the direction and to the extent claimed.[25] An example of a patent issued under this interpretation is found in the case of the famous Idaho mine in Grass Valley, California. We present for illustrative purposes a copy of the plat accompanying this patent (Figure 1):—

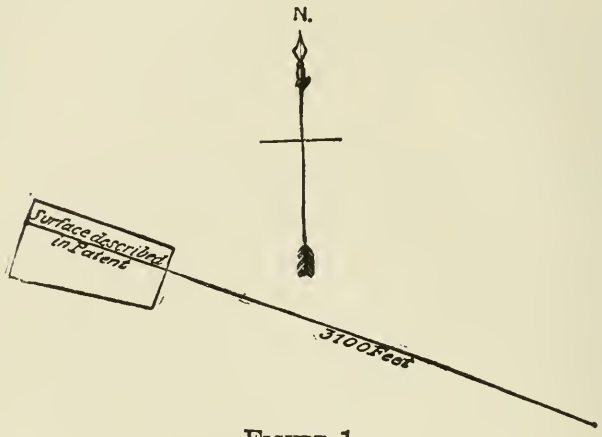

FIGURE 1.

This patent described the surface ground shown on the plat, and granted "the said mineral claim, or lot of land, above described, with the right to follow said vein, or lode, to the distance of thirty-one hundred linear feet, with its dips, angles, and variations, although it may enter the land adjoining." Just what was in fact granted by the patent to a line might be the cause for serious controversy, even if the line correctly followed the outcrop of the vein. But subsequent development proved that this outcrop, or top, was considerably north of the patented line. Litigation arose between the Idaho and the Maryland, adjoining on the east, as to where the right of the Idaho on the vein

[25] Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 64, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 26, 59 Pac. 607, 612, 50 L. R. A. 209, 218.

terminated and that of the Maryland began, and as to what was the bounding plane on the dip between the two companies. Under the interpretation followed by the land department, it would seem that the Idaho company could follow the vein in whatever direction it ran, after leaving the surface boundaries, to the extent of the thirty-one hundred feet. The trial court ruled that the diagram fixed the position of the lode, and that the bounding plane on the lode between the two companies was to be drawn through the point at the eastern terminus of the lode line shown on the plat. The case was compromised during the trial. It is cited simply to show some of the embarrassments flowing from the early interpretation by the land department of the act, and the difficulties encountered in later years where coterminous proprietors are brought into controversy with these old locations or with patents granted under this act.

Frequently the land department went to another extreme on this subject of surface ground. Patents were issued covering a few hundred feet of a lode, embraced within irregular surface boundaries which covered an area of several hundred acres.

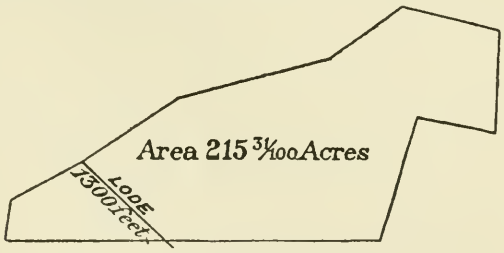

FIGURE 2.

Figure 2 presents an illustration of this. It is taken from a patent issued by the department, based upon a claim to the lode, originating under the act of 1866, upon proceedings completed and entry made prior to the passage of the act of May 10, 1872.

So long as the act of 1866 was in force, which granted but the one lode, the legal controversies likely to arise over a proper construction of such a patent were not particularly serious. But when we consider that the act of 1872 purports to grant to the holder of such a patent all other lodes which have their tops, or apices, within the patented surface area, it will be seen that many complications might arise as to end-line planes and dip rights between coterminous proprietors. All of this, however, will be reserved for future discussion. Our object has been simply to illustrate the rules of interpretation which prevailed in the land department.

§ 60. **Construction by the courts.**—The courts of last resort have uniformly overruled the interpretation of this act adopted by the land department, and have established the rule that surface lines, both side and end, were contemplated by the act of 1866, and that when a patent was once obtained the patentee was not permitted to follow the vein on its course beyond the surface boundaries.[26]

The Flagstaff lode claim, in reference to which, on application for patent, the land department announced its interpretation [27] that the patentee might follow the lode to the linear extent claimed, whatever might be its course, came before the courts after the patent was issued, in two cases, one of which reached the supreme court of the United States. As the Flagstaff case is a noted one, and has served as a precedent in a number

[26] McCormick v. Varnes, 2 Utah, 355; Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 467, 25 L. ed. 253; Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 65, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; Montana Ore Purchasing Co. v. Boston & M. C. C. & S. M. Co., 20 Mont. 336, 337, 51 Pac. 159, 160, 19 Morr. Min. Rep. 186; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 58, 22 Morr. Min. Rep. 575; Lillie Lode M. Claim, 31 L. D. 21.

[27] Copp's Min. Dec., p. 61.

of controversies, we herewith present a diagram (Figure 3)[28] illustrating the several controversies.

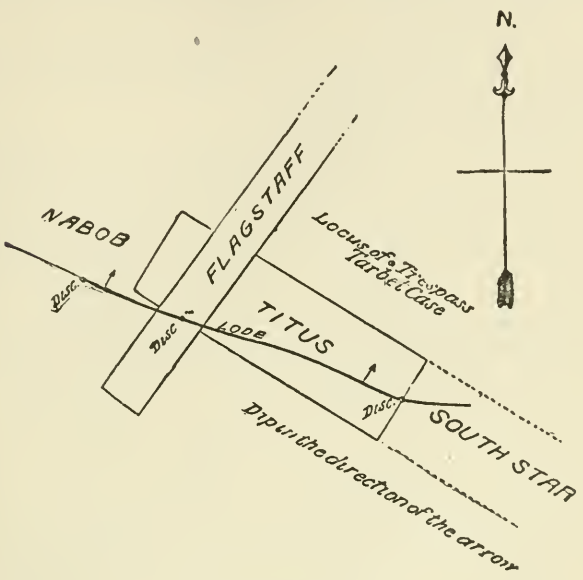

FIGURE 3.

The Flagstaff patent granted a superficies one hundred feet wide by twenty-six hundred feet long, with the right to follow the vein to the extent of twenty-six hundred feet. It appeared that the lode crossed the side lines, as indicated on the diagram. Two controversies arose; one with the Nabob, on the west, and the other with the Titus, on the east. In each case the Flagstaff company contended that they had a right to the lode for the length thereof claimed, though it ran in a different direction from that in which it was supposed to run when the location was made.

[28] This diagram, so far as it relates to the case of Flagstaff M. Co. v. Tarbet, is taken from a certified copy of the map used at the trial. The Nabob claim is designated thereon from the description given in McCormick v. Varnes, 2 Utah, 355.

The supreme court of Utah passed upon both cases, the Nabob case alone being reported, so far as that court was concerned.[29] It held in that case that the Flagstaff patented ground did not cover or embrace any part of the vein on its course, or strike, outside of and beyond the side lines.

The Titus case was decided on parallel lines, and was appealed to the supreme court of the United States,[30] where the ruling was affirmed, and the doctrine firmly established that the right to the lode only extended to so much of the lode as is found within the surface boundaries.[31] If the patentee located crosswise of the lode, and his claim was only one hundred feet wide, that one hundred feet was all he had a right to.[32]

Prior to this decision of the supreme court of the United States, the supreme court of Colorado had announced the same doctrine as the supreme court of Utah,[33] but without referring to the Utah cases. It is more than probable that the two courts reached the same conclusions without either having knowledge of the action of the other.

The doctrine of the Flagstaff case has been applied frequently to cases of somewhat similar character.[34] The facts found in the case of New Dunderberg

[29] McCormick v. Varnes, 2 Utah, 355.

[30] Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 467, 25 L. ed. 253.

[31] See Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 65, 18 Sup. Ct. Rep. 285, 43 L. ed. 72; Montana Ore Purchasing Co. v. Boston & M. Co., 20 Mont. 336, 51 Pac. 159, 160, 19 Morr. Min. Rep. 186.

[32] See, also, Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 65, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; Walrath v. Champion M. Co., 171 U. S. 293, 304, 18 Sup. Ct. Rep. 909, 43 L. ed. 170.

[33] Wolfley v. Lebanon, 4 Colo. 112; Johnson v. Buell, 4 Colo. 557.

[34] Walrath v. Champion M. Co., 63 Fed. 552, 556; S. C., 72 Fed. 978, 19 C. C. A. 323; Dunderberg Min. Co. v. Old, 79 Fed. 598, 606, 25 C. C. A. 116; Larned v. Jenkins, 113 Fed. 634, 51 C. C. A. 344; Davis v. Shepherd, 31 Colo. 142, 72 Pac. 57, 58, 22 Morr. Min. Rep. 575.

Mining Co. v. Old [35] are strikingly similar to those in the Flagstaff case, as will appear from Figure 3A.

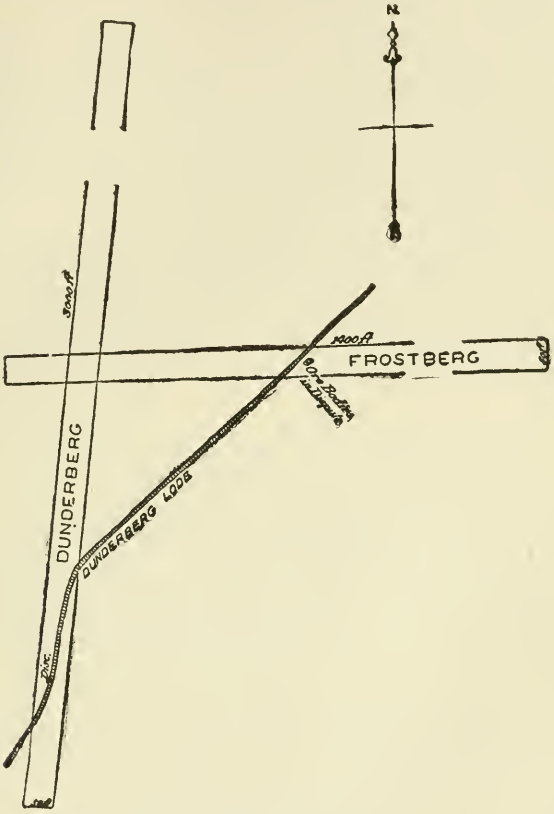

FIGURE 3A.

The owners of the Frostberg sought to recover from the owners of the Dunderberg for ore extracted by them under the Frostberg surface. The court sustained the contention of the Frostberg owners, limiting the right under the Dunderberg patent to vertical side line planes of that claim.

[35] 79 Fed. 598, 25 C. C. A. 116.

The rule declared in the Flagstaff case was fully discussed approvingly by the supreme court of the United States in two interesting cases.[36]

It will be thus seen that until a locator defined his claim for purposes of patent, under the act of 1866, he could follow the lode in any direction it might take to the length claimed; but after patent he was confined to the lines of his survey. As was said by the circuit court of appeals for the eighth circuit:—

> A discoverer of a vein cannot be permitted to locate his claim, present his diagram, and obtain a grant for the lode and the land he claims, and then disregard the limitations of the grant and follow the lode without his location wherever it happens to lead.[37]

As to the extent of the dip or extralateral right under locations held and patents issued under the act of 1866, we reserve the discussion for a succeeding chapter.[38] To a considerable extent this act and the titles issued under it are brought into connection, and are at least partly blended with the later, or present, legislative system and the titles held thereunder.

§ 61. Local rules and customs after the passage of the act.—It will be observed that the act left to local regulation all the details of location, limiting, however, the linear extent of an individual location to two hundred feet, with an additional claim to the discoverer, and providing that not more than three thousand feet should be taken in any one claim by any association of

[36] Del. Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 65, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; Walrath v. Champion M. Co., 171 U. S. 293, 302, 18 Sup. Ct. Rep. 909, 43 L. ed. 170.

[37] Larned v. Jenkins, 113 Fed. 634, 636, 51 C. C. A. 344. See, also, Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 64, 18 Sup. Ct. Rep. 895, 43 L. ed. 72.

[38] *Post*, § 572 et seq.

persons. The law also granted to the locators the right to follow the vein to any depth, with all its dips, angles, and variations. This was the rule in most mining districts before the passage of the act, although in certain localities lode claims were required to be "square," with no right to follow the vein on the dip beyond vertical planes drawn through the surface boundaries. As the act did not apply to placers, this class of claims continued to be entirely governed by local rules until the passage of the placer law of July 9, 1870. Lode claims continued to be so governed within the limitation as to length of claim and the extent which might be held by location on a given lode by any association.

§ 62. The act of July 9, 1870.—This is commonly known as the placer law, in contradistinction to the lode law of 1866, and was amendatory of and supplemental to that law. It provided, in terms, that claims usually called "placers," including all forms of deposit, excepting veins of quartz or other rock in place, should be subject to entry and patent under like circumstances and conditions and upon similar proceedings as were provided for vein or lode claims, with the exception that a survey was not necessary where the proposed entry conformed to legal subdivisions. It fixed the price for such lands at two dollars and fifty cents per acre, and authorized their subdivision into ten-acre tracts. It limited the extent of a placer location, whether by an individual or an association of persons, to one hundred and sixty acres. Hitherto no limitation had been imposed as to the area which might be included in a location.[39] It also provided, that where a person or association of persons shall have

[39] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 650, 26 L. ed. 875.

held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of possession and working of the claims for such period should be sufficient, in the absence of adverse claims, to entitle the applicant to a patent.[40] In other words, possession and working for the statutory period, without location, ripened into an equitable title against the government itself.

As we have heretofore observed, placer claims were first patentable under this act.[41]

The historical importance of the act (the full text of which will be found in the appendix) lies in the extension of the right to patent to placers and other forms of deposit not included within the lode law of 1866.

§ 63. Local rules and customs after the passage of the act.—Under the placer law, placer locations were still to conform to local rules as to the extent of the claims, subject to the limitation that no more than one hundred and sixty acres could be located by an individual or an association of persons. In this respect individuals and associations seem to have been placed upon the same footing; that is, either might take up one hundred and sixty acres.[42]

With this limitation, and the requirement that placer locations upon surveyed land should conform to the public surveys, the manner of locating, working, and conditions under which forfeiture arose were left to local regulation. The act remained in force less than two years, when it was superseded by the general min-

[40] The land department construed this provision to apply to lode claims as well as placers. Circ. Inst.—Copp's Min. Dec., p. 253.

[41] Deffeback v. Hawke, 115 U. S. 392, 401, 6 Sup. Ct. Rep. 95, 29 L. ed. 423; Moxon v. Wilkinson, 2 Mont. 421.

[42] St. Louis Smelting Co. v. Kemp, Fed. Cas. No. 12,239A.

ing act of May 10, 1872, which preserved its essential features.

§ 64. Accession to the national domain during the third period.—The purchase of Alaska from Russia, in March, 1867, was the only accession to the public domain within this period. It was not until 1884, however, that the laws relating to mining claims and rights incident thereto became operative in this district. The act providing for a civil government for Alaska [43] made such laws applicable, subject to regulations to be prescribed by the secretary of the interior,[44] and also provided that parties who had previously located mines or mineral privileges therein should not be disturbed, but should be allowed to perfect their claims. Prior to the passage of this act patents for mining claims in Alaska could not be obtained.[45]

By act of congress passed August 24, 1912,[46] Alaska had confirmed upon it legislative powers, by providing for a legislative assembly, practically placing it in the category of a territory and enabling it to pass such laws as were not in conflict with congressional legislation. This necessarily includes the right to legislate on mining subjects on the same lines and with the same limitations as the states.

[43] May 17, 1884—23 Stats. at Large, p. 24; 1 Fed. Stats. Ann. 34.

[44] 4 Land Decisions, p. 128; Meydenbaur v. Stevens, 78 Fed. 787, 789, 18 Morr. Min. Rep. 578.

[45] Commissioner's letter—Copp's Min. Dec., p. 215.

[46] 37 Stats. at Large, p. 512.

CHAPTER V.

FOURTH PERIOD: FROM THE ENACTMENT OF THE LAW OF MAY 10, 1872, TO THE PRESENT TIME.

§ 68. The act of May 10, 1872.—On May 10, 1872, congress passed a law entitled "An act to promote the development of the mining resources of the United States," which reaffirmed the policy of the government as to the exploration, development, and purchase of its mineral lands by its citizens, or those who had declared their intention to become such, yet, particularly with respect to lode claims, it made a radical departure. This act is embodied in the Revised Statutes of the United States, and, to all intents and purposes, constitutes the present system. It is printed in full in the appendix, where will also be found the various sections of the revision embodying its terms. It is not our purpose here to deal with it analytically. The entire treatise will practically be devoted to a discussion and exposition of it. It is our present purpose to simply outline its salient features, draw attention to the changes in the law made by the act, and give it its proper place in the history of mining legislation.

§ 69. Declaration of governmental policy.—With reference to the declaration of governmental policy, it

embodies the spirit of the preceding enactments, making such changes in expression as were necessitated by substituting one enactment, embracing all classes of mineral lands, for two practically separate ones, dealing with two distinct classes.

The act of 1866 declared that the mineral lands of the public domain should thenceforward be free and open to exploration and occupation by all citizens and those who had declared their intention to become such, and granted the privilege to the claimants of a vein, or lode, of obtaining title to the *mine*. The act of 1870 extended like privileges to the owners of placer and other forms of deposit. The act of May 10, 1872, declares that all *mineral deposits* in land belonging to the United States are hereby open to exploration and purchase, and the *lands in which they are found to occupation and purchase*.[1] The language in italics, particularly the last sentence, "the lands in which they are found," seems to disclose the intent of the act in its radical departure from the method theretofore in vogue of locating lode claims. As a declaration of policy, however, we can see no essential difference in the spirit of the old and that of the new. The latter was, to all intents and purposes, a reaffirmance of the former. Let us briefly examine and discuss the changes made by the act in other respects, bearing in mind that it is not our present intention to critically discuss the latter law in all its aspects. We simply wish to invite attention to the principal modifications of the old system, and enumerate the salient features of the new.

1 Campbell v. Ellet, 167 U. S. 116, 119, 17 Sup. Ct. Rep. 765, 42 L. ed. 101; Calhoun G. M. Co. v. Ajax G. M. Co., 182 U. S. 499, 508, 21 Sup. Ct. Rep. 885, 45 L. ed. 1200; Doe v. Waterloo M. Co., 54 Fed. 935, 937; Parrot S. & C. Co. v. Heinze, 25 Mont. 139, 64 Pac. 326, 329.

§ 70. Changes made by the act—Division of the subject.—We can best deal with the subject by distributing it into three distinct heads:—

(1) Changes made with regard to lode claims;

(2) Changes made with regard to other claims;

(3) New provisions affecting both classes of claims.

We will discuss these in the order enumerated.

§ 71. Changes made with regard to lode claims.—The act of 1866 left the manner of locating these claims to local regulation, limiting the linear extent of each individual claim to two hundred feet, except in case of the discoverer, and to a maximum of three thousand feet to an association of persons.

We have seen that under the local rules locations were made of the *vein* and a given number of linear feet on the course was claimed; also, that prior to patent the locator could follow that vein, wheresoever it might run, to the extent claimed. His surface ground was for the convenient working of his lode, and its extent was regulated entirely by local custom. His right to the vein in length or depth was not dependent upon the form or extent of the surface ground. When he applied for and received a patent, he received title to but one lode, and could only follow that on its course to the extent which it was included within his surface lines. While end lines were implied, his right to pursue the vein in depth was not based upon their substantial parallelism.

The new law changed all this. As was said by Judge Beatty,—

> Disagreeable as the awakening may be, it is time we are opening our eyes to the fact that a new system has been introduced.[2]

[2] Gleeson v. Martin White M. Co., 13 Nev. 442, 459.

Under the act of 1872 the miner locates a surface,[3] which must be so defined as to include the top, or apex, of his lode. Failing in this, he obtains nothing. If he mistakes the course of his vein, it is his loss. He can only hold the vein on its course to the extent that the top, or apex, thereof is found within his boundaries.[4] He may thus acquire a superficies fifteen hundred feet in length by six hundred feet in width, if local regulations do not restrict these measurements.

In other words, under the old law he located the *lode*. Under the new, he must locate a piece of land containing the top, or apex, of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top, or apex, of the vein.[5] If he makes such a location, containing the top, or apex, of his discovered lode, he will be entitled to all other lodes having their tops, or apices, within their surface boundaries.[6] His end lines must be parallel and crosswise of the vein; otherwise, he cannot pursue his lode or lodes on their downward course beyond vertical planes drawn through his surface side lines (and perhaps, these side lines produced, as in such case the side lines perform the functions of end lines). The

[3] See Traphaagen v. Kirk, 30 Mont. 562, 77 Pac. 58, 60.

[4] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 84, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; Montana Ore Purchasing Co. v. Boston & M. C. C. & S. M. Co., 20 Mont. 336, 51 Pac. 159, 160; Lillie Lode Mine Claim, 31 L. D. 21.

[5] St. Louis M. Co. v. Montana M. Co., 194 U. S. 235, 238, 24 Sup. Ct. Rep. 654, 48 L. ed. 953.

[6] Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 88, 18 Sup. Ct. Rep. 895, 43 L. ed. 72; Calhoun G. M. Co. v. Ajax G. M. Co., 27 Colo. 1, 83 Am. St. Rep. 17, 31, 59 Pac. 607, 612, 50 L. R. A. 209, 216; Id., 182 U. S. 499, 508, 21 Sup. Ct. Rep. 885, 45 L. ed. 1200; East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266, 269, 27 Sup. Ct. Rep. 258, 51 L. ed. 476.

law in terms does not so state; but this is the interpretation reached by the courts.[7]

The foregoing states the essential differences in theory between the two acts. By this act of 1872 there was also granted to the owners of "one lode" patents, or locations, all lodes other than the one originally located, with the right to follow them in depth.

It may also be observed that the act of 1866 applied to claims upon lodes, or veins, of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper. With reference to claims located prior thereto, the act of 1872 added to the list of metallic substances named lead, tin, and "other valuable deposits."

The act also contained rules for the determination of controversies between claimants of cross lodes and those uniting on the dip, and other minor details, all of which will be considered at the proper time.

§ 72. Changes made with regard to other claims.—No radical changes in the method of acquiring title to placers and other forms of deposit not in place were made by the act; but the quantity of ground which might be acquired by an individual was limited to twenty acres. The act is silent as to the quantity which might be taken by an association of persons. Judge Hallett was of the opinion that the one hundred and sixty acre limitation in this respect contained in the act of 1870 remained unrepealed.[8] Be that as it may, the Revised Statutes re-enacted this provision of the act of 1870.[9]

Provisions were also made for obtaining titles to lodes known to exist within placers, and reserving such

[7] See *post*, § 586.

[8] St. Louis Smelting Co. v. Kemp, Fed. Cas. No. 12,239A.

[9] Rev. Stats., § 2330.

lodes from the operation of the placer patents, where they were not claimed by the placer applicant, a subject upon which the act of 1870 was silent.[10]

§ 73. New provisions affecting both classes of claims.—The act of 1872 went beyond the preceding legislation in many details. It fixed the amount of annual work to be performed in order to maintain the integrity of locations made both before and after the passage of the act. It provided for the marking of the boundaries of claims, prescribed the contents of records where local rules or state legislation required record, and the conditions under which forfeiture might be worked. The proceedings to obtain patent and the method of asserting and determining adverse claims were much more elaborate than in the preceding act, as well as much more satisfactory.

§ 74. Tunnels and millsites.—The act also provided a method of acquiring title to nonmineral land for the purpose of a millsite, either in connection with a located lode or where used by the owner of a mill or reduction works. It also incorporated a provision with reference to tunnels as a means of discovering blind lodes and securing certain rights on the discovered lodes to the locator and projector of the tunnel. These subjects will be fully discussed in their appropriate place.

§ 75. Legislation subsequent to the act of 1872.—Several amendments were made to the original act and

[10] Where entry and payment has been made under the act of 1870, the decision of the land department is conclusive that the land was placer, and that there were no "known lodes." Crane's Gulch Placer M. Co. v. Scherrer, 134 Cal. 350, 352, 86 Am. St. Rep. 279, 281, 66 Pac. 487, 488, 21 Morr. Min. Rep. 549.

some supplemental legislation of a minor character is to be noted before closing this historical review. A brief enumeration of these acts is all that will be here required.

The act of February 18, 1873,[11] excepted Michigan, Wisconsin, and Minnesota from the operation of the general mining laws. Mineral lands in these states, with the exception of salines,[12] are subject to entry under agricultural land laws.[13]

The acts of March 1, 1873,[14] and June 6, 1874,[15] extended the time for the performance of annual labor on claims located prior to the act of 1872; and the act of January 22, 1880,[16] fixed a uniform time for the performance of labor upon all claims located subsequent to the act of 1872.[17]

The act of May 5, 1876,[18] excepted Missouri and Kansas, and that of March 3, 1883,[19] exempted Alabama, from the operation of the general mining acts. The act of January 12, 1877,[20] in relation to salines, which was superseded by the act of January 31, 1901;[21] the act of June 3, 1878,[22] in relation to timber cutting, and an act passed on the same day,[23] commonly known

11 17 Stats. at Large, p. 465; C. M. L. 23.

12 See *post*, §§ 513–515.

13 United States v. Omdahl, 25 L. D. 157.

14 17 Stats. at Large, p. 483; C. M. L. 23.

15 18 Stats. at Large, p. 61; C. M. L. 23.

16 21 Stats. at Large, p. 61; C. M. L. 24.

17 McGinnis v. Egbert, 8 Colo. 41, 5 Pac. 652, 655; Slavonian M. Co. v. Decavich, 7 Saw. 217, 7 Fed. 331, 332.

18 19 Stats. at Large, p. 52; Comp. Stats. 1901, p. 1439; 5 Fed. Stats. Ann. 54.

19 1 Land Decisions, p. 656.

20 19 Stats. at Large, p. 221; Comp. Stats. 1901, p. 1547; 5 Fed. Stats. Ann. 48.

21 See *post*, §§ 513, 515.

22 20 Stats. at Large, p. 88; Comp. Stats. 1901, p. 1528; 7 Fed. Stats. Ann. 297.

23 Id., p. 89.

as "the stone and timber act," and the amendment to the latter act, passed August 4, 1892;[24] the act of February 11, 1897, specifically authorizing the location of petroleum lands under the placer mining laws;[25] the act passed in 1900, providing a code for Alaska, and providing a method for acquiring beach claims;[26] the act extending the coal land laws to Alaska[27] and amendatory acts;[28] the act of January 31, 1901, extending the mining laws to saline lands;[29] and the act of 1902 relating to the Philippine islands, and outlining a system for locating and patenting mining claims therein,[30] which was amended by the act of February 6, 1905,[31] are the only other enactments during the period that are worthy of note.

Some of these acts have performed a temporary purpose; others, to some extent, form a part of the existing system, and, as such, will be again referred to in treating of the different subjects to which they relate.

With reference to the Revised Statutes, approved June 22, 1874, it may be said that they were obviously a mere revision and consolidation of the general laws existing and in force on December 1, 1873. The existing system of mining law, with the exception of a few acts passed since December 1, 1873, is found codified or consolidated into the Revised Statutes. In treating of this system in the future we will simply refer to the

[24] Supp. R. S., vol. ii, p. 65.

[25] See *post*, § 422.

[26] 31 U. S. Stats., pp. 321, 329.

[27] June 6, 1900, 31 Stats. at Large, 658; Comp. Stats. 1901, p. 1441; 5 Fed. Stats. Ann. 57.

[28] April 24, 1904, 33 Stats. at Large, 525; Comp. Stats. (Supp. 1911), p. 616; 10 Fed. Stats. Ann. 27; May 28, 1908, 35 Stats. at Large, 424; Comp. Stats. (Supp. 1911), p. 617; Fed. Stats. Ann. (Supp. 1909), 30.

[29] See *post*, §§ 513, 515.

[30] 32 Stats. at Large, p. 691; 5 Fed. Stats. Ann. 718.

[31] 33 Stats. at Large, 692; Comp. Stats. (Supp. 1911), 527; 10 Fed. Stats. Ann. 267.

sections of the Revised Statutes, unless the subject under discussion necessitates a reference to the original act.

In addition to the foregoing legislation we shall have occasion to note a marked change in governmental policy with reference to coal, oil, gas and phosphate lands, with legislation impending in congress looking to dealing with the class of lands on the basis of a leasing or royalty system. Lands containing these classes of deposits are rapidly being withdrawn from location and entry under executive orders to await the enactment of legislation pending for their disposition. This subject will be considered in its appropriate place.

§ 76. Local rules and customs since the passage of the act.—Subject to the limitations enumerated in the act, 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, and amount of work necessary to hold possession. While this privilege is thus granted, it is not universally exercised. Generally, in California the district organizations are things of the past; and we believe it is the case in other states and territories. The mining laws themselves are, under ordinary conditions, sufficient for all practical purposes. Yet we do encounter districts which still possess a potential existence. Therefore, local rules must be dealt with as a part of the existing system, though much limited in their scope.

They have performed their part in the scheme of evolution, and have, for the most part, disappeared, to be replaced by higher forms of legislation.

As to the state and territorial legislation, the tendency in later years has been in the direction of individual mining codes, more or less comprehensive. While the existing federal laws largely dispense with the necessity for local regulation and circumscribe the field within which states may legitimately act, yet we find individual codes in some instances re-enacting many of the provisions of the federal laws and supplementing them with numerous provisions, some of which are subject to the criticism of being in conflict with the paramount law. The force and effect of this class of legislation will receive due attention when the subjects to which they relate are under discussion.

In Alaska, which until the passage of the act of August 24, 1912,[31a] had no legislative branch of government, one would naturally expect to find elaborate and comprehensive codes supplementing federal legislation. Such was the case in the earlier days of mining activity in that region, but these local codes have, as we understand the situation, gradually fallen into disuse, and in many localities where they once flourished they are practically ignored.[32]

§ 77. Accession to the national domain during the fourth period.—By treaty of cession entered into between the United States and the republic of Hawaii, adopted by joint resolution of congress July 7, 1898, all lands within the Hawaiian islands covered by the treaty which were the property of the republic, as distinguished from lands held in private ownership, passed to the United States, and became subject to the disposal of congress the same as other public lands.

31a 37 Stats. at Large, p. 512.

32 "Placer Mining in Alaska," by Thomas R. Shepherd, Yale Law Journal, May, 1909.

As yet the public land laws of the United States have not been extended to the new territory of Hawaii, and, pending further action by congress, the laws of the republic existing at the time of the treaty of cession regulating the sale and disposal of the public lands are continued in force. None of these last-named laws provide for the sale or other disposition of lands classified as mineral. It is extremely doubtful if there exists within any of these islands any deposits of commercial value which fall within the definition of mineral lands, as these terms are construed by the courts of the United States.

By the treaty of Paris terminating the Spanish-American war, there was ceded to the United States by Spain the island of Porto Rico. By this cession all lands in that and other islands of the West Indies (excepting Cuba) which theretofore belonged to the crown of Spain passed to the United States. By act of congress, July 1, 1902,[33] all such lands were ceded by the United States to the territory of Porto Rico for the use and benefit of the people of that island. As to what, if any, may be the mineral resources of Porto Rico, no accurate data is obtainable. The sale and disposal of all public lands within Porto Rico is intrusted entirely to the territorial government. None of the federal land laws are there in operation, and as yet the island government has enacted no laws either classifying its lands or providing for their sale or other disposal.

By the same treaty last above referred to the United States acquired from Spain the Philippine archipelago, the treaty passing to the first-named power:—

> All buildings, wharves, barracks, forts, structures, public highways, and other immovable property which, in conformity with the law, belong to the

[33] 32 Stats. at Large, p. 731; 5 Fed. Stats. Ann. 778.

public domain, and as such belong to the crown of Spain.

It was not until July 1, 1902, that any action was taken by congress to provide a system of mining laws for these islands, although the need for early legislation on the subject was generally felt and urged upon the attention of congress.[34] On that date there was approved an act temporarily providing for the administration of the affairs of civil government in the Philippine islands,[35] which contained a code of laws governing the disposal of public lands valuable for minerals. This law was amended in 1905.[36]

The system established by these acts is based upon the "square" location theory, compelling locators to confine themselves to vertical boundaries. In other respects it is framed upon the method of locating found in British Columbia and the Australian colonies.

The full text of the law in its application to public mineral lands in these islands is printed in the appendix.

[34] Report of Chief of Mining Bureau, Appendix K, Taft Commission Report, part ii, p. 354.

[35] 32 Stats. at Large, p. 691; 5 Fed. Stats. Ann. 718.

[36] 33 Stats. at Large, 692; Comp. Stats. (Supp. 1911), 527; 10 Fed. Stats. Ann. 267.

CHAPTER VI.

THE FEDERAL SYSTEM.

§ 80. Conclusions deduced from preceding chapters. In the preceding chapters we have given a short synopsis of such foreign mining laws as might reasonably be supposed to have exerted an influence on our system. We have also traced the origin and gradual development of the body of substantive law which now governs the acquisition and enjoyment of mining rights upon the public domain of the United States and have endeavored to show the relationship which the several states have occupied in the past, and now occupy, with reference to public mineral lands within their respective boundaries. From the general review, we are permitted to deduce the following general conclusions:—

Mines in the United States are not ranked as the property of society, the working of which is to be confided to the federal government. Mining with us is not a "public utility." It is simply a private industry, to be fostered and encouraged as all other economic industries are fostered and encouraged; but the exploitation and development of mines are no more governmental functions than is the cultivation of the soil or the business of manufacturing. The United States is the paramount proprietor of the public mineral lands, holding them not as an attribute of sovereignty, but as property acquired by cession and purchase. As such paramount proprietor, it has the same right of dominion and power of alienation as is

incident to absolute ownership in individuals.[1] By the term "public lands," we mean such as are subject to sale or other disposal under general laws. Land to which any claims or rights of others have attached does not fall within the designation of "public land."[2]

> Public lands belonging to the United States, for whose sale or other disposition congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by congressional authority, either express or implied.[3]

Whenever a tract of land has once been legally appropriated for any purpose, from that moment it becomes severed from the mass of public lands.[4]

While in the various treaties of cession and purchase through which territory was acquired and added to the national domain the federal government recognized and obligated itself to protect the rights and equities of grantees of the ceding nation or state, and by virtue of its federated system of government held certain property in trust for future states,[5] the great mass of

1 Lux v. Haggin, 69 Cal. 255, 340, 10 Pac. 674, 722.

2 Newhall v. Sanger, 92 U. S. 761, 763, 23 L. ed. 769; Bardon v. Northern Pac. R. R. Co., 145 U. S. 535, 538, 12 Sup. Ct. Rep. 856, 36 L. ed. 806; Mann v. Tacoma Land Co., 153 U. S. 273, 284, 14 Sup. Ct. Rep. 820, 38 L. ed. 714; McFadden v. Mountain View M. & M. Co., 97 Fed. 670, 679, 38 C. C. A. 354; State of Louisiana, 30 L. D. 276, and cases cited; Union Pacific Ry. Co. v. Harris, 76 Kan. 255, 91 Pac. 68, 69; affirmed, 215 U. S. 386, 388, 30 Sup. Ct. Rep. 138, 139, 54 L. ed. 246; Northern Lumber Co. v. O'Brien, 139 Fed. 614, 616, 71 C. C. A. 598, affirmed, 204 U. S. 190, 196, 27 Sup. Ct. Rep. 190, 51 L. ed. 438.

3 Lockhart v. Johnson, 181 U. S. 516, 520, 21 Sup. Ct. Rep. 665, 45 L. ed. 979.

4 Wilcox v. McConnell, 13 Pet. 498, 513, 10 L. ed. 264; Teller v. United States, 113 Fed. 273, 279, 51 C. C. A. 230; Scott v. Carew, 196 U. S. 100, 25 Sup. Ct. Rep. 193, 49 L. ed. 403.

5 Tide lands—Shively v. Bowlby, 152 U. S. 1, 26, 14 Sup. Ct. Rep. 548, 38 L. ed. 331; In re Logan, 29 L. D. 395; Nome Transp. Co., 29 L. D.

the acquired territory falls within the designation of "public lands," and passed to the United States untrammeled by either the tradition, laws, or policy of the ceding power, or by compact with the new states.[6]

As such absolute owner, the government might, at its pleasure, withhold its lands from occupation or purchase,[7] lease them for limited periods,[8] donate them to states for educational or other purposes, and to individuals or corporations to aid in the construction of railways and other internal improvements, sell or otherwise dispose of them absolutely or conditionally, and prescribe the terms and conditions under which private individuals might acquire permanent ownership, or the right of temporary enjoyment.[9]

> With respect to the public domain the constitution vests in congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations; congress has the absolute right to prescribe the terms, the conditions, and the mode of transferring this property, or any part of it, to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its existence.[10]

447. Lands under navigable waters—Pollard's Lessee v. Hagan, 3 How. 212, 223, 11 L. ed. 565; Argillite Ornamental Stone Co., 29 L. D. 585.

[6] Pollard's Lessee v. Hagan, 3 How. 212, 224, 11 L. ed. 565.

[7] Camfield v. United States, 167 U. S. 518, 524, 17 Sup. Ct. Rep. 864, 42 L. ed. 260; Light v. United States, 220 U. S. 523, 536, 31 Sup. Ct. Rep. 485, 55 L. ed. 570; Stearns v. Minnesota, 179 U. S. 223, 243, 21 Sup. Ct. Rep. 73, 45 L. ed. 162.

[8] United States v. Gratiot, 1 McLean, 454, Fed. Cas. No. 15,249; S. C., 14 Pet. 526, 10 L. ed. 573.

[9] Black v. Elkhorn M. Co., 163 U. S. 445, 16 Sup. Ct. Rep. 1101, 41 L. ed. 221.

[10] Gibson v. Chouteau, 13 Wall. 92, 99, 20 L. ed. 534; Light v. United States, 220 U. S. 523, 536, 31 Sup. Ct. Rep. 485, 55 L. ed. 570; Butte City Water Co. v. Baker, 196 U. S. 119, 126; Camfield v. United States, 167 U. S. 518, 524, 17 Sup. Ct. Rep. 864, 42 L. ed. 260.

On the other hand, congress has no power to legislate after the government has conveyed its title.[11]

The regalian doctrine of ownership in the crown of the royal metals, wheresoever found, based upon the theory that these metals were a prerogative of the crown, which prevailed in England, France, Spain, and Mexico, was never recognized in this country. A grant or conveyance by the United States carries all minerals, unless reserved expressly or by implication in the law or instrument purporting to pass the title.[12]

In countries from which the United States acquired its properties the contrary doctrine prevailed, and minerals did not pass to the grantee unless specially named in the instrument.[13]

§ 81. Outline of the federal system—Scope of the treatise.—It follows as a corollary from what has been heretofore stated, that the system of rules which sanctions and regulates the acquisition and enjoyment of mining rights, and defines the conditions under which title may be obtained to mineral lands within the public domain of the United States, is composed of several elements, most of which find expression in positive legislative enactment. Others, while depending for their existence and force upon the sanction of the general government, either express or implied, are, in a measure, controlled by local environment, and are evidenced by the expressed will of local assemblages, em-

[11] Cone v. Roxana G. M. & T. Co., 2 Legal Adv. 350 (C. C. Dist. Colo. 1899).

[12] Fremont v. Flower, 17 Cal. 199, 223, 79 Am. Dec. 123, 137; Barden v. N. P. R. R., 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992; Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; Old Dominion Copper Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333, 337.

[13] Fremont v. Flower, 17 Cal. 199, 223, 79 Am. Dec. 123, 137; United States v. Castillero, 2 Black, 1, 167, 17 L. ed. 645; Halleck's Introduction to De Fooz on the Law of Mines, § 7.

bodied in written regulations, or rest in unwritten customs peculiar to the vicinage.

American mining law may therefore be said to be found expressed:—

(1) In the legislation of congress;

(2) In the legislation of the various states and territories supplementing congressional legislation and in harmony therewith;

(3) In local rules and customs, or regulations established in different localities, not in conflict with federal legislation or that of the state or territory wherein they are operative.

This system does not seek to regulate or control mines or mining within lands held in private ownership, except such only as are acquired directly from the government under the mining laws, and then only forming a muniment of the locator's or purchaser's title. It does not presently require the payment of tribute or royalty as a condition upon which the public mineral lands may be explored or worked, although there is a strong probability that as to some of the economic minerals, such as oil, gas, coal and phosphates, there will before long be a change in the national policy. As heretofore observed, the system treats the government simply as a proprietor holding the paramount title to its public domain, with right of disposal upon such terms and conditions, and subject to such limitations, as the law-making power may prescribe. With the exception, perhaps, of saline lands and lands containing deposits of coal and some of the nonmetallic substances, the system is practically confined in its operation to those states lying wholly or in part west of the hundredth meridian, embracing Arizona, California, Colorado, Oregon, Washington, Nevada, Idaho, Montana, New Mexico, North Dakota,

South Dakota, Wyoming, Utah, and the territory of Alaska.[14] These comprise the precious metal bearing areas of the public domain. This system, as thus defined and limited, is the subject of this treatise.

This system is by no means symmetrical or perfect. It is one of the most difficult branches of the law to even logically arrange for the purpose of treatment, and the embarrassments surrounding its philosophical exposition are almost insurmountable. It has received attention in a fragmentary way at the hands of eminent writers, who are most logical and instructive when discoursing upon its imperfections and apparent absurdities. The courts are not harmonious with regard to rules of interpretation. No one tribunal has exclusive jurisdiction to determine questions arising under it. Its proper interpretation does not always involve fed-

[14] As to saline lands, the act of congress of January 31, 1901, placed them in the category of mineral lands, and authorized their entry and purchase under the laws relating to placers. This act applies to all public land states wherein there are unoccupied lands of the United States containing salt springs or deposits of salt in any form (Circ. Inst., 31 L. D. 131). The general mining laws are also in force in Florida, Mississippi, Louisiana, and Arkansas; but from a practical standpoint their operation in these states is not very extensive. By act of congress all lands in Oklahoma were originally declared to be agricultural (26 Stats. at Large, p. 1026; Comp. Stats. 1901, p. 1617; 6 Fed. Stats. Ann. 418). On March 3, 1901 (31 Stats. at Large, p. 680), congress extended the mining laws over the lands within the territory of Oklahoma ceded to the United States by the Comanche, Kiowa, and Apache Indians (Instructions, 31 L. D. 154). Porto Rico, the Hawaiian islands, and the Philippines contain public lands of the United States, but the land laws have not been extended over them as yet (Op. Atty.-Gen., 29 L. D. 32; McFadden v. Mountain View M. Co., 97 Fed. 670, 38 C. C. A. 354). In Hawaii the land laws existing during the republic are continued in force (Act of April 30, 1900; Instructions, 30 L. D. 195). Congress has ceded to the territory of Porto Rico all the public lands for the use and benefit of the people of that island (32 Stats. at Large, p. 731; 5 Fed. Stats. Ann. 778). Congress has enacted a comprehensive mining code for the Philippine islands, a full discussion of which will be found in another portion of this treatise.

eral questions, conferring upon the federal courts jurisdiction. It has thus come to pass that the courts of last resort in several of the states and territories, in construing the same law, have reached diametrically opposite conclusions; and in many of its most important features we have conflicting theories enunciated by different courts of equal dignity and equal ability, until we are almost constrained to say that "chaos has come again."

It is not our purpose to condemn the system, but to endeavor to deal with it fairly as we find it. In the language of Judge Beatty,—

> Nobody can pretend that it is perfect; but to our minds it is a great improvement on the system which it displaced. We are willing to admit that cases may arise to which it will be difficult to apply the law; but this only proves that such cases escaped the foresight of congress, or that, although they foresaw the possibility of such cases occurring, they considered that possibility so remote as not to afford a reason for departing from the simplicity of the plan they chose to adopt. So far the wisdom of the congressional plan has been sufficiently vindicated by experience.[15]

[15] Gleeson v. Martin White M. Co., 13 Nev. 442.

TITLE III.

LANDS SUBJECT TO APPROPRIATION UNDER THE MINING LAWS, AND THE PERSONS WHO MAY ACQUIRE RIGHTS THEREIN.

CHAPTER I.

"MINERAL LANDS" AND KINDRED TERMS DEFINED.

§ 85. Necessity for definition of terms.—It becomes necessary for us to determine precisely what character of lands fall within the purview of the mining laws, and to define, at least with reasonable certainty, what may be the subject of appropriation under them. To say that these laws apply to mineral lands only, and that mineral lands alone can be occupied and enjoyed under them, states the fact broadly. But what are *mineral lands?* What is the test of the character of a given tract, when its mineral quality is asserted by a claimant under the mining laws, and that assertion is denied by an agricultural claimant to the same tract? To enable us to intelligently answer these questions, we are called upon to consider the phrases employed in the various acts of congress, and sift them down to a generic or comprehensive term, from which we may proceed to evolve a definition as accurate as the nature of the subject will permit.

§ 86. Terms of reservation employed in various acts.—As we have already observed,[1] in the earlier legislation of congress, establishing a system for the pre-emption and settlement of the public domain, as well as in most of the legislative grants to the states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, mineral lands were uniformly reserved from the operation of the law, and were excepted from the grant. The terms employed in specifying what was reserved are not altogether uniform. A few examples will illustrate this.

The pre-emption act of 1841 (section ten) provided that no lands on which are situated any *known* salines or mines should be liable to entry under and by virtue of the provisions of the act.[2]

The act of September 27, 1850, creating the office of surveyor-general of Oregon, and providing for surveys, and making donations to settlers, directs

> that no mineral lands, nor lands reserved for salines, shall be liable to any claim under and by virtue of the provisions of this act.

The act of March 3, 1853, for the survey of public lands in California, the granting of pre-emption rights

1 See *ante*, § 47.

2 "Congress on March 3, 1891, by an act entitled 'An act to repeal the timber culture laws and for other purposes' (26 Stats., p. 1095; Comp. Stats. 1901, p. 1535; 6 Fed. Stats. Ann. 497), repealed the pre-emption law, and thereby also eliminated from the homestead law the words 'known salines or mines,' which were in the latter by adoption (Rev. Stats., § 2289; Comp. Stats. 1901, p. 1388; 6 Fed. Stats. Ann. 285). But congress left in force the provisions of section 2302 of the Revised Statutes (Comp. Stats. 1901, p. 1410; 6 Fed. Stats. Ann. 321), by which it is declared, among other things, that 'no mineral lands shall be liable to entry and settlement under the provisions of the homestead law.'" Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 46; S. C., on appeal, 112 Fed. 4, 11, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; 190 U. S. 301, 23 Sup. Ct. Rep. 692, 47 L. ed. 1064.

therein, and for other purposes, directs 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 operation of the pre-emption act of 1841, and further interdicting any person from obtaining the benefit of the act by a settlement or location on "mineral lands."[3]

By the fourth section of the act of July 22, 1854, to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes, it is directed that none of the provisions of the act shall extend to "mineral lands," salines, etc.

The act of July 4, 1866, giving authority for varying surveys from the rectangular system in Nevada, reserves from sale in all cases "lands valuable for mines of gold, silver, quicksilver, or copper."

The acts of July 1, 1862,[4] and July 2, 1864,[5] commonly known as the "Pacific railroad acts," reserve "mineral lands," excepting coal and iron from the designation.

Illustrations might be multiplied indefinitely, but the foregoing are sufficient for our present purpose.

No specific legislative interpretation or definition of the term "mineral lands," which were so reserved and excepted, was ever attempted. This was left for judicial or departmental construction.[6]

[3] Public Domain, p. 311.

[4] 12 Stats. at Large, p. 489; 6 Fed. Stats. Ann. 720.

[5] 13 Stats. at Large, p. 356; 6 Fed. Stats. Ann. 726.

[6] Considerable light is thrown upon the congressional definition of the word "mineral" in the acts of congress passed between 1864 and 1884, a consideration of which acts justified the supreme court of the United States in the conclusion that "the word 'mineral' had by successive declarations of congress been extended to include all valuable mineral." Northern Pacific Ry. Co. v. Soderberg, 188 U. S. 526, 531, 23 Sup. Ct. Rep. 365, 47 L. ed. 575; Harry Lode Claim, 41 L. D 403.

As during the early periods of our legislative history the ownership of these reserved lands remained in the government, and were withheld from private ownership, conflicts of asserted title rarely, if ever, arose, and opportunity for judicial interpretation was not afforded.

When a change in the policy of the government took place, and that which had theretofore been uniformly reserved became subject to sale and appropriation as "mineral land," "lands valuable for mines," "lands containing valuable mineral deposits," "lands claimed for valuable deposits," and other designations, *ejusdem generis*, the necessity arose for a rule of interpretation sufficiently comprehensive to embrace the terms when used either as words of exception in a grant or act of congress, or as defining the subject of a grant under the mining laws.

While the land department, in passing upon the character of land sought to be entered as mineral under these laws, in the absence of protest or controversy as to its character, might be satisfied with a much less degree of proof than would be required to bring the same tract within the excepting clause of a prior grant, logically the term "mineral lands," and its equivalent terms, wherever used in the acts or grants of congress, either as words of reservation or in the mining laws authorizing their appropriation, has the same limit and breadth of signification. What had been reserved by one series of legislative enactments, and in the different legislative grants, is identically that the appropriation of which is encouraged and sanctioned by another series of laws.

The term "known mines," as used in the pre-emption act of 1841, and in the homestead law, which was

in the latter by adoption,[7] is not the equivalent of the term "mineral lands," as used in the mining laws, or of the same term found in section 2302 of the Revised Statutes reserving such lands from entry and settlement under the homestead laws,[8] and should undoubtedly receive a more limited interpretation. As was said by Judge Ross:—

> The words "mineral lands" are certainly more general and much broader than the words "lands in which are situated any known salines or mines," formerly existing in the pre-emption and homestead laws. The wide distinction between them is clearly pointed out in Bardon v. Northern Pacific Railroad Company, 154 U. S. 288, [14 Sup. Ct. Rep. 1030, 38 L. ed. 992]; Davis (Admr.) v. Wiebbold, 139 U. S. 507, 516, [11 Sup. Ct. Rep. 628, 35 L. ed. 238]; Deffeback v. Hawke, 115 U. S. 392, 401, [6 Sup. Ct. Rep. 95, 29 L. ed. 423].[9]

This discussion of this particular term may therefore remain in abeyance until we enter upon the subject of pre-emption claims in conflict with asserted mining rights.

Eliminating, therefore, from present consideration "known mines," as the words are used in the act above referred to, we are called upon to consider the following terms and phrases:—

(1) "Mineral lands," as used in statutes reserving them from sale, or other disposal, and in section one of the act of July 26, 1866;

[7] Rev. Stats., § 2289; Comp. Stats. 1901, p. 1388; 6 Fed. Stats. Ann. 285.

[8] Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 46; S. C., on appeal, 112 Fed. 4, 11, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; 190 U. S. 301, 23 Sup. Ct. Rep. 692, 47 L. ed. 1064. See opinion by Sloan, J., in Old Dominion Copper M. & S. Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333, 338.

[9] Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 46; S. C., on appeal, 112 Fed. 4, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; 190 U. S. 301, 23 Sup. Ct. Rep. 692, 47 L. ed. 1064.

(2) "All forms of deposit," in section twelve of the act of July 9, 1870, and section twenty-three hundred and twenty-nine of the Revised Statutes;

(3) "Lands containing valuable mineral deposits," in section one of the act of 1872, and section twenty-three hundred and nineteen, Revised Statutes;

(4) "Land claimed for valuable deposits," in section six, act of 1872, and section twenty-three hundred and twenty-five, Revised Statutes;

(5) "Lands valuable for minerals," in section twenty-three hundred and eighteen, Revised Statutes;

(6) "Lands valuable for mines," as used in the act of July 4, 1866, giving authority for varying surveys in Nevada.

(7) "Nonmineral public lands," in the act of March 2, 1899,[10] authorizing a railroad to select lands in lieu of lands in national park.

While the supreme court of the United States[11] seems to intimate that the expression "lands containing valuable mineral deposits," used for the first time in the act of 1872, and re-enacted in the Revised Statutes, is of broader import than the term "mineral lands" used in the previous acts, a careful study and analysis of all cases decided by that court, as well as all courts in the mining regions, fail to disclose any material distinction in the meaning of the two terms. "Mineral lands" are lands that contain "valuable mineral deposits," and *vice versa.* The same may be said of the other terms.

From a well-considered examination of all the authorities on this subject, there is no room for any conclusion other than that the expressions "mineral

[10] 30 Stats. at Large, 993.

[11] Deffeback v. Hawke, 115 U. S. 392, 404, 6 Sup. Ct. Rep. 95, 29 L. ed. 423.

lands," "all forms of deposits," "lands containing valuable mineral deposits," "valuable deposits," "lands valuable for minerals," "lands valuable for mines," are, generally speaking, legal equivalents, and may be, and frequently are, used interchangeably.[12]

In this view our preliminary inquiry may be addressed to a consideration of the terms "mines" and "minerals."

§ 87. **"Mine" and "mineral" indefinite terms.**—Mr. Ross Stewart, in the opening chapter of his valuable work on Mines, Quarries, and Minerals in Scotland,[13] says:—

> The terms "mine" and "mineral" are not definite terms; they are susceptible of limitation according to the intention with which they are used; and in construing them regard must be had not only to the deed or statute in which they occur, but also to the relative position of the parties interested and the substance of the transaction or arrangement which the deed or statute embodies. Consequently, in themselves, these terms are incapable of a definition which would be universally applicable.[14]

§ 88. **English denotation—"Mine" and "mineral" in their primary sense.**—An examination of the English authorities shows what may be appropriately termed an evolution of denotation, beginning in the earlier history of English jurisprudence with the primary or etymological significance of the words, and gradually enlarging their meanings until their original derivation and early judicial application became all

12 See Brady's Mortgagee v. Harris, 29 L. D. 426, and cases cited.

13 Edinburgh, 1894.

14 Stewart on Mines, p. 1. Citing Lord Watson in Magistrates of Glasgow v. Farie (1888), L. R. 13 App. Cas. 657, 676; Kay, J., in Midland Ry. Co. v. Haunchwood, 20 Ch. Div. 552, 555. See, also, Bainbridge on Mines, 5th ed., 2, 4.

but obsolete. In this primary sense, a "mine" denoted an underground excavation made for the purpose of getting minerals;[15] and, as a corollary, minerals primarily were the substances obtained through underground excavations.

The word "mine" was used in contradistinction to "quarry," and "minerals" meant substances of a mineral character which could only be worked by means of *mines*, as distinguished from *quarries*.[16] In other words, regard was there had entirely to the *mode* in which the substance was obtained, and not to its chemical or geological character.[17]

William's Law Dictionary[18] defines "minerals" to be "anything that grows in mines and contains metals," and "mines" is defined as "quarries or places whereout anything is dug; this term is likewise applied to hidden treasure dug out of the earth." These same definitions recur in Tomlin's Law Dictionary.[19]

Lord Halsbury says:—

> I should think that there could be no doubt that the word "minerals" in old times meant the substances got out by mining; and I think "mining" in old times meant subterranean excavation.[20]

§ 89. **Id.—Enlarged meaning of "mine."**—These primary significations were soon enlarged, so that in time the word "mine" was construed to mean, also, the place where minerals were found, and soon came to be used as an equivalent of "vein," "seam," "lode," or to denote an aggregation of veins, and, under cer-

15 Midland Ry. Co. v. Haunchwood B. & T. Co. (1882), L. R. 20 Ch. D. 552.

16 Darvill v. Roper, 3 Drew. 294, 61 Eng. Rep. 915.

17 Bainbridge on Mines, 4th ed., p. 5.

18 London, 1816.

19 London, 1835.

20 Magistrates of Glasgow v. Farie, L. R. 13 App. Cas. 657, 670.

tain circumstances, to include quarries and minerals obtained by open workings.[21]

§ 90. Id.—"Mineral" as defined by the English and Scotch authorities.—In reference to the term "mineral," we quote the following from Bainbridge:—

> A mineral has been defined, in the narrow sense of the word, to be a fossil, or what is dug out of the earth, and which is predominantly metalliferous in character. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. In this view, it will embrace as well the bare granite of the high mountains as the deepest hidden diamonds and metallic ores.[22]

In his later edition [23] he reforms the definition as follows:

> The word "minerals" in its widest acceptation comprises every inorganic substance forming part of the crust or solid body of the earth other than the layer of soil which sustains vegetable life and other than the subsoil; and the minerals may be surface minerals (such as gravel and clay) or minerals buried more or less deep in the subsoil. Also, usually, upon any grant or conveyance of lands excepting the minerals, the minerals of either kind will remain in the grantor, although under exceptional circumstances the surface minerals will (to some extent, at least) pass to the grantee. Also,

21 Midland Ry. Co. v. Haunchwood B. & T. Co. (1882), L. R. 20 Ch. D. 552, 558; Stewart on Mines, p. 2. See, also, Nephi Plaster & Mfg. Co. v. Juab County, 33 Utah, 114, 93 Pac. 53, 14 L. R. A., N. S., 1043; White v. Miller, 200 N. Y. 29, 140 Am. St. Rep. 618, 92 N. E. 1065, 1068.

22 Bainbridge on Mines, 4th ed. (1878), p. 1. See, also, Stewart on Mines, p. 9.

23 5th ed. (1900).

minerals are not the less minerals because they are gotten by quarrying as distinguished from mining.[24]

Mr. Stewart says:—

> Both scientifically and popularly the term "mineral" has been applied to substances whose chemical and physical properties are sufficiently uniform to admit of identification and classification, whether they exist in a mine or upon the surface of the ground.[25]

A few illustrations from comparatively recent authorities will enable us to understand the modern signification given to the term "mineral" by the English courts.[26]

In Midland Railway v. Checkley,[27] Lord Romilly, master of the rolls, said:—

> Stone is, in my opinion, a mineral, and, in fact, everything except the mere surface which is used for agricultural purposes. Anything beyond that which is useful for any purpose whatever, whether it is gravel, marble, fire-clay, or the like, comes within the word "mineral," when there is a reservation of the mines and minerals from a grant of land.[28]

In Midland Railway Co. v. Haunchwood B. & T. Co.,[29] Mr. Justice Kay expressed the view that "min-

24 Bainbridge on Mines, 5th ed., 4.

25 Stewart on Mines, p. 9.

26 Many of the English cases herein discussed are referred to in Soderberg v. Northern Pacific Ry. Co., 188 U. S. 526, 535, 536, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

27 (1867), L. R. 4 Eq. C. 19.

28 In the recent case of North British R. Co. v. Budhill Coal & S. Co. (1910), App. Cas. 116, 125, this statement was quoted and criticised by Lord Loreburn: "No decision has, however, gone so far as that of Lord Romilly."

29 (1882), L. R. 20 Ch. D. 552, 555.

erals" meant, primarily, all substances (other than the agricultural surface of the ground)

> which may be got for manufacturing or mercantile purposes, whether from a mine, as the word would seem to signify, or such as stone or clay, which are gotten by open working.

In the leading case of Hext v. Gill,[30] the house of lords announced the rule that a reservation of "minerals" includes every substance which can be obtained from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning.[31]

In Attorney-General v. Welsh Granite Co.,[32] Lord Esher, master of the rolls, said:—

> The many cases which have been cited go to establish the definition, especially Attorney-General v. Mylchreest,[33] and Hext v. Gill, where Mellish, L. J., states the result of authorities. It is evident from these cases that "minerals" means substances which can be got from beneath the surface, not by mining only, but also by quarrying, for the purpose of profit.[34]

[30] (1872), L. R. 7 Ch. App. 699.

[31] This doctrine was approved and followed in a later case (Attorney-General v. Tomline (1877), L. R. 5 Ch. D. 750).

[32] (1887), 35 W. R. 617.

[33] (1879), 4 App. Cas. 294. See, also, Wainman v. Earl of Rosse, 2 Ex. 800; Earl of Rosse v. Wainman, 14 Mees. & W. 855; Mickelthwaite v. Winter, 6 Ex. 644.

[34] In Northern Pacific Ry. Co. v. Soderberg, 188 U. S. 526, 530, 23 Sup. Ct. Rep. 365, 47 L. ed. 575, it was said by Justice Brown that the distinction between underground workings was expressly repudiated by the English courts in Midland Ry. Co. v. Haunchwood (1882), 20 Ch. D. 552, and in Hext v. Gill (1872), L. R. 7 Ch. App. 699. The New York court of appeals seems, however, to recognize this distinction. Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495, 49 Am. St. Rep. 683, 42 N. E. 186, 18 Morr. Min. Rep. 279. See, also, Brady v. Smith, 181 N. Y. 178, 179, 185, 106 Am. St. Rep. 531, 73 N. E. 963, 964, 2

In Magistrates of Glasgow v. Farie, before the house of lords, involving the interpretation of a reservation in an act of parliament authorizing the construction of waterworks,[35] wherein it was provided that the undertakers of the project "shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them," Lord Herschell thus announced his view:—

> I think the reservation must be taken to extend to all bodies of mineral substances lying together in seams, beds, or strata, as are commonly worked for profit and have a value independent of the surface of the land.[36]

In Loosemore v. Tiverton & North Devon Ry. Co.,[37] Mr. Justice Fry, following Hext v. Gill, says:—

> There being no such restrictive context in the present case, the inquiry is whether the clay which was got out was clay which could be worked for a profit.

Lord Halsbury, in the Farie case (*supra*), criticises the doctrine announced by Lord Herschell in Hext v. Gill. He says:—

> In the first place, it introduces as one element the circumstances that the substance can be got at a profit. It is obvious that if that is an essential part of the definition, the question whether a particular substance is or is not a mineral may depend on the state of the market; and it may be that a mineral one year is not a mineral the next.[38]

Ann. Cas. 636; White v. Miller, 200 N. Y. 29, 140 Am. St. Rep. 618, 92 N. E. 1065, 1067.

35 Waterworks Clauses Act (1847), 10 & 11 Vict., c. 17.

36 L. R. 13 App. Cas. 685; Greville v. Hemmingway (1903), 87 L. T. 443; Johnstone v. Crompton Co. (1899), 2 Ch. 190; Great Western Ry. Co. v. Carpalla Clay Co. (1909), 1 Ch. D. 218, 239; affirmed (1910), App. Cas. 83.

37 (1882), L. R. 22 Ch. D. 25.

38 13 App. Cas. 657.

Whereupon in a later case [39] Lord Herschell rejoins that he sees no reason to alter his criticised conclusion, but explains as follows:—

> I desire only to say that when I stated that in my opinion the reservation must be taken to extend to all such bodies of mineral substances lying together in seams, beds or strata, as are commonly worked for profit, and have a value independent of the surface of the land, I did not intend by these latter words to suggest that the value of the mineral substances at the time of the reservations was the test whether they were reserved or not. I used them in order to emphasize the fact that it was not every scattered piece of mineral lying under the land that could be called a "mine" but only mineral substance lying in seams or beds or strata.

In the still later case of Great Western Ry. Co. v. Carpalla China Clay Co.,[40] Justice Farwell thus explains Lord Herschell's criticised views:—

> I do not think the Lord Justice intended to say that the definition of "mineral" can depend on the fluctuation of the market. What I understand him to mean is that because it is one of those things which are usually worked with the object of making a profit, not because a profit is made but because the object is to make a profit, and the substance is extracted from the soil for the purpose of making a profit out of it when gotten.

Lord Macnaghten thus expresses his views in Magistrates of Glasgow v. Farie, sitting with Lord Herschell:—

> In its widest significance the word "mineral" probably means every inorganic substance forming a part of the crust of the earth other than the layer of soil which sustains vegetable life. In some of

[39] Midland Ry. Co. v. Robinson (1889), 15 App. Cas. 19, 26.
[40] (1909), 1 Ch. D. 218, 237; affirmed (1910), App. Cas. 83.

> the reported cases it seems to be laid down or assumed that to be a mineral a thing must be of commercial value or workable at a profit. Be that as it may, it has been laid down that the word "minerals" when used in a legal document, or in any act of parliament, must be understood in its widest signification, unless there be something in the context, or in the nature of the case, to control its meaning.[41]

Of course, the element of profitable working is in no sense a part of the definition of the word in its primary or etymological sense.

While these criticisms and explanations of Lord Herschell's views are plausible when the primary or etymological signification of the word is considered, yet the doctrine of Hext v. Gill and the later cases following it may be fairly said to present a reasonable definition in the light of the progressiveness of the age and advancement in the natural sciences, with which the courts seem to have kept pace, making due allowance for the influence, in special instances, of the context as a factor of interpretation.

One of the latest expressions on this subject in the house of lords is found in an opinion by Lord Macnaghten in Great Western Ry. Co. v. Carpalla United China Clay Co.,[42] holding that china clay is a mineral within the meaning of section 77 of the "Railway Claims Consolidation Act." In North British Ry. Co. v. Budhill C. & S. Co.,[43] a controversy arose as to whether "sandstone" (freestone) was a mineral within the meaning of the Scotch Railway Acts. Many of the

41 Magistrates of Glasgow v. Farie (1888), L. R. 13 App. Cas. 689, 690.

42 (1910), App. Cas. 83, affirming the decision of the court of appeals (1909), 1 Ch. D. 218.

43 (1910), App. Cas. 116, 125.

English and Scotch cases are there reviewed and the conclusion reached that sandstone was not a mineral within the meaning of the excepting clause, stress being laid on the context in which the term occurred.

Lord Loreburn in his opinion referring to the prior cases says that it is impossible to extract from them any uniform standard.

> No one principle has been accepted and every principle has its friends. In these circumstances it would be quite unprofitable to expect a solution by piecing together the *dicta* of even most eminent authorities. They are contradictory.

The element of commercial value, which to a large extent controls the acquisition of mining titles in the United States, is by no means new. The German Codes contained a limitation prohibiting the prospector from claiming mineral or ore which did not offer the basis for practical and lucrative mining or metallurgical operations. Under the French and Belgian systems, before a mining concession could be obtained, it was necessary "to ascertain whether the land contains a layer which is susceptible of a profitable working." [44]

In Sweet's dictionary of English law,[45] we find the following definition:—

> In the most general sense of the term, minerals are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit.[46]

[44] Halleck's De Fooz on the Law of Mines, p. 110.

[45] London, 1882.

[46] This definition was also adopted in Rapalje and Lawrence's law dictionary, published in America the following year. Many of the English cases are cited in Murray v. Allard, 100 Tenn. 100, 66 Am. St. Rep. 740, 43 S. W. 355, 39 L. R. A. 249; and in Northern Pacific Ry. v. Soderberg, 188 U. S. 526, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

§ 91. Id.—English rule of interpretation.—Mr. Stewart enunciates certain rules as being sanctioned by current authority in England and Scotland, governing the construction of the term "mineral." These are as follows:—

First—The word "mineral" when used in a legal document or in an act of parliament, must be understood in its widest signification, unless there be something in the context or nature of the case to control its meaning.

Second—The meaning of the word "mineral," though not easily restricted, yields to the context when the relative positions of the parties interested, their intention, or the substance of the transaction so indicates.

Third—In doubtful cases, the custom of the district, or such usages without which a deed or statute would be inconsistent, may limit the word "minerals."

Fourth—Where the terms "mines" and "minerals" are both used in the same deed or statute, the word "minerals" is not on that account to suffer limitation of its meaning.[47]

In treating of the rules governing the interpretation of American statutory law, we shall have occasion to recur to the foregoing.

§ 92. Id.—Substances classified as "mineral" under the English decisions.—Before leaving the subject of the English law and decisions, it is not out of place to enumerate some of the substances which have been adjudicated by the English courts to be within the term "mineral." In this enumeration it is well to bear in mind the irreconcilable character of the English cases pointed out by Lord Loreburn in North British

[47] Stewart on Mines, pp. 10–13.

Railway v. Budhill, *supra*, and the further fact that although a given substance may have been determined in certain cases to be a mineral, later cases, while not necessarily disputing the definition, hold that considering the context in which the term is used, it is not to be treated as a mineral within an excepting clause of a grant or statute. The later cases are not necessarily in conflict with the earlier.

In this enumeration it is hardly necessary to mention gold, silver, the common metals, or coal, as they fall within the earlier definition of the term, and were usually obtained through underground excavations. In addition to these, the following substances have been successively held to be minerals:—

Beds of stone, obtained either by mining or quarrying; [48]

Stone, obtained by quarrying; [49]

Stone, for road-making and paving; [50]

[48] Earl of Rosse v. Wainman (1845), 14 M. &. W. 859; S. C., 10 Morr. Min. Rep. 398—construing act of parliament (55 Geo. III, c. 18—inclosure act) reserving to the lords "all mines and minerals."

[49] Micklethwait v. Winter (1851), 6 Ex. 644, under an inclosure act.

[50] Midland Railway v. Checkley (1867), L. R. 4 Eq. C. 19, a case under a canal act excepting coal, limestone, ironstone or "other minerals." Concerning a reservation in canal act (1796) of the mines and minerals within and under the lands through which the canal was to be made, the master of the rolls said that every species of stone, whether marble, limestone, or ironstone, came within the category of "minerals."

In Bell v. Wilson (*post*), the vice-chancellor said that in strictness the term "mineral" comprises chalk, slate, and all kinds of stone, whether freestone, sandstone, or granite.

In Attorney-General v. Welsh Granite Co. (1887), 35 W. R. 617—construing inclosure act (1812), similar to that considered in Rosse v. Wainman (*supra*),—it was held that the term "mineral" included granite.

In Menzies v. Earl of Breadalbane (1818), 19 Fac. Coll. 521, 1 Sh. App. 225, the house of lords held that building stone was not reserved under an exception of "mines and minerals" in a private contract.

Freestone (sandstone);[51]

Limestone;[52]

Flint stones turned up with the plow by the tenant in the course of husbandry;[53]

Slate;[54]

Clay;[55]

[51] Bell v. Wilson (1865), 2 Drew. & S. 395; S. C., on appeal, L. R. 1 Ch. App. 303—construing an exception in a lease of "mines and seams of coal and other mines, metals, or minerals, as well opened as not opened."

Jamieson v. North British Ry. Co., 6 Scot. L. Rep. 188—construing Scotch Railway Clauses Act, which is identical with English act.

Glasgow & S. W. Ry. Co. v. Bain (1893), 21 R. 134; Mawson v. Fletcher (1870), L. R. 6 Ch. App. C. 91, 94.

Contra in private contract reserving minerals. Duke of Hamilton v. Bentley (1841), 3 D. 1121; and in the excepting clauses of Scotch Railway Clauses Act reversing some of the Scotch cases. North British Ry. Co. v. Budhill C. & S. Co. (1910), App. Cas. 116.

Under the common law of Scotland, freestone is not included in an exception of mines and minerals in a conveyance—Lord Shaw in the same case.

In Greville v. Hemmingway (1903), 87 L. T. 443, Lord Alverstone held that a bed of sandstone lying sixty feet below the surface which could not be worked except by breaking the surface, was included in a reservation in a conveyance reserving certain mines and minerals.

[52] Fishbourne v. Hamilton (1890), L. R. 25 Ir. 483; Midland Railway v. Robinson (1889), L. R. 15 App. Cas. 19; but as explained by Lord Loreburn in North British Railway v. Budhill (1910), App. Cas. 116, 124, this case turned upon the question whether or not quarries of mineral as well as mines of mineral were within the meaning of the statute. See in this connection Brown's Trust, 11 W. R. 19. Glasgow & S. W. Ry. Co. v. Bain (1893), 21 R. 134; Manson v. Fletcher (1870), L. R. 6 App. Cas. 91; Dixon v. Caledonian & Glasgow Ry. Co., L. R. 5 App. Cas. 820.

[53] Tucker v. Linger (1883), L. R. 8 App. Cas. 508—construing reservation in lease of "mines and minerals, quarries of stone, brickearth, and gravel pits." But tenant held to be entitled to them by virtue of local custom.

[54] Duchess of Cleveland v. Meyrick, 16 W. R. 104; 37 L. J. Ch. 125. It will be observed that slate is specifically named in the reservations in both English and Scotch Railway Clauses Acts. This accounts for the dearth of English decisions. See note under "*Clay*," *post*.

[55] This substance may or not be a mineral, depending on its quality, manner of occurrence and availability for commercial purposes. The

ordinary variety occurring as surface or subsoil constituting the land is not a mineral in any accepted sense.

Great Western Ry. Co. v. Blades (1901), 2 Ch. 624; 70 L. J. Ch. 847; Todd Burleston & Co. v. N. E. Ry. Co. (1903), 1 K. B. 630; Skey & Co. v. Parsons (1909), 101 L. T. 103, 25 T. R. 708; Great Western Ry. Co. v. Carpalla (1909), 1 Ch. D. 218, 234; affirmed (1910), App. Cas. 83.

As to clay used for making ordinary brick, the authorities are somewhat confusing by reason of inexact classifications. The cases are reviewed in Great Western Ry. Co. v. Blades (1901), 2 Ch. 624. The finer grades classified commercially as china, fire-clay or "kaolin," used in the arts and manufactures, are generally recognized as a mineral. Hext v. Gill (1872), L. R. 7 Ch. App. 699, involving an exception in grant of freehold in copyhold tenement by Duke of Cornwall (1799), reserving "all mines and minerals within and under the premises, with full and free liberty of ingress, egress, and regress, to dig, search for and to take, use and work, for the said excepted minerals." (See explanation of this case in White v. Miller, 200 N. Y. 29, 140 Am. St. Rep. 618, 92 N. E. 1065.)

Working for china clay in this case was by stripping the soil from the bed and turning a stream of water over the clay, similar to the tin "streaming" practiced in some portions of Cornwall.

This process is minutely described in the late case of Great Western Ry. v. Carpalla (1909), 1 Ch. D. 218, 225; Ruabon Brick & Terra Cotta Co. v. Great Western Ry. (1893), L. R. 1 Ch. 427; Lord Herschell in Magistrates of Glasgow v. Farie (1888), 13 App. Cas. 657; Great Western Ry. Co. v. Carpalla (1909), 1 Ch. D. 218, 234; affirmed (1910), App. Cas. 83; Midland Ry. Co. v. Haunchwood (1882), L. R. 20 C. Div. 552. (For comment on this case by U. S. land department, see King v. Bradford, 31 L. D. 108.)

Clay may be a mineral in one district and not in another. Great Western Ry. v. Blades, *supra*. See, also, Attorney-General v. Mylchreest (1879), 4 App. Cas. 294 (defining the rights of the crown in the Isle of Man); Caledonia Ry. v. Glenboig (1910), S. C. 951; 47 Sc. L. R. 823 (Court of Sessions); Jersey v. Neath (1889), Q. B. D. 555; Loosemore v. Tiverton (1882), L. R. 22 Ch. D. 25.

The English and Scotch cases in which the various railways are parties practically all arose under acts of parliament known as the "Railway Clauses Acts." These acts, among other things, prescribe the methods by which railway companies may obtain, by what is termed "compulsory purchase," land for their roadbeds, stations, and other necessary adjuncts. Similar acts are in force in both England and Scotland, and appear to be a substitute for the condemnation proceedings used in this country. The following extracts from one of these acts will serve to show the context under consideration in this case, as well as in a number of others which may be referred to:—

Coprolites (phosphatic nodules).[56]

The foregoing illustrations will serve to demonstrate the evolution of denotation referred to in a preceding paragraph, and give a fair outline of the meaning given to the terms "mines" and "minerals" by the courts of last resort in England and Scotland. Considering the scope of this treatise, a more critical review of the English authorities would serve no useful purpose.

§ 93. The American cases defining "mine" and "mineral."—Lord Loreburn in the case of North British Ry. Co. v. Budhill,[57] in construing the mineral reservations in the acts of parliament (Railway Clauses Acts), attributes the greatest importance to the earlier decisions of the English courts in construing similar reservations in private conveyances. He expresses the view that when an act of parliament uses a word which has received a judicial construction in the English courts, it presumably uses it in the same sense. This rule would obviously not obtain in construing an act of Congress. State decisions construing private contracts have purely a local force. Con-

And, with respect to mines lying under or near the railway, be it enacted:—

Sec. 77. The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines shall be deemed excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby.

Subsequent sections provide that the owner of the minerals desiring to work within forty yards of the railway or under the same must give the company notice. Thereupon the company may exercise the option of purchasing the minerals, the value thereof to be ascertained by appraisement. If the company does not give notice within thirty days of the exercise of that option, the owner of the minerals may work under the railway.

[56] Attorney-General v. Tomline (1877), L. R. 5 Ch. D. 750.

[57] (1910), App. Cas. 116, 127.

gress cannot be deemed to have employed terms in the sense given to them by any of the state courts. At the same time it is important to ascertain the expression of American courts on the meaning of these terms, as furnishing a persuasive guide in a limited sense to the true rule of interpretation.

In the United States, until a comparatively recent period, controversies over the construction of the terms "mines" and "minerals" have been limited to cases arising, as in some of the English cases, out of the use of these terms in conveyances, leases, and the like, where the context, or the peculiar situation of the parties, or the subject of the litigation, to some extent at least, controlled. A brief review of some of these authorities will be of interest.

In Gibson v. Tyson,[58] the supreme court of Pennsylvania had under consideration a grant reserving to the grantee "all minerals or magnesia of any kind." This was held to include chromate of iron; but the court intimated that had it not been for the parol evidence concerning the supposed character of the land, and the situation of the parties at the time the instrument was executed, it would have excluded the substance afterward found and designated as chromate of iron, because it was nonmetallic, and the "great mass of mankind do not consider anything mineral that is not metallic."

In Hartwell v. Camman,[59] the New Jersey court of chancery, in construing the terms of a conveyance granting "all mines, minerals, opened or to be opened," thus states its views:—

> By the use of the terms "mines" and "minerals," it is clear that the grantor did not intend to include

[58] 5 Watts, 34, 41.

[59] 10 N. J. Eq. 128, 133, 64 Am. Dec. 448, 451, 3 Morr. Min. Rep. 229.

everything embraced in the mineral kingdom, as distinguished from what belongs to the animal and vegetable kingdom. If he did, he parted with the soil itself. . . . . Nor can I see any more propriety in confining the meaning of the terms used to any one of the subordinate divisions into which the mineral kingdom has been subdivided by chemists, either earthy, metallic, saline, or bituminous. . . . . I do not think the terms should be confined to the metals, or metallic ores. I cannot doubt if a stratum of salt, or even a bed of coal, had been found, they would have passed under the grant.

The court holds that "paint-stone" falls within the term "minerals," as the substance was valuable for its mineral properties, could be converted into a merchantable article adapted to the mechanical and ornamental arts, and was embraced in the definition given by men of science.[60]

In Funk v. Haldeman,[61] the supreme court of Pennsylvania treated petroleum oil as a mineral, saying that "until our scientific knowledge on the subject is increased, that is the light in which the courts will be likely to regard this valuable production of the earth."

Under a statute of Pennsylvania, passed April 25, 1850, it was provided that suit in the county where the lands were situated might be brought by a tenant in common of "minerals." Under this act the court of common pleas of Erie county [62] held that petroleum was a mineral, and the fact that it was unknown as a product from land at the time the act was passed did not prevent its application.

[60] See, also, Johnson v. California Lustral Co., 127 Cal. 283, 287, 59 Pac. 595, 596.

[61] (1866), 53 Pa. 229, 248.

[62] Thompson v. Noble (1870), 3 Pittsb. 201.

In Griffin v. Fellows,[63] a question arose as to the construction of an instrument, executed in 1796, leasing a tract of public land, "together with the mines or minerals of whatever description." There were no opened mines or quarries on the premises at the date of the lease. Mining of coal was first commenced by the tenant in 1810, and quarrying stone in 1855. It was held by the supreme court of Pennsylvania, adopting the views of the trial court, that "the term 'minerals' embraces everything not of the mere surface, which is used for agricultural purposes; the granite of the mountains, as well as metallic ores and fossils, are comprehended within it,"[64] and consequently that, "by the terms of the lease, the lessee and his assigns have the right to mine coal and quarry stone."

In Dunham v. Kirkpatrick,[65] in construing a deed containing a reservation of "all minerals," the supreme court of Pennsylvania held that while it was true that petroleum was a mineral, yet in popular estimation it was not so regarded; and following the rule of construction invoked in Gibson v. Tyson, the court concluded, that in contemplation of the parties to the instrument petroleum was not within the reservation.

The same court, however, in a more recent case,[66] seems to have ignored the doctrine of Dunham v. Kirkpatrick.

The legislature of Pennsylvania had passed an act providing, among other things, for the mortgaging of a "leasehold of any colliery, *mining land*, manufacturing, or other premises." In passing upon the act, the court held that petroleum was a mineral substance

63 (1873), 32 P. F. Smith, 114, 8 Morr. Min. Rep. 657.

64 Citing the English case of Earl of Rosse v. Wainman, 14 M. & W. 859.

65 (1882), 101 Pa. 36, 43, 47 Am. Rep. 696.

66 Gill v. Weston (1885), 110 Pa. 316, 1 Atl. 921, 923.

obtained from the earth by a process of mining, and lands from which it is obtained may, with propriety, be called mining lands. Therefore, the act applied to and authorized a mortgage of a leasehold of oil land, although the act was passed *before petroleum was discovered*, substantially following the doctrine announced in Thompson v. Noble (*supra*).

The same court, in a still later case,[67] holds that natural gas is a mineral, although it possesses peculiar attributes, which require the application of precedents arising out of ordinary mineral rights with much more careful consideration, and terms it a mineral *ferae naturae*. That it is classified as a mineral there is no doubt.[68]

The supreme court of Ohio holds that petroleum is not included within the terms of a conveyance which grants in perpetuity the right of "mining and removing such coal, or other minerals." The court followed Dunham v. Kirkpatrick, and while admitting that the words "other minerals," or "other valuable minerals," taken in their broadest sense, would include petroleum oil, held that the parties did not intend to include oil in the word "minerals."[69]

Dunham v. Kirkpatrick has been variously dealt with in other cases. The court which decided it seems to have ignored it in a later case,[70] without necessarily

67 Westmoreland & Cambria Nat. Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 725, 5 L. R. A. 731, 732.

68 Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 Pac. 995, 997, 1 Ann. Cas. 403; People v. Bell. 237 Ill. 332, 86 N. E. 593, 594, 19 L. R. A., N. S., 746, 15 Ann. Cas. 511, and cases cited; Manufacturers G. & O. Co. v. Ind. Natural Gas Co., 155 Ind. 461, 57 N. E. 912, 915, 50 L. R. A. 768, 771, 20 Morr. Min. Rep. 672; Ohio Oil Co. v. Indiana, 177 U. S. 190, 202, 20 Sup. Ct. Rep. 576, 44 L. ed. 729, 20 Morr. Min. Rep. 466.

69 Detlor v. Holland, 57 Ohio St. 492, 49 N. E. 690, 692, 40 L. R. A. 266, 268.

70 Gill v. Weston (1885), 110 Pa. 316, 1 Atl. 921, 923. See comment as to this in McCombs v. Stephenson, 154 Ala. 109, 44 So. 867, 868.

intending to overrule it.[71] The supreme court of Michigan holds petroleum to be a mineral within a reservation of "all minerals," thereby expressly repudiating the doctrine of Dunham v. Kirkpatrick.[72]

The supreme court of Alabama considers it against the weight of authority,[73] as does the supreme court of Tennessee.[74]

While, owing to the circumstances surrounding a particular transaction, and the intention of the parties taken in connection with the context, petroleum may at times be held not to have been comprehended in the term "mineral" as used in a reservation clause of a conveyance, the decisions of the American courts are practically uniform in holding that petroleum is a mineral.[75] In construing private conveyances it is apparent that each case must be decided upon the language of the grant or reservation, the surrounding circumstances and the intention of the grantor, if it can be ascertained.[76]

[71] See comment of supreme court of Kentucky in McKinney's Heirs v. Central Kentucky Natural Gas Co., 134 Ky. 239, 120 S. W. 314, 316.

[72] Weaver v. Richards, 156 Mich. 320, 120 N. W. 818, 819.

[73] McCombs v. Stephenson, 154 Ala. 109, 44 So. 867, 868.

[74] Murray v. Allard, 100 Tenn. 100, 66 Am. St. Rep. 740, 43 S. W. 355, 359, 39 L. R. A. 249, 252, 19 Morr. Min. Rep. 169.

[75] Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 Pac. 995, 997, 1 Ann. Cas. 403; Mound City B. & G. Co. v. Goodspeed etc. Co., 83 Kan. 136, 109 Pac. 1002, 1004; People v. Bell, 237 Ill. 332, 86 N. E. 593, 19 L. R. A., N. S., 746, 15 Ann. Cas. 511; Isom v. Rex Crude Oil Co., 147 Cal. 659, 661, 82 Pac. 317, 318; Northern Pac. Ry. v. Soderberg, 188 U. S. 526, 534, 23 Sup. Ct. Rep. 365, 47 L. ed. 575; Webb v. American Asphaltum Co., 157 Fed. 203, 205, 84 C. C. A. 651; Weaver v. Richards, 156 Mich. 320, 120 N. W. 818, 819; McCombs v. Stephenson, 154 Ala. 109, 44 So. 867, 868; Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436, 441, 25 L. R. A. 222, 233.

[76] Brady v. Smith, 181 N. Y. 178, 106 Am. St. Rep. 531, 73 N. E. 963, 964, 2 Ann. Cas. 636 (reversing Brady v. Brady, 88 App. Div. 427, 84 N. Y. Supp. 1119, which had affirmed Brady v. Brady, 31 Misc. Rep. 411, 65 N. Y. Supp. 621); White v. Miller, 134 App. Div. 908, 118 N. Y.

Under an act of Congress passed February 11, 1897,[77] petroleum is declared to be a mineral within the meaning of the federal mining laws, setting at rest a possible doubt on this question raised by a decision of the then secretary of the interior, Hoke Smith, who ruled that lands containing petroleum were not mineral lands within the meaning of these laws.[78]

A case decided by the New York court of appeals [79] involved the construction of two deeds executed by the owner of a tract of land. The first deed conveyed all the "mineral ores" in the tract, "reserving all other rights and interests in said lands, save said mineral ores and the right to raise and remove the same." By the second deed, which made no reference to the first, there was conveyed to the same grantees all the mineral *and* ores on the same tract, with the right to mine and remove the same; also, the right to sink shafts, and sufficient surface to erect suitable buildings necessary and usual in mining and raising ores; also, the right of ingress and egress for mining purposes, and to make exploration for minerals and ores.

The plaintiff was the owner of whatever passed by these two conveyances. The defendant was the owner of what remained of the tract. The controversy arose over the right of the defendant to quarry granite on the tract. The granite was discovered on the premises after the first two deeds were executed, but prior to the acquisition of title by defendant. The court, after reviewing several of the English cases hereinbefore cited,

Supp. 1150, 200 N. Y. 29, 140 Am. St. Rep. 618, 92 N. E. 1065, 1067; McCombs v. Stephenson, 154 Ala. 109, 44 So. 867, 868; Burdick v. Dillon, 144 Fed. 737, 739, 75 C. C. A. 603.

77 29 Stats. at Large, 526; Comp. Stats. 1901, p. 1434; 5 Fed. Stats. Ann. 47.

78 Ex parte Union Oil Co., 23 L. D. 222.

79 Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495, 49 Am. St. Rep. 683, 42 N. E. 186, 189.

and the New Jersey case of Hartwell v. Camman (*supra*), reached the conclusion that the term "mineral ores" used in the first deed did not include granite; that the words "minerals and ores" used in the second deed, standing alone, would include granite; that it would be an unwarrantable limitation to exclude from the operation of the grant beds of coal or other nonmetallic mineral deposits of commercial value, or to confine it to such minerals as were known or supposed to be on the premises at the time.[80] But the court held that the context of the second deed conveying the "mineral and ores" limited the grant to such minerals as could be obtained by underground workings; and as granite is not so obtained, it did not pass under the conveyance.

The court also held that the meaning of the words "minerals and ores" in a deed could not be limited or explained by declaration of the parties thereto as to what was intended to be covered by the deed, reformation thereof not being sought.[81]

Limestone, silica, and silicated rock are minerals within the meaning of the constitution of the state of Washington permitting alien ownership of mineral lands.[82] None of these substances, however, would, according to the weight of authority, be considered as reserved in a deed excepting "minerals" if they constituted the land or a principal part of it.[83] Sand

[80] Followed in Brady v. Brady, 31 Misc. Rep. 411, 65 N. Y. Supp. 621. See, also, Phelps v. Church of Our Lady, 115 Fed. 852, 854, 53 C. C. A. 407.

[81] White v. Miller, 134 App. Div. 908, 118 N. Y. Supp. 1150, 200 N. Y. 29, 140 Am. St. Rep. 618, 92 N. E. 1065, 1069.

[82] State v. Evans, 46 Wash. 219, 89 Pac. 565, 568, 10 L. R. A., N. S., 1163.

[83] Brady v. Smith, 181 N. Y. 178, 106 Am. St. Rep. 531, 73 N. E. 963, 964, 2 Ann. Cas. 636; White v. Miller, 134 App. Div. 908, 118 N. Y. Supp. 1150, 200 N. Y. 29, 140 Am. St. Rep. 618, 92 N. E. 1065, 1068.

used for building purposes has been held to be a mineral—within the meaning of the mining laws,[84] a conclusion, however, with which the land department disagrees.[85] It was held not to be within a reservation of minerals in a deed.[86] Yet if it possessed a special value, *e. g.*, glass-making, it might be deemed within such a reservation.[87]

Marble in place is a mineral, and is included within a reservation of "all minerals."[88]

The circuit court of appeals of the eighth circuit enumerates a number of nonmetallic substances which are properly classified as mineral, such as alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, and building stone.[89]

The real test seems to be the character of the deposit as occurring independently of the mere soil, valuable in itself for commercial purposes, that is, near enough to a market to have a value.[90]

84 Loney v. Scott, 57 Or. 378, 112 Pac. 172, 175.

85 Zimmerman v. Bennson, 39 L. D. 310.

86 Staples v. Young (1908), 1 Ir. R. 135.

87 Hendler v. Lehigh Valley R. Co., 209 Pa. 256, 103 Am. St. Rep. 1005, 58 Atl. 486, 487; McCombs v. Stephenson, 154 Ala. 109, 44 So. 867, 868.

88 Brady v. Brady, 31 Misc. Rep. 411, 65 N. Y. Supp. 621; Phelps v. Church of Our Lady, 115 Fed. 882, 884, 53 C. C. A. 407; White v. Miller, 200 N. Y. 29, 140 Am. St. Rep. 618, 92 N. E. 1605; Hendler v. Lehigh Valley R. Co., 209 Pa. 256, 103 Am. St. Rep. 1005, 58 Atl. 486. But see Deer Lake Co. v. Mich. L. & I. Co., 89 Mich. 180, 50 N. W. 807, which seems to limit the definition of minerals to those in "common use." This case is severely criticised in McCombs v. Stephenson, 154 Ala. 109, 44 So. 867.

89 Webb v. American Asphaltum M. Co., 157 Fed. 203, 205, 84 C. C. A. 651. See, also, Northern Pac. Ry. v. Soderberg, 188 U. S. 526, 532, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

90 Hendler v. Lehigh Valley Co., 209 Pa. 256, 103 Am. St. Rep. 1005, 58 Atl. 486, 487.

A review of the English and American cases justifies the conclusion that there is but little, if any, difference in the general results reached by the courts of the two countries.

§ 94. "Mineral lands," as defined by the American tribunals.—In a preceding section [91] it has been assumed that the term "mineral lands" is sufficiently comprehensive to embrace the various kindred designations found in the various acts of congress, and that these various terms may be, and frequently are, used interchangeably. Upon this assumption, let us consider what is meant by the term "mineral lands" and its legal equivalents.

On this subject there has been great uniformity of decision by those courts of the states and of the United States which have had the most frequent occasion to consider the subject, and by the land department.[92]

The supreme court of California as early as 1864 gave its views upon the question in a well-considered case,[93] the earmarks of which may be plainly observed in many, if not all, the subsequent decisions bearing upon the subject. It thus presented its views:—

> It is not easy in all cases to determine whether any given piece of land should be classed as mineral land or otherwise. The question may depend upon many circumstances; such as whether it is located in those regions generally recognized as mineral lands or in a locality ordinarily regarded as agricultural in its character. Lands may contain the precious metals, but not in sufficient quantities to justify working them as mines or make the locality gen-

[91] Section 86.

[92] Davis v. Weibbold, 139 U. S. 507, 515, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; Northern Pacific Ry. Co. v. Soderberg, 188 U. S. 526, 530, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

[93] Ah Yew v. Choate, 24 Cal. 562.

erally valuable for mining purposes, while they are well adapted to agricultural pursuits; or they may be poorly adapted to agricultural or grazing pursuits, but rich in minerals, and there may be every gradation between the two extremes. There is, however, no certain, well-defined, obvious boundary between the mineral lands and those that cannot be classed in that category. Perhaps the true criterion would be to consider whether, upon the whole, the lands appear to be better adapted to mining or other purposes. However that may be, in order to determine the question, it would, at all events, be necessary to know the condition and circumstances of the land itself, and of the immediate locality in which it is situated. It is the duty of the officers of the government having the matter in charge, before making a grant, to ascertain these facts and to determine the problem whether the lands are mineral or not.

In a later case,[94] construing the mineral reservation in the Pacific railroad acts, the same court determined as follows:—

The mere fact that portions of the land contained particles of gold or veins of gold-bearing quartz rock would not necessarily impress it with the character of mineral land, within the meaning of the acts referred to. It must, at least, be shown that the land contains metals [95] in quantities sufficient to render it available and valuable for mining purposes. Any narrower construction would operate to reserve from the uses of agriculture large tracts of land which are practically useless for any other purpose, and we cannot think this was the intention of congress.

[94] Alford v. Barnum, 45 Cal. 482, 484.

[95] The use of the term "metals" in this connection is of no controlling importance. It was undoubtedly used without any design to restrict the meaning of the word "mineral" to metallic substances.

This case was cited approvingly by the supreme court of the United States, and the general rule of interpretation thus enunciated:—

> The exceptions of minerals from pre-emption and settlement, and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness, and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term "mineral," in the sense of this statute, is applicable.[96]

The mere fact that the land contains "copper, gold and silver-bearing quartz" does not impress it with the character of mineral land within the meaning of the act of congress excluding mineral lands from the grant to the Central Pacific railroad. Only lands valuable for mining purposes are reserved from sale.[97]

In United States v. Reed,[98] before the circuit court for the district of Oregon, a bill was filed by the United States to set aside a patent issued upon a homestead entry, on the ground that the land was mineral, and not agricultural, and was at the date of entry more valuable for mining than for agricultural purposes, and was so to the knowledge of the patentee. Judge Deady, in disposing of the question, said:—

[96] Davis v. Weibbold, 139 U. S. 507, 515, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; United States v. Central Pac. R. R. Co., 93 Fed. 871, 873.

[97] Merrill v. Dixon, 15 Nev. 401, 407; United States v. Central Pac. R. R. Co., 93 Fed. 871, 873.

[98] 12 Saw. 99–104, 28 Fed. 482, 486.

The nature and extent of the deposit of precious metals which will make a tract of land mineral, or constitute a mine thereon within the meaning of the statute, has not been judicially determined. Attention is called to the question in McLaughlin v. United States, 107 U. S. 526,[99] but no opinion is expressed. The land department appears to have adopted a rule that if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some measure of gold or silver, and the bill in this case is drawn on that theory of the law. In my judgment, that is the only practical rule of decision that can be applied to the subject. Nor can account be taken in the application of this rule of profits that would or might result from mining under other and more favorable conditions and circumstances than those which actually exist, or may be produced or expected in the ordinary course of such pursuit or adventure on the land in question.

In Dughi v. Harkins,[100] which was before the interior department in November, 1883, there was a contest between mineral and agricultural claimants, the land having been returned as agricultural by the surveyor-general. In disposing of it, Secretary Teller, in a communication to the commissioner of the general land office, said:—

The burden of proof is therefore upon the mineral claimant, and he must show, not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter, by possibility, develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that as a present fact it is mineral in character; and this must appear from actual production of mineral, and not from any theory that it may produce it; in other words, it is fact, and not theory, which must control your office in deciding upon the character of

[99] 2 Sup. Ct. Rep. 802, 27 L. ed. 621.

[100] 2 Land Decisions, p. 721.

this class of land. Nor is it sufficient that the mineral claimant shows that the land is of little agricultural value. He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value.[1]

Rulings to the same effect upon applications for mineral patents are found in decisions of the department for many years. They are, that such applications should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact. If mineral patents will not be issued unless the mineral exist in sufficient quantity to render the land more valuable for mining than for other purposes, which can only be known by developments or exploration, it should follow that the land may be patented for other purposes, if that fact does not appear.[2]

The leading case of Davis v. Weibbold (*supra*) reviews these rulings, and so clearly affirms their doctrine that nothing more is required than to freely quote this case. Says the court:—

It would seem from this uniform construction of that department of the government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining states, federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for

[1] Quoted in Davis v. Weibbold, 139 U. S. 507, 522, 11 Sup. Ct. Rep. 628, 35 L. ed. 238, and in United States v. Central Pac. R. R. Co., 93 Fed. 871, 874.

[2] Magalia G. M. Co. v. Ferguson, 6 L. D. 218; Nicholas Abercrombie, Id. 393; John Downs, 7 L. D. 71; Cutting v. Reininghaus, Id. 265; Creswell M. Co. v. Johnson, 8 L. D. 440; Thomas J. Laney, 9 L. D. 83.

their minerals as to justify expenditure for their extraction. The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated. There has been no direct adjudication on this point by this court, but this conclusion is a legitimate inference from several of its decisions. It was implied in the opinion in Deffeback v. Hawke, 115 U. S. 392,[3] and in the cases of Colorado C. & I. Co. v. United States, 123 U. S. 307;[4] United States v. Iron S. M. Co., 128 U. S. 673.[5]

§ 95. Interpretation of terms by the land department.—As in all contests between agricultural and mineral claimants prior to final entry, in all applications to enter lands under the mining laws, and in administering the various grants to railroads, as to lands remaining unpatented, the land department is the sole judge of the character of the land and the final arbiter upon this subject, it is deemed important to supplement the foregoing selection of authorities by presenting the rulings of that department on the subject. They enter somewhat more into detail, and will furnish a reliable guide to those who may have occasion to deal with that special tribunal upon the subject of mineral lands.

Commissioner Drummond[6] thus enunciates the rule which has since governed the land department:—

[3] 6 Sup. Ct. Rep. 95, 29 L. ed. 423.

[4] 8 Sup. Ct. Rep. 131, 31 L. ed. 182.

[5] 9 Sup. Ct. Rep. 195, 32 L. ed. 571.

To the same effect see Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 676; Cleary v. Skiffich, 28 Colo. 362, 89 Am. St. Rep. 207, 210, 65 Pac. 59, 60.

[6] Circ. of Instructions, July 15, 1873. This circular is referred to and accepted, as stating the correct rule, in Pacific Coast Marble Co. v. N. P. R. R., 25 L. D. 233, 238. To the same effect, see Aldritt v. N. P.

In the sense in which the term "mineral" was used by congress, it seems difficult to find a definition that will embrace what mineralogists agree should be included. . . . . From a careful examination of the matter, the conclusion I reach as to what constitutes a valuable mineral deposit is this: That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantities and quality to render the land sought to be patented more valuable on this account than for the purpose of agriculture, should be treated by the office as coming within the purview of the mining act of May 10, 1872.[7]

The only safe rule for the department to follow is that already laid down and adhered to in many cases—that the coal or mineral character of the land must be determined by the actual production from mining on the tract in dispute, or by satisfactory evidence that mineral (coal) exists on the land in question in sufficient quantities to make the same more valuable for mining than for agriculture. . . . .

It has been repeatedly held by this department that the proof of the mineral character of the land must be specific, and show actual production of mineral therefrom; that it is not enough to show that land in the neighborhood, or adjoining lands, are mineral in character, or that the lands in question may hereafter be found to be mineral. (Kings County v. Alexander, 5 L. D. 126; and Dughi v. Harkins, 2 L. D. 721.) The proof must show satisfactorily the mineral (coal) character, and not be based upon a theory.[8]

It is contended that the mining statutes provide that in an *ex parte* case, "land containing gold *in any quantity* is mineral land, and that they contemplate inquiry into the value of the deposit only when the

R. R., 25 L. D. 349; Phifer v. Heaton, 27 L. D. 57; Schrimpf v. N. P. R. R. Co., 29 L. D. 327; Morrill v. N. P. R. R., 30 L. D. 475; Beaudette v. N. P. R. R. Co., 29 L. D. 248.

[7] Copp's Min. Dec., p. 317; W. H. Hooper, 1 L. D. 561.

[8] Savage v. Boynton, 12 L. D. 612.

application of the mineral locator conflicts with that of some other locator or claimant." . . . .

It must be apparent that, for the purpose of issuing patent, there is lodged somewhere the authority and duty to ascertain whether a claim contains "valuable deposits," for no other land can be so acquired. It is equally clear that for the same purpose such authority is vested in this department, charged, as it is, with the determination of the facts prior to the issuance of patent. Should the question of the character of the land be properly presented at any time before patent, it would manifestly be the duty of the department to ascertain whether or not the land contains "valuable deposits," in an *ex parte* case or a contest. The fact that a claim is contested would not change the character of the land to be taken under this law. In any event, it must contain "valuable deposits.[9]

The proof of the mineral character of the land must be specific, and based upon the actual production of mineral; that it is not enough to show that neighboring or adjoining lands are mineral in character, and that the lands in controversy may hereafter develop minerals to such an extent as to show its mineral character, but it must appear from actual production of mineral, and not from a theory that the lands may hereafter produce it.[10]

The present existence of mineral in such quantity as to render the land more valuable for mining than agriculture must be shown, to defeat an agricultural entry.[11]

It is not necessary that, to meet the requirements, there should be upon the land a mine in working order, from which gold is being actually produced. It is sufficient if it be shown by satis-

9 Royal K. Placer, 13 L. D. 86.

10 Warren v. State of Colorado, 14 L. D. 681.

11 Winters v. Bliss, 14 L. D. 59; Walton v. Batten, Id. 54; Peirano v. Pendola, 10 L. D. 536.

factory proof that mineral exists in paying quantities, and such proof will usually be based on mining operations or explorations. In the present case it has not been shown that any mining has been carried on on this land. The evidence consists of the testimony of persons, most of them claiming to be expert miners, who went upon this land and panned out small quantities of earth. The preponderance thereof shows that the land bears gold, and taking the testimony of the witnesses for the mineral claimants alone, it sustains the conclusion that it is there in paying quantities.[12]

When the development, and its results, display such promise that the prudent, reasonable man would be justified in expending money and labor in legitimate mining operations, untainted by an appearance of speculation, the land must be held mineral within the meaning of that term as used in the granting act. (Pacific railroad acts.) If it was held otherwise, the mining industry, so far as it pertained to odd sections within the grant, would be paralyzed. The rule is that paying mines are only shown to exist after years of labor and much money expended in the development. Prospectors do not find riches on the surface. Profit is not received from the grass-roots down. They must have an opportunity given them to open the mine as their means permit.[13]

After careful consideration of the subject, it is my opinion that where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in lands belonging to the United States . . . . are . . . . declared to be free and open to exploration and pur-

[12] Johns v. March, 15 L. D. 196.

[13] Casey v. N. P. R. R., 15 L. D. 439.

chase." For if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be willing to risk time and capital in the attempt to bring to light and make available the mineral wealth which lies concealed in the bowels of the earth, as congress obviously must have intended the explorers should have proper opportunity to do.[14]

The invitation is to explore and purchase "all valuable mineral deposits" in the public lands and to occupy and purchase the lands in which they may be found. Broader or more comprehensive language could hardly have been used. Wherever mineral deposits are found in the public lands, they are declared to be free and open to exploration and purchase, with only one qualification—they must be *valuable* mineral deposits.[15]

With reference to the rulings of the land department, the tribunal to which is confided the duty of administering the public land laws, the supreme court of the United States says:—

The rulings of the land department to which we are to look for the contemporaneous construction of these statutes have been subject to very little fluctuation and almost uniformly, particularly of late years, lend strong support to the theory . . . . that the words "valuable mineral deposits" should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including nonmetallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, building stone and coal. The

[14] Castle v. Womble, 19 L. D. 455; Walker v. S. P. R. R. Co., 24 L. D. 172; Leach v. Potter, 24 L. D. 573; Magruder v. Oregon & Calif. R. R. Co., 28 L. D. 174; McQuiddy v. State of California, 29 L. D. 181.

[15] Pacific Coast Marble Co. v. Northern Pac. R. R. Co., 25 L. D. 233, 243.

cases are far too numerous for citation, and there is practically no conflict in them. The decisions of the state courts have also found the same interpretation.[16]

Mere indications of mineral do not prove that the lands contain permanent valuable deposits.[17] Nor does the fact that a mining location has been made indicate that the land is valuable for mineral.[18] As between rival applicants for government title, a tract cannot be assumed to be mineral because it is situated in a mineral belt and is adjacent to numerous mining claims.[19]

In determining what constitutes mineral land within the meaning of the acts of congress, we have treated the subject generally, without regard to the form in which the mineral deposits occur—*i. e.*, whether "in place," as in quartz veins, or not "in place," as in case of auriferous gravels, clays, and other substances usually encountered in horizontal beds or isolated deposits. What constitutes a vein or lode, or whether a given character of deposit may be located and acquired as "in place," or not "in place," will be discussed under appropriate heads in other portions of this work. The rulings cited and definitions quoted apply equally to all forms of deposits, with perhaps this suggestion: In lode locations nonmineral surface ground is necessarily embraced therein. But in placers it is contemplated that the entire area should fall within the designation

[16] Soderberg v. Northern Pac. Ry. Co., 188 U. S. 526, 534, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

[17] Tulare Oil & M. Co. v. Southern Pac. R. R. Co., 29 L. D. 269, 272. See, also, Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 676, 20 Morr. Min. Rep. 283; Bay v. Oklahoma Southern G. & O. Co., 13 Okl. 425, 73 Pac. 936, 939.

[18] Harkrader v. Goldstein, 31 L. D. 87; In re Bourquin, 27 L. D. 280.

[19] Elda Mining Company, 29 L. D. 279. See, also, Cleary v. Skiffich, 28 Colo. 362, 89 Am. St. Rep. 207, 210, 65 Pac. 59, 61.

of mineral—not necessarily homogeneous throughout, but all mineral.[20]

§ 96. American rules of statutory interpretation.—In addition to the ordinary canons of statutory interpretation, there are certain recognized rules applicable to the acts of congress which are within the scope of this treatise. These may be briefly enumerated as follows:—

(1) The mining laws are to be read in the light of matters of public history, relating to the mineral lands of the United States;[21]

(2) Where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, that construction should be adopted which will support the claim of the government rather than that of the individual;[22]

(3) In the case of a doubtful or ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and ought not to be overruled without cogent reasons.[23]

We might add a fourth rule, deducible from the foregoing and from the current of American authority and

[20] See Ferrell v. Hoge, 29 L. D. 12.

[21] Jennison Exr. v. Kirk, 98 U. S. 453, 457, 25 L. ed. 240.

[22] Slidell v. Grandjean, 111 U. S. 412, 437, 4 Sup. Ct. Rep. 475, 28 L. ed. 321; Leavenworth L. & G. R. Co. v. United States, 92 U. S. 733, 740, 23 L. ed. 934; Barden v. N. P. R. R. Co., 154 U. S. 288, 321, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992; Northern Pacific R. R. v. Soderberg, 188 U. S. 526, 534, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

[23] United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588; Brown v. United States, 113 U. S. 568, 571, 5 Sup. Ct. Rep. 638, 28 L. ed. 1079; Barden v. N. P. R. R. Co., 154 U. S. 288, 321, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992; Northern Pac. R. R. Co. v. Soderberg, 104 Fed. 425, 427, 43 C. C. A. 620; S. C., on appeal, 188 U. S. 526, 23 Sup. Ct. Rep. 365, 47 L. ed. 575; United States v. Johnstone, 124 U. S. 236, 253, 8 Sup. Ct. Rep. 446, 31 L. ed. 389; Lynch v. United States, 138 Fed. 535, 543, 71 C. C. A. 59; Pacific Coast Marble Co. v. N. P. R. R. Co., 25 L. D.

decisions of the land department, and that is, that the word "mineral," as used in these various acts, should be understood in its widest signification.[24] We do not conceive that there is anything in the context of the several acts, or in their nature, to restrict its meaning. This is practically the English rule announced by Mr. Ross Stewart, which has heretofore been referred to, and which is amply supported by the highest English authority.[25]

Judge Hanford, United States district judge for the district of Washington, thus clearly states the rule:—

> In its common and ordinary signification the word "mineral" is not a synonym for "metal," but is a comprehensive term including every description of stone and rock deposits, whether containing metallic substances or entirely nonmetallic.[26]

At one time the supreme court of the state of Washington held that the word "mineral" as used in the United States mining laws was limited to *metallic* substances,[27] but subsequently recognized that its ruling

233; Aldritt v. N. P. R. R. Co., 25 L. D. 349; Phifer v. Heaton, 27 L. D. 57; Hayden v. Jamison, 26 L. D. 373; Beaudette v. N. P. R. R. Co., 29 L. D. 327.

[24] Northern Pac. R. R. Co. v. Soderberg, 99 Fed. 506, 104 Fed. 425, 43 C. C. A. 620; S. C., on appeal, 188 U. S. 526, 530, 23 Sup. Ct. Rep. 365, 47 L. ed. 575; Burdick v. Dillon, 144 Fed. 737, 741, 75 C. C. A. 603; Webb v. American Asphaltum Co., 157 Fed. 203, 205, 84 C. C. A. 651; State v. Evans, 46 Wash. 219, 89 Pac. 565, 567, 10 L. R. A., N. S., 1163.

[25] *Ante*, § 91.

[26] Northern Pac. R. R. Co. v. Soderberg, 99 Fed. 506, 507; S. C., on appeal, 104 Fed. 425, 43 C. C. A. 620; affirmed, 188 U. S. 526, 530, 23 Sup. Ct. Rep. 365, 47 L. ed. 575; Webb v. American Asphaltum Co., 157 Fed. 203, 205, 84 C. C. A. 651; Nephi Plaster & M. Co. v. Juab County, 33 Utah, 114, 93 Pac. 53, 55, 14 L. R. A., N. S., 1043; White v. Miller, 118 N. Y. Supp. 1150, 134 App. Div. 908, 200 N. Y. 129, 140 Am. St. Rep. 618, 92 N. E. 1065, 1067.

[27] Wheeler v. Smith, 5 Wash. 704, 32 Pac. 784, 785. See comment on this case in Pacific Coast Marble Co. v. N. P. R. R., 25 L. D. 233, 241.

was unsound, and adopted the broader doctrine announced in practically all the other cases,—state, federal and English.[28]

§ 97. Substances held to be mineral by the land department and the American courts.—For convenience of reference, as well as to note wherein the land department and the American courts are in harmony or disagreement in their respective classifications of the different substances, we here enumerate them. We omit the metallic substances, as they are obviously within all definitions of the term "mineral."

Alum.[29]

Amber.[30]

Asphaltum.[31]

Borax.[32]

Brick Clay. See *Clay.*

Building Stone and Stone of Special Commercial Value.[33]

[28] State v. Evans, 46 Wash. 219, 89 Pac. 565, 567, 10 L. R. A., N. S., 1163.

[29] Webb v. American Asphaltum Co., 157 Fed. 203, 205, 84 C. C. A. 651; Copp's Min. Lands, 50, 100; 1 L. D. 561; Downey v. Rogers, 2 L. D. 707, 709.

[30] Webb v. American Asphaltum Co., 157 Fed. 203, 205, 84 C. C. A. 651.

[31] Webb v. American Asphaltum Co., 157 Fed. 203, 205, 84 C. C. A. 651; Copp's Min. Lands, p. 50; 1 L. D. 561; Tulare Oil & M. Co. v. S. P. R. R. Co., 29 L. D. 269. See, also, Gesner v. Gas Co., 1 James, N. S., 72; Gesner v. Cairns, 2 Allen, N. B., 595.

[32] Copp's Min. Lands, pp. 50, 100; 1 L. D. 561; 2 L. D. 707; Webb v. American Asphaltum Co., 157 Fed. 203, 205, 84 C. C. A. 651.

[33] Conlin v. Kelly, 12 L. D. 1 (overruling In re Bennet, 3 L. D. 116); McGlenn v. Weinbroeer, 15 L. D. 370; Vandoren v. Plested, 16 L. D. 508; In re Delaney, 17 L. D. 120; Hayden v. Jamison, 26 L. D. 373; Forsythe v. Weingart, 27 L. D. 680; Northern Pac. R. R. Co. v. Soderberg, 99 Fed. 506, 508, 104 Fed. 425, 426, 43 C. C. A. 620; 188 U. S. 526, 529, 23 Sup. Ct. Rep. 365, 47 L. ed. 575; Beaudette v. N. P. R. R. Co., 29 L. D. 248. But see South Dakota v. Vermont S. Co., 16 L. D.

Carbonate of Soda. See *Soda.*
Cement. (Gypsum.)[34]
China Clay. See *Clay.*
Clay.[35]
Coal.[36]
Diamonds.[37]
Gravel.[38]
Gypsum.[39]
Guano.[40]
Kaolin. See *Clay.*

263; State of Utah, 29 L. D. 69. The passage of the act of 1892 (27 Stats. at Large, p. 348; Comp. Stats. 1901, p. 1434; 5 Fed. Stats. Ann. 47) removes all future controversy on the subject, and permits those lands to be entered as mineral. On this subject, see *post*, § 421.

[34] Phifer v. Heaton, 27 L. D. 57.

[35] Kaolin or china (sometimes called fire-clay). Montague v. Dobbs, 9 Copp's L. O. 165; Aldrite v. Northern P. R. R. Co., 25 L. D. 349. Ordinary brick held by land department not to be a mineral. King v. Bradford, 31 L. D. 108. For adverse comment on this ruling, see *post*, § 424. The question was mooted but not decided in King v. Mullins, 27 Mont. 364, 71 Pac. 155. For manufacturing cement, State v. Evans, 46 Wash. 219, 89 Pac. 565, 567, 10 L. R. A., N. S., 1163. For English cases on subject of clay, see *ante*, § 92.

[36] McKean v. Buell, Copp's Min. Lands, p. 343; Townsite of Coalville, 4 Copp's L. O., p. 46; In re Norager, 10 Copp's L. O., p. 54; Brown v. N. P. R. R. Co., 31 L. D. 29. Coal, however, is disposed of under special laws, and will be separately considered under another portion of this treatise. *Post*, § 495 et seq.

[37] Copp's Min. Lands, 88; Kentucky D. M. & D. Co. v. Kentucky T. D. Co., 141 Ky. 97, 132 S. W. 397, 398.

[38] For building purposes, Loney v. Scott, 57 Or. 378, 112 Pac. 172, 175. The land department does not agree with the ruling in this case. Zimmerman v. Brunson, 39 L. D. 310. Auriferous gravels are of course subject to location under the placer laws.

[39] Copp's Min. Lands, 176; Phefer v. Heaton, 27 L. D. 57; McQuiddy v. California, 29 L. D. 181; Nephi Plaster & M. Co. v. Juab Co., 33 Utah, 114, 93 Pac. 53, 58, 14 L. R. A., N. S., 1043; Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176, 178; White v. Miller, 118 N. Y. Supp. 1150, 134 App. Div. 908, 92 N. E. 1065, 1068, 200 N. Y. 29, 140 Am. St. Rep. 618.

[40] Richter v. Utah, 27 L. D. 57. Congress has enacted special laws regulating the discovery of guano islands in the high seas (Rev. Stats.

Limestone.[41]
Marble.[42]
Mica.[43]
Natural Gas.[44]
Nitrate of Soda. See *Soda.*
Onyx.[45]
Petroleum.[46]
Phosphates.[47]
Salt.[48]

U. S., §§ 5570–5578; Comp. Stats. 1901, pp. 3739–3741; 3 Fed. Stats. Ann. 159–161; 20 Stats. at Large, p. 30; 23 Stats. at Large, p. 11).

[41] Morrill v. Northern Pac. R. R. Co., 30 L. D. 475; 10 Copp's L. D., p. 50; 12 L. D. 1; Shepherd v. Bird, 17 L. D. 82; Copp's Min. Lands, pp. 176, 309. See, also, Freezer v. Sweeney, 8 Mont. 508, 21 Pac. 20, 21, 17 Morr. Min. Rep. 179; State v. Evans, 46 Wash. 219, 89 Pac. 565, 567, 10 L. R. A., N. S., 1163; overruling Wheeler v. Smith, 5 Wash. 704, 32 Pac. 784, 785.

[42] Copp's Min. Lands, p. 176; Pacific Coast Marble Co. v. Northern Pac. R. R. Co., 25 L. D. 233; Forsythe v. Weingart, 21 L. D. 680; Shrimpf v. N. P. R. R. Co,, 29 L. D. 327; Henderson v. Fulton, 35 L. D. 652.

[43] Copp's Min. Lands, 182.

[44] It is well settled that natural gas is a mineral. Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 Pac. 995, 996; People v. Bell, 237 Ill. 332, 86 N. E. 593, 594. This substance is specifically dealt with. *Post*, § 423.

[45] Utah Onyx Development Co., 38 L. D. 504.

[46] In a previous section (§ 93) will be found quite an extended discussion on the mineral quality of petroleum. It is classified as mineral under the act of Congress of February 11, 1897 (29 Stats. at Large, 526; Comp. Stats. 1901, p. 1434; 5 Fed. Stats. Ann. 46). We note the following departmental rulings; Union Oil Co. (on review), 25 L. D. 351 (reversing S. C., 23 L. D. 222); Copp's Min. Lands, 160; 1 Copp's L. D. 179; A. A. Dewey, 9 Copp L. D. 51; McQuiddy v. State of California, 29 L. D. 181; Kern Oil Co. v. Clotfelter, 30 L. D. 583; Southern Pac. R. R. Co., 41 L. D. 264. For state decisions, see *post*, § 422.

[47] Gary v. Todd, 18 L. D. 59; but see S. C. (on review), 19 L. D. 414; Pacific Coast Marble Co. v. N. P. R. R. Co., 25 L. D. 233 (overruling Tucker v. Florida Ry. & N. Co., 19 L. D. 414); Florida Cent. & Pa. Ry. Co., 26 L. D. 600. As to phosphatic deposits generally, see *post*, § 425.

[48] Garrard v. Silver Peak Mines, 82 Fed. 578, 589; S. C., on appeal, 94 Fed. 983, 989, 36 C. C. A. 603; Eagle Salt Works, Copp's Min. Lands,

Sand.[49]
Sandstone. See *Building Stone.*
Slate.[50]
Soda. (Nitrate and carbonate.)[51]
Stone. See *Building Stone.*
Sulphur.[52]
Umber.[53]

By an act approved January 31, 1901,[54] congress declared that lands chiefly valuable for deposits of salt should be subject to location under the placer mining laws, with the proviso that the same person should not locate or enter more than one claim. At one time prior to the passage of this act the land department had ruled that salt lands were mineral and within the reservation contained in the railroad grants and state grants,[55] and permitted them to be acquired under the mining laws;[56] but later the department held that such lands were not subject to disposal, except at public

336; Territory of New Mexico, 35 L. D. 1. Under act of Congress, January 31, 1904, deposits of salt are subject to location under the placer laws. *Post,* § 513 et seq.

49 For building purposes, Loney v. Scott, 57 Or. 378, 112 Pac. 172, 175. The land department holds to the contrary. Zimmerman v. Brunson, 39 L. D. 310. A deposit of sand suitable for making glass ought to be considered a "mineral." Hendler v. Lehigh Valley R. Co., 209 Pa. 256, 103 Am. St. Rep. 1005, 58 Atl. 486, 487.

50 Schrimpf v. N. P. R. R., 29 L. D. 327; Copp's Min. Lands, 143. See, also, Burdick v. Dillon, 144 Fed. 737, 741, 75 C. C. A. 603; In re McDonald, 40 L. D. 7.

51 Copp's Min. Lands, 50, 100; 1 L. D. 561.

52 Copp's Min. Lands, 50, 100; 1 L. D. 561.

53 Copp's Min. Lands, 161.

54 31 Stats. at Large, p. 745; Comp. Stats. 1901, p. 1435; 5 Fed. Stats. Ann. 48.

55 Eagle Salt Works, Copp's Min. Lands, p. 336; Hall v. Litchfield, Id., p. 333. See, also, Garrard v. Silver Peak Mines, 82 Fed. 578, 587; S. C., 94 Fed. 983, 36 C. C. A. 603; Morton v. Nebraska, 21 Wall. 660, 22 L. ed. 639; Circular, 31 L. D. 130.

56 Copp's Min. Lands, p. 333.

auction or private sale, under the act of January 12, 1877.[57]

Land chiefly valuable because of a cavern therein, and containing crystalline deposits marketable as curiosities, is not patentable under the mining laws.[58]

Other than the decisions and rulings of the land department, we encounter a limited number of cases involving specific substances. This is easily accounted for. The land department is the tribunal specially charged with the determination of the character of lands falling within the purview of the laws considered in this treatise. This question being one of fact, the determination by the department culminating in the issuance of a patent is conclusive, and not open to collateral attack. Such controversies, therefore, rarely find their way into the courts. In a succeeding chapter, treating of placers and other deposits, subject to location under the placer laws, will be found cited the few cases which we have been able to discover upon the subject.

§ 98. Rules for determining mineral character of land.—While it is difficult to formulate a definition sufficiently comprehensive in itself to cover all possible exigencies, we think that a conservative application of the rules governing statutory construction, heretofore enumerated in connection with the adjudicated cases and rulings of the land department, permits us to deduce the following:—

The mineral character of the land is established when it is shown to have upon or within it such a substance as—

[57] 19 Stats. at Large, p. 221; Comp. Stats. 1901, p. 1547; 5 Fed. Stats. Ann. 48; Salt Bluff Placer, 7 L. D. 549; Hall v. Litchfield, Copp's Min. Lands, p. 333.

[58] South Dakota M. Co. v. McDonald, 30 L. D. 357.

(*a*) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or—

(*b*) Is classified as a mineral product in trade or commerce; or—

(*c*) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—

And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it.[59]

[59] The land department thus states its conclusions: "Whatever is recognized as mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws." Pacific Coast Marble Co. v. Northern Pac. R. R. Co., 25 L. D. 233, 244. See, also, Aldritt v. Northern Pac. R. R. Co., 25 L. D. 349; Phifer v. Heaton, 27 L. D. 57; McQuiddy v. State of California, 29 L. D. 181; Tulare Oil & M. Co. v. S. P. R. R. Co., 29 L. D. 269; Schrimpf v. Northern Pac. R. R. Co., 29 L. D. 327; Morrill v. Northern Pac. R. R. Co., 30 L. D. 475; Territory of New Mexico, 35 L. D. 1; Elliott v. Southern Pac., 35 L. D. 139; Henderson v. Fulton, 35 L. D. 652; McConaghy v. Doyle, 32 Colo. 92, 75 Pac. 419, 420; State v. Evans, 46 Wash. 219, 89 Pac. 565, 567, 10 L. R. A., N. S., 1163; Nephi Plaster Co. v. Juab Co., 33 Utah, 114, 93 Pac. 53, 54, 14 L. R. A., N. S., 1043; Northern Pac. R. R. Co. v. Soderberg, 99 Fed. 506, 508; S. C., on appeal, 104 Fed. 425, 427, 43 C. C. A. 620, 188 U. S. 526, 23 Sup. Ct. Rep. 365, 47 L. ed. 575; United States v. Copper Queen etc. Co., 7 Ariz. 80, 60 Pac. 885, 886; Cleary v. Skiffich, 28 Colo. 362, 89 Am. St. Rep. 207, 211, 65 Pac. 59, 61; Webb v. American Asphaltum Co., 157 Fed. 203, 205, 84 C. C. A. 651; Harry Lode Claim, 41 L. D. 403.

CHAPTER II.

THE PUBLIC SURVEYS AND THE RETURN OF THE SURVEYOR-GENERAL.

§ 102. No general classification of lands as to their character.—No general systematic classification of the public lands, according to their mineral or nonmineral character, for the purpose of sale or other disposal, has ever been attempted, at least until a very recent period.

Geological examination and survey of lands in the Lake Superior district, and in the Chippewa land district, in Wisconsin, were provided for by acts of congress, passed in 1847.[1]

These acts conferred authority on the president to sell at public auction such land as contained copper, lead, or other valuable ores, at the minimum price of five dollars per acre. And such examination and survey were for the purpose of establishing the character of the lands in these regions, for the express purpose of sale as mineral lands.

But three years later (September 26, 1850), this policy was abandoned, and this class of lands in these districts was directed to be sold in the same manner,

[1] March 1, 1847, 9 Stats. at Large, p. 146; March 3, 1847, Id., p. 179.

at the minimum price, and with the same rights of pre-emption as other public lands.[2]

§ 103. **Geological Surveys.**—By act of congress March 3, 1879,[3] the office of director of the geological survey, under the interior department, was established. To this officer was confided the direction of the geological survey, the classification of the public lands and the examination of the geological structure, mineral resources and products of the national domain. The conscientious work of this magnificent organization is a monument to the industry, scientific attainment and continued devotion to the public service of the groups of men who organized and carried on the great work. The benefit accruing to the mining industry has been incalculable. The work, however, was not until a very recent period co-ordinated in any serious degree with that of the general land office, to which tribunal was confided the sale and disposal of the public lands under general laws. For many years, and until a very recent period which marks a definite change in governmental policy in the disposal of lands containing coal, phosphates, natural gas and petroleum, to be hereafter noted, the work of the survey performed no function in the administration of the public land system and was not necessarily considered in determining the mineral or nonmineral character of the land embraced within the limits of the geological survey. Its maps, although confessedly accurate and possessing the highest scientific and economic value, were not admissible in evidence, except possibly for the limited purpose of showing the general nature of the land (other than its mineral or nonmineral quality), its elevation

[2] 9 Stats. at Large, p. 472.

[3] 20 Stats. at Large, 394; Comp. Stats. 1901, p. 1488; 3 Fed. Stats. Ann. 156.

and surroundings.[4] But by an evolutionary process, the survey has at last become an important factor in the classification of public land. As was said by Mr. George Otis Smith, director of the survey, in an address read before the national irrigation congress at Spokane (August, 1909):—

> We have just entered upon another epoch of realization by the nation of the true source of its wealth and prosperity and both the legislative and executive branches of the federal government are awake to the fact that exact knowledge is essential to the proper utilization of our country's great resource of land. The earlier propaganda bore fruit in the creation of a scientific bureau first among whose functions was the classification of the public lands. But this specific duty laid upon the new federal bureau was subordinated to the more general though hardly less important task of determining the national resources of the public domain and the opportunity for a scientific classification of the land before the larger part of the more valuable areas had passed into private ownership was lost. In the present period of aroused public opinion the land classification which leads to better use and the field knowledge on which intelligent administration must be based, have come to be regarded as vital factors in the public land policy. . . . . Thus the geological survey is heartily co-operating with the general land office to the end that the best disposition of the land may be secured.[5]

While as yet congress has not given to the work of the survey evidentiary force—for purposes of private litigation—such work serves two important ends, one executive, enabling that department of the government to act intelligently in the withdrawal of areas from

[4] United States v. Van Winkle, 113 Fed. 903, 904, 51 C. C. A. 533, 22 Morr. Min. Rep. 56.

[5] 99 Mining and Scientific Press, 229.

location, settlement or sale, in pursuance of governmental policies, the other administrative, guiding the general land office in passing upon the character of the land, applied for by individuals under the various public land laws.

It is now the practice of the land department in dealing with public lands which have been investigated by the survey to resort to the folios, giving to them the effect of *prima facie* evidence, throwing the burden on the applicant attacking the result shown, except where the burden has been shifted to the government by the issuance of a receiver's receipt.[6]

The important functions of the geological survey in connection with the classification and appraisement of coal lands will be outlined when we reach the subject of coal.[7]

§ 104. General system of land surveys.—It is a matter of common knowledge that the public lands are ordinarily surveyed into rectangular tracts, bounded by lines conforming to the cardinal points. These surveys are made under the immediate supervision of the United States surveyors-general in their respective surveying districts. The actual surveys in the field are conducted by deputies appointed by the surveyors-general, or by parties to whom contracts are let for such surveys, under the direction of the surveyors-general, to whom all reports are primarily made.

[6] See, generally, Miller v. Thompson, 36 L. D. 123; Instructions, 34 L. D. 194; 36 L. D. 215; 37 L. D. 17; Pettit v. Rolleri (May, 1910), unpublished. In the case of Dixon v. Taylor (not officially reported), 95 Mining & Scientific Press, 123, involving the character of the land applied for as timber, the secretary of the interior ruled that the geological folio was admissible to show the mineral character (deep auriferous gravels) of the land.

[7] *Post*, § 495 et seq.

In prosecuting work in the field, the parties conducting the field-work are charged with the duty of noting at the end of their notes of survey coal banks or beds, peat or turf grounds, minerals, and ores, with particular description of the same as to quality and extent, and all "diggings" therefor; also, salt springs and licks, together with a general description of the township in the aggregate, as respects the face of the country, its soil and geological features, timber, minerals, water, and the like.

The smallest subdivisions under the congressional system are quarter-quarter sections or forty-acre tracts, unless a fractional quarter section is subdivided, when subdivisions may be smaller than forty-acre lots and different in their general form.[8] This is the rule applicable to the public lands generally where lands (other than mineral) are granted or sold under general laws.[9]

§ 105. What constitutes the surveyor-general's return.—The original field-notes and accompanying data, with a topographical sketch of the country surveyed, are returned to the surveyor-general, who examines them, and, if found correct, approves them, whereupon the draftsman protracts the same on township plats in triplicate. After the surveyor-general approves the plats they are forwarded to the general land office. When approved by that office, one is retained there, one returned to the surveyor-general, and

[8] These irregular lots occur either by reason of mineral segregations, or in providing for excess or deficiencies in townships, in which latter case they are always found on the north and west boundaries of the townships.

[9] Hooper v. Nation, 78 Kan. 198, 96 Pac. 77, 79. In the location of placers the smallest legal subdivision is ten acres. Roman Placer M. Claim, 34 L. D. 260. *Post*, § 448.

the third [10] is sent to the local land office, to enable the register and receiver to dispose of the lands embraced in the several townships, and the triplicate is transmitted to the commissioner of the general land office. Lands must be treated as unsurveyed until the plat is finally approved in the general land office and filed in the local office.[11] These approved field-notes, taken in connection with the township plats protracted in the office, constitute what is known as the surveyor-general's return.

§ 106. Prima facie character of land established by the return.—The lands embraced in the survey are treated *prima facie* as being of the character shown by this return, and are said thenceforward to be borne on the official records as agricultural, timber, or mineral land, according to the facts developed by the return. The books of the land office are presumed to correctly show the character and condition of the land.[12] If lands are noted on the plat as mineral, they are *prima facie* mineral lands, and no entry thereof will be permitted, except under the mining laws, until the presumption arising from the return is overcome by satisfactory proofs.[13]

A return by the surveyor that sixteenth and thirty-sixth sections granted to the states for school purposes

10 In re F. A. Hyde, 37 L. D. 164.

11 Copp's Min. Dec. 41; Bullock v. Rouse, 81 Cal. 590, 595, 22 Pac. 919; Medley v. Robertson, 55 Cal. 396; In re F. A. Hyde, 37 L. D. 164.

12 Olive Land & D. Co. v. Olmstead, 103 Fed. 568, 574; Bay v. Oklahoma Southern Gas & Oil Co., 13 Okl. 425, 73 Pac. 936, 939.

13 Gold Hill Q. M. Co. v. Ish, 5 Or. 104; Cowell v. Lammers, 10 Saw. 246, 21 Fed. 200; Johnston v. Morris, 72 Fed. 890, 19 C. C. A. 229; Dobbs' Placer, 1 L. D. 567; Dughi v. Harkins, 2 L. D. 721; Cole v. Markley, 2 L. D. 847; Hooper v. Ferguson, 2 L. D. 712; Roberts v. Jepson, 4 L. D. 60; Cosmos Co. v. Gray Eagle Co., 104 Fed. 20, 48; Richter v. State of Utah, 27 L. D. 95.

are mineral, and the approval of his field-notes and plats, and the filing thereof in the general land office, are a sufficient determination that the lands are mineral to authorize a selection of indemnity school lands by the state.[14]

If the lands are not returned as mineral, the presumption obtains that they are agricultural in character,[15] and therefore cannot be entered under the mining laws until the return is contradicted. At all inquiries held for the purpose of investigating the character of surveyed lands, this return has been said to rank as a deposition.[16]

It is unnecessary to say that this return is open to contradiction.[17] It concludes no one.[18] The return may be overcome by showing a discovery of sufficient mineral to make the land more valuable for mining than for agriculture.[19]

Indications of mineral do not demonstrate that there is a valuable deposit.[20] A mere location certificate is

[14] Johnston v. Morris, 72 Fed. 890, 897, 19 C. C. A. 229; In re State of California, 23 L. D. 423.

[15] Bedel v. St. Paul M. & M. Co., 29 L. D. 254.

[16] Kirby v. Lewis, 39 Fed. 66, 75; United States v. Breward, 16 Pet. 143, 147, 10 L. ed. 918; United States v. Hanson, 16 Pet. 196, 199, 10 L. ed. 935. The return of the commission appointed under the act of February 26, 1895 (see *post*, § 160), is given by the land department the same legal effect as the surveyor-general's return. Circular, 25 L. D. 446; Lynch v. United States, 138 Fed. 535, 541.

[17] Caledonia M. Co. v. Rowen, 2 L. D. 714.

[18] Winscott v. N. P. R. R. Co., 17 L. D. 274.

[19] Lynch v. United States, 138 Fed. 535, 541; Magruder v. Oregon & Cal. R. R. Co., 28 L. D. 174, overruling Sweeney v. N. P. R. R. Co., 20 L. D. 394; Walker v. S. P. R. R. Co., 24 L. D. 172, and other cases.

[20] Miller v. Chrisman, 140 Cal. 440, 446, 98 Am. St. Rep. 63, 73 Pac. 1083, 1084, affirmed *sub. nom.*, Chrisman v. Miller, 197 U. S. 313, 321, 25 Sup. Ct. Rep. 468, 49 L. ed. 770; Weed v. Snook, 144 Cal. 439, 440, 77 Pac. 1023, 1024; Whiting v. Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849, 853; Bay v. Oklahoma S. G. & O. Co., 13 Okl. 425, 73 Pac. 936, 940; Tulare Oil & M. Co. v. S. P. R. R. Co., 29 L. D. 269.

not in itself evidence of the mineral character of the land, and will not be sufficient to overcome the return.[21] But when a legal mineral location has been made (which, of course, must be based upon a sufficient discovery), the slight presumption in favor of the return is overcome, and the burden of proof shifts to the party attacking the mineral claim.[22] The allowance of a mineral entry of a tract, as a matter of course, overcomes a return as agricultural.[23]

While the rule which treats the surveyor-general's return as establishing *prima facie* the character of the land is a convenient one in controversies arising between individuals over an asserted right to enter public lands, as determining upon whom rests the burden of proof, it has been productive of iniquitous results in administering the colossal land grants to railroad companies; and we are justified in asserting that its force as a universal rule has been materially weakened by the recent decisions of both the land department and the courts of last resort. The return constitutes but a small element of consideration when the question of the character of the land is in issue.[24] It is chiefly important as determining upon whom rests the burden of proof.[25]

When it is considered that sections of one mile square are the smallest tracts the outboundaries of

21 Etling v. Potter, 17 L. D. 424; Berry v. C. P. R. R. Co., 15 L. D. 463; Magruder v. Oregon & Cal. R. R. Co., 28 L. D. 174; McQuiddy v. State of California, 29 L. D. 181; Elda Mining Co., 29 L. D. 279; Holton v. N. P. R. R. Co., 30 L. D. 442; Harkrader v. Goldstein, 31 L. D. 87.

22 State of Washington v. McBride, 18 L. D. 199; N. P. R. R. v. Marshall, 17 L. D. 545; Rhodes v. Treas, 21 L. D. 502; Walker v. S. P. R. R., 24 L. D. 172.

23 Johns v. Marsh, 15 L. D. 196; Walton v. Batten, 14 L. D. 54.

24 Aspen Cons. M. Co. v. Williams, 27 L. D. 1; Kinkade v. State of California, 39 L. D. 491.

25 Magruder v. Oregon & Cal. R. R. Co., 28 L. D. 174; Tulare Oil Co. v. S. P R. R. Co., 29 L. D. 269.

which the law requires to be actually surveyed; that the minor subdivisions are not surveyed in the field, but are defined by law, and protracted—not ascertained by the surveyor but created [26] in the surveyor-general's office on the township plats, the lines being imaginary; [27] that surveyors, as a rule, are neither practical miners nor geologists; that they are compensated not for the volume of information furnished as to the character of the lands, but for the number of linear miles surveyed in the field; that their investigation as to the character of the land is wholly superficial,—it would seem that but little weight should be given to these returns. If the surveyor, in subdividing a township into sections, encounters a mine in active operation, we may find some mention of that fact in his field-notes; but usually he does not go beyond this. A fair illustration of the unreliability of these returns in this respect may be found in almost all the mineral districts over which the public surveys have been extended. We note the following caustic criticism of the land department itself on this subject. In an official communication (March 11, 1872) from Mr. Drummond, commissioner of the general land office, to Mr. Delano, secretary of the interior, the commissioner says:—

> To illustrate the unreliability of the surveyors' returns as to the character of these lands, and the absolute necessity for the rule which, with your advice and consent, I have adopted, it may be proper to refer in this connection to some of the applications for patents for mines in California, the lands embracing which were returned on the official township plats as agricultural in character, the existence of mines therein not becoming known to this office

[26] Bullock v. Rouse, 81 Cal. 590, 594, 22 Pac. 919; Smith v. City of Los Angeles, 158 Cal. 702, 705, 708, 112 Pac. 307, 309.

[27] Public Domain, p. 184.

until after the receipt of such applications for mining title.

(Here follows a list of thirty-five mines.)

The foregoing claims are all within the Sacramento district, and many more could be enumerated were it necessary to illustrate the want of reliability of the surveyors' returns as to the character of these lands. . . . . But with the kind of returns furnished it is totally impossible to determine whether any given tract in the mineral district is properly agricultural land within the meaning of the law or not, or whether this office could, with a due regard for the execution of the law, proceed to patent such as agricultural land without further investigation.[28]

And in an earlier communication the same commissioner uses the following apt language:—

I am impressed with the conviction that it is neither in harmony with the spirit or intent of the laws of congress, nor with the true public policy, to sanction the indiscriminate absorption of the lands in what has heretofore been known as the reserved mineral belt in the public domain under laws only applicable to lands clearly nonmineral, simply because the deputy surveyors failed to return the same as mineral in character. This view is strengthened by the fact that very many, in fact the majority, of the applications for mineral patents, are found, upon consulting our official township plats, to be within subdivisions not reported as mineral in character.[29]

In a circular letter issued in December, 1871, to the registers and receivers of land offices in the mining regions of California, instructing them to withhold from agricultural entry a large number of townships, the same commissioner thus expresses his views:—

[28] Copp's Min. Dec., p. 308.

[29] Copp's Min. Dec., p. 297.

> Experience having shown that this office cannot with any degree of safety judge of the character of these lands, whether mineral or agricultural, from the data furnished by such returns, and there being no authority of law for the employment of a competent geologist to investigate the matter, the head of the department has, in consideration of the public interests and to prevent the indiscriminate absorption of the mineral lands of the public domain through the instrumentality of insufficient returns, found it imperatively necessary to adopt the course herein announced, both for the protection of those who have already expended time, capital and labor in opening and developing these mines, and those of the citizens of the United States who may hereafter desire to exercise their legal right to do so.[30]

In the light of these conceded facts, it is a marvel that either the land department or the courts ever announced the doctrine that such returns were *prima facie* evidence of anything save their own inherent weakness and insufficiency for this purpose.

The question as to the effect of these returns was before the supreme court of the United States in a case,[31] in which Justice Field, delivering the opinion of the court, said:—

> Some weight is sought to be given by counsel of the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868, and a plat thereof filed by the surveyor in the local land office in September of that year, from which it is asserted that the character of the land was ascertained and determined, and reported to be agricultural, and not mineral. But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left

[30] Copp's Min. Dec., p. 302.

[31] Barden v. N. P. R. R. Co., 154 U. S. 288, 320, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992.

to the surveyor-general. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted, or make any binding report thereon.

Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties, or to determine them, nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject.[32]

§ 107. Character of land, when and how established.—The character of a given tract of land is always a question of fact, to be determined, generally speaking, by the land department, on hearings ordered for that purpose, or at the time patent is applied for, and the decision of the department, culminating in the issuance of a patent, is final.[33]

[32] See, also, Leonard v. Lennox, 181 Fed. 760, 768; Winscott v. Northern Pac. R. R. Co., 17 L. D. 274, 276; Aspen Cons. M. Co. v. Williams, 27 L. D. 1, 21.

[33] Pac. M. & M. Co. v. Spargo, 8 Saw. 647, 16 Fed. 348; Cowell v. Lammers, 10 Saw. 255, 21 Fed. 200, 206; Barden v. N. P. R. R. Co., 154 U. S. 288, 330, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992; Gale v. Best, 78 Cal. 235, 12 Am. St. Rep. 44, 20 Pac. 550, 551; Dahl v. Mont. C. Co., 132 U. S. 264, 10 Sup. Ct. Rep. 97, 33 L. ed. 325; Dahl v. Raunheim, 132 U. S. 260, 261, 10 Sup. Ct. Rep. 74, 33 L. ed. 324; Carter v. Thompson, 65 Fed. 329, 330; Klauber v. Higgins, 117 Cal. 541, 49 Pac. 466, 467; United States v. Budd, 144 U. S. 154, 167, 12 Sup. Ct. Rep. 575, 36 L. ed. 388; United States v. Mackintosh, 85 Fed. 333, 336; Shaw v. Kellogg, 170 U. S. 312, 338, 18 Sup. Ct. Rep. 632, 42 L. ed. 1050; Northern Pac. R. R. Co. v. Soderberg, 86 Fed. 49, 50; Mendota Club v. Anderson, 101 Wis. 479, 78 N. W. 185, 189; Rood v. Wallace, 109 Iowa, 5, 79 N. W. 449, 451; Potter v. Randolph, 126 Cal. 458, 58 Pac. 905, 906; Standard Quicksilver M. Co. v. Habeshaw, 132 Cal. 115, 64 Pac. 113, 114; Dreyfus v. Badger, 108 Cal. 58, 41 Pac. 279, 280; Paterson v. Ogden, 141 Cal. 43, 45, 99 Am. St. Rep. 31, 74 Pac. 443; Southern Development Co. v. Endersen, 200 Fed. 272.

Matters of fact such as the character of the land, when once investigated and determined by the officers of the land department and the applicant allowed to select or enter and pay for it, vests a right which cannot be affected by subsequent discoveries in respect to its character or condition.[34]

The precise point of time when the character of a given tract of land is to be determined will depend somewhat upon the nature of the right asserted, and the date to which it is supposed to relate. This subject will be fully discussed under appropriate heads, when considering the various congressional grants out of which mineral lands are reserved, and the various methods of acquiring public lands other than mineral, and in the chapter treating of the land department and its functions.

§ 108. Jurisdiction of courts to determine character of land when the question is pending in land department.—It will not be doubted that, while the title to land remains in the United States, and controversies arise between occupants or possessors over the right of possession, neither party having invoked the jurisdiction of the land department for the purpose of acquiring the ultimate title, the courts have power to determine the rights of the respective parties based upon the law of possession,[35] and incidentally to pass upon the question of the character of the land, should such question be necessarily involved.[36]

But that the courts have no jurisdiction to determine questions of fact with reference to the public lands

[34] Northern Pacific Ry. v. United States, 176 Fed. 706, 708, 101 C. C. A. 117; affirming United States v. Northern Pac. Ry., 170 Fed. 498, 500.

[35] Marquez v. Frisbie, 101 U. S. 473, 475, 25 L. ed. 800; Sims v. Morrison, 92 Minn. 341, 100 N. W. 88, 89; Zimmerman v. McCurdy, 15 N. D. 79, 106 N. W. 125, 126, 12 Ann. Cas. 29.

[36] Potter v. Randolph, 126 Cal. 458, 58 Pac. 905, 906.

while the claims of the respective parties are pending before the land department is axiomatic.[37]

A party aggrieved by an erroneous decision of the land department must exhaust his remedies in that department before he can resort to the courts.[38] With the orderly exercise of the functions of that department in administering the public land laws the courts cannot interfere.[39] When, therefore, the jurisdiction of the land department is once set in motion, and that tribunal is engaged in the investigation which necessarily involves a determination of the character of the land, and which determination would be conclusive, the courts are precluded from trying or determining this question.[40]

As to whether the pendency of proceedings before the land department deprives the courts of all jurisdiction in cases involving this issue or simply suspends their functions to await the ultimate judgment of the department, depends on the nature of the controversy, the question involved other than the character of the land, and the nature of the relief sought. The decisions on this subject are not numerous, but are practically harmonious.

[37] Marquez v. Frisbie, 101 U. S. 473, 475, 25 L. ed. 800; Astiazaran v. Santa Rita Land & M. Co., 148 U. S. 80, 82, 30 Sup. Ct. Rep. 457, 39 L. ed. 376; Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 308, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064; Northern Lumber Co. v. O'Brien, 204 U. S. 190, 27 Sup. Ct. Rep. 249, 51 L. ed. 438; affirming 124 Fed. 819, 822; Oregon v. Hitchcock, 202 U. S. 60, 70, 26 Sup. Ct. Rep. 568, 50 L. ed. 935; Sims v. Morrison, 92 Minn. 341, 100 N. W. 88, 89; Zimmerman v. McCurdy, 15 N. D. 79, 106 N. W. 125, 126, 12 Ann. Cas. 29; Warnekros v. Cowan, 13 Ariz. 42, 108 Pac. 238, 239; Hays v. Parker, 2 Wash. Ter. 198, 202, 3 Pac. 901; Humbird v. Avery, 110 Fed. 465, 471; Savage v. Worsham, 104 Fed. 18; Herbien v. Warren, 2 Okl. 4, 35 Pac. 575, 576; Allen v. Pedro, 136 Cal. 1, 68 Pac. 99, 100.

[38] Kendall v. Long (Wash.), 119 Pac. 9, 12.

[39] See *post*, §§ 664, 665.

[40] Le Fevre v. Amonson, 11 Idaho, 45, 81 Pac. 71, 72; Low v. Katalla Co., 40 L. D. 534, reviewing many of the cases on this subject.

Judge Ross said, in Cosmos Exploration Co. v. Gray Eagle Oil Co.: [41]—

> The demurrers to the present bills raise the questions of jurisdiction and the sufficiency of the bills themselves. The bills expressly allege that upon the making of the selections under which the complainants claim, and the publishing of the notice required by the local rules and regulations of the land department, the defendants to the bills initiated in the land office contests by written protests against such selections, on the ground that the lands selected were mineral lands, and not therefore subject to selection under the act of June 4, 1897, and that those contests are still pending in the land department. Those averments in the bills, in my opinion, state the complainants out of court; for no court can lawfully anticipate what the decision of the land department may be in respect to the contests, nor direct in advance what its decision should be, even in matters of law, much less in respect to matters of fact, such as is that relating to the character of any particular piece of land.[42]

The circuit court of appeals affirmed the decision of Judge Ross, and said, among other things:—

> We are of the opinion that the federal courts are without jurisdiction to entertain a suit to determine the respective rights of the parties to any land to which the title remains in the government of the United States in regard to which, as shown by the averments in the present bill, a contest between the parties is pending in the land department of the government.[43]

[41] 104 Fed. 20, 40; S. C., on appeal, 112 Fed. 4, 7, 50 C. C. A. 79, 21 Morr. Min. Rep. 633, 61 L. R. A. 230; affirmed, 190 U. S. 301, 308, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064.

[42] See, also, Savage v. Worsham, 104 Fed. 18; Ripinsky v. Hinchman, 181 Fed. 786, 794.

[43] 112 Fed. 47, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; affirmed, 190 U. S. 301, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064.

The supreme court of California,[44] while conceding that a court should not attempt to determine questions of fact pending before, and when they are within the exclusive jurisdiction of, the land department, held that a court has jurisdiction of an action which involves such a controversy, but has no power to decide that question, and should suspend proceedings until the land department has determined it. The suit was brought by a homestead claimant to quiet title to lands a portion of which were claimed by defendant under mining locations. The defendant alleged that a contest was pending in the land department to determine the character of the land. Before the trial took place, the department decided the case in favor of the homestead claimant, and the court proceeded to judgment in his favor. On appeal, defendant contended that the action should have been dismissed because it was commenced at a time when the controversy was pending in the land office. The supreme court said, among other things:—

> The court certainly had jurisdiction of the cause. The real contention was that it could not determine the issues raised by the pleadings, because they involved a question which it could not try, and for the determination of which a special tribunal had been created. If that were so a dismissal would have been the proper course. But was it so? . . . . The land department of the United States is not a special tribunal organized to determine who is the owner of land. The department is the medium through which parties may acquire the title of the United States. . . . . It determines the existence or nonexistence of alleged facts, to enable it to select the person who is entitled to purchase. . . . . The court very properly, then, delayed the trial until the question as to the character of the land was determined by the land

[44] Potter v. Randolph, 126 Cal. 458, 58 Pac. 905, 906.

department, which alone had the power to decide that controversy. The court had jurisdiction of the action, but could not try that particular controversy, which was involved in the action. Being a suit to quiet title, and not to recover possession, there was no special reason for anticipating the action of the department.

The court then intimates that if the suit had been one to recover possession, it would have had power to try such questions so far as necessary to determine the right of possession, but that its decision would not trench upon or conclude the land department.[45]

It was further held that the decision of the land department as to the character of the land was properly admitted as evidence, and was conclusive upon the question.

The rule is well settled that while a question, the determination of which is exclusively confided to the land department, is under consideration, and within the control of that department, the courts will not render a decree in advance of the action of the government officials and thereby render such action nugatory.[46]

At the same time, it is also well settled that while a controversy is so pending before the department, the courts will protect the parties in their possession until such contest is terminated,[47] particularly when such

[45] Upon this point see Marquez v. Frisbie, 101 U. S. 473, 475, 25 L. ed. 800; Humbird v. Avery, 110 Fed. 465, 472; affirmed on appeal, 195 U. S. 480, 504, 25 Sup. Ct. Rep. 123, 49 L. ed. 286; Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 308, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064; Bockfinger v. Foster, 190 U. S. 116, 126, 23 Sup. Ct. Rep. 836, 47 L. ed. 975; Warnekros v. Cowan, 13 Ariz. 42, 108 Pac. 238, 239. See, also, Manser Lode, 27 L. D. 326.

[46] Thompson v. Basler, 148 Cal. 646, 113 Am. St. Rep. 321, 84 Pac. 161, 162, and cases cited.

[47] Reservation State Bank v. Holst, 17 S. D. 240, 95 N. W. 931, 932, 70 L. R. A. 799; Tiernan v. Miller, 69 Neb. 764, 96 N. W. 661, 662.

possession is an essential for completing purchase under the acts of congress relating to public lands,[48] or to preserve the peace or to determine controversies arising out of temporary rights in public lands.[49]

The courts would certainly be authorized to interfere by interlocutory injunction to prevent waste or destruction of the substance of the estate and preserve the *status quo* pending final decision by the department.[50]

In Lightner M. Co. v. Superior Court [51] an action had been commenced by the claimant of a quartz lode held by location situated within a patented townsite, for a trespass committed by the owner of the townsite title, the contention being that when the townsite patent was issued the lode was known to exist, and was, therefore, reserved from the operation of the townsite patent. While this suit was pending, and before trial, the claimant of the mine and plaintiff in the case applied for a patent for the mining claim. Upon an application to set the cause for trial, the defendant (the townsite claimant) protested on the ground that the controversy involving the existence of a known lode at the time of the issuance of the townsite patent was *sub judice* before the land department, and that, therefore, the court should suspend further action to abide the final determination of that tribunal. The trial

[48] Jones v. Hoover, 144 Fed. 217, 219.

[49] Warnekros v. Cowan, 13 Ariz. 42, 108 Pac. 238, 239, and cases cited.

[50] We think this is a rational inference from the opening and closing paragraphs of the opinion of the supreme court of the United States in Cosmos Exploration Co. v. Gray Eagle Co., 190 U. S., at pages 308 and 315, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064. In affirming the judgment of the circuit court of appeals dismissing the bill, the supreme court *ex industria* points out that the bill did not ask for an injunction pending action by the department.

[51] 14 Cal. App. 642, 112 Pac. 909, 911.

court refused to take this course, and prohibition was applied for in the district court of appeals. That court affirmed the action of the trial court upon the theory that the crucial questions involved in the case were possession or the right of possession at a time prior to the commencement of proceedings in the land office, questions which it was peculiarly in the province of the courts to determine, and with which the land department had no concern.

We think the ruling may be upheld also upon the ground that the court first acquired jurisdiction over the parties and subject matter, which was not ousted by the later proceedings in the land office. Further, the determination of the land office on the question of "known lode" would not be conclusive on the courts. This question is always and ultimately a question of judicial cognizance.[52]

If the claimant to the lode held a patent bearing date subsequent to the date of the townsite patent, it would not be conclusive against the owner of the townsite title, and the courts would ultimately be compelled to determine the question regardless of the patent.[53]

Where a controversy arises between two mineral claimants, both asserting locator's rights to the same deposit, one claiming that it is a lode, the other that it is a placer, it was held by Judge Van Fleet, sitting as district judge for the state of Idaho (ninth circuit), that in an adverse suit arising out of the patent proceeding, the court cannot determine the question of the character of the deposit, but the matter was within the exclusive jurisdiction of the land department, to be decided by it after the court had determined the present

[52] Iron Silver Mining Co. v. Campbell, 135 U. S. 286, 293, 10 Sup. Ct. Rep. 765, 34 L. ed. 155, 16 Morr. Min. Rep. 218.

[53] Id.

right of possession flowing from priority of location, and that the judgment of the department as to this issue could in no wise be controlled by the court.[53a]

The circuit court of appeals of the eighth circuit, however, in a similar controversy between the same parties, ruled that it was a question which the court was called upon to decide in the first instance, without attempting to determine the effect of the decision upon the land department.[53b]

In cases where it is the manifest duty of the courts to suspend the trial or entry of the decree until such time as the land department shall have passed upon such questions as are exclusively within its jurisdiction, the issuance of the patent is not necessary before the courts may act. When the proceeding is terminated in the land department by action which is a finality, that of itself is sufficient to enable the courts to proceed,[54] provided, of course, that the action is one of which the court would otherwise have jurisdiction.[55] Further discussion of the respective functions of the land department and the courts will be found in later portions of this work.[56] We shall also observe that at certain stages of patent proceedings certain matters are specifically referred to the courts for determination, pending which the powers of the land department are suspended.[57]

[53a] Duffield v. San Francisco Chemical Co., 198 Fed. 942, 944, 945.

[53b] San Francisco Chemical Co. v. Duffield, 201 Fed. 830, 834. These actions both arose out of controversies over the classification of the rock phosphates in Idaho and Utah discussed in section 425a, *post*. See, also, discussion in sections 720, 721, as to adverse claims in patent proceedings between contending placer and lode claimants.

[54] Cope v. Braden, 11 Okl. 291, 67 Pac. 475, 476.

[55] Le Fevre v. Amonson, 11 Idaho, 45, 81 Pac. 71, 72.

[56] *Post*, §§ 664–666.

[57] *Post*, §§ 741, 759.

CHAPTER III.

STATUS OF LAND AS TO TITLE AND POSSESSION.

ARTICLE I. INTRODUCTORY.

§ 112. Only public lands subject to appropriation under the mining laws.—The mineral character of a given tract of land having been ascertained as a present fact, according to the rules enunciated in a preceding chapter, it becomes necessary to determine the *status* of the land as to title and possession before any legal right of appropriation under the mining laws can be asserted and maintained by the mineral claimant. Only public mineral lands can be entered under the mining laws. Land to which any claim or right of others has legally attached does not fall within the definition of "public land."[1]

[1] See *post*, § 322; Newhall v. Sanger, 92 U. S. 761, 764, 23 L. ed. 769; Bardon v. N. P. R. R. Co., 145 U. S. 535, 538, 12 Sup. Ct. Rep. 856, 36 L. ed. 806; Mann v. Tacoma Land Co., 153 U. S. 273, 284, 14 Sup. Ct.

While under the system in vogue on the continent of Europe, in Mexico, and the South American republics, mining privileges may be acquired in lands of private proprietors under certain restrictions and governmental regulations, no such right exists in any of the states and territories of the United States wherein the federal mining laws are operative. Lands held in private ownership in such states and territories cannot be invaded.[2] The land sought to be entered upon as mineral land must be free, open, public land, and not legally reserved, appropriated, dedicated to any other use or purpose, or otherwise legally disposed of. As to whether a given tract of land sought to be entered as mineral is free and open to acquisition under the mining laws is sometimes a difficult question to solve. To enable us to intelligently deal with this subject, it will be necessary to examine the various methods by which the government parts with its title to its lands, its obligation under treaties of cession, the nature and extent of grants previously made, and the reservations or executive withdrawals of certain parts of its territory made for public purposes or in the exercise of governmental policy.

Rep. 820, 38 L. ed. 714; Teller v. United States, 113 Fed. 273, 280, 51 C. C. A. 230; Cameron v. United States, 148 U. S. 301, 309, 13 Sup. Ct. Rep. 595, 37 L. ed. 459; United States v. Tygh Valley Land Co., 76 Fed. 693; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. Rep. 548, 38 L. ed. 331; In re Logan, 29 L. D. 395; Nome Transp. Co., 29 L. D. 447; Thallman v. Thomas, 111 Fed. 279, 49 C. C. A. 317; Garrard v. Silver Peak Mines, 82 Fed. 578; Union Pac. R. Co. v. Harris, 76 Kan. 255, 91 Pac. 68, 69; affirmed, 215 U. S. 386, 30 Sup. Ct. Rep. 138, 54 L. ed. 246; Northern Lumber Co. v. O'Brien, 139 Fed. 614, 616, 71 C. C. A. 598; affirmed, 204 U. S. 190, 27 Sup. Ct. Rep. 249, 51 L. ed. 438; Scott v. Carew, 196 U. S. 100, 109, 25 Sup. Ct. Rep. 193, 49 L. ed. 403.

2 Biddle Boggs v. Merced M. Co., 14 Cal. 279, 376.

Article II. Mexican Grants.

§ 113. Introductory.—For a period commencing with the cession by Mexico under the treaty of Guadalupe Hidalgo, and ending with the dissolution of the court of private land claims, originally established by act of congress, March 3, 1891, to investigate and determine the validity and extent of Mexican grants in Arizona, New Mexico, Colorado, Wyoming, Utah, and Nevada,[3] the relationship of Mexican grants to the great body of the public domain has been the subject of congressional legislation and judicial inquiry, presenting many interesting and complicated questions. At the present time, with the possible exception of isolated grants which were not required to be presented for confirmation to the court above named,—

[3] This court having completed the work assigned to it has gone out of existence.

i. e., grants which were *perfect* prior to the treaty,[4]—it is presumed that all rights and claims of every nature to lands arising out of Mexican grants have been finally adjudicated, their limits ascertained, and the line of demarkation between grant and public lands clearly defined. The subject, if deserving of a place in a discussion of the American law of mines, is of historical interest only. Nevertheless, the recent acquisition by the United States of the Philippines, Porto Rico, and Hawaii, accompanied by treaty stipulations regarding the recognition and protection of pre-existing rights and equities in lands previously granted by the ceding nations, renders it expedient to give the subject of Mexican grants, their mode of administration, their relationship to the great body of the public lands, and the operation of the mining laws in respect thereto, some prominence.

With a comprehensive mining code enacted by congress governing the acquisition of possessory rights in the public mineral lands of the Philippine islands, many questions analogous to those which have arisen in the continental area of the public domain, respecting grants from foreign nations, will undoubtedly be made the subject of judicial inquiry. These considerations we think justify the treatment of the subject within reasonable limitations.

§ 114. Ownership of mines under Mexican law.—Under the laws in force in Mexico at the date of the treaty of Guadalupe Hidalgo, mines, whether in public

[4] Section 12 of the act of March 3, 1891, 26 Stats. at Large, 859; Comp. Stats. 1901, p. 772; 6 Fed. Stats. Ann. 57. Where a controversy arises between mineral locators and claimants of such a grant, the inquiry necessarily is, Was the grant a perfect one which was not required to be submitted to the court of private land claims? Sena v. American Turquoise Co., 14 N. M. 511, 98 Pac. 170, 171.

or private property, belonged to the supreme government.[5]

No interest in the minerals of gold and silver passed by a grant from the government of the land in which they were contained, without express words designating them. Such grant only passed an interest in the soil distinct from that of the minerals.[6]

The interest in minerals was conveyed through the operation of the mining ordinances, or by proceedings upon denouncement, when a mine, once discovered and registered, had been abandoned and forfeited.[7]

Mining rights under the Mexican laws were held upon conditions not affecting the title to the land as derived under the ordinary conveyances; and such rights might be acquired and held by others besides the owner of the land under the ordinary grants, and were terminable when, by their use, the minerals contained in the soil were wholly removed.[8]

In other words, there was a severance of the title to the minerals from the title to the land. The minerals, particularly gold, silver, and quicksilver, were *jura regalia*, and were considered to belong to the supreme government in virtue of its sovereignty.

This was substantially the law of the ceding country at the date of the ratification and exchange of the treaty.

§ 115. Nature of title conveyed to the United States by the treaty.—By the treaty of cession, all of the prop-

[5] Castillero v. United States, 2 Black, 17, 167, 17 L. ed. 360.

[6] Fremont v. Flower, 17 Cal. 199, 79 Am. Dec. 123; Lockhart v. Johnson, 181 U. S. 516, 524, 21 Sup. Ct. Rep. 665, 45 L. ed. 979.

[7] Fremont v. Flower, 17 Cal. 199, 79 Am. Dec. 123; United States v. San Pedro etc. Co., 4 N. M. 225, 17 Pac. 407; United States v. Castillero, 2 Black, 17, 17 L. ed. 360.

[8] Castillero v. United States, 2 Black, 17, 17 L. ed. 360.

erty theretofore belonging to Mexico within the limits defined by the compact between the two nations passed to the United States.[9]

The government of the United States was based upon different theories from that of the ceding country. By the operation of the treaty, none of the Mexican theories of government were grafted upon the American system. The ownership conferred by the cession was not an incident of sovereignty, and the United States held the minerals and the lands in which they are found just as they held any other public property which they acquired from Mexico.[10]

No foreign government could, by treaty or otherwise, impart to the United States any of its sovereign prerogatives; nor has the United States the capacity to receive or power to exercise them. Every nation acquiring territory by treaty or otherwise must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it.[11]

§ 116. Obligation of the United States to protect rights which accrued prior to the cession.—It is a matter of political history that within the territory ceded, particularly within the area now comprising the states of California and Colorado and the territories of New Mexico and Arizona, and to a limited extent, perhaps, in other states, rights were asserted to a large number of tracts of land by title derived from the ceding nation. These tracts varied in area from comparatively few acres to immense bodies of land, in some instances embracing principalities within their claimed bound-

[9] Fremont v. Flower, 17 Cal. 199, 79 Am. Dec. 123.
[10] Fremont v. Flower, 17 Cal. 199, 79 Am. Dec. 123.
[11] Pollard v. Hagan, 3 How. 212, 11 L. ed. 565.

aries. Most of these claimed grants were either grants for colonization or for the purposes of stock-raising and agriculture. A very few were for mines claimed to have been acquired under the mining ordinances. Most of them were inchoate—that is to say, something remained to be done to either perfect and establish the title or to fix the boundaries. Many were spurious and fraudulent. As to all these asserted rights, the treaty of Guadalupe Hidalgo imposed upon the government of the United States the obligation to protect titles acquired under Mexican rule.[12] This obligation was imposed upon our government by international law independent of treaty stipulation.[13] These rights were consecrated by the law of nations.[14] A right of any validity before the cession was equally valid afterward.[15] The duty of providing the mode of securing these rights and of fulfilling the obligations imposed upon the United States belonged to the political department of the government. Congress might discharge that duty itself or delegate it to the judicial department.[16] In the larger sense, however, all the lands ceded were "public lands" until congress placed them in a state of reservation to abide the investigation into the nature and extent of the title asserted

12 Peralta v. United States, 3 Wall. 434, 18 L. ed. 221; Knight v. U. S. Land Assn., 142 U. S. 161, 12 Sup. Ct. Rep. 258, 35 L. ed. 974.

13 Strother v. Lucas, 12 Pet. 410, 9 L. ed. 1137.

14 United States v. Moreno, 1 Wall. 400, 17 L. ed. 633; 1 Wharton's Int. Dig., § 4.

15 United States v. Moreno, 1 Wall. 400, 17 L. ed. 633; Interstate L. Co. v. Maxwell L. G. Co., 139 U. S. 569, 11 Sup. Ct. Rep. 656, 35 L. ed. 278.

16 Astiazaran v. Santa Rita L. & M. Co., 148 U. S. 80, 13 Sup. Ct. Rep. 457, 37 L. ed. 376; De la Croix v. Chamberlain, 12 Wheat. 599, 6 L. ed. 741; Chouteau v. Eckhart, 2 How. 344, 11 L. ed. 293; Tameling v. U. S. Freehold Co., 93 U. S. 644, 23 L. ed. 998.

by parties claiming under grants from the ceding nation.[17]

§ 117. Adjustment of claims under Mexican grants in California.—With reference to Mexican grants in California, congress provided for the appointment of a board of land commissioners,[18] to whom all persons claiming lands by virtue of any right or title derived from the Spanish or Mexican government were required to present their claims. The action of the commissioners was subject to review by the United States district court, and the right to appeal to the supreme court of the United States was given. Under this act most of the Mexican land grants in California were adjudicated, and patents issued for such as were ultimately confirmed. A similar method had been pursued with reference to grants claimed in the territory ceded by Spain and France.[19]

The government of the United States, when it came to consider this statute, was not without large experience in a somewhat similar class of cases arising under the treaties for the purchase of Florida from Spain and the territory of Louisiana from France. In the latter case, particularly, a very much larger number of claims by private individuals existed to the soil acquired by the treaty, some of whom resided on the lands which they claimed, while others did not, and the titles asserted were as diverse in their nature as those arising under the cession from Mexico.[20]

[17] Lockhart v. Johnson, 181 U. S. 516, 21 Sup. Ct. Rep. 665, 45 L. ed. 979. See Baca Float No. 3, 30 L. D. 497.

[18] Act of March 3, 1851, 9 Stats. at Large, p. 631.

[19] Public Domain, p. 375.

[20] Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. Rep. 525, 32 L. ed. 926.

§ 118. Adjustment of claims under Mexican grants in other states and territories.—As to claimed Mexican grants situated within the territory of New Mexico, congress, on July 22, 1854, passed an act [21] providing, among other things, that the surveyor-general for that territory should examine into and report to the interior department upon the *status* of private land claims within his jurisdiction. The provisions of this act were extended to Colorado by the act of February 28, 1861,[22] and to Arizona by the act of February 24, 1863.[23]

Some of the grants so reported upon under these acts were presented to congress, and were confirmed. But by far the greater proportion awaited the passage of some general law providing a uniform method of adjustment. Such a law was passed March 3, 1891.[24]

This act created a court of private land claims, consisting of a chief justice and four associate justices, to which tribunal all persons claiming lands within the limits of the territory derived by the United States from the republic of Mexico, and now embraced within the territories of New Mexico and Arizona, and the states of Nevada, Colorado, Wyoming, and Utah, were called upon to submit their claims.[25] The object for

21 10 Stats. at Large, p. 308.

22 12 Stats. at Large, p. 172.

23 12 Stats. at Large, p. 664.

24 26 Stats. at Large, p. 854; Comp. Stats. 1901, p. 765; 6 Fed. Stats. Ann. 48.

25 The California act required all classes of claimed grants to be presented, whether perfect or inchoate. The act of 1891 left it optional with the owner of a perfect grant to present it or not, as he saw fit. In Sena v. American Turquoise Co., 14 N. M. 511, 98 Pac. 170, there was a controversy between a Mexican grant claimant and a mining locator. The grant had been presented to the court of private land claims and rejected. In the case above cited the grant claimant undertook to prove "perfect grant" through evidence which had not been presented to the court. The effect was unsuccessful.

which this court was created has been accomplished. It ceased to exist by operation of law June 30, 1904, its records being transmitted to the department of the interior [26] and such of its functions as were necessary to carry its decrees into effect were transferred to the general land office.[27] A large number of claimed grants were submitted to it. It confirmed some, and rejected others. The act creating this tribunal may be said to have been drawn on lines parallel to the one passed for California, but, in one respect at least, it made a radical innovation. The California act made no mention of or reference to mineral lands distinctively. The law now under consideration contains the following provision:—

> No allowance or confirmation of any claim shall confer any right or title to any gold, or silver, or quicksilver mines, or minerals of the same, unless the grant claimed effected the donation or sale of such mines or minerals to the grantee, or unless the grantee has become otherwise entitled thereto in law or equity; but all such mines and minerals shall remain the property of the United States, with the right of working the same, which fact shall be stated in all patents issued under this act. But no such mine shall be worked on any property confirmed by this act without the consent of the owner of such property, until specially authorized thereto by an act of congress hereafter passed.

Whatever may be the proper interpretation to be placed upon this proviso on final analysis, it might seem from a casual reading to foreshadow a radical departure from the previous policy of the government. All reservations heretofore made or authorized by con-

[26] Stats. at Large, 1144; Comp. Stats. (Supp. 1911), p. 86; 10 Fed. Stats. Ann. 340.

[27] 33 Stats. at Large, 485; Comp. Stats. (Supp. 1911), p. 87; 10 Fed. Stats. Ann. 340.

gress, with the exception of "known mines," in the pre-emption act of 1841, and "veins," or "lodes," in the townsite act of 1865, have been of the *lands* containing mineral, not the mineral within the lands. The effect of these new provisions and the construction of the patents to be issued under them will be duly considered at the proper time.

§ 119. **Claims to mines asserted under the Mexican mining ordinances.**—It may be conceded on the threshold that where a valid claim to a mine or a mining right existed prior to the cession within the territory ceded, such right was to be respected, and should have been determined in the same manner as claims to other land were determined.[28] We are not aware of any such claim ever having been thus far successfully established.

But few were ever asserted in California; and, of course, the time for such assertion has long since elapsed. Only two strictly mining titles were presented for confirmation to the court of private land claims created under the act of March 3, 1891. Both of these were rejected upon the ground that the officer of the former government purporting to make the grant had no authority to make it. Therefore, we have no further concern with this class of claims. We are to deal only with rights asserted to lands claimed either under the colonization laws of Mexico or for agricultural, pastoral, and kindred purposes.

§ 120. **Status of grants considered with reference to condition of title.**—The *status* of lands embraced within claimed Mexican grants pending the investigation and determination of title and defining boundaries depended to some extent upon the nature of the grant

[28] Castillero v. United States, 2 Black, 17, 17 L. ed. 360.

—that is, whether it was perfect or inchoate, had definitely fixed boundaries, or was simply a float,—and also to a greater degree upon the policy of congress expressed from time to time in its legislation on the subject. This will be made manifest as we proceed with the discussion. So far as the inquiry is pertinent to the questions considered in this treatise, Mexican grants may be considered in four different aspects:—

(1) Grants *sub judice*—that is to say, awaiting final confirmation and determination of boundaries;

(2) Grants confirmed finally by action of the judicial tribunals under the California act, and the boundaries fixed;

(3) Grants confirmed by direct action of congress;

(4) Grants which have been confirmed under the act of March 3, 1891, situated in Colorado, Wyoming, Utah, Nevada, New Mexico, or Arizona.

Let us consider these in the order named.

§ 121. **Grants sub judice.**—With respect to all classes of Mexican grants, it may be said that they were *sub judice* until the title had been established and the boundaries finally defined by the tribunals charged with these functions, or the right finally declared invalid and without foundation, or until the period fixed by the various acts requiring presentation to the respective tribunals passed without such presentation having been made.[29]

§ 122. **Different classes of grants.**—Mexican grants were of three kinds:—

29 Under the California act all classes of grants, whether perfect or imperfect, were required to be presented. Under the act of March 3, 1891, the owners of *perfect* grants might present their claims or not, as they saw fit.

(1) Grants by specific boundaries, where the donee is entitled to the entire tract;

(2) Grants of quantity, as of one or more leagues within a larger tract, described by what are called outside boundaries, where the donee is entitled to the quantity specified and no more;

(3) Grants of a place or rancho by name, where the donee is entitled to the whole tract, according to the boundaries given, or, if not given, according to the extent as shown by previous possession.[30]

§ 123. **Grants of the first and third classes.**—With respect to lands containing mines or mineral deposits within the claimed exterior boundaries of any grant falling within the first and third classes in California, or in New Mexico, Utah, Arizona, Wyoming, and Nevada, prior to the act of March 3, 1891, it may be stated generally that no right to any such lands could be acquired under the general mining laws so long as the grant remained *sub judice*. Such lands were not "public lands" within the meaning of that term as used in the acts of congress respecting the disposition of the public domain.[31]

And it is immaterial whether the claim was *lawfully* made or not. As was said by the supreme court of the United States,—

> Claims, whether grounded upon an inchoate or perfected title, were to be ascertained and adequately protected. This duty, enjoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the

[30] United States v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, 32 L. ed. 213; Higueras v. United States, 5 Wall. 827, 18 L. ed. 469; Hornsby v. United States, 10 Wall. 224, 19 L. ed. 900.

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

claimed lands until an opportunity was afforded the parties in interest for a judicial hearing and determination. It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was, in the opinion of congress, no mode of separating them from those which were valid without investigation by a competent tribunal; and our legislation was so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim, until it was barred by lapse of time or rejected.[32]

The theory by which grants of the two classes under consideration were while *sub judice* withheld from appropriation under the general land laws of congress is thus stated by the same tribunal:—

The right to make the segregation rested exclusively with the government, and could only be exercised by its officers. Until they acted and effected the segregation, the confirmees were interested in preserving the entire tract from waste and injury and in improving it; for until then they could not know what part might be assigned to them. Until then no third person could interfere with their right to the possession of the whole. No third person could be permitted to determine in advance of such segregation that any particular locality would fall within the surplus, and thereby justify his intrusion upon it and its detention from them. . . . . If the law were otherwise than as stated, the confirmees would find their possessions limited, first in one direction, and then in another, each intruder asserting that the parcel occupied by him fell within the surplus, until in the end they would be excluded from the entire tract.[33]

[32] Newhall v. Sanger, 92 U. S. 761, 764, 23 L. ed. 769.

[33] Van Reynegan v. Bolton, 95 U. S. 33–36, 24 L. ed. 351 (citing Cornwall v. Culver, 16 Cal. 429; Mahoney v. Van Winkle, 21 Cal. 552; Riley v. Heisch, 18 Cal. 198).

This was the doctrine early announced by the supreme court of the state of California and maintained through a long line of decisions.[34]

It has been said that the primary object of the act of March 3, 1851, to ascertain and settle the private land claims in the state of California, was to distinguish the vacant public lands from those that were private property.[35]

Until a confirmation of a grant, no valid title as against the United States is vested to any specific land. Nor does a confirmation locate the claim and sever the land from the public domain without a survey.[36]

Until such confirmation and final survey, lands within the claimed limits were reserved from the operation of the general land laws, and no title to any portion could be obtained under the pre-emption or other laws.

When the limits have been definitely fixed, the surplus for the first time becomes open to settlement and purchase.[37] A like result follows in cases where the grant is finally rejected, or where the claimant fails to present his claim within the time specified in the act.[38]

§ 124. **Grants of the second class, commonly called "floats."**—Do the foregoing rules apply to cases falling within the second class of grants, commonly called "floats"?—for example, a grant of ten square leagues

34 Ferris v. Coover, 10 Cal. 589; Mahoney v. Van Winkle, 21 Cal. 552; Thornton v. Mahoney, 24 Cal. 569; Rich v. Maples, 33 Cal. 102; Mott v. Reyes, 45 Cal. 379; Shanklin v. McNamara, 87 Cal. 371, 26 Pac. 345.

35 Castro v. Hendricks, 23 How. 438, 16 L. ed. 576.

36 Ledoux v. Black, 18 How. 473, 15 L. ed. 457.

37 United States v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, 32 L. ed. 213; Quinn v. Chapman, 111 U. S. 445, 4 Sup. Ct. Rep. 508, 28 L. ed. 476.

38 Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. Rep. 525, 32 L. ed. 926; United States v. Fossat, 21 How. 446, 16 L. ed. 186.

within claimed exterior boundaries of one hundred square leagues. This was the case of the Mariposa grant in California, claimed by and ultimately confirmed to General John C. Fremont.

The decisions heretofore quoted and the rules enunciated applied to conditions antedating the enactment of general mining laws. Prior to July 26, 1866, no mineral lands, even on the unquestioned public domain, could be acquired in absolute private ownership. The various acts passed from 1851 to 1891 regulating the settlement of private land claims made no mention of minerals or mineral lands.

The California act, by legislative intendment, as we have heretofore shown, reserved these claimed lands from pre-emption and homestead settlement.

The acts conferring authority upon surveyors-general in the territories to examine and report upon Mexican grants contained a provision to the effect that "until final action of congress on such claims, all lands covered thereby shall be reserved from sale or other disposition by the government." [39]

Would these inhibitions imply that lands lying within the claimed exterior boundaries of a float were not open to exploration and purchase, as lands containing gold and silver? Confessedly, titles to these minerals could not have been obtained under the Mexican government by proceedings other than under the mining ordinances; and it can be plausibly asserted that the United States was under no legal or equitable obligation to confer upon these grantees something

[39] As will be hereafter noted, the act of March 3, 1891, repealed the clause as to claimed grants in Arizona, New Mexico, Utah, Nevada, and Wyoming. The *status* of those grants after that date was somewhat different. The rule here stated is, we think, the correct one as to all Mexican grants prior to March 3, 1891.

more than they could have acquired had there been no change in the paramount proprietorship.

And yet we fail to see anything in the adjudicated cases which would not reserve the entire claimed tract from occupation and purchase under the mining laws until such time as the boundaries are finally fixed and the surplus becomes public domain.

The supreme court of the United States thus distinguishes this class of grants:—

> It is in the option of the government, not of the grantee to locate the quantity granted; and, of course, a grant by the government of any part of the territory contained within the outside limits of the grant only reduces by so much the area within which the original grantee's proper quantity may be located. If the government has the right to say where it shall be located, it certainly has the right to say where it shall not be located; and if it sells land to a third person at a place within the general territory of the original grant, it is equivalent to saying that the quantity due to the original grantee is not to be located there. In other words, if the territory comprehended in the outside limits and bounds of a Mexican grant contains eighty leagues, and the quantity granted is only ten leagues, the government may dispose of seventy leagues without doing any wrong to the original grantee.[40]

The case was that of a railroad grant evidenced by patent for a section of land within a float. Suit was brought to vacate the patent on the ground that the land patented was at the time of the patent embraced within the exterior boundaries of a claimed Mexican grant, then *sub judice*, and that therefore the patent was void, relying upon the case of Newhall v. Sanger,[41] which involved precisely the same grant,

[40] United States v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, 32 L. ed. 213.

[41] 92 U. S. 761, 23 L. ed. 769.

although, as presented for the consideration of the supreme court in that case, it appeared to be a grant by specific boundaries, and not a float.

The case of United States v. McLaughlin established the doctrine that the government might, by *direct congressional grant*, dispose of lands within a float so long as sufficient remained to satisfy the call of the grant for quantity. This rule was subsequently reannounced, and followed in later cases.[42]

But, as we understand the McLaughlin case, the court did not intend to infer that any such lands were subject to appropriation *under general laws*. In fact, the court says:—

> It may be that the land office might properly suspend ordinary operations in the disposal of lands within the territory indicated; and in that sense they might not be considered as public lands.

We think a review of the authorities justifies the conclusion that floats were not exceptions to the general doctrine that Mexican grants while *sub judice* were to the extent of their claimed exterior boundaries, as defined in the *expediente*, withdrawn from exploration and purchase under the general mining laws; and this is true wheresoever within the ceded territory these grants were found prior to the passage of the act of March 3, 1891. Under this act a different policy was inaugurated. It repealed the provisions of the act of July 22, 1854, which placed all lands within this class of claimed grants in a state of reservation. By this repeal, lands which were *in fact* public lands belonging to the United States, although within the

42 Carr v. Quigley, 149 U. S. 652, 13 Sup. Ct. Rep. 961, 37 L. ed. 885; Wisconsin Cent. R. R. Co. v. Forsythe, 159 U. S. 48, 15 Sup. Ct. Rep. 1020, 40 L. ed. 71; United States v. Gurtner, 38 Fed. 1; Grant v. Oliver, 91 Cal. 158, 27 Pac. 596, 598.

claimed limits of a Mexican grant, became open to entry and sale under the laws of the United States.[43]

This may be illustrated. A mining location could not have been made within the claimed limits of a Mexican grant prior to March 3, 1891, so long as such grant was *sub judice*. Since that date such a location could be made; and if it is ultimately determined that the asserted claim to the grant was mineral, or did not embrace within its limits as finally confirmed the *locus* of the mining claim, the mining location would be valid. In other words, a prospector might locate a mining claim within the limits of a claimed grant which was *sub judice*, taking his chances that the grant would either not be confirmed or would not embrace his location.[44]

§ 125. Grants confirmed under the California act.— As to grants confirmed finally, with boundaries fixed by action of the judicial tribunals, under the California act, such grants occupy the *status* of patented lands, and will be so considered. A right to a patent is equivalent to a patent issued.

The question as to whether mines of the precious metals passed by confirmation to a grantee of a Mexican grant has never been in terms judicially determined by the supreme court of the United States.

[43] Lockhart v. Johnson, 181 U. S. 516, 521, 21 Sup. Ct. Rep. 665, 45 L. ed. 979; Lockhart v. Wills, 9 N. M. 344, 54 Pac. 336; Lockhart v. Leeds, 10 N. M. 568, 63 Pac. 48.

[44] Lockhart v. Johnson, 181 U. S. 516, 525, 45 L. ed. 979. Previous to this decision the land department held that all such lands remained in a state of reservation until the grant was finally disposed of, and that no rights under the public land laws could be acquired within the claimed limits of a grant so long as it remained *sub judice*. Tumacacori and Calabazas Grant, 16 L. D. 408, 423; In re Farr, 24 L. D. 1; Baca Float No. 3, 30 L. D. 497; In re Katherine Davis, 30 L. D. 220.

In the case of the Mariposa grant,[45] General Fremont's right to confirmation was assailed upon the ground that the grant embraced mines of gold or silver. The supreme court of the United States confirmed the grant, holding that the only question before it was the validity of the title; that, under the mining laws of Spain and Mexico, the discovery of a mine did not destroy the title of the individual to the land granted; that whether there were any mines on the grant in question, and, if there were, what were the rights of sovereignty in them, were questions which must be decided in another form of proceeding, and were not subjected to the jurisdiction of the commissioners or the court by the act of 1851. But in the later case of the New Almaden quicksilver mine,[46] a direct application for confirmation of a mining title was made; and the same court, while denying the validity of the asserted right, held that rights to mines acquired from Spain and Mexico prior to the cession were interests in land, and as such were subject to the jurisdiction of the commissioners. The Fremont case was not mentioned by the court, although in the court below, Judge Hoffman, sustaining the jurisdiction, held that the rule announced by him was not in conflict with the Fremont case, the only question there being the validity of the grant.

After the patent was issued to Fremont, the question arose in the California courts as to whether the minerals of gold and silver discovered within the grant passed to the confirmee under the patent, and the supreme court of that state thus announced its conclusions:—

[45] Fremont v. United States, 17 How. 542, 576, 15 L. ed. 241.

[46] Castillero v. United States, 2 Black, 17, 17 L. ed. 360.

> The United States occupy, with reference to their real property within the limits of the state, only the position of a private proprietor, with the exception of exemption from state taxation, and their patent of such property is subject to the same general rules of construction which apply to conveyances of individuals. From the operation of conveyances of this nature—that is, of individuals,—the minerals of gold and silver are not reserved, unless by express terms. They pass with the transfer of the soil in which they are contained. And the same is true of the operation of the patent, the instrument of transfer of the governmental proprietor, the United States; no interest in the minerals remains in them without a similar reservation.
>
> The United States have uniformly regarded the patent as transferring all interests which they could possess in the soil, and everything imbedded in or connected therewith. Wherever they have claimed mines, it has been as part of the *lands* in which they were contained; and whenever they have reserved the minerals from sale or other disposition, it has only been by reserving the lands themselves. It has never been the policy of the United States to possess interests in land in connection with individuals.[47]

This doctrine seems logical. We are not aware of its ever having been seriously questioned. It was commented on and distinguished by the supreme court of New Mexico in a case involving a patent issued under a special act of congress, confirming a grant,[48] to be hereafter discussed; but we do not think its force has been destroyed or weakened.

Unquestionably, the United States might have said to these claimants:—

[47] Fremont v. Flower, 17 Cal. 199, 79 Am. Dec. 123; Moore v. Smaw, Id. See, also, Ah Hee v. Crippen, 19 Cal. 492; Biddle Boggs v. Merced M. Co., 14 Cal. 279; Manning v. San Jacinto Tin Co., 7 Saw. 419, 9 Fed. 726.

[48] United States v. San Pedro etc. Co., 4 N. M. 225, 17 Pac. 337.

> The title asserted by you as the grantee of the Mexican government did not convey to you the right to the minerals of gold, silver, or quicksilver which are within your claimed grant. It is not our purpose to convey to you lands containing these metals; and before any title is bestowed upon you by this government, you must demonstrate that the lands are nonmineral in character. If mineral lands are found within your boundaries, they must be segregated out, as in the case of pre-emption, homestead, and other classes of grant, and you will be given a title to the remainder.

Or it might have gone further and offered a title reserving all minerals, as it is claimed was attempted in the later act applicable to Colorado, New Mexico, Arizona, Utah, Nevada, and Wyoming. But the government imposed no such conditions as to grants in California. Its patent passed everything it had acquired from the Mexican government, and the United States ceased to have any further concern with the land or its constituent elements.

A patent issued upon a confirmed Mexican grant passes whatever interest the United States may have had in the premises.[49] It operates, in consequence, as an absolute bar to all claims under the United States having their origin subsequent to the petition for confirmation. It is, in effect, a declaration that the rightful ownership never had been in the United States, but at the time of the cession it had passed to the claimant or those under whom he claimed.[50]

If the grantee received more than he could have acquired from the Mexican government, it is not a matter concerning which outsiders may lawfully complain.

[49] Beard v. Federy, 3 Wall. 478, 18 L. ed. 88; Adam v. Norris, 103 U. S. 591, 26 L. ed. 583; More v. Steinbach, 127 U. S. 70, 8 Sup. Ct. Rep. 1067, 32 L. ed. 51; Henshaw v. Bissel, 18 Wall. 255, 21 L. ed. 835.

[50] Adam v. Norris, 103 U. S. 591, 26 L. ed. 583, and cases therein cited.

The United States might confirm and patent a Mexican grant for a much larger quantity of land than it was possible to be obtained under the Mexican law.[51]

Why did it not possess the same power with reference to the minerals? Possessing that power, it exercised it by issuing a patent containing no reservation. As a matter of fact, the California act did not authorize the insertion of a reservation; and if a patent issued under that law contained such, it would have been to that extent void, as being unauthorized.[52]

§ 126. Grants confirmed by direct action of congress.—We are aware of no principle of law which permits us to draw distinctions between the legal effect of a patent issued under an act of congress, directly confirming a grant, and one issued as a result of an investigation by tribunals created by congress for that purpose. We should not have divided the question, and placed direct congressional confirmation in a separate category, were we not confronted by a very able and thoughtful opinion promulgated by the supreme court of New Mexico,[53] wherein that court announces the doctrine that an act of congress confirming to a claimant his title to a tract of land granted to him by the Mexican government under the colonization laws of Mexico and Spain, and a patent issued in accordance therewith, conveys no title to the mineral lands included in such grant.

[51] United States v. Maxwell L. G. Co., 121 U. S. 325, 7 Sup. Ct. Rep. 1015, 30 L. ed. 949.

[52] Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29 L. ed. 423; Amador-Medean G. M. Co. v. S. Spring Hill, 13 Saw. 523, 36 Fed. 668; Smokehouse Lode Cases, 6 Mont. 397, 12 Pac. 858; Clary v. Hazlitt, 67 Cal. 286, 7 Pac. 701; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 5 Pac. 570; Wolfley v. Lebanon M. Co., 4 Colo. 112.

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

The record in this case is very voluminous, and the opinion of the court lengthy. An epitome of the facts, the issues raised, and conclusions reached by the court are essential to a proper consideration of the force and value of the decision as a precedent. The confirmatory act in question is very short, and for convenience sake we quote it:—

> Be it enacted, ... That the grant to José Serafin Ramirez, of the Cañon del Agua, as approved by the surveyor-general of New Mexico, January 20, 1860, and designated as number seventy in the transcript of private land claims in New Mexico, transmitted to congress by the secretary of the interior, January 11, 1861, is hereby confirmed; *provided,* that this confirmation shall only be construed as a relinquishment on the part of the United States, and shall not affect the adverse rights of any persons whomsoever.[54]

A patent was issued pursuant to this confirmation, describing the grant by metes and bounds, as shown in the field-notes of the approved survey, containing no reserving or excepting clauses other than the one provided for in the act.

The grant, as patented, included within its exterior boundaries rich and valuable mines of gold, silver, iron, copper, and lead, some of which were worked prior to the treaty of cession by Mexican citizens. Others were thereafter discovered, occupied, and developed by American citizens, it being generally understood that they were situated upon the public domain, and not upon private property.

Suit was brought by the government to vacate and annul the patent, on the ground that the claimant had, by a fraudulent conspiracy with the surveyor-general, his clerk, the deputy surveyor, and other persons,

[54] (June 12, 1866), 14 U. S. Stats. at Large, p. 588.

secured a survey of said claimed grant which included land not conveyed nor intended to be conveyed by the Mexican government; that this fraudulent survey, upon which the patent was based, embraced the mines, whereas a proper construction of the terms of the grant, as presented for confirmation, would have excluded them.

There was an abundance of evidence to substantiate the fraudulent character of the survey, and to sustain the ruling of the supreme court of New Mexico setting aside and annulling the patent.

But a supplemental bill had been filed in the trial court without objection which raised another legal issue. It was therein alleged as follows:—

> That said defendant is now, and has been, in possession of large portions of said tract of land mentioned and described in said original bill of complaint as being the property of the United States, and by said fraudulent survey now included and embraced within the boundaries mentioned and described in the patent of the United States, as set forth in said bill of complaint; and that said defendant is now in possession of many mines, leads, lodes, and veins of mineral-bearing quartz or rock belonging to the United States, and situated upon said tract of land, the property of the United States. The said mines, leads, lodes, and veins are very rich and valuable for gold, silver, copper, and other ores. That said defendant claims said land, with its mines, leads, lodes, and veins of mineral-bearing rock and mineral deposits, by and under said patent of the United States.

This was followed by a prayer for an injunction prohibiting the defendant from mining or appropriating the ores.

Upon this issue, although the supreme court of New Mexico had determined that the patent, having been

fraudulently obtained, was null and void, and therefore conveyed nothing, felt constrained to go further, and enunciate the doctrine that, even if valid, the patent did not convey the minerals, and granted an injunction.

If the conclusion of the court was correct, and it undoubtedly was, that a proper survey made under the grant would exclude the mines, it was quite evident that the United States had a right to prevent the claimant from wasting the substance of its property by extracting and removing the metal-bearing ores, and an injunction was very properly sought, evidently upon this theory. It was quite unnecessary, in order to support the judgment awarding the injunction, to hold that the minerals did not pass by the patent. Therefore, all that the court said with reference to minerals not passing by the patent, which they had declared to be void, and to have passed nothing, was *obiter*, and wholly unnecessary.

The reasoning of the court on this branch of the case rests upon the assumption that as the claimant under the grant could not have obtained from the Mexican government the right to the minerals, therefore he could not *demand* them from the United States. But this is not the question at issue. The question is, What did the patent, assuming it to have been valid, convey?

In speaking of the California cases of Moore v. Smaw and Fremont v. Flower, heretofore cited, the court says that a careful study of these cases will prove that there were circumstances in the grant confirmation indicating an intent not disclosed in the Cañon del Agua case. A thorough knowledge of the Mariposa grant, its history, and the various judicial controversies arising out of it between the mineral claimants and the grantees under the Mexican gov-

ernment, enables us to assert that there are no differences in essential characteristics between the two grants. Neither asserted title under the mining ordinances. One was for colonization purposes, and the other for pastoral. The patent in one case was issued on a confirmation made by special act of congress, and in the other on a confirmation made by tribunals especially created by congress for that purpose.

The Cañon del Agua case was appealed to the supreme court of the United States, where the judgment of the supreme court of New Mexico was affirmed;[55] but the question as to whether the patent, if valid, carried the right to the mines was neither discussed nor decided.

With all due deference to the supreme court of New Mexico, we think we are justified in the conclusion that its decision in the Cañon del Agua case does not militate against the doctrine of the California cases, nor weaken the force of the line of decisions on the subject of patents to confirmed Mexican grants reviewed in the preceding paragraphs.

The decision in Fremont v. Flower was written by Judge Field. It has always stood unquestioned. As was said by Dr. Raymond in a monograph,—

> That a United States patent for land passes to the patentee (in the absence of explicit reservations authorized by law) all the interest of the United States, whatever it may be, in everything connected with the soil, or forming any portion of its bed, or fixed to its surface,—in short, everything embraced within the term "land,"—was declared long ago in the cases arising out of the Mexican land grants in California. (See Fremont v. Flower, 17 Cal. 199, 79 Am. Dec. 123, and other cases.) The very acute and sound decisions of the supreme court of California

[55] 146 U. S. 120, 13 Sup. Ct. Rep. 94, 36 L. ed. 912.

in these cases (the chief credit for which is due to Stephen J. Field, now on the bench of the United States supreme court) may be said to have placed upon indestructible foundations the public land system of the United States, the corner-stone of which is the completeness and invulnerability of the title of the patentee. It is worthy of notice, that in these cases the land in question had been granted by the Mexican government, with reservation of the precious metals, the deposits of which that government has always claimed to own, and the ownership of which therefore passed, under treaty, unimpaired by the agricultural grants, to the United States. Nevertheless, it was held that, in confirming the Mexican grants and issuing its patents for the territory, the United States actually conveyed to the patentees rights which they had never obtained from Mexico, on the broad principle that the unqualified grant of a patent for "land" *gives all.* In other words, though the United States might have reserved the mineral right, it could only have done so in explicit terms, failing which, all its interests passed with its patent. The wisdom of this timely decision is universally admitted. Unquestionably it saved us from an intolerable chaos and confusion.[56]

Before leaving this subject, it may be well to invite attention to another class of grants made by congress, in satisfaction of rights asserted, having their origin under the Mexican rule. In several instances, in recognition of equities, congress has authorized claimants to select certain lands in lieu of those originally claimed. This authorization is generally accompanied with a restrictive clause prohibiting the selection of mineral lands. Under these conditions, the land department administers the grant, and necessarily in doing so

[56] "The Force of the United States Mineral Land Patent," Mineral Industry, vol. iv, p. 781.

passes upon the character of the land,[57] as of the date of selection.[58] The duty devolves upon the claimant to establish the nonmineral character of the lands selected.[59]

Should any lands be included within the selection which are determined to be mineral in character, as that term is defined and understood by the land department and the courts, a segregation would be required as to such lands, and patent would issue for the remainder.

Such patent when issued would be conclusive that the land was nonmineral, and it could not be thereafter collaterally assailed.[60]

§ 127. Grants which have been finally confirmed under the act of March 3, 1891, situated in Colorado, Wyoming, Utah, Nevada, New Mexico, or Arizona.— What is the true intent and meaning of the proviso contained in the act of March 3, 1891?

> No allowance or confirmation of any claim shall confer any right or title to any gold or silver or quicksilver mines, or minerals of the same, unless the grant claimed effected the donation or sale of

[57] Or, as in some cases, the duty of determining the character of the land is lodged with the surveyor-general, who acts under the supervisory control of the secretary of the interior. Shaw v. Kellogg, 170 U. S. 312, 333, 18 Sup. Ct. Rep. 632, 42 L. ed. 1050.

[58] Baca Float No. 3, 29 L. D. 44, 52.

[59] Id., 13 L. D. 624.

[60] Carter v. Thompson, 65 Fed. 329; Dahl v. Raunheim, 132 U. S. 260, 10 Sup. Ct. Rep. 74, 33 L. ed. 324; Steel v. Smelting Co., 106 U. S. 447, 1 Sup. Ct. Rep. 387, 27 L. ed. 226; Cowell v. Lammers, 10 Saw. 247, 21 Fed. 200; Manning v. San Jacinto Tin Co., 7 Saw. 419, 9 Fed. 726; St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875; Butte & B. M. Co. v. Sloan, 16 Mont. 97, 40 Pac. 217, 218; Gale v. Best, 78 Cal. 235, 12 Am. St. Rep. 44, 20 Pac. 550, 551; Forestier v. Johnson, 12 Cal. App. 9; Klauber v. Higgins, 117 Cal. 451, 49 Pac. 466; Paterson v. Ogden, 141 Cal. 43, 99 Am. St. Rep. 31, 74 Pac. 443. As to conclusiveness of patent as to character of land, see *post*, § 779.

such mines or minerals to the grantee, or unless the grantee has become otherwise entitled thereto in law or equity; but all such mines and minerals shall remain the property of the United States, with the right of working the same, which fact shall be stated in all patents issued under this act. But no such mines shall be worked on any property confirmed by this act without the consent of the owner of such property, until specially authorized thereto by an act of congress hereafter passed.

The inquiry presents some difficulty. Its proper solution involves the consideration of a number of elements. That the individual proprietor of the soil may grant a tract of land, reserving the mines, opened or unopened, or the minerals or any specific mineral which may be found therein, whether known to exist or otherwise, is elementary.[61]

The government of the United States in this respect is clothed with the same privileges as individual proprietors. If the reservation is effectual for any purpose other than to safeguard and protect equitable rights in mines which at the time the grant was confirmed had been discovered and were being worked by parties other than the grant claimants, the legislation is so opposed to the antecedent policy of the government, so inconsistent with all its legislation during the last half century at least, and so thoroughly inconsistent with the land system which prevails in other portions of the public land states and territories, that we hardly know how to deal with it. These provisions of the law looking to the reservation of the minerals of gold, silver, and quicksilver, fairly bristle with legal interrogation-marks.

What are mines of gold and silver?

[61] See *ante*, § 9, and cases cited.

In the great case of mines (The Queen v. The Earl of Northumberland), it was held that mines of the baser metals, such as copper and lead, which contained gold or silver, were royal mines, and were reserved to the crown; and it required acts of parliament in the reign of William and Mary to change this rule.

To what extent may the government utilize this privilege, and enjoy the reserved estate? Certainly it cannot extend the operation of the general mining laws over the patented grants. The act does not sanction the carving out of any defined quantity of surface area to be used in connection with mining operations.[62] If we are left to the rule applicable in cases of individuals, it could occupy only so much of the surface as was necessary in the usual and reasonable course of working;[63] and this would necessarily vary in each particular instance, dependent upon the character of the ore and its mode of occurrence. It may be possible in certain states that the government or its licensees could condemn rights of way or surface ground for mining purposes under the law of eminent domain, on the theory that in these states mining is declared by the local courts to be a "public use."[64] Yet, the right of eminent domain is a right of municipal sovereignty, to be exercised in accordance with the rules prescribed by the individual states. Congress cannot be deemed to have acted upon the theory that its licensees would have to exercise the right of condemnation in order to enjoy the thing granted. In some states mining is not a "public use," and the right could not be exercised. It is true that the act contains the saving grace which inhibits anyone without the

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

[63] MacSwinney on Mines, p. 282; Stewart on Mines, p. 33.

[64] *Post*, § 254 et seq.

consent of the owner of the grant from working the mines "until specially authorized thereto by act of congress, to be hereafter passed," thus preventing a general invasion by enterprising explorers of the possession of the grant-owner, and giving congress an opportunity to readjust its legislation in this behalf, to harmonize with the established policy of the government.

We do not see why a preliminary investigation as to the character of the land embraced within a claimed grant should not have been authorized, and the mineral lands segregated, as in the case of railroad grants, homestead entries, and donations to states for educational purposes. If it is objected that a surface examination might not disclose the mineral possibilities, the answer is, that such is often the case with other classes of titles on the public domain. A discovery of mineral upon lands after they have been patented under the homestead, townsite, railroad, school, or other grants, would not defeat the patent or enable the government, or anyone else, to abridge the right of the patentee to the land granted, or sanction an intrusion upon his possession.[65]

We cannot see the propriety of adopting one policy with reference to by far the greater portion of the public domain, and another one, based on different theories, applicable to the remainder. While it may not be fairly within the author's privilege to speculate

[65] Cowell v. Lammers, 10 Saw. 246, 21 Fed. 200, 204; Colo. C. & I. Co. v. United States, 123 U. S. 307, 325, 8 Sup. Ct. Rep. 131, 31 L. ed. 182; Pac. Coast M. & M. Co. v. Spargo, 8 Saw. 645, 16 Fed. 348; Richards v. Dower, 81 Cal. 44, 22 Pac. 304, 306; Cooper v. Roberts, 18 How. 173, 179, 15 L. ed. 338; Davis v. Weibbold, 139 U. S. 507, 518, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; McCormick v. Sutton, 97 Cal. 373, 32 Pac. 444, 445; Smith v. Hill, 89 Cal. 122, 26 Pac. 644; Traphagen v. Kirk, 30 Mont. 562, 77 Pac. 58.

as to what troubles may arise, or what difficulties may be encountered in executing the act in question, we are very much inclined to believe that the proviso will be a serious annoyance to both the government and the grant-owner, without any compensating features.

At the first session of the fifty-seventh congress a bill framed for the purpose of giving effect to the proviso was introduced in the house of representatives, the first section of which is as follows:—

> *Be it enacted by the senate and house of representatives of the United States of America in congress assembled,* That hereafter all gold, silver, and quicksilver deposits, or mines, or minerals of the same, on lands embraced within any land claim confirmed by the decree of the court of private land claims, or as to which a suit for confirmation shall be pending in any court having jurisdiction thereof, are hereby declared to be free and open to exploration and purchase, under the mining laws of the United States, the local mining laws and regulations, and such regulations in addition thereto and consistent therewith as may be prescribed by the secretary of the interior from time to time, by citizens of the United States and those who have declared their intention to become so.

Upon reference to the committee on mines and mining, that committee requested the views of the secretary of the interior upon the measure, a customary courtesy when legislation affecting the public domain is under consideration by the national legislature. The views of Secretary Hitchcock in response to the request, formulated with the aid of the assistant attorney-general of the department, are herewith appended. They are to be commended for their persuasive logic.

> After careful consideration of the subject, the department is of opinion that only mines of gold,

silver, or quicksilver, or minerals of the same, known to exist within a confirmed private land claim at the date of its confirmation, and not the property of the grantee by the terms of the confirmed grant, or otherwise, in law or in equity, were by said act declared to remain the property of the United States, the working of which mines, after confirmation of the grant, and without the owner's consent, was to be provided for by future legislation. This construction appears to be a reasonable one, and one which it seems to the department will effectuate the purposes of the act.

Considerations of equity and justice, as well as the stability of titles based upon decree of confirmation rendered by the court of private land claims, and patents issued in pursuance thereof, require that there shall be a time with respect to which such titles must be considered as settled. This could not be so if the view should obtain that all lands in claims confirmed by the court and patented by the government are nevertheless to be free and open to exploration for gold, silver, and quicksilver deposits, or mines or minerals of the same, under the mining laws of the United States, as the bill in question proposes to declare. It is not believed that such was the intention of congress in the enactment of the above-quoted provision of the act of March 3, 1891.

This view is strengthened by the declaration in the act that no *such mine* shall be *worked* on any confirmed claim without the consent of the owner thereof, until specially authorized by a future act of congress. What congress had in mind evidently was the reservation and future *working of mines* of gold, silver, or quicksilver, existing within the limits of a confirmed claim at the time of confirmation. The act deals with gold, silver, and quicksilver *mines*, and minerals of the *same;* that is, minerals of the *mines*. To properly come within the designation of *mines*, the existence of the minerals referred to must have been known at the date of the decree of confirmation.

It is not in terms declared that no allowance or confirmation of any claim shall confer any right or title to minerals of gold, silver, or quicksilver not known to exist in the land at the time of confirmation of the claim, and which may be discovered after confirmation and patent. To so construe the act would tend to disturb and render uncertain all titles issued upon decrees of confirmation made by the court of private land claims. It cannot be considered that congress contemplated a result so unreasonable and so manifestly out of harmony with all previous legislation relating to the disposal of the public lands, in the absence of language plainly and unmistakably expressive of such intention. There is nothing in the statute which requires or would warrant such a construction.

The future legislation contemplated by the act relates only to the working of "*mines or minerals of the same*,"—that is, to develop claims and the minerals therein—mines and minerals,—which had been discovered at the time of confirmation, and not to minerals which were then wholly unknown and which may be found many years after the confirmation and after the issuance of patent by the government. Legislation making provision for the working of all mines of gold, silver, or quicksilver, which were known at the date of the confirmation of any claim to exist within its limits, and which were not conveyed to the grantee by the terms of the grant, and to which he has not become otherwise entitled, in law or in equity, would, in the judgment of the department, be appropriate legislation.

Many private land claims have been finally adjudicated and patented under the act of March 3, 1891. To hold that the titles thus granted by the government are liable to be in whole or in part subverted and rendered nugatory by future discoveries in the patented lands of valuable deposits of gold, silver, or quicksilver, as would have to be done to support the bill under consideration, would be in direct contravention of what has come to be regarded

as settled law, supported by a long line of judicial and departmental decisions, that when a person once establishes his right to a patent from the government for a portion of the public domain, he thereby acquires a vested interest in the land to which title is sought; and if the land is not then known to contain valuable deposits of minerals, no discoveries of minerals thereafter made therein, either before or after the actual issuance of patent, will in any manner affect his right to a patent for the land or his right to and exclusive ownership of all such subsequently discovered minerals. It is not believed that by the act of March 3, 1891, congress intended to make so grave a departure from long-established principles and precedents governing the disposal of the public lands.

For these reasons I cannot approve the proposed bill.

§ 128. **Conclusions.**—From the foregoing exposition of the law, we are authorized to deduce the following conclusions:—

(1) No right can be acquired under the general mining laws to any mineral lands lying within the claimed boundaries of any Mexican grant, so long as the grant remains *sub judice*. The only exception to this rule is the case of grants in New Mexico, Arizona, Colorado, Utah, Nevada, and Wyoming, where, since March 3, 1891, locations may be made within the exterior limits of claimed grants which are *sub judice*, the determination of the ultimate validity of such locations to abide the final action of the court of private land claims, as pointed out in section one hundred and twenty-four.

(2) Lands lying within the exterior boundaries of a claimed grant are restored to the public domain, and become open to exploration and purchase under the mining laws, either (*a*) when the grant is finally re-

jected, or (*b*) where the claimant fails to present his claim for confirmation within the time fixed by law.[66]

(3) In case of floats, the surplus remaining after satisfaction of the grant becomes public domain when the action of the tribunals fixing the boundaries becomes final.

(4) Final confirmation of a grant, and the patent issued pursuant thereto, convey to the grantee all the minerals, with the possible exception of grants falling within the jurisdiction of the court of private land claims created by the act of March 3, 1891. As to the latter class of grants, no definite rule may be dogmatically stated. But the construction of the act in question by the secretary of the interior, as heretofore outlined, is of persuasive force. Under the present state of the law, none of this last class of confirmed grants can be invaded for the purposes of mineral exploration, nor can any rights be initiated within their boundaries, under the general mining laws. A locator on such lands would be a naked trespasser, and could be ejected by the owner of the grant.

[66] The final judgment rejecting the grant restores the land to the public domain without any action on the part of the land department. In re Davis, 30 L. D. 220.

Article III. Grants to the States and Territories for Educational and Internal Improvement Purposes.

§ 132. Grant of sixteenth and thirty-sixth sections.

The ordinance of May 20, 1785, "for ascertaining the mode of disposing of the lands in the western territory," contained the following provision:—

> There shall be reserved the lot number sixteen of every township for the maintenance of public schools within said township.

This was an endowment of six hundred and forty acres of land in each township, equivalent to one thirty-sixth of the entire public domain.[67]

This reservation was thereafter specially provided for in the organization of each new state up to the time of the formation of Oregon territory. In the act creating this territory,[68] an additional grant of the thirty-sixth section in each township was provided for, for the use of the future state, and ever since that date every new state, upon its admission to the Union, has received a donation of at least the sixteenth and thirty-sixth sections, or twelve hundred and eighty acres, in each township. Under the act of July 16, 1894, Utah was granted sections two, sixteen, thirty-two, and thirty-six in each township.[69] Arizona [70] on its admission received a like donation. Oklahoma, in addition to sections sixteen and thirty-six, received a grant of sections thirteen and thirty-three in certain parts of the state for specific purposes.[71] In 1880 congress granted to Nevada two million acres for common-school purposes in lieu of the sixteenth and thirty-sixth sections.[72] Reservations of sixteenth and thirty-sixth sections have likewise been made in all the territories, to be granted and confirmed to such new states as may be carved out of them,[73] and in one instance at least congress has granted the sixteenth and thirty-sixth sections to what was there a

[67] Public Domain, p. 224. For historical review of grants to states, see State of Idaho, 37 L. D. 430.

[68] August 14, 1848, 9 Stats. at Large, p. 323.

[69] 28 Stats. at Large, pp. 107, 109; 7 Fed. Stats. Ann. 124; Law v. State of Utah, 29 L. D. 622.

[70] 36 Stats. at Large, p. 572; 1 Fed. Stats. Ann. (Supp. 1912) 372.

[71] 34 Stats. at Large, p. 273; Fed. Stats. Ann. (Supp. 1909) 638.

[72] 21 Stats. at Large, p. 288; 6 Fed. Stats. Ann. 481; Manser Lode, 27 L. D. 327.

[73] Public Domain, p. 226.

territory (New Mexico), the grant taking immediate effect, without waiting for its admission as a state.[74] In addition it received sections two and thirty-two on its admission as a state.[75]

As indicative of the changed national policy with reference to the "conservation of natural resources," a policy which promises to result in a radical modification in the laws governing the disposal of lands containing economic nonmetallic minerals, we may note the reservation for water-power sites in the grants of specific sections to Arizona and New Mexico. In the enabling acts granting lands to these states there is reserved to the United States all land actually or prospectively valuable for the development of water powers or powers for hydro-electric use or transmission, such lands to be ascertained and designated by the secretary of the interior within five years after the proclamation by the president declaring the admission of the state.[76]

§ 133. **Indemnity grant in lieu of sixteenth, thirty-sixth and other sections lost to the states.**—Upon extending the surveys over the public lands in the various states, it was discovered that in many instances a sixteenth, thirty-sixth or other designated section, in numerous townships was lost to the state; that is, by reason of a prior legal occupancy or settlement, or an antecedent grant, appropriation, or reservation, it was impossible for the grant as to these sections to take effect. In such cases the sections were said not to be *in place*. To remedy this, and compensate the

[74] Act of June 21, 1898 (30 Stats. at Large, p. 484; 6 Fed. Stats. Ann. 482); Instructions, 29 L. D. 364, 27 L. D. 281, 31 L. D. 261.

[75] 36 Stats. at Large, p. 561; 1 Fed. Stats. Ann. (Supp. 1912). 360.

[76] Arizona, 36 Stats. at Large, p. 575; 1 Fed. Stats. Ann. (Supp. 1912) 375; New Mexico, Id., p. 564; 1 Fed. Stats. Ann. (Supp. 1912) 363.

state for the loss thus occurring, congress enacted laws granting indemnity; that is, the state was authorized to select other unoccupied and unreserved public lands within its boundaries *in lieu* of the sixteenth, thirty-sixth or other designated sections so lost to the state. States may also select nonmineral lands to compensate for the failure of the grant of these sections by reason of the ascertained mineral character of the land.[77]

In addition to this, the government has in recent years inaugurated a policy of placing large areas under a state of reservation, and there have been created a great many national park, forest and other reserves which embrace surveyed lands, including many sixteenth, thirty-sixth and other designated sections, title to which had, prior to the establishment of the reserves, become vested in the state. It has been held by the land department that the state had a right to waive its title to such lands, and select others in lieu thereof.[78]

On June 4, 1897,[79] congress passed an act enabling parties who had theretofore acquired title from the government to land included within the limits of these reserves to exchange them for other lands beyond such limits. This act the land department construed as au-

[77] Act of Feb. 28, 1891 (26 Stats. at Large, p. 796; Comp. Stats. 1901, p. 1381), amending Rev. Stats., § 2275; State of California, 31 L. D. 335; State of Montana, 38 L. D. 247. Section made applicable to grants to New Mexico and Arizona. 36 Stats. at Large, pp. 562, 572; 1 Fed. Stats. Ann. (Supp. 1912) 360, 372.

[78] Under the provisions of section 2275 of the Revised Statutes, as amended by the act of February 28, 1891 (26 Stats. at Large, p. 796; Comp. Stats. 1901, p. 1381); State of California (on review), 28 L. D. 57; Territory of New Mexico, 29 L. D. 399; State of California, 33 L. D. 356. The circuit court for the ninth circuit, southern district of California, does not agree with the land department as to its interpretation of the law. Hibberd v. Slack, 84 Fed. 571, 573.

[79] 30 Stats. at Large, 11, 36; 7 Fed. Stats. Ann. 314.

thorizing the states, or purchasers from them, to exchange such lands for others,[80] although this construction has been questioned by at least one of the federal courts.[81]

The act of June 4, 1897, was repealed by act of March 3, 1905.[82] The only authority, therefore, authorizing indemnity selections by states is to be found in sections 2275 and 2276 of the Revised Statutes as amended February 28, 1891, and the enabling acts subsequently passed admitting new states into the Union.[83]

Our present purpose is not to critically analyze these various laws but to define and classify the different character of grants to states, and explain the manner of administering them in connection with the public mineral land laws, which are unquestionably, to some extent at least, *in pari materia.*

§ 134. Other grants for schools and internal improvements.—In addition to the grant of sixteenth, thirty-sixth and other sections and lands in lieu thereof, where they are lost to the state, congress has from time to time made other grants to the several states, not of any designated sections or townships, but of a given quantity of land, to be selected from the body of the public domain.

For example, on September 4, 1841,[84] congress granted to each of the public land states then admitted, and to each new state to be thereafter admitted, five hundred thousand acres of public lands for internal improvements, to be selected from the

80 Circ. Instructions, 28 L. D. 328.

81 Hibberd v. Slack, 84 Fed. 571, 581, 582.

82 33 Stats. at Large, 1264; Comp. Stats. (Supp. 1911), p. 639; 10 Fed. Stats. Ann. 406.

83 New Mexico, 36 Stats. at Large, p. 562; 1 Fed. Stats. Ann. (Supp. 1912), 360; Arizona, Id., p. 572; 1 Fed. Stats. Ann. (Supp. 1912) 372.

84 5 Stats. at Large, p. 453.

body of the public lands within the respective states. This is commonly called "the five hundred thousand acre grant."

A grant was also made to each of the public land states of two townships, or forty-six thousand and eighty acres, for university purposes, the grant to be satisfied by selection of unoccupied and unappropriated public lands within the respective states.

A further grant was made to the various states of the Union, to those containing no public lands as well as to those which were essentially public land states.[85] This grant, commonly called "the agricultural college grant," was of thirty thousand acres for each senator and representative to which the state was entitled under the apportionment of 1860.[86] In the public land states the grant was to be satisfied by selection of public lands within their respective boundaries. To the states wherein there was no public land, scrip was issued, commonly known as "agricultural college scrip." This scrip could be located anywhere on the unreserved and unappropriated public domain in any state, and could be used in the payment of pre-emption or commuted homestead entries. It was sold to speculators and individuals, who subsequently utilized it by locating it on lands subject to private entry.

Congress also made other donations of a similar character, but we have here given a sufficient outline of grants to states to enable us to discuss their operation and effect with reference to mineral lands on the public domain. As each new state was admitted, donations were made for definite specific purposes, the aggregate at least equaling and at times exceeding those granted to other public land states. The extent

[85] July 2, 1862, 12 Stats. at Large, p. 503.
[86] Public Domain, p. 229.

of those granted to the respective states is not of serious moment in this connection.

§ 135. Conflicts between mineral claimants and purchasers from the states.—In administering grants of such extensive character, it is quite natural that conflicts should arise between the miner and the purchaser of state lands, particularly in the mineral regions of the west. These controversies found their way into the courts and the land department, and, as a result, certain principles of law have been announced which may be best presented by first considering the character of the lands which could pass by the grant, and at what time the respective grants take effect and become operative as to particular tracts.

§ 136. Mineral lands exempted from the operation of grants to the states.—Some of the grants to the states in terms reserved mineral lands from their operation. This was the case with the agricultural college grant, which contained the reservation "that no mineral lands shall be selected or purchased under the provisions of this act." And the grant of seventy-two sections to the state of California for seminary purposes [87] contained a similar clause. Kindred exceptions were inserted in all the more recent grants; but in some of the earlier ones, notably those donating sixteenth and thirty-sixth sections, and the five hundred thousand acre grant, the law was silent as to mineral lands. But, as we have already seen, the uniform policy of the government prior to the enactment of the general mining laws was to reserve mineral lands from sale, pre-emption, and all classes of grants.[88] Of course, since the passage of the mining laws, title

[87] 10 Stats. at Large, p. 244.

[88] *Ante*, § 47, and cases there cited.

to mineral lands can be obtained only under these laws.

In California, the supreme court of that state early announced the doctrine in reference to the grant of sixteenth and thirty-sixth sections, that, as there was no statement in the act of any condition, exception, reservation, or limitation, mineral lands were not withdrawn from the operation of the act, but passed to the state.[89] But this case was subsequently overruled.[90]

The supreme court of Nevada, in construing a similar grant to that state, held that mineral lands within sections sixteen or thirty-six did not pass; but the decision was based upon an estoppel upon the part of the state by reason of the passage by congress of an act concerning certain lands granted to the state, which act provided that in all cases lands valuable for mines of gold, silver, quicksilver, or copper should be reserved from sale.[91] The legislature of the state accepted the grants subject to this clause.[92] And the court very properly held that by reason of this acceptance the state was estopped from asserting title to mineral lands found within the sixteenth and thirty-sixth sections.[93]

The land department, in recent years at least, by a uniform line of decisions, has held that mineral lands did not pass to the state under the school grants.[94]

[89] Higgins v. Houghton, 25 Cal. 252, 13 Morr. Min. Rep. 195. See, also, Wedekind v. Craig, 56 Cal. 642.

[90] Hermocilla v. Hubbell, 89 Cal. 8, 26 Pac. 611.

[91] 14 Stats. at Large, p. 85, § 5.

[92] Nev. Stats. (1867), p. 57; Comp. Laws Nevada, vol. ii, §§ 3835–3837.

[93] Heydenfeldt v. Daney G. & S. M. Co., 10 Nev. 290; S. C., on writ of error, 93 U. S. 634, 640, 23 L. ed. 995.

[94] Worcester v. Kitts, 8 Cal. App. 181, 96 Pac. 335, 336; In re Hogden et al., 1 Copp's L. O. 135; Copp's Min. Dec., p. 30; The Keystone Case, Id., 105, 109, 125; In re Le Franchi, 3 L. D. 229; Keystone Lode v. State

The supreme court of the United States had this question under consideration in reference to the grant of sixteenth and thirty-sixth sections to the state of Michigan, in Cooper v. Roberts,[95] where it was held that mineral lands passed by the grant, even as against a license from the government to search for and extract lead and other ores. The grant in question became operative at a period prior to the discovery of gold in California, and at a time when the policy of leasing lead mines by the government was in force.[96]

But at a later period the question was again brought before the supreme court of the United States in the case of the Ivanhoe M. Co. v. Keystone M. Co.,[97] and the doctrine was finally established that congress in making these grants to the states did not intend to depart from the uniform policy theretofore adopted in reserving mineral lands from sale, and that mineral lands found within a sixteenth or thirty-sixth section, known to be such at the time the grant took effect, did not pass to the state.

It may be observed that in the Ivanhoe-Keystone case no mention is made of the Michigan case.

The rule having been thus announced, it follows as a corollary that no lands can be selected or located in satisfaction of *any* of the grants to the states which at the time of the proposed selection are known to be mineral lands.[98]

of Nevada, 15 L. D. 259; State of California v. Poley, 4 Copp's L. O. 18; In re Chas. Norager, 10 Copp's L. O. 54; State of Utah v. Allen, 27 L. D. 53, 55; Florida Central etc. R. R. Co., 26 L. D. 600.

95 18 How. 173, 179, 15 L. ed. 338.

96 See *ante*, § 33.

97 102 U. S. 167, 172, 26 L. ed. 126.

98 United States v. Mullan, 7 Saw. 466, 470, 10 Fed. 785; S. C., on appeal, 118 U. S. 271, 276, 6 Sup. Ct. Rep. 1041, 30 L. ed. 170; Garrard v. Silver Peak Mines, 82 Fed. 578, 587; S. C., on appeal, 94 Fed. 983, 36 C. C. A. 603.

A limited exception to this rule is found in Oklahoma. In that state all lands were originally declared to be agricultural.[99] The act admitting the state into the Union [100] recognized that some of the granted lands were mineral in character (oil), and placed certain restrictions on their disposal by the state. Lands granted to this state for school purposes situated in the Cherokee outlet are not subject to the federal mining laws.[1]

§ 137. Restrictions upon the definition of "mineral lands," when considered with reference to school land grants.—In a preceding chapter, we have endeavored to establish a general definition of the term "mineral lands," as that term is used in the various mining acts of congress; and we have also attempted to formulate definite rules of statutory construction to be applied to such acts and these terms when found therein.[2]

Thus, we have heretofore said [3] that the word "mineral," as used in these various acts, should be understood in its widest signification, and that all substances which are classified as a mineral product in trade or commerce, or possess economic value for use in trade, manufacture, the sciences, or the arts, fall within the designation of the term "mineral." That this is true as a general rule, we have no doubt.[4] We

[99] 26 Stats. at Large, p. 1026; Comp. Stats. 1901, p. 1617; 6 Fed. Stats. Ann. 418.

[100] 34 Stats. at Large, p. 267; Fed. Stats. Ann. (Supp. 1909) 632.

[1] In re Shirley, 35 L. D. 113, 115.

[2] Tit. III, ch. i, §§ 85–96.

[3] *Ante*, § 96.

[4] See Northern Pac. R. R. Co. v. Soderberg, 99 Fed. 506, 104 Fed. 425, 43 C. C. A. 620; S. C., 188 U. S. 526, 534, 23 Sup. Ct. Rep. 365, 47 L. ed. 575; Burdick v. Dillon, 144 Fed. 737, 75 C. C. A. 603; Pacific Coast Marble Co. v. Northern Pac. R. R. Co., 25 L. D. 233; Aldritt v. Northern Pac. R. R. Co., 25 L. D. 349.

are firmly convinced that it should be accepted as a universal rule in dealing with the public lands. But when we are confronted with the administration of the school land grants, railroad grants, and other grants of a like character, we find that the land department at certain periods of its history has been disposed to discriminate in some instances between those substances which are obviously mineral and those which, owing to the advancement in science and the industrial arts, become classified commercially or scientifically as mineral products.

§ 138. Petroleum lands.—This disposition on the part of the land department to restrict the definition of the term "mineral lands" was exhibited by Secretary Smith in the case of petroleum lands. He first held that petroleum was not a mineral within the meaning of the mining laws.[5]

He subsequently, and in harmony with his conception of the law as thus expressed, ruled that lands containing petroleum in sufficient quantities to render them more valuable for that purpose than for any other were not mineral lands, and were subject to selection by the states in lieu of lost sixteenth and thirty-sixth sections.[6]

In support of his first ruling, from which the second logically followed, he cited the Pennsylvania case of Dunham v. Kirkpatrick,[7] to the effect that a reservation of "mineral" in a deed does not include petroleum, although it is admitted petroleum is technically a mineral.

[5] Ex parte Union Oil Co., 23 L. D. 222.

[6] Chandler v. State of California, Oct. 27, 1896 (not reported).

[7] 101 Pa. 36, 47 Am. Rep. 696.

This decision is in conflict with prior cases decided in Pennsylvania,[8] and has been practically overruled or its doctrine ignored by the same court in a later case.[9]

Secretary Smith's views were in direct conflict with a decision by Judge Ross in the case of Good v. California Oil Co.,[10] where it was said:—

> The premises in controversy are oil-bearing lands the government title to which, under existing laws, can alone be acquired pursuant to the provisions of the mining laws relating to placer claims.

They were also contrary to the prior rulings of the land department.[11]

Acting Secretary Ryan, however, overruled the decision of Secretary Smith, and in the course of his opinion thus stated the result of his examination of the records of the land department on the subject of petroleum lands:—

> From an examination of the records of your office [commissioner of the general land office] which

[8] Stoughton's Appeal, 88 Pa. 198; Thompson v. Noble, 3 Pittsb. 201. See, also, 10 Morr. Min. Rep. 421.

[9] Gill v. Weston, 110 Pa. 313, 1 Atl. 921. The doctrine of Dunham v. Kirkpatrick (*supra*) has been followed by the supreme court of Ohio (Detlor v. Holland, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266), but repudiated in Tennessee (Murray v. Allard, 100 Tenn. 100, 66 Am. St. Rep. 740, 43 S. W. 355, 39 L. R. A. 249), and West Virginia (Williamson v. Jones, 39 W. Va. 231, 19 S. E. 441, 25 L. R. A. 222).

The supreme court of Michigan holds that Dunham v. Kirkpatrick stands alone and is decidedly against the weight of authority. Weaver v. Richards, 156 Mich. 320, 120 N. W. 818, 819. The supreme court of Kentucky, however, takes a different view and follows the rule laid down in the Dunham-Kirkpatrick case. McKinney's Heirs v. Central Kentucky Natural Gas Co., 134 Ky. 239, 120 S. W. 314, 315.

[10] 60 Fed. 531, 532.

[11] Copp's Min. Lands, p. 61; Sickles' Min. Laws, p. 491; In re Hooper, 1 L. D. 560; Maxwell v. Brierly, 10 Copp's L. O. 50; Roberts v. Jepson, 4 L. D. 60; Piru Oil Co., 16 L. D. 117; In re Dewey, 9 Copp's L. O. 51; Downey v. Rogers, 2 L. D. 707; Samuel E. Rogers, 4 L. D. 284.

I have caused to be made, it is ascertained that ever since the circular of July 13, 1873, until the date of the decision complained of, the practice of allowing entry and patent for lands chiefly valuable for their deposits of petroleum under the law and regulations relating to placer claims has been continued and uniform. Under the practice a large number of patents have been issued and very large and valuable property interests acquired.[12]

Subsequently it was specifically held by the department that land chiefly valuable for its petroleum deposits could not be selected by the states in satisfaction of their floating grants.[13]

Shortly after the announcement of the ruling of Secretary Smith above referred to, congress passed an act providing in terms that lands valuable for petroleum may be acquired under the placer mining laws.[14] This was but the adoption by the national legislature of the construction (uniform, except for the sporadic case above cited) theretofore placed upon the mining laws by the tribunal charged with their administration.[15]

It follows that land chiefly valuable for its deposits of petroleum never could, nor can it now, be selected by the states in satisfaction of any of their grants.

§ 139. **Lands chiefly valuable for building-stone.**— Prior to the passage by congress of the act of August 4, 1892, specifically placing lands chiefly valuable for their deposits of building-stone in the category of mineral lands subject to entry under the placer mining laws, the land department had frequently held that

12 Union Oil Co. (on review), 25 L. D. 351, 354.

13 McQuiddy v. State of California, 29 L. D. 181.

14 Feb. 11, 1897, 29 Stats. at Large, p. 526; Comp. Stats. 1901, p. 1434; 5 Fed. Stats. Ann. 47.

15 *Post*, § 422.

such lands were mineral in character and subject to such appropriation,[16] although there were rulings to the contrary.[17]

In the case of Pacific Coast Marble Co. v. Northern Pacific R. R. Co.,[18] a careful and analytical review of the prior decisions of the department on this subject was made by Secretary Bliss, from which it clearly appears that the weight of departmental authority is decidedly in favor of the broad interpretation of the term "mineral lands," and placing lands chiefly valuable for their deposits of building-stone within the purview of the mining laws. So far as the federal courts have expressed themselves on the subject, the departmental construction has been commended and followed.[19]

That building-stone lands are to be classified as mineral lands, and as such are reserved from grants made to railroad companies, is well settled by the rulings of both the land department [20] and the courts.[21]

A similar rule should be applied in the administration of land grants to the states, unless there is something in the language of the act of August 4, 1892,

[16] Bennett's Placer, 3 L. D. 116; McGlenn v. Weinbroeer, 15 L. D. 370; Van Doren v. Plested, 16 L. D. 508; Forsythe v. Weingart, 27 L. D. 680; Maxwell v. Brierly, 10 Copp's L. O. 50.

[17] Conlin v. Kelly, 12 L. D. 1; Hayden v. Jamison, 16 L. D. 537; Clark v. Erwin, Id. 122.

[18] 25 L. D. 233.

[19] Northern Pac. Ry. Co. v. Soderberg, 99 Fed. 506; S. C., on appeal, 104 Fed. 425, 43 C. C. A. 620, 188 U. S. 526, 534, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

[20] Pacific Coast Marble Co. v. Northern Pac. R. R. Co., 25 L. D. 233; Aldritt v. Northern Pac. R. R. Co., Id. 349; Beaudette v. Northern Pac. R. R. Co., 29 L. D. 248; Schrimpf v. Northern Pac. R. R. Co., Id. 327; Morrill v. Northern Pac. R. R. Co., 30 L. D. 475.

[21] Northern Pac. Ry. Co. v. Soderberg, 99 Fed. 506; S. C., on appeal, 104 Fed. 425, 43 C. C. A. 620, 188 U. S. 526, 534, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

which inhibits such application. This act contains the following provision:—

> That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building-stone under the provisions of the law in relation to placer mining claims; *provided*, that lands *reserved* for the benefit of public schools or donated to any state shall not be subject to entry under this act.[22]

The only lands specifically *reserved* in the legislative grants to the states are the sixteenth and thirty-sixth sections. These acquire precision by the approval of the survey, and title thereupon vests in the state without further action by the land department, if the state has been admitted at the time of the survey, or upon its admission if it occupied the *status* of a territory at the time of the grant.

As to these lands, it would seem that the proviso of the act above quoted applies, and building-stone lands within sixteenth and thirty-sixth sections would pass to the state. The land department has so determined.[23]

It has also been held that a mining location made upon building-stone lands prior to the passage of the act at a time when such locations were recognized, which location had passed to entry in the land office prior to a grant to the state, took precedence over the grant to the state.[24]

The land department has also decided, in effect, that the terms of reservation embodied in the act of August 4, 1892, included the floating and indemnity grants to the state, and that building-stone lands can be selected

[22] 27 Stats. at Large, p. 348; Comp. Stats. 1901, p. 1434; 5 Fed. Stats. Ann. 47.

[23] In re Hooper, 16 L. D. 110; South Dakota v. Vermont Stone Co., Id. 263 (although, as to this last case, see In re Gibson, 21 L. D. 327).

[24] In re Gibson, 21 L. D. 327.

by the state in satisfaction of their floating grants.[25] This seems to us illogical. By the terms of the grants falling within this category there are no reservations of any particular tracts. No part of the public domain is placed in a state of reservation or withdrawn from location and entry under the mining laws to await the selection by the state of its quota of lands under floating or indemnity grants. These grants are donations of unidentified acres to be selected from the nonmineral public domain. Such grants do not acquire precision until after the selection and its approval.[26]

It would seem that as building-stone lands fall by legislative definition as well as by departmental ruling within the term "mineral lands," and are subject to location under the mining laws, it should follow that the states cannot select lands of this character in satisfaction of its floating grants, no specific lands being reserved or donated under such grants. The proviso under discussion is not so clear in its terms as to enable us to dogmatically assert that building-stone lands may not be selected by the state in satisfaction of this class of grants; but to reach the contrary conclusion requires, in our judgment, the application of extremely liberal rules of interpretation and a reading between the lines, which is not always a safe method to adopt in construing statutes. In the absence of this proviso, the rule applicable to selection of lands under indemnity railroad grants would apply, as the two classes of laws in this regard are in all respects similar.[27]

§ 140. In construing the term "mineral lands," as applied to administration of school land grants, the

[25] State of Utah, 29 L. D. 69.

[26] *Post*, § 143.

[27] Swank v. State of California, 27 L. D. 411.

time to which the inquiry is addressed is the date when the asserted right to a particular tract accrued, and not the date upon which the law was passed authorizing the grant.—We have digressed for the moment to discuss a question which might be more appropriately presented when dealing with the character of lands subject to appropriation under the so-called placer laws; but it seems necessary for us here to present the matter as introductory to the main subject presently under consideration.

There is nothing in the context of the school land-grant laws where the reservation of "mineral lands" appears which restricts the meaning of the term. If a restricted meaning is to be applied, it must be by reason of the relative position of the parties or the substance of the transaction.[28]

In considering this relative position of the parties, and the substance of the transaction, to what point of time must we direct our attention in dealing with school land grants and rights asserted under them? To the date of the passage of the act making the grant or authorizing the selection, or the time when the state or its grantees become first entitled to assert a claim to a particular tract of land?

Fortunately, this question has been satisfactorily settled for us; so that lengthy discussion will be avoided.

Prior to the passage of the coal land act of July 1, 1864,[29] the land department did not regard or treat coal lands or coal mines as mineral lands, within the meaning of the prior acts of congress.[30] This act provided:—

[28] Stewart on Mines, pp. 10–13; *ante*, § 91.

[29] 13 Stats. at Large, p. 343.

[30] In re Yoakum, 1 Copp's L. O. 3.

> That when any tracts embracing coal-beds or coal-fields constituting portions of the public domain, and which, as mines, are excluded from the pre-emption act of 1841, and which, under past legislation, are not liable to ordinary entry, it shall and may be lawful for the president to cause such tracts in suitable legal subdivisions to be offered at public sale to the highest bidder.

Assuming that the above ruling of the land department was correct, prior to the passage of that act coal lands might be selected under previously enacted school land-grant laws.

In 1868, one Mullan applied to the state surveyor-general of California to purchase a half-section of land selected by the state under the act of March 3, 1853, in lieu of the corresponding half of a sixteenth section theretofore lost to the state. His application was favorably considered, and in due process of time the secretary of the interior listed the land to the state, and Mullan or his grantee received a state patent. At the time Mullan instituted the proceedings culminating in the listing and issuance of the state patent the land was notoriously coal land, and was being actually worked for its coal deposits by the Black Diamond Coal Company. These facts were brought to the attention of the government, and suit was instituted in its behalf to vacate the listing. The case was tried before the late Judge Sawyer, in the circuit court of the United States (ninth circuit),[31] who held that whatever might have been originally the proper construction of the word "mines," as used in the pre-emption act of 1841, the act of July 1, 1864, gave a legislative construction to the term which thenceforth attached to all known "coal-beds or coal-fields" *in which no*

[31] United States v. Mullan, 7 Saw. 466, 10 Fed. 785, 789.

interest had before become vested, and withdrew such coal lands from the operation of all other acts of congress; that thereafter known coal lands were not subject to selection by the state as lieu lands; and that the state has no indefeasible rights to select such lieu lands from any particular class of lands.

The supreme court of the United States affirmed this decision,[32] thus summing up its views:—

> At the time the selection was actually made, therefore, it cannot be doubted that the land was mineral land, both in law and in fact, within the meaning of the act under which the state, and those who purchased from the state, undertook to acquire title, and we agree with the circuit court in the opinion that the *rights of the parties are to be determined by the law as it stood then.*

The enactment of the general mining laws by congress incorporated into the land system a new element, announced new principles and a new policy, in the light of which all pre-existing land-grant laws to the extent that they remain unsatisfied were to be administered. All land-grant acts passed subsequent to the enactment of the mining laws operative in any of the precious metal bearing states or territories, contain the usual clauses of reservation as to mineral lands.

§ 141. Test of mineral character applied to school land grants.—As conclusions logically flowing from what has been heretofore said, the question as to whether a given tract of land is mineral, and its selection under school land-grant laws for that reason inhibited, or is nonmineral, and subject to selection, is one to be determined according to the state of the law as it exists at the time the right to select is asserted.

[32] Mullan v. United States, 118 U. S. 271, 6 Sup. Ct. Rep. 1041, 30 L. ed. 170.

If the mineral character of such tract is established according to the rules announced in section ninety-eight, then it cannot pass under the grants to states for educational purposes.[33] This rule is subject to the qualification discussed in a previous section,[34] that since the act of 1892 lands containing deposits of building-stone probably vest in the state under its grants of particular sections, and possibly may be selected under its indemnity or floating grants.

It is, of course, conceded that after a right has once vested to a tract of land which, at the time it became segregated from the body of the public domain and passed to states or individuals, was nonmineral, according to the state of the law and the facts then existing, no subsequent change in commercial conditions nor advancement in the industrial arts can affect those rights.[35] But tracts still open to selection are, in turn, to be governed by the new condition of things, and controlled by such enlarged definitions as may be then applied by the current of judicial or departmental authority. This rule injures no one. It is consistent with the progressiveness of the age and the spirit of our laws.

§ 142. When grants of the sixteenth and thirty-sixth sections take effect.—Until the survey of the township and the designation of the specific sections, the right of the state rests in compact, binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which

[33] If a discovery of mineral has been made on each twenty acres of a placer location, the whole location is excepted from school indemnity selection. Quigley v. State of California, 24 L. D. 507.

[34] *Ante*, § 139.

[35] In re Gibson, 21 L. D. 327.

shall be the subject of the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach; and if there is no legal impediment, the title then vests absolutely in the state,[36] by virtue of the survey. The government does not certify or patent sixteenth or thirty-sixth sections to the states.[37]

While the grant of these sections is one *in praesenti*, it is, before the lands are surveyed, essentially a float, a grant of a quantity of lands equal in amount to twelve hundred and eighty acres in each township.

Until the *status* of the lands is fixed by a survey, and they are capable of identification, congress reserves absolute power over them, compensating the state for such loss as might accrue to it to the extent that legal impediments prevent the title from passing.[38]

[36] Cooper v. Roberts, 18 How. 173, 15 L. ed. 338; Hibberd v. Slack, 84 Fed. 571, 574. See, also, Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; State of Utah, 29 L. D. 418; Sherman v. Buick, 45 Cal. 656; Higgins v. Houghton, 25 Cal. 252, 13 Morr. Min. Rep. 195; Finney v. Berger, 50 Cal. 248; Medley v. Robertson, 55 Cal. 397, 399; State of Oregon, 41 L. D. 259.

[37] 31 L. D. 212; Southern Development Co. v. Endersen, 200 Fed. 272, 274.

[38] Heydenfeldt v. Daney G. M. Co., 93 U. S. 634, 23 L. ed. 995. This case is somewhat severely criticised and its doctrine disputed by the supreme court of Idaho, in Balderston v. Brady, 17 Idaho, 567, 107 Pac. 493, 498, suggesting that it has been practically overruled by implication. The discussion is confessedly *obiter*. The circuit court for the district of Idaho evidently differs with the supreme court of that state. United States v. Bonners Ferry L. Co., 184 Fed. 187, 188. The supreme court of Washington follows the ruling of the Idaho supreme court. State v. Whitney (Wash.), 120 Pac. 116.

Under act of February 28, 1891 (26 Stats. at Large, p. 796; Comp. Stats. 1901, p. 1381; 6 Fed. Stats. Ann. 462), states are awarded indemnity by reason of losses accruing to them on account of mineral character of sixteenth and thirty-sixth sections. And under a recent ruling, where these sections fall within the grants to states of swamp and overflowed lands, the states may select other lands in lieu thereof.

Until the survey is finally approved by the commissioner of the general land office, and copies are filed in the local land office,[39] the state has no title which it can convey to a purchaser.[39a]

Therefore, in determining whether or not the lands embraced within these sections are mineral lands, and exempted from the operation of the grant, the inquiry is addressed to their known character at the time of the final approval and filing[40] of the survey. If at the time of such approval and filing they are known to be mineral, within the meaning of that term as heretofore defined,[40a] title does not pass to the state,[41]

State of California, 31 L. D. 335, construing same act. The secretary of the interior has ruled that it must clearly appear that the base lands were known to be mineral at the time the title of the state originally vested, if at all. Subsequent discoveries cannot be utilized for the purpose of creating a base for indemnity selection. State of Oregon, 32 L. D. 105. A later ruling, however, is to the effect that lieu selection may be made where the mineral character of the base was disclosed subsequent to the vesting of title. State of California, 33 L. D. 356.

[39] In re Hyde, 37 L. D. 164.

[39a] Finney v. Berger, 50 Cal. 248; Medley v. Robertson, 55 Cal. 397; State of California v. Wright, 24 L. D. 54; Niven v. State of California, 6 L. D. 439.

[40] In re Hyde, 37 L. D. 164.

[40a] *Ante*, §§ 93–98. The existence of a placer location within a school section, or the pendency of an application for a placer patent at the date when the grant of school lands became effective, will not operate to except such lands from the grant to the state, if said lands were not in fact mineral in character. George M. Bourquin, 27 L. D. 289. See, also, Harkrader v. Goldstein, 31 L. D. 87.

[41] Ivanhoe M. Co. v. Keystone Cons. M. Co., 102 U. S. 167, 26 L. ed. 126; Heydenfeldt v. Daney, 93 U. S. 634, 23 L. ed. 995; Hermocilla v. Hubbell, 89 Cal. 5, 26 Pac. 611; Pereira v. Jacks, 15 L. D. 273; Mahogany No. 2 Lode, 33 L. D. 37; State of South Dakota v. Trinity G. M. Co., 34 L. D. 485; State of South Dakota v. Delicate, 34 L. D. 717; State of South Dakota v. Walsh, 34 L. D. 723. But see Saunders v. La Purisima G. M. Co., 125 Cal. 159, 57 Pac. 656, 20 Morr. Min. Rep. 93, and the discussion in section 144a, *post*, as to the conclusiveness of a state patent upon the character of the land.

but remains in the general government and subject to its disposal under the mining laws.[42]

If they were not known to be mineral at the date of the approval of the survey, they pass to the state, and discovery of minerals on such lands subsequent to such approval does not defeat the title of the state.[43]

As was said by the supreme court of the United States,[44] a change in the conditions occurring subsequently to the taking effect of the grant, whereby new discoveries are made, or by means whereof it may become profitable to work the mineral deposits, cannot affect the title, as it passed at the time of the grant. This is a general rule, applicable to all classes of grants.[45]

It is also true that if at the time the grant would have taken effect, in the absence of legal impediments, the land was known to be mineral in character, the subsequent exhaustion of the mineral and its aban-

[42] Hermocilla v. Hubbell, 89 Cal. 5, 26 Pac. 611; Olive Land & Dev. Co. v. Olmstead, 103 Fed. 568, 576, 20 Morr. Min. Rep. 700; Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20; S. C., on appeal, 112 Fed. 4, 50 C. C. A. 79, 21 Morr. Min. Rep. 633.

[43] Wheeler v. Smith, 5 Wash. 704, 32 Pac. 784; Townsite of Silver Cliff, 6 Copp's L. O. 152; Keystone Case, Copp's Min. Dec., pp. 105, 109, 125; State of California v. Poley, 4 Copp's L. O. 18; In re J. Dartt, 5 Copp's L. O. 178; In re State of Colorado, 6 L. D. 412; Virginia Lode, 7 L. D. 459; In re Abraham L. Miner, 9 L. D. 408; Pereira v. Jacks, 15 L. D. 273.

[44] Colo. C. & I. Co. v. United States, 123 U. S. 307, 8 Sup. Ct. Rep. 131, 31 L. ed. 182.

[45] Deffeback v. Hawke, 115 U. S. 404, 6 Sup. Ct. Rep. 95, 29 L. ed. 426; Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; Hunt v. Steese, 75 Cal. 620, 17 Pac. 920; Cowell v. Lammers, 10 Saw. 247, 21 Fed. 200; Manning v. San Jacinto Tin Co., 7 Saw. 419, 9 Fed. 726; Richards v. Dower, 81 Cal. 51, 22 Pac. 304; S. C., on writ of error, 151 U. S. 658, 14 Sup. Ct. Rep. 452, 38 L. ed. 305, 17 Morr. Min. Rep. 704; McCormick v. Sutton, 97 Cal. 373, 32 Pac. 444; Smith v. Hill, 89 Cal. 122, 26 Pac. 644; Southern Development Co. v. Endersen, 200 Fed. 272, 275.

donment for mining purposes would not operate to vest title in the state.[46]

When a state seeks to select indemnity lands in lieu of others which it claims are mineral in character at the time of the survey, unless it be shown that such lands were actually lost to the state, a hearing should be had to determine the character of such lands.[47]

Any portion of the superficial area within the boundary lines fixed by the location of a valid lode claim subsisting at the time the title of the state would have taken effect, in conflict with a school section, may rightfully be claimed and held under the mining laws.[48]

What we have heretofore said as to the time when grants to sixteenth and thirty-sixth sections take effect applies to surveys made subsequent to the admission of the state into the Union. Where lands have been surveyed prior to the admission of the state, the grant takes effect as of the date of admission; and in such cases the inquiry as to the character of the land is directed to that point of time.[49]

Where grants are made of specific sections to the territories, as in the case of New Mexico,[50] title vests

[46] Hermocilla v. Hubbell, 89 Cal. 5, 26 Pac. 611.

[47] Bond v. State of California, 31 L. D. 34. In State of Oregon, 32 L. D. 105, the secretary of the interior held that the subsequent discovery of mineral in the land would not enable the state to use it as a base for the selection of indemnity lands. And in a later ruling (State of California, 33 L. D. 356) it was held that the state might utilize such a base for indemnity purpose. This latter ruling was based upon the act of February 28, 1891, *supra*.

[48] State of South Dakota, 34 L. D. 717.

[49] Townsite of Silver Cliff, 6 Copp's L. O. 152; Boulder & Buffalo M. Co., 7 L. D. 54; Fleetwood Lode, 12 L. D. 604; Warren v. State of Colorado, 14 L. D. 681; State of Washington v. McBride, 18 L. D. 199; State of Utah v. Allen, 27 L. D. 53; Law v. State of Utah, 29 L. D. 623; State of South Dakota v. Trinity G. M. Co., 34 L. D. 485; State of South Dakota v. Delicate, 34 L. D. 717.

[50] 30 Stats. at Large, p. 484; 27 L. D. 281; 29 L. D. 364; 31 L. D. 261.

as of the date of the survey, as in the case of grants made to states after their admission.

We reserve for future discussion[51] the effect of a state patent as an adjudication of the character of the land.

§ 143. Selections by the state in lieu of sixteenth and thirty-sixth sections, and under general grants.— It follows as a corollary from what has heretofore been said that the states cannot select lands of known mineral character in satisfaction of any of their land grants,[52] with the possible exception of lands containing deposits of building-stone, as explained in a previous section.[53]

The point of time when the character of a given tract sought to be selected by the state in satisfaction of any of its floating grants is to be determined is the time when the selection is made,[54] and a selection is not made until it has been approved by the land department.[55] No "vested right" arises from a mere

[51] *Post*, § 144a.

[52] United States v. Mullan, 7 Saw. 470, 10 Fed. 785; Mullan v. United States, 118 U. S. 271, 6 Sup. Ct. Rep. 1041, 30 L. ed. 170; Garrard v. Silver Peak Mines, 82 Fed. 578, 587; S. C., on appeal, 94 Fed. 983, 36 C. C. A. 603; Richter v. State of Utah, 27 L. D. 95; Manser Lode Claim, 27 L. D. 326; McQuiddy v. State of California, 29 L. D. 181.

[53] *Ante*, § 139.

[54] Olive Land & Development Co. v. Olmstead, 103 Fed. 568, 576, 20 Morr. Min. Rep. 700. See, also, McCreery v. Haskell, 119 U. S. 327, 331, 7 Sup. Ct. Rep. 176, 30 L. ed. 408; Howell v. Slauson, 83 Cal. 539, 23 Pac. 692; Shenandoah M. & M. Co. v. Morgan, 106 Cal. 409, 39 Pac. 802.

[55] Wisconsin Central R. R. Co. v. Price County, 133 U. S. 496, 511–514, 10 Sup. Ct. Rep. 341, 33 L. ed. 687; Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 43; S. C., on appeal, 112 Fed. 4, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; affirmed, 190 U. S. 301, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064; Swank v. State of California, 27 L. D. 411; McQuiddy v. State of California, 29 L. D. 181; Kern Oil Co. v. Clarke, on review, 31 L. D. 288.

application to select.[56] If prior to approval and certification a disclosure is made that the land is mineral, such disclosure defeats the selection.[57]

The act of August 4, 1854, carried forward in the Revised Statutes as section two thousand four hundred and forty-nine, provides as follows:—

> Where lands have been or shall hereafter be granted by any law of congress to any one of the several states and territories, and where such law does not convey the fee-simple title of the lands or require patents to be issued therefor, the lists of such lands which have been or may hereafter be certified by the commissioner of the general land office under the seal of his office, either as originals or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.[58]

It has been frequently held that a certified list issued under and pursuant to this statute is of the same effect as a patent.[59]

[56] State of Washington, 36 L. D. 371.

[57] Kinkade v. State of California, 39 L. D. 491.

[58] 10 Stats. at Large, p. 346; Rev. Stats., § 2449; Comp. Stats. 1901, p. 1516; 6 Fed. Stats. Ann. 515.

[59] Frasher v. O'Connor, 115 U. S. 102, 5 Sup. Ct. Rep. 1141, 29 L. ed. 311; Mower v. Fletcher, 116 U. S. 380, 6 Sup. Ct. Rep. 409, 29 L. ed. 593; McCreery v. Haskell, 119 U. S. 327, 7 Sup. Ct. Rep. 176, 30 L. ed. 408; Garrard v. Silver Peak Mines, 94 Fed. 983, 984, 36 C. C. A. 603; Howell v. Slauson, 83 Cal. 539, 23 Pac. 692; Shenandoah M. & M. Co. v. Morgan, 106 Cal. 409, 39 Pac. 802; Southern Development Co. v. Endersen, 200 Fed. 272, 283, and cases cited.

It operates upon the selection as of the day when made and reported to the local land office, or cuts off, as would a patent in such cases, all subsequent claimants.[60]

A patent once issued by the United States is conclusive evidence that the land is of the character purporting to be conveyed by it.

As was said by the supreme court of the United States, speaking through Mr. Justice Brewer,—

> It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department one way or the other in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined.[61]

In another case it was said, upon the authority of former adjudications as well as upon principle, that parol evidence is inadmissible to show, in opposition to the concurrent action of federal and state officers having authority in the premises, that the lands listed and certified were, as a matter of fact, at the time of the selection and its approval of such character that their selection was inhibited by the legislation creating the grant.[62]

[60] McCreery v. Haskell, 119 U. S. 327, 331, 7 Sup. Ct. Rep. 176, 30 L. ed. 408; Howell v. Slauson, 83 Cal. 546, 23 Pac. 694.

[61] Burfenning v. Chicago, St. Paul etc. Ry., 163 U. S. 321, 323, 16 Sup. Ct. Rep. 1018, 41 L. ed. 175; Gertgens v. O'Conner, 191 U. S. 237, 240, 24 Sup. Ct. Rep. 94, 48 L. ed. 163. See, also, *post*, § 779, and cases there cited.

[62] McCormick v. Hayes, 159 U. S. 332, 348, 16 Sup. Ct. Rep. 37, 40 L. ed. 171. See, also, Rogers Locomotive Works v. American Emigrant Co.,

In the case of Garrard v. Silver Peak Mines,[63] a doctrine was announced which as a matter of first impression would seem to place a radical limitation on this rule. The facts of the case, so far as they are essential to the present discussion, were briefly as follows:—

The predecessors in title of the Silver Peak Mines had, long prior to any selection by the state of the lands in controversy, located, under state possessory laws passed prior to the enactment of any mining law by congress, a tract of land and millsite containing one hundred and sixty acres, and had also erected thereon extensive and valuable improvements. There also had been prior to said time located on said premises a lode mining claim called the "Manser mining claim." Subsequently the state of Nevada made application to select certain lands embracing a portion of the millsite and mining claim. This selection was duly approved, and the land listed or certified to the state. Garrard acquired the title from the state through mesne conveyances, with full knowledge of the true character of the lands and the adverse occupancy of the Silver Peak Mines. He brought ejectment to recover possession. The defense relied upon the facts above outlined as to the known mineral character of the tract and its adverse occupancy at the time of the selection; and one of the important questions discussed in the case was as to whether the state patent, predicated upon the approved selection and certification by the land department, could be collaterally assailed by parol evidence establishing the known antecedent mineral character of the land. On this branch of the case Judge Hawley said:—

164 U. S. 559, 17 Sup. Ct. Rep. 188, 41 L. ed. 552; Johnson v. Drew, 171 U. S. 93, 18 Sup. Ct. Rep. 800, 43 L. ed. 88; Southern Development Co. v. Endersen, 200 Fed. 272.

63 82 Fed. 578.

The state authorities were to select the land granted from any unappropriated nonmineral public land. They were not invested with the duty of passing upon the question of fact as to whether or not each particular section of land was nonmineral or unappropriated; nor was this duty imposed upon the commissioner of the general land office when he certified to the selection, or upon the secretary of the interior when he approved the same, to the same extent as in cases of applications made by individuals or corporations for patent to agricultural or mineral lands, where specific proofs are required, and the land department is clothed with the power to hear and determine all questions as to the character of the land, the right of the applicant to apply for and receive the same, and the sufficiency of the proofs to show a compliance with the law entitling the applicant to a patent. All of these acts upon the part of the officers were subject to the reservations specified in the act itself.

This doctrine was upheld by the circuit court of appeals.[64] The land department adopted this construction of the law and issued its patent to the Silver Peak Mines for the Manser mining claim, and this without any independent investigation on its part as to the antecedent history or character of the land,[65] although it had frequently held that after it has approved and certified lands to states the title to the lands so certified passes to the state as completely as though patent had issued, and precludes the exercise of further departmental jurisdiction over the land until such certification is vacated by judicial proceedings.[66]

[64] 94 Fed. 983, 36 C. C. A. 603. For a differentiation of this case, see Southern Development Co. v. Endersen, 200 Fed. 272, 286.

[65] Manser Lode Claim, 27 L. D. 326.

[66] State of California v. Boddy, 9 L. D. 636; Hendy v. Compton, Id. 106; Tanner v. O'Neill, 14 L. D. 317.

In the Garrard case a court of equity would undoubtedly have erected a trust in favor of the mineral claimant upon the state title, or the government might have successfully prosecuted an action to vacate the listing. But if the case is to be accepted as authority to the effect that after approval of the selection and certification to the state, which is in effect a conveyance of the title, the land department still retains jurisdiction to review its action, investigate the character of the land, and, if found to be mineral, vacate the listing and issue a mineral patent, the reconciliation of the doctrine so announced with the long line of decisions enunciated by the supreme court of the United States heretofore cited is not without embarrassment. The suggestion found in the court's opinion above quoted, that the duty imposed upon the commissioner of the general land office to investigate the character of land is to be performed with a greater degree of diligence and circumspection in the case of individuals and corporations than in the case of state selections, does not, in our judgment, strengthen the ultimate conclusion.

Be this as it may, until the selection is finally approved by the officers of the government charged with this duty, and the land is certified or listed to the state, the state has no title which it can convey to the purchaser.[67]

Without such approval, neither the state nor its grantee can question any further disposition which the United States may make of the land embraced in the attempted selection.[68]

[67] Churchill v. Anderson, 53 Cal. 212; Buhne v. Chism, 48 Cal. 467; Wisconsin Cent. R. R. Co. v. Price County, 133 U. S. 496, 10 Sup. Ct. Rep. 341, 33 L. ed. 687; Allen v. Pedro, 136 Cal. 1, 68 Pac. 99; Baker v. Jamison, 54 Minn. 17, 55 N. W. 750; Slade v. County of Butte, 14 Cal. App. 453, 457, 112 Pac. 485, 486.

[68] Roberts v. Gebhart, 104 Cal. 67, 37 Pac. 782.

Applications to select indemnity state lands must be accompanied by nonmineral affidavit based upon examination made within three months from the date of selection.[69] It also must be accompanied by a certificate of nonsale and nonencumbrance of land designated as base, regardless of whether the land has been surveyed or not.[70]

§ 144. Effect of surveyor-general's return as to character of land within sixteenth and thirty-sixth sections, or lands sought to be selected in lieu thereof, or under floating grants.—We have already had occasion to comment on the general unreliability of that class of returns of surveyors-general[71] from which an inference or presumption is said to arise that the lands are nonmineral in character. Where the lands, however, are returned as mineral, it suggests direct knowledge brought to the attention of the surveyor of the notorious mineral character of the land. And in such cases, perhaps, more weight should be given to the returns. It has been held that where a given sixteenth, thirty-sixth or other specifically granted section is returned as mineral by the surveyor, and his field-notes and plat are filed in the general land office, this is a sufficient determination that the lands are mineral to authorize the state to select indemnity lands in lieu thereof.[72]

But the better rule is undoubtedly that a mineral return by the surveyor-general does not have the effect of establishing the character of the lands as chiefly valuable for mineral, and cannot therefore in

69 State of South Dakota, 37 L. D. 458.

70 State of California, 39 L. D. 174.

71 *Ante*, § 106. Also, Instructions, 31 L. D. 212.

72 Johnston v. Morris, 72 Fed. 890, 19 C. C. A. 229; In re State of California, 23 L. D. 423.

itself operate so as to take the land out of the grant to the state as mineral land. This can only be done by proof clearly showing that the lands were, at the time the rights of the state would have attached, known to contain valuable deposits of mineral and to be chiefly valuable on account of such deposits.[73]

If the lands are returned as agricultural lands, or if the character of the lands is not sufficiently shown by the survey, the state should not be permitted to select indemnity lands until it has been determined that the lands which it claims to have lost by reason of their mineral character were in fact of that character at the date of the approval of the survey.[74]

Of course, the state having selected lieu lands in such a case, it would be estopped from ever after claiming that the surveyor-general's return upon which it based its right to select lieu land was false. The selection when made would operate as a waiver of its right to the land relinquished.[75] A like estoppel should rest upon the government. It should not be permitted to assert that the lands relinquished are not mineral in character, as it is only by reason of this character that the government retains dominion and control over the lands.

Where, however, no application is made to select land in lieu of sixteenth, thirty-sixth or other specifically granted sections, returned as mineral, the state

[73] State of Utah, 32 L. D. 117; State of Oregon, 32 L. D. 412; State of California, 39 L. D. 158; Instructions, 31 L. D. 212.

[74] Bond v. State of California, 31 L. D. 34. See Instructions, Id. 212. The secretary of the interior has ruled that under the act of February 28, 1891 (26 Stats. at Large, p. 796), Comp. Stats. 1901, p. 1381, 6 Fed. Stats. Ann. 1462, the state is authorized to select indemnity lands in lieu of sixteenth and thirty-sixth sections shown to be mineral as a present fact. State of California, 33 L. D. 356.

[75] In re State of California, 28 L. D. 57; State of Oregon, 32 L. D. 412; State of California, 33 L. D. 356.

has a right to be heard upon the question of the character of the land, in whatever tribunal the question is raised.[76] If a mining location is made upon such a section, and application is made for a mineral patent, the state is a necessary party to the investigation touching the character of the land and the time when it became known as such.[77]

It cannot be deprived of this right by any proceeding to which it is not a party, or of which it has had no legal notice. If notified and it fails to appear, it will be bound by the adjudication made by the land officers, and cannot subsequently attack the ruling.[78]

Where the mineral character of a mining claim in conflict with a section claimed by the state is challenged by the state, the usual formal proofs under mineral patent proceedings will not suffice, but in such case the mineral character of the claim must be established by substantive proof, and the state is not bound to take the initiative at a hearing ordered to determine that question.[79]

In the case of applications for mineral patents for lands within railroad land-grant limits, the publication and posting of the patent application has been held to operate as such notice.[80]

The publication, however, of a notice of a hearing ordered by the land department to determine the character of the land is not sufficient. The railroad company, through its officers, should be personally served.[81]

A similar rule should undoubtedly be applied where the claims of the mineral locator conflict with asserted

[76] Richter v. State of Utah, 27 L. D. 95.

[77] Boulder & Buffalo M. Co., 7 L. D. 54; Fleetwood Lode, 12 L. D. 604.

[78] Mahogany No. 2 Lode Claim, 33 L. D. 37.

[79] State of South Dakota v. Welsh, 34 L. D. 723.

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

[81] McCloud v. Central Pac. R. R. Co., 29 L. D. 27.

rights under grants to states which rights are still in any sense subject to administration, or over which the land department retains jurisdiction sufficient to enable it to pass upon the character of the land.

As sixteenth, thirty-sixth and other specially designated sections pass to the state, in the absence of legal impediment, by the survey *ex propria vigore*, or by the admission of the state after survey, there is no preliminary adjudication,[82] actual or presumed, by the land department as to the character of the land. There is no antecedent judgment, as there is in preemption or homestead cases, which is final and conclusive upon collateral attack. The return of the surveyor-general is in no sense such an adjudication. It follows that the question may be raised at any time by anyone in privity with the government of the United States. The holder of a valid subsisting mining location is in such privity.

We reserve for discussion in the next section the effect of a state patent as evidence of the character of the land.

With reference to the state selecting lieu lands, or lands in satisfaction of its floating grants, it is not precluded from applying for lands returned as mineral. It has a right to contest this return, and establish upon hearings ordered for that purpose the nonmineral character of the land, the same as any other applicant to purchase or make private entry of public lands.

But before such selection can be preliminarily accepted, the state must "prove the mineral off," upon notice given of a hearing for that purpose.[83]

[82] *Post*, § 144a.

[83] Regulations of the Department, pars. 100–105, appendix; State of California, 22 L. D. 294; S. C. (on review), Id. 402; Commissioner's Letter, Copp's Min. Dec., p. 40; Richter v. State of Utah, 27 L. D. 95.

§ 144a. Conclusiveness of state patents as to character of land.—It does not necessarily follow that the state must, under its laws regulating the sale of its lands acquired from the general government, by its conveyance vest in the grantee the same title and right acquired by it. As the paramount proprietor of its granted lands, it may pass such laws and prescribe such rules and regulations governing the administration of its grants as the legislature may deem expedient, and the state's vendee takes title subject to such laws.[84]

Land at the time of survey, in the case of sixteenth, thirty-sixth or other specifically granted sections, or at the time of listing and certification, in the case of lieu or floating grants, may, so far as its known character is concerned, be nonmineral. Exploitation after the state has acquired its title may develop its mineral character. The legislature of the state may impress upon its conveyance to grantees limitations and reservations in the light of which all state patents must be construed.[85]

It is impossible to state any general rule as to the operative force of such instruments, as legislation in this regard may not be, and in fact is not, the same in all the states. In the absence of any legislation imposing limitations upon the title so conveyed, it may be assumed, where the general government has approved and certified to the state lands in satisfaction of its indemnity or floating grants, that such certification, followed by a state patent, would make the title in the vendee impervious to collateral attack.[86]

[84] Stanley v. Mineral Union, 26 Nev. 55, 63 Pac. 59, 60.

[85] Stanley v. Mineral Union, 26 Nev. 55, 63 Pac. 59, 60; Southern Development Co. v. Endersen, 200 Fed. 272, 284, and cases cited.

[86] McCormick v. Hayes, 159 U. S. 332, 348, 16 Sup. Ct. Rep. 37, 40 L. ed. 171; Southern Development Co. v. Endersen, 200 Fed. 272.

The production of such a patent would be *prima facie* evidence of certification by the United States. The force and effect of such a patent, however, might be overcome by showing that at the date of the patent the land had not been so certified.[87] This would not be a collateral attack on the patent.[88]

In the case of sixteenth, thirty-sixth and other specifically granted sections, we have heretofore observed [89] that there is no preliminary investigation by the land department as to the character of the land. Neither the law nor regulations of the department prescribe any procedure for a determination of the question as a condition precedent to the vesting of title in the state. As there is neither certification nor patent for these sections emanating from the general government, there would seem to be nothing upon which to base a conclusive presumption that the lands at the date of the survey were of any particular character.

It would seem, however, that in some jurisdictions, at least, the same conclusive effect given to a state patent for indemnity lands based upon a preliminary investigation as to the character of the land by the United States land officers and the ultimate certification by the government to the state is given to patents issued by the state for the sixteenth and thirty-sixth sections, which, as we have heretofore observed, are not based upon either investigation as to character of the land or certification.

For many years it has been the custom in California, and perhaps elsewhere, for the state land officers, prior to disposing of the lands within sixteenth and thirty-

87 Hooper v. Young, 140 Cal. 274, 98 Am. St. Rep. 56, 74 Pac. 140.
88 *Post*, §§ 175(4), 777(4).
89 *Ante*, § 144.

sixth sections, to obtain from the register of the local United States land office a certificate showing the *status* of these sections as disclosed in the tract-books,[90]—that is, as to whether it appears from such books that there are pre-emption or homestead filings covering these sections, or other facts which might impair the title of the state. If there appear on these books no notations showing the existence of any impediments, the register has, at the request of the state, so certified, and noted the fact of certification in the tract-books. There is absolutely no authority for this so-called "certificate." The action of the register is not supplemented by any action on the part of the commissioner or secretary of the interior. The certificate does not purport to deal with the character of the land, the only evidence as to that fact being the United States surveyor-general's return, which, as heretofore pointed out, is not entitled to serious weight. Registers of the land office have no powers except such as are defined in the acts of congress and in departmental regulations made in pursuance of law,[91] and the power to give such certificates is not given either expressly or by implication in either the acts of congress or departmental regulations.

The attention of the secretary of the interior was called to this practice of issuing certificates from the register's office, through a report made to the commissioner of the general land office by one of the registers, which report was as follows:—

> I find noted upon the tract-books these words (with regard to a certain section 16) "Certified to the state per J. W. Garden, register, Oct. 8, 1885." Our tract-books are filled with notations of this

[90] *Post*, § 660.

[91] Parker v. Duff, 47 Cal. 554; *post*, § 660.

kind or similar notations to sections sixteen and thirty-six, and I presume that it was the practice of former registers, as it is now, to certify to the state, upon inquiry by the state surveyor-general, the *status* of the lands in sections sixteen and thirty-six as shown by the records.

With reference to this procedure, the secretary says:—

> It is apparent by this statement of the register that neither his predecessors nor he has comprehended the nature of their duties respecting these school sections. No such notations as is here indicated should have been issued. The character of school sections in California as to whether mineral or nonmineral is not to be wholly determined by the surveyor-general's return, nor indeed is his return considered as a very high or persuasive evidence of the character of the lands when it is once drawn in question. . . . . It is also possible that lands in a school section might be excepted from a grant to a state because of other things than their mineral character, which would not necessarily be shown upon the records of the local office.
>
> While it is competent and proper for the local officers, in response to legitimate inquiries, to give such information as is shown by the records of their office,—as, for instance, whether a given section sixteen has been returned as mineral or nonmineral, or whether any portion thereof is or is not included in a homestead or other entry,—it is not competent or proper that these officers should also undertake to state in a manner which may be erroneously accepted as a certification or authorized statement that the section has or has not passed to the state.[92]

The supreme court of California seems to have treated this class of certificates issued by the register as possessing the same legal effect as a certification by

92 Instructions, 31 L. D. 212.

the commissioner of the general land office approving lieu or indemnity selections or selections in satisfaction of floating grants, and has said that such certification followed by the issuance of a state patent renders the title so evidenced immune from collateral attack,[93] practically overruling a previous decision by the same court permitting an attack on a state patent by a mineral claimant, and upholding the title to the mining claim upon the findings of the trial court, that at the date of the survey the land was known to be mineral.[94]

It is manifest that either the supreme court, in Saunders v. La Purisima G. M. Co., has given to the register's certificate unwarranted legal value or the secretary of the interior has without legal justification inhibited the practice of issuing such certificates. With all possible deference to the supreme court of California, the logic of the situation would seem to be with the secretary of the interior. A state patent cannot transmit a title which the state did not receive. If the lands are known to be mineral at the date of the survey, the title does not pass to the state.[95]

One occupying the *status* of a *bona fide* mining locator at the date of survey, not being in privity with the state, could under the later decision of the supreme court of California be deprived of his "day in court" by the issuance of a state patent. We do not think the question of the known character of the land within a sixteenth, thirty-sixth or other specifically designated section is foreclosed by the issuance of such patent. The question may be investigated at any time,

93 Saunders v. La Purisima G. M. Co., 125 Cal. 159, 57 Pac. 656, 658, 20 Morr. Min. Rep. 93.

94 Hermocilla v. Hubbell, 89 Cal. 5, 26 Pac. 611.

95 Ivanhoe M. Co. v. Keystone M. Co., 102 U. S. 167, 175, 26 L. ed. 126.

either by the courts, in the absence of a contest pending before the land department, or by that tribunal, at the instigation of an applicant for a mineral patent, due notice of such application being given to the state or its grantee.[96]

Notwithstanding the author's views on this question, the later opinions of the appellate courts of that state sustain the invulnerability of such a patent from attack on the ground of the known mineral character of the land at the date of the survey,[97] adhering to the rule laid down in Saunders v. La Purisima G. M. Co., *supra*.

§ 145. Conclusions.—From the foregoing exposition of the law, we deduce the following conclusions:—

(1) That lands embraced within sixteenth, thirty-sixth or other specifically granted sections, known to be mineral in character at the date of the final approval of the survey, do not pass to the state, but remain a part of the public mineral domain, subject to exploration and purchase, the same as other public mineral lands.

(2) The state may not select as lieu lands, or lands in satisfaction of its floating grants, any tract whose mineral character is known or established prior to the final approval of the selection and listing to the state.

(3) The approval by the commissioner of the land office of a selection by a state of lands under an indemnity or other floating grant is in the absence of fraud a conclusive adjudication of the character of such lands. Such approval and certification have the effect of a patent.

[96] Fleetwood Lode, 12 L. D. 604; Boulder & Buffalo M. Co., 7 L. D. 54.

[97] Worcester v. Kitts, 8 Cal. App. 181, 96 Pac. 335.

(4) Where sixteenth, thirty-sixth or other specifically granted sections are returned by the surveyor as mineral, and the state accepts this return and selects other lands in lieu thereof, both the state and general government are estopped from thereafter asserting that the lands are nonmineral.

(5) Where such sections are returned as mineral, and the state does not accept the return as establishing the character of the land, it has a right to its "day in court" for the purpose of impeaching the return. Where it desires to select lands, either in lieu of sixteenth, thirty-sixth or other specifically granted sections or under its floating grants, which lands are returned by the surveyor-general as mineral, it has a right to "prove the mineral off," and, if successful, to have the lands selected listed to it.

(6) Whether or not a given tract is of a known mineral character at the time the grant or selection would take effect, in the absence of legal impediments, must be determined by the facts as they exist at that time, and the then state of the law, as recognized by the current of judicial authority.

Article IV. Railroad Grants.

§ 149. Area of grants in aid of railroads, and congressional legislation donating lands for such purposes.—From the year 1850 to June 30, 1880, congress granted to states, territories, and railroad corporations, in aid of the construction of railways, upward of one hundred and fifty million acres of the public domain. Of these, more than one hundred million acres were within the precious metal bearing states and territories.[98]

Prior to 1862, grants of this character were generally made to states as trustees and agents of transfer for the benefit of companies projecting the railways; but with the passage of the Pacific railroad act, July 1, 1862,[99] was inaugurated a complete change in the

[98] Public Domain, pp. 273–287.

[99] 12 Stats. at Large, p. 489; 6 Fed. Stats. Ann. 720.

system of land bounties to aid in the construction of railroads. The grants were thenceforward direct to the corporation.[100]

As to grants made prior to 1862, we have no particular concern. Most, if not all, of the roads extending into the mineral regions of the west received their donations either under the Pacific railroad acts of 1862 and 1864 or under acts subsequently passed.

It is not within the purview of this treatise to deal with railroad grants in any respect other than as the operation of such grants within the precious metal bearing states and territories requires us to analyze the general character of the grants, and to determine the nature and extent of the things granted, the time when such grants take effect as to particular tracts, and such collateral questions as may be incidentally necessary to elucidate or explain the reasons for the rules established by the courts and the land department in administering the various grants.

For this purpose it will not be necessary to enumerate or discuss all the acts of congress granting lands in aid of the construction of railroads, but it will be sufficient for us to take as a basis certain pronounced types. So far as the scope of this treatise is concerned, these types represent features common to all grants. While there may be limitations in some of the later acts which do not appear in the selected types, and perhaps larger privileges and immunities are conferred by some than by others, yet in so far as the administration of the grants within the mineral regions and their application and effect with reference to mineral lands are concerned, we do not understand that there is any opportunity for differentiation.

[100] Public Domain, p. 267.

§ 150. Types of land grants in aid of the construction of railroads, selected for the purpose of discussion.—We select for the purpose of discussion the following acts and resolutions of congress:—

(1) An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes (approved July 1, 1862),[1] and the act amendatory thereof (approved July 2, 1864);[2]

(2) An act granting lands in aid of the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route (approved July 2, 1864);[3]

(3) Joint resolution reserving mineral lands from the operation of all acts passed at the first session of the thirty-eighth congress granting lands or extending the time of former grants.[4]

A consideration of the grants provided for by these acts, taken in connection with the joint resolution of congress, will enable us to present the subject under discussion fairly, to note the adjudicated cases, and from them formulate what we understand to be the rules to be applied in construing and administering grants of this character according to the existing state of the law.

§ 151. Character of the grants.—The act of July 1, 1862, granted to the corporations therein named, commonly called the "Pacific railroad companies," rights of way over the public lands to the extent of two hundred feet in width on each side of the road, together

1 12 Stats. at Large, p. 489; 6 Fed. Stats. Ann. 720.
2 13 Stats. at Large, p. 356; 6 Fed. Stats. Ann. 726.
3 13 Stats. at Large, p. 365; 6 Fed. Stats. Ann. 732.
4 13 Stats. at Large, p. 567.

with all necessary grounds for stations, buildings, workshops, and depots, machine-shops, turntables, switches, sidetracks, and water-stations. In addition, there was also granted every alternate section of public land not sold, reserved, or otherwise disposed of, designated by odd numbers, to the amount of five alternate sections per mile on each side of the respective roads, on the line thereof, and within the limits of ten miles on each side of said roads.

The amendatory act of July 2, 1864, enlarged this grant from five to ten alternate sections, and the lateral limits from ten to twenty miles. Neither of these acts contained any provision authorizing the selection of indemnity lands in lieu of odd-numbered sections, which might be subsequently ascertained to be lost to the companies by reason of their prior sale, reservation, or other disposition.

The act of July 2, 1864, incorporating the Northern Pacific railroad company, made a like grant to that company of rights of way and lands for necessary depot and other purposes. In the territories through which the projected roads might pass a land grant was given of every alternate odd-numbered section to the amount of twenty alternate sections per mile, and in the states ten alternate sections per mile.

There were also granted indemnity lands for odd-numbered sections which might be ascertained to be lost to the company, by reason either of their mineral character or their prior sale, reservation, or disposal, such indemnity lands to be selected within certain limits specified in the act.

We therefore have to deal with practically three classes of grants:—

(1) Grants of rights of way and lands for depots, sidetracks, and kindred purposes;

(2) Grants of particular sections within certain defined limits, generally called "primary," or "place," limits;

(3) A right to select lands in lieu of and as indemnity for losses accruing to the respective companies by reason of the odd-numbered sections having been previously sold, reserved, or otherwise disposed of, this right of selection to be exercised within certain defined limits, generally called "indemnity limits."

We will presently consider these different classes of grants and their attributes.

§ 152. Reservation of mineral lands from the operation of railroad grants.—At the time the Pacific railroad land grant acts were passed there was no congressional law authorizing the acquisition of title to mineral lands. They were passed during what we have denominated, in a previous chapter,[5] as the second period of our national history, during which rights and privileges upon the public mineral lands were regulated by local rules and customs, with the passive acquiescence of the government. As was said by the circuit court of appeals (ninth circuit), in dealing with mining locations within the limits of railroad grants, claims to mineral lands could be lawfully initiated by discovery, possession, and development, according to the customs of miners and local regulations at and previous to the date of the railroad grant (1864).[6]

When these railroad acts became laws, the policy of the government of reserving the mines and mineral lands for the use of the United States was fixed; and if there had been no special clauses of reservation in

[5] Tit. II, ch. iii, §§ 40–49.

[6] N. P. R. R. Co. v. Sanders, 49 Fed. 129, 134, 1 C. C. A. 192; S. C., on writ of error, 166 U. S. 620, 635, 17 Sup. Ct. Rep. 671, 41 L. ed. 1139.

the acts, the courts would have been forced to the conclusion that such lands were reserved by implication from the donations to railroads, following the doctrine announced with reference to grants of sixteenth and thirty-sixth sections to the states for school purposes.[7]

This doctrine of implied reservation has been applied by the land department to a grant of lands in Florida to aid in the construction of a railroad.[8]

However, in framing the later railroad acts, congress deemed it prudent to leave no room for dispute or discussion on this score, and inserted in each one of the acts clauses of reservation. The act of July 1, 1862,[9] contained the proviso "that all mineral lands shall be excepted from the operation of this act." The amendatory act of July 2, 1864, provided that "any lands granted by this act or the act to which this is an amendment . . . . shall not include . . . . mineral lands, ... or any lands returned and denominated as mineral lands." It also provided "that the term 'mineral land,' wherever the same occurs in this act and the act to which this is an amendment, shall not be construed to include coal and iron land." The act of July 2, 1864, incorporating the Northern Pacific railroad company, contained reservations and limitations of similar import.[10]

At the second session of the same congress (thirty-eighth) which passed the act amendatory of the original Pacific railroad act and the Northern Pacific act, a joint resolution was adopted by the senate and house of representatives which provided,—

7 Ivanhoe M. Co. v. Keystone M. Co., 102 U. S. 167, 171, 26 L. ed. 126; *ante*, § 136.

8 Florida Cent. & Peninsular R. R. Co., 26 L. D. 600.

9 12 Stats. at Large, p. 492, § 3; 6 Fed. Stats. Ann. 722.

10 13 Stats. at Large, p. 367, § 3; 6 Fed. Stats. Ann. 727.

> That no act passed at the first session of the thirty-eighth congress granting lands to states or corporations to aid in the construction of roads or for other purposes . . . . shall be so construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States, unless otherwise specially provided in the act making the grant.[11]

The mining act of July 26, 1866, followed.

The circuit court of appeals for the ninth circuit has held that these reservations in railroad grants were made in contemplation of future legislation as well as the existing laws.[12]

In the light of this legislation, it is difficult to understand how any serious controversy could arise over the administration of these land grants in the mineral regions. But such conflicts did arise, generally between purchasers of the railroad title and mineral claimants, and the battle was fiercely waged in all the tribunals, both state and federal. These controversies involved a discussion as to the character of the grants and the time when they took effect as to particular tracts. We have observed that there are found in this class of legislation grants of three different kinds: (1) the grant of the right of way and for sidetracks, stations, and kindred purposes; (2) grants of particular sections; (3) indemnity lands. We will consider each class with reference to the mineral reservations found in the several acts.

§ 153. Grants of rights of way.—The grants of rights of way found in the various railroad acts contain no reservations or exceptions. They are present,

11 13 Stats. at Large, p. 567.

12 N. P. R. R. Co. v. Sanders, 49 Fed. 129, 1 C. C. A. 192; S. C., on writ of error, 166 U. S. 620, 634, 17 Sup. Ct. Rep. 671, 41 L. ed. 1139.

absolute grants, subject to no conditions, except those necessarily implied, such as that the road shall be constructed and used for the purposes designated. They are in effect grants of the fee,[13] subject, however, to a reversionary right in the event the land ceases to be used for the purposes for which it was granted. The estate has been characterized as a "limited fee" [14] or a "base fee." [15] No part of the right of way can be alienated without the consent of congress nor lost by laches or acquiescence.[16] Grants of this character carry with them the implied condition that the lands are not to be used except for the purposes of legitimate railroad operation.[17] No title is acquired to underlying mines, and the land cannot be mined for its oil, gas or other mineral deposits.[18] The extraction of oil or mineral would result in an injury to the reversionary estate.

The railroad company secures the surface and so much of the underlying minerals as may be necessary to support the surface.[19] The obligation to support the surface would of course be mandatory.[20] All persons acquiring any portion of the public lands, after the passage of such acts, provided the act definitely

13 Missouri, Kansas & Texas Ry. v. Roberts, 152 U. S. 114, 14 Sup. Ct. Rep. 496, 38 L. ed. 377; New Mexico v. United States Trust Co., 172 U. S. 171, 19 Sup. Ct. Rep. 128, 43 L. ed. 407; Melder v. White, 28 L. D. 412.

14 Northern Pacific R. R. v. Townsend, 190 U. S. 267, 271, 23 Sup. Ct. Rep. 671, 47 L. ed. 1044.

15 Missouri K. & T. Ry. Co., 34 L. D. 504.

16 Kindred v. Union Pac. Ry., 168 Fed. 648, 650, 94 C. C. A. 112.

17 Oregon S. L. Ry. v. Quigley, 10 Idaho, 770, 80 Pac. 401, 404.

18 Missouri K. & T. Ry., 34 L. D. 470, Id. 504; Gladys City O. G. M. Co. v. Right of Way O. Co. (Tex. Civ. App.), 137 S. W. 171, and cases cited.

19 Dilts v. Plumville R. Co., 222 Pa. 516, 71 Atl. 1072, 1076.

20 Southwest Missouri Ry. Co. v. Big Three M. Co., 138 Mo. App. 129, 119 S. W. 982.

fixes the route,[20a] take the same subject to the right of way conferred by them for the proposed road.[21]

The grants are floats until the line of the road is "definitely fixed" by filing the map of definite location. When so filed, and approved by the secretary of the interior, title vests to the lands within the limits of the right of way, as fixed by the act, as of the date of the passage of the act.[22]

The line of the road may also be "definitely fixed" by the actual construction of the road without having previously filed the map or profile,[23] and such actual construction precludes location of mining claims within the right of way limits.[24]

The reservation of "mineral lands" found in these acts does not apply to the lands embraced within the right of way limits. This right of way extends to and covers all public lands, whether mineral or not.[25]

If at the time the right of way attaches mineral lands over which the road is to pass are unoccupied, a sub-

[20a] Union Pacific R. R. v. Harris, 215 U. S. 386, 388, 30 Sup. Ct. Rep. 138, 54 L. ed. 246.

[21] St. Joseph & Denver City R. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; Moran v. Chicago, B. & Q. Ry., 83 Neb. 680, 120 N. W. 192, 193, and cases cited; Nielsen v. Northern Pacific Ry. Co., 184 Fed. 601, 106 C. C. A. 581; Montana Cent. R. R. Co., 25 L. D. 250.

[22] St. Joseph & Denver City R. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; Smith v. N. P. R. R. Co., 58 Fed. 513, 7 C. C. A. 397; W. P. R. R. Co. v. Tevis, 41 Cal. 489; Northern Pac. R. R. Co. v. Murray, 87 Fed. 648, 31 C. C. A. 183; United States v. Oregon & Cal. R. R. Co., 176 U. S. 28, 20 Sup. Ct. Rep. 261, 44 L. ed. 358.

[23] Jamestown & Northern Ry. Co. v. Jones, 177 U. S. 125, 20 Sup. Ct. Rep. 568, 44 L. ed. 698; Minneapolis & St. P. Ry. v. Doughty, 208 U. S. 251, 257, 28 Sup. Ct. Rep. 291, 52 L. ed. 474; Comford v. Great Northern Ry., 18 N. D. 570, 120 N. W. 875, 876.

[24] Pennsylvania M. & Imp. Co. v. Everett & M. C. Ry. Co., 29 Wash. 102, 69 Pac. 628.

[25] Doran v. C. P. R. R. Co., 24 Cal. 246; Wilkinson v. N. P. R. R. Co., 5 Mont. 538, 548, 6 Pac. 349; Pennsylvania M. & Imp. Co. v. Everett & M. C. Ry. Co., 29 Wash. 102, 69 Pac. 628.

sequent location thereof, followed by a patent to the locators, is inferior to the right of way to the company, and must yield to the superior legal title,[26] without resort to a court of equity to set the patent aside.

As was said by the supreme court of Montana,—

> The mineral lands excluded from the operation of this act are evidently not those covered by the right of way. . . . . And it would be destructive of the rights of the railroad company if mining claims could at any time be located and worked upon the track and land covered by the right of way. . . . . The operations of mining and the business of railroads cannot be conducted at the same time upon the same ground; and a reservation of such a character would beget a conflict of rights and a confusion of interests not in contemplation of intelligent legislative action.[27]

Where a mining location is prior to the definition of the right of way, its subsequent abandonment restores the land to the public domain and the right of way attaches as against the relocation of the abandoned claim.[28]

The limits of the grant of the right of way once fixed by the filing and approval of the map of definite location, or by the actual construction of the road in the absence of such filing and approval, cannot thereafter be changed to the detriment of any other party.[29]

[26] Rio Grande Western Ry. Co. v. Stringham (Utah), 110 Pac. 868, 871, and cases cited.

[27] Wilkinson v. N. P. R. R. Co., 5 Mont. 538, 548, 6 Pac. 349. It is intimated by the secretary of the interior that a mineral patent might be obtained which encroached upon a right of way or lands selected for depot and station grounds subject to the railroad easement. Grand Canyon Ry. Co. v. Cameron, 35 L. D. 495. See City of Butte v. Miskosowitz, 39 Mont. 350, 102 Pac. 593, 596, as to mining under streets.

[28] Bonner v. Rio Grande S. R. Co., 31 Colo. 446, 72 Pac. 1065, 1066.

[29] Smith v. N. P. R. R. Co., 58 Fed. 513, 7 C. C. A. 397, and cases cited; Northern Pac. R. R. Co. v. Murray, 87 Fed. 648, 31 C. C. A. 183.

It will be remembered that many of these decisions are under acts passed prior to the mining act of July 26, 1866. We do not concede that a right of way granted to a railroad company subsequent to the passage of that act would take precedence over a prior valid subsisting mining location. As we understand the law, since the passage of the mining acts the location of a valid mining claim operates to withdraw the land embraced within it from the public domain.[30] It is a grant from the government. A railroad corporation claiming a right of way under a subsequent grant by congress could not cross the located mining claim (provided the same is upon *mineral* land) without condemning the land and paying the miner compensation.[31] In this respect, as we will hereafter endeavor to show, mining claims differ from inchoate homestead and pre-emption claims.[32] As to lands for depot, sidetrack, and other kindred purposes, no controversies are likely to arise. For the most part, these adjuncts are necessarily within the right of way limits, if in fact the laws do not contemplate they should be. If other lands necessary to be used for these collateral purposes may be selected outside of the right of way limits, then their selection would necessarily be under the supervision of the land department, and rights thereto would not attach until final approval of the selection,[33] unless there was such actual occupation and use for such purpose as to give unquestioned notice

[30] Southern California Ry. Co. v. O'Donnell, 3 Cal. App. 382, 85 Pac. 932.

[31] Montana Cent. Ry. Co., 25 L. D. 250; Alaska Pac. Ry. v. Copper River & N. W. Ry., 160 Fed. 862, 864, 87 C. C. A. 666.

[32] St. Paul M. & M. Co. v. Maloney, 24 L. D. 460; Dakota Cent. R. R. Co. v. Downey, 8 L. D. 115; Santa Fe Pacific Ry., 29 L. D. 36.

[33] See Union Pac. Ry., 25 L. D. 540; Santa Fe Pacific R. R. Co., 27 L. D. 322, 29 L. D. 36; Opinion Attorney-General, 28 L. D. 130.

of an intended appropriation.[34] Such selection, however, when approved would relate back to the date of the application, and take precedence over intervening rights.[34a]

§ 154. Grants of particular sections, as construed by the courts.—The grants of the alternate sections are said to be of lands "in place," and the limits within which they are granted are called "primary" or "place" limits, contradistinguished from "indemnity" limits in cases of grants which provide for indemnity or lieu selections, as well as for lands "in place."

Grants of particular sections or of lands "in place" do not acquire precision until the lands are surveyed and the line of the road is definitely fixed.[35] Until such time the grant is said to be a float, and congress retains the power to otherwise dispose of them.[36] Such grants are, however, grants *in praesenti*. They attach to particular tracts as soon after the filing of the map of definite location of the road as these tracts become identified by survey; and when so identified, title vests in the company, in the absence of legal impediments, by relation as of the date of the passage of the act. This is too well settled to require argument. The authorities in support of it are numerous and uniform.[37]

[34] Comford v. Great Northern Ry., 18 N. D. 570, 120 N. W. 875, 876.

[34a] Stalker v. Oregon Short L. R. Co., 225 U. S. 142, 32 Sup. Ct. Rep. 636.

[35] Nelson v. Northern Pacific Ry., 188 U. S. 108, 116, 23 Sup. Ct. Rep. 302, 47 L. ed. 406; Trodick v. Northern Pacific Ry., 164 Fed. 913, 915, 90 C. C. A. 653; affirmed in 221 U. S. 208, 31 Sup. Ct. Rep. 607, 55 L. ed. 704.

[36] United States v. Northern Pac. Ry., 193 U. S. 16, 17, 24 Sup. Ct. Rep. 330, 48 L. ed. 593.

[37] United States v. Oregon & Cal. R. R. Co., 176 U. S. 28, 20 Sup. Ct. Rep. 261, 44 L. ed. 358; Van Wyck v. Knevals, 106 U. S. 360, 1 Sup.

While this is true as to such lands as are within the purview of the grant, it is not to be inferred that the mineral or nonmineral character of the land is to be determined as of the date of either the survey or filing the map of definite location.

This question came before the circuit court of the United States for the ninth circuit, northern district of California, upon the demurrer to the complaint in the case of Francoeur v. Newhouse,[38] wherein the late Judge Sawyer announced the rule that the exception of mineral lands from the grant to the Pacific railroads only extended to lands *known* to be mineral and apparently mineral at the time *when the grant attached;* and a discovery of a gold mine in the lands after the title has vested in the company by full performance of the conditions did not defeat the title of the railroad company, although at the time of the discovery no patent had been issued to the railroad.

Subsequently, at the trial of this cause, the same judge charged the jury to the same effect; that the words "mineral land," as used in the act of congress,

Ct. Rep. 336, 27 L. ed. 201; Kan. P. Ry. Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. Rep. 566, 28 L. ed. 1122; St. Paul & Pac. R. R. Co. v. N. P. R. R. Co., 139 U. S. 1, 5, 11 Sup. Ct. Rep. 389, 35 L. ed. 77; Sioux City & I. F. T. L. & L. Co. v. Griffey, 143 U. S. 32, 12 Sup. Ct. Rep. 362, 36 L. ed. 64; Smith v. N. P. R. R. Co., 58 Fed. 513, 7 C. C. A. 397; United States v. S. P. R. R. Co., 146 U. S. 570, 13 Sup. Ct. Rep. 152, 36 L. ed. 1091; Schulenberg v. Harriman, 21 Wall. 44, 60, 22 L. ed. 551; Missouri, K. & T. R. Co. v. Kansas Pac. R. R. Co., 97 U. S. 491, 24 L. ed. 1095; St. Joseph & Denver City R. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; N. P. R. R. Co. v. Wright, 54 Fed. 67, 4 C. C. A. 193; United States v. Northern Pac. R. R. Co., 103 Fed. 389; S. P. R. R. Co. v. Whitaker, 109 Cal. 268, 41 Pac. 1083; McLaughlin v. Menotti, 89 Cal. 354, 26 Pac. 880; Sjoli v. Dreschel, 199 U. S. 564, 26 Sup. Ct. Rep. 154, 50 L. ed. 311; Nelson v. Northern Pacific Ry., 188 U. S. 108, 23 Sup. Ct. Rep. 302, 47 L. ed. 406; Trodie v. Northern Pacific Ry., 164 Fed. 913, 90 C. C. A. 653; affirmed in 221 U. S. 208, 31 Sup. Ct. Rep. 607, 55 L. ed. 704.

[38] 40 Fed. 618.

meant land known to be mineral at the time the grant took effect and attached to the specific land in question, or lands which there was satisfactory reason to believe were such at said time; that only such land as was known to be mineral, or which there was satisfactory reason to believe was mineral, at the time the grant attached to the land is excepted from the grant.[39] The doctrine thus announced was maintained or accepted in several later cases in the same circuit.[40]

The case of Northern Pacific Railroad v. Barden,[41] arose in the same circuit in the district of Montana, the hearing being had before Judges Sawyer and Knowles. Judge Sawyer reiterated his views as expressed in the Francoeur-Newhouse case; but Judge Knowles dissented, holding that the mineral character of the land might be established at any time prior to the issuance of the patent to the railroad company, and when so established such land was not within the purview of the grant, and the title thereto never vested in the company.

This case went to the supreme court of the United States on writ of error,[42] and that tribunal settled the controversy. The grant there under consideration was to the Northern Pacific Railroad, under the act of July 2, 1864, heretofore referred to. It appeared that the line of the road opposite and past the lands in controversy became definitely fixed on July 6, 1882, by filing with the commissioner of the general land office the required plat. The quartz-mining claims were on an odd-numbered section of the railroad grant, within the

39 Francoeur v. Newhouse, 43 Fed. 238.

40 Valentine v. Valentine, 47 Fed. 597; N. P. R. R. Co. v. Barden, 46 Fed. 592; N. P. R. R. Co. v. Sanders, 49 Fed. 129, 1 C. C. A. 192; N. P. R. R. Co. v. Cannon, 54 Fed. 252, 4 C. C. A. 303.

41 46 Fed. 592.

42 Barden v. N. P. R. R. Co., 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992.

"place" or "primary" limits, and were discovered in 1888. Prior to such discovery, the railroad company had applied to the government to have the section in question certified to it under its grant, and such application had been approved by the commissioner of the general land office; but no action had been taken thereon by the secretary of the interior. The land in question had been returned by the surveyor-general as agricultural land.

Upon this state of facts the supreme court of the United States enunciated the following rules of law:—

(1) The Northern Pacific Railroad Company cannot recover under the grant to it by the act of congress of July 2, 1864, mineral lands from persons in possession thereof who have made locations, although the mineral character of the land was not discovered until the year 1888, no patent having been issued to said company therefor;

(2) It was the intention of congress to exclude from the grant of lands to the Northern Pacific Railroad Company actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral;

(3) The reservation in the grant of mineral lands was intended to keep them under government control for the public good, in the development of the mineral resources of the country, and for the benefit and protection of the miner and explorer, instead of compelling him to litigate or capitulate with a stupendous corporation and ultimately succumb to such terms, subject to such conditions, and amenable to such servitudes as it might see proper to impose;

(4) The government has exhibited its beneficence in reference to its mineral lands, as it has in the disposition of its agricultural lands, where the claims and

rights of the settlers are fully protected. The privilege of exploring for mineral lands was in full force at the time of the location of the definite line of the road, and was a right reserved and excepted out of the grant at that time.

This is the law of the land; and in the light of these rules all grants to railroads are to be construed and administered. A discovery of mineral on lands falling within the primary or place limits of any railroad grant, at any time prior to the issuance of the patent, if it be demonstrated that such lands are in fact mineral, within the meaning of that term as defined by the current of judicial authority, establishes the fact that the lands are not within the grant, and title thereto never vested in the railroad company.[43] But nonmineral land is not excepted from the grant by reason of a "claim" thereto under the mining laws, unless it is one which has been asserted before the local land office, and is pending of record there at the time the line of road is definitely fixed.[44]

[43] Elliott v. Southern Pacific R. R., 35 L. D. 149; Southern Pacific R. R., 41 L. D. 264. There are instances where the secretary of the interior has directed the suspension of proceedings for entries and patents to railroad companies for a definite period to enable the lands to be prospected within limited areas with a view to the determination of the mineral character. Union Pacific R. R., 32 L. D. 48. The power of the secretary to authorize such suspension is questionable. See Sjoli v. Dreschel, 199 U. S. 564, 566, 26 Sup. Ct. Rep. 154, 50 L. ed. 311.

[44] Northern Pac. R. R. Co. v. Allen, 27 L. D. 286; Northern Pac. R. R. Co. v. Sanders, 166 U. S. 620, 17 Sup. Ct. Rep. 671, 41 L. ed. 1139. The secretary of the interior has ruled that an adjudication by the general land office in a proceeding in which the question is in issue, that lands within the primary limits of a railroad grant were at the date of the grant mineral in character, so long as it stands unimpeached excepts them from the operation of the grant, and no rights attach under the grant upon a subsequent adjudication by that office under another proceeding that the lands in question are at that time nonmineral. Central Pacific R. R. v. De Rego, 39 L. D. 288.

It will be observed that the grant in question in the Barden case was one which in addition to the grant of alternate sections also granted indemnity to the Northern Pacific Railroad, in lieu of such lands as might be lost to it by reason of their mineral character. In the decision of the court this fact is noted. But we do not apprehend that this element was of controlling force. The same principles of law as applied to grants which contain indemnity provisions apply with equal force to grants which do not contain them, such as the original Pacific railroad act of July 1, 1862. In the former class of grants, congress has simply declared that the grant as to quantity should not suffer diminution. In the latter, congress has simply granted the lands to the railroad company to the extent that they are of the class which is properly patentable under the act. To the extent that the lands within the limits are within the reservation clauses, then, and to that extent, the grant as to quantity is diminished.

§ 155. Construction of railroad grants by the land department.—The rule announced by the supreme court of the United States in the Barden case was always followed by the land department in administering railroad grants. This fact is so stated in the decision in that case, and the ruling announced by Secretary Noble in C. P. R. R. v. Valentine [45] is thus quoted at length:—

> The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the land

[45] 11 L. D. 238, 246.

department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction, it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of the patent. Moreover, I am informed by the officers in charge of the mineral division of the land department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent, or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time, there should be, in my judgment, the clearest evidence of error, as well as the strongest reasons of policy and justice, controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property.[46]

§ 156. Distinctions between grants of sixteenth and thirty-sixth sections to states and grants of particular sections to railroads.—Grants to railroads of particular sections bear a striking resemblance to the

[46] This case involved the same property in controversy in Valentine v. Valentine (47 Fed. 597). The author was counsel for the mineral claimant in both proceedings. Before the land department the inquiry was limited to the *present* character of the land. In the circuit court, under the previous ruling in that circuit, in Francoeur v. Newhouse (40 Fed. 618), the inquiry was addressed to the date of the passage of the railroad act and the filing of the map of definite location. The ruling of the secretary in the case before the land department has been quoted approvingly and followed in later cases. North Star M. Co. v. C. P. R. R. Co., 12 L. D. 608; N. P. R. R. Co., 13 L. D. 691; Winscott v. N. P. R. R. Co., 17 L. D. 274; N. P. R. R. Co. v. Marshall, Id. 545; N. P. R. R. Co. v. Champion Cons., 14 L. D. 699. See, also, the earlier cases of C. P. R. R. Co. v. Mammoth Blue Gravel, 1 Copp's L. O. 134; G. D. Smith, 13 Copp's L. O. 28. The latest expression of the department is found in Southern Pacific R. R. Co., 41 L. D. 264.

grants to the states of sixteenth and thirty-sixth sections for school purposes. Both are grants *in praesenti.* But in cases of school grants of specific sections no patents issue to the state. The state has nothing to do or perform as a condition precedent to the taking effect of the grant. Nor is any action of the land department invoked preliminarily as to determination of the character of the land.[47] It has the power, when called upon at the instigation of either party, to make the investigation; but it is not an exclusive power, and nothing in ordinary cases ever issues to the state which is evidence of any judgment of the land department upon the question of the character of the land. In cases of railroad grants the company is required to comply with a number of conditions before it can assert its right to a patent. The land department retains exclusive jurisdiction over these railroad lands until patent issues, for the purpose of determining whether or not the conditions have been complied with, and necessarily to adjudicate upon the patentability of the lands under the particular act in question. The late Judge Sawyer thus forcibly stated the rule:—

> Under the statute [Pacific railroad act] it is as clearly the duty of the officers authorized to issue patents to the railroad companies, to ascertain whether the lands patented are embraced in the congressional grant, and patentable, or are mineral lands, and not patentable, as it is in the case of preemption, homestead, or other entry and sale of public lands to ascertain the facts authorizing the issue of the patent. . . . . There must be some point of time when the character of the land must be finally determined; and, for the interest of all concerned, there

[47] *Ante,* § 144a.

can be no better point to determine this question than at the time of issuing the patent.[48]

The supreme court of the United States thus announced the rule in the Barden–N. P. R. R. case,[49] heretofore discussed, after quoting the ruling of the land department in the case of C. P. R. R. v. Valentine:—

> The fact remains that under the law the duty of determining the character of the lands granted by congress and stating it in instruments transferring the title of the government to the grantees reposes in officers of the land department. Until such patent is issued, defining the character of the land granted and showing that it is nonmineral, it will not comply with the act of congress in which the grant before us was made.
>
> The grant, even when all the acts required of the grantees are performed, only passes a title to nonmineral lands; but a patent issued in proper form upon a judgment rendered after a due examination of the subject by the officers of the land department charged with its preparation and issue that the lands were nonmineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary.

In case of sixteenth, thirty-sixth or other sections specifically granted to the state there is no "instrument transferring the title issued by the department, no patent in proper form upon a judgment rendered after due examination of the subject by the officers of the land department"; therefore, in this class of grants the question remains to be litigated whenever and wherever it may arise.

As we have heretofore seen, when dealing with school grants, the surveyor-general's return concludes

[48] Cowell v. Lammers, 10 Saw. 255, 257, 21 Fed. 200. See, also, N. P. R. R. Co. v. Cannon, 54 Fed. 252.

[49] 154 U. S. 330, 14 Sup. Ct. Rep. 1030, 38 L. ed. 1003.

no one.[50] Neither does it, for that matter, in the case of railroad grants.[51]

The foregoing illustrates the distinctions to be made between the two classes of grants. We think it nothing more than right that where a given tract of land has been applied for by a railroad company, and its selection thereof is of record, that the company should be notified in some way of an adverse application.[52] The published notice of application for a mineral patent required by section twenty-three hundred and twenty-five has been held to be sufficient by the United States circuit court of appeals for the ninth circuit.[53]

But the mere publication of a notice of a hearing ordered by the land officers to determine the character of the land disconnected with the patent proceeding is not sufficient. In such cases the railroad company is entitled to personal notice.[54] Under instructions issued by the secretary of the interior September 9, 1904,[55] registers and receivers are required to give notice to the railroad grantee of every application for mineral patent embracing lands within railroad sections.

§ 157. Indemnity lands.—Ordinarily, it will not appear at the time the line of the road is definitely fixed how many acres of land or what lands are excepted from the grant of land "in place," by reason of their mineral character, prior sales, or reservations.

50 *Ante*, §§ 144, 144a.

51 Barden v. N. P. R. R. Co., 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992; Winscott v. N. P. R. R. Co., 17 L. D. 274; Cal. & Ore. R. R. Co., 16 L. D. 262. See, also, *ante*, § 106.

52 S. P. R. R. Co. v. Griffin, 20 L. D. 485.

53 N. P. R. R. Co. v. Cannon, 54 Fed. 252, 4 C. C. A. 303.

54 McCloud v. Central Pac. R. R. Co., 29 L. D. 27.

55 33 L. D. 262.

Until this is ascertained the grant is a float, extending over the indemnity limits defined by the act. When any deficiency of the lands in place is determined, the right to select lands in lieu thereof arises, and selection may then be made from any of the lands of the United States within the indemnity limits of the grant; and when such selection is made and approved, the grant for the first time attaches to any specific lands within those limits.[56]

Until selection is made title remains in the government and congress has full power to deal with the lands as it sees fit.[57] The secretary of the interior has no authority to withdraw from sale or settlement lands within indemnity limits which have not been previously selected with his approval to supply deficiencies within the place limits of the company's road.[58]

The rules applicable to selection by the states of lands in lieu of sixteenth, thirty-sixth or other specifically granted sections are alike applicable to the selection of indemnity lands under acts of congress granting

[56] Oregon & Cal. R. R. v. United States, 189 U. S. 103, 112, 113, 23 Sup. Ct. Rep. 615, 47 L. ed. 726; Humbird v. Avery, 195 U. S. 480, 506, 25 Sup. Ct. Rep. 123, 49 L. ed. 286; Sjoli v. Dreschel, 199 U. S. 564, 26 Sup. Ct. Rep. 154, 50 L. ed. 311; Weyerhaeuser v. Hoyt, 219 U. S. 380, 31 Sup. Ct. Rep. 300, 55 L. ed. 258; United States v. Winona & St. P. R. R. Co., 67 Fed. 948, 967, 15 C. C. A. 96; Kansas Pac. R. R. Co. v. Atchison, T. & S. F. R. R. Co., 112 U. S. 414, 5 Sup. Ct. Rep. 208, 28 L. ed. 794; Barney v. Winona & St. P. R. R. Co., 117 U. S. 228, 6 Sup. Ct. Rep. 654, 29 L. ed. 858; Sioux City & St. P. R. R. Co. v. Chicago, M. & St. P. R. R. Co., 117 U. S. 406, 6 Sup. Ct. Rep. 790, 29 L. ed. 928; Wisconsin Cent. R. R. Co. v. Price County, 133 U. S. 496, 10 Sup. Ct. Rep. 341, 33 L. ed. 687; United States v. Missouri, K. & T. R. R. Co., 141 U. S. 358, 12 Sup. Ct. Rep. 13, 35 L. ed. 766; Oregon & C. R. R. Co. v. United States, 48 C. C. A. 520, 109 Fed. 514; and see Willamette Valley & Cascade M. W. R. R. Co., 29 L. D. 344.

[57] Clark v. Herington, 186 U. S. 206, 209, 22 Sup. Ct. Rep. 872, 46 L. ed. 1128.

[58] Sjoli v. Dreschel, 199 U. S. 564, 568, 26 Sup. Ct. Rep. 154, 50 L. ed. 311.

aid to railroads. These rules will be found stated in a preceding section.[59]

As mineral lands cannot inure to the railroad companies within the primary or place limits of their respective grants, it follows, as a matter of course, that mineral lands within the indemnity limits cannot be selected in lieu of lands lost to the companies within the place limits.[60]

Coal is a mineral, and although lands containing it may have passed to the railroad under its grant of alternate sections in place, this class of lands cannot be selected in satisfaction of deficiencies arising from losses of lands "in place."[61] Only lands agricultural in character may be selected under the indemnity grants.[62]

Until the selection is finally approved (where such approval is necessary[63]) and certified to the railroad company, the land department retains jurisdiction for the purpose of investigating the character of the land. If it is found to be mineral, it remains a part of the public domain, and subject to exploration and purchase under the mining laws.[64]

A marked difference in phraseology should be noted between that usually employed in railroad grants and

59 *Ante*, § 143.

60 United States v. Mullan, 7 Saw. 470, 10 Fed. 785; Mullan v. United States, 118 U. S. 271, 6 Sup. Ct. Rep. 1040, 30 L. ed. 170; S. P. R. R. Co. v. Allen G. M. Co., 13 L. D. 165.

61 United States v. Northern Pacific R. R., 170 Fed. 498, 501; affirmed in Northern Pacific Ry. v. United States, 176 Fed. 706, 101 C. C. A. 117.

62 Northern Pacific R. R., 39 L. D. 314.

63 An act of July 27, 1866, granting lands to the Southern Pacific Railroad Company, and providing that lands shall be selected under the direction of the secretary of the interior, does not require that the selection shall be approved by the secretary. Groeck v. Southern Pac. R. R. Co., 102 Fed. 32, 42 C. C. A. 144.

64 Walker v. Southern Pac. R. R. Co., 24 L. D. 172.

that found in the act granting certain indemnity lands to the St. Paul, Minneapolis and Manitoba Railway [65] and a similar act granting such lands to the Northern Pacific Railroad.[66]

By these acts the companies were permitted to select an equal quantity of nonmineral public lands *so classified as nonmineral* at the time of actual government survey which has been or might thereafter be made.

The general land office held under these acts that the failure to designate lands upon the field-notes and plat as mineral is to classify them as nonmineral rendering them subject to the grant, and the duty did not devolve on that office to go behind this classification and investigate the real character of the land upon an application to select.[67]

With this view, however, the courts do not agree. The classification at the time of survey is not binding nor does it preclude the government from asserting its right to have the lands which are mineral in fact excluded from those out of which selection may be made. True character and not classification, without regard to time, is the fundamental meaning.[68]

§ 158. Restrictions upon the definition of "mineral lands," when considered with reference to railroad grants.—In most of the acts granting lands in aid of the construction of railroads, it is expressly stated that coal and iron are not to be classified as mineral within the meaning of that term as employed in the reserva-

[65] August 5, 1892, 27 Stats. at Large, p. 390; 6 Fed. Stats. Ann. 447.

[66] March 2, 1899, 30 Stats. at Large, p. 993.

[67] Bedal v. St. Paul, M. & M. Ry. Co, 29 L. D. 254; Davenport v. Northern Pacific R. R., 32 L. D. 28. See, also, State of Idaho v. Northern Pacific R. R., 37 L. D. 135.

[68] United States v. Northern Pacific R. R., 170 Fed. 498, 501; affirmed in Northern Pacific Ry. v. United States, 176 Fed. 706, 101 C. C. A. 117.

tion clauses. Where such legislative declaration is found, of course, lands containing coal and iron will pass to the railroad company under the grants of particular sections.[69] But as heretofore observed,[70] lands of this class are mineral in character and cannot be selected in satisfaction of the floating or indemnity grants. It also follows as a matter of course that if the granting act is silent upon the subject of these two commodities, lands containing them do not pass.[71]

In the administration of the railroad grants there was at one time the same disposition upon the part of the land department to restrict the meaning of the term "mineral," as used in the reservation clauses of these grants, which prevailed in dealing with grants to states. What we have heretofore said with reference to this rule of construction when considering the latter class of grants applies with equal force to railroad grants.[72]

More recent decisions of the department have, however, given a liberal interpretation to the term "mineral."[73]

Let us review the action of the land department in dealing with this subject as applied to railroad grants.

As early as 1875 the department held that lands more valuable for the deposits of limestone than for agricul-

[69] Rocky Mountain C. & I. Co., 1 Copp's L. O. 1.

[70] *Ante*, § 157.

[71] United States v. Northern Pacific R. R., 170 Fed. 498, 500; affirmed in Northern Pacific Ry. v. United States, 176 Fed. 706, 101 C. C. A. 117.

[72] *Ante*, §§ 137–141.

[73] Pacific Coast Marble Co. v. Northern Pac. R. R. Co., 25 L. D. 233; Aldritt v. N. P. R. R. Co., Id. 349; Union Oil Co. (on review), Id. 351; Florida & Penin. R. R. Co., 26 L. D. 600; Phifer v. Heaton, 27 L. D. 57; Forsythe v. Weingart, Id. 680; Beaudette v. N. P. R. R. Co., 29 L. D. 248; Tulare Oil & M. Co. v. S. P. R. R. Co., Id. 269; Schrimpf v. N. P. R. R. Co., Id. 327; Morrill v. N. P. R. R. Co., 30 L. D. 475; Elliott v. Southern Pacific R. R., 35 L. D. 149.

ture might be patented under the mining laws. This ruling has been followed in later cases.[74]

In the case of Elias Jacob,[75] Commissioner Williamson made a contrary ruling; but this decision was overruled by the secretary in the Hooper case.[76] We thus have established, by a uniform series of decisions, a departmental rule of construction, that lands valuable for deposits of lime are mineral in character, and may be entered under the mining laws.

In 1873, the department issued a circular[77] for the guidance of surveyors-general and registers and receivers, wherein it classified borax, carbonate and nitrate of soda, sulphur, alum, and asphalt as minerals, and open to entry under the mining laws. We are not aware that this classification has ever been questioned. Secretary Hoke Smith announced the rule that in administering railroad grants the word "mineral," as used in the reservation clauses, is to be understood to apply only to the more valuable metals, such as gold, silver, cinnabar, and copper.[78]

His argument proceeded upon the theory that at the time of the *passage of the act* wherein mineral lands were reserved, either expressly or by implication, the substances in controversy (phosphates and petroleum) were not minerals in contemplation of congress, and therefore passed to the railroad; that congress at that

[74] In re H. C. Rolfe, 2 Copp's L. O. 66; In re W. H. Hooper, 8 Copp's L. O. 120; In re Josiah Gentry, 9 Copp's L. O. 5; Maxwell v. Brierly, 10 Copp's L. O. 50; Conlin v. Kelly, 12 L. D. 1; Shepherd v. Bird, 17 L. D. 82; Morrill v. N. P. R. R. Co., 30 L. D. 475.

[75] 7 Copp's L. O. 83.

[76] 8 Copp's L. O. 120.

[77] Copp's Min. Dec., p. 316.

[78] Tucker et al. v. Florida Ry. & Nav. Co., 19 L. D. 414 (subsequently overruled); Pacific Coast Marble Co. v. N. P. R. R. Co., 25 L. D. 233); Union Oil Co., 23 L. D. 222 (reversed on review, 25 L. D. 351).

time only had in contemplation the more valuable metals.

The vice of the distinguished secretary's reasoning is found in his assumption that after the passage of the railroad acts, and before title vests under them, congress has no power to change its policy or enlarge the scope of its legislation with respect to mineral lands. That this view is erroneous, we think we have fully demonstrated in the preceding article on the subject of grants to states for educational purposes.

His decision was overruled by his successor, and the liberal rule now prevails.[79]

Secretary Smith's ruling would have enabled railroad companies in the future to obtain title under the unadministered grants to a large class of valuable deposits, such as limestone, alum, soda, asphalt, marble, borax, sulphur, etc., which, by legislative and judicial construction, are within the purview of the mining laws.

Recently the following substances have been held to be mineral within the meaning of the reservation in the railroad grants: Granite,[80] asphaltum,[81] marble and slate,[82] limestone,[83] phosphates generally,[84] sandstone,[85] salt and saline deposits,[86] and petroleum.[86a]

79 Pacific Coast Marble Co. v. N. P. R. R. Co., 25 L. D. 233; Union Oil Co. (on review), Id. 351.

80 Northern Pac. R. R. Co. v. Soderberg, 99 Fed. 506; S. C., on appeal, 104 Fed. 425, 43 C. C. A. 620; affirmed, 188 U. S. 526, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

81 Tulare Oil Co. v. S. P. R. R. Co., 29 L. D. 269.

82 Schrimpf v. Northern Pac. R. R. Co., Id. 327.

83 Morrill v. Northern Pac. R. R. Co., 30 L. D. 475.

84 Florida Cent. & Penin. R. R. Co., 26 L. D. 600.

85 Beaudette v. N. P. R. R., 29 L. D. 248.

86 Elliott v. Southern Pacific R. R., 35 L. D. 149.

86a Southern Pacific R. R., 41 L. D. 264. The question as to whether petroleum is a mineral and lands containing it are reserved from the operation of the railroad acts is now before the supreme court of the

In the instructions issued to the commissioners appointed under the act providing for the classification of mineral lands within railroad grants in Idaho and Montana, the secretary was not unmindful of the injunction contained in that act, "That all said lands shall be classified as mineral which, by reason of valuable mineral deposits, are open to exploration, occupation, and purchase under the provisions of the United States mining laws."[87] Is this not a legislative declaration that no lands which are subject to entry under those laws shall be patented to a railroad company? We think it is, although we are of the opinion that this was the law prior to the passage of this act.[88]

Undoubtedly lands containing any substance which may be the subject of location under the mining laws according to the modern rules of interpretation would be exempt from the operation of the railroad grants unless such lands were specifically granted, as in the case of coal and iron in grants of sections in place.

In various sections of this work will be found mention of nonmetallic substances which are held to be mineral and subject to location under the mining laws.[89]

United States in the case of Burke v. Southern Pacific R. R., fully discussed in § 161, *post*.

[87] 20 L. D. 351. See Beaudette v. Northern Pac. R. R. Co., 29 L. D. 248; Schrimpf v. Northern Pac. R. R. Co., Id. 327; Morrill v. Northern Pac. R. R. Co., 30 L. D. 475; Northern Pac. R. R. Co. v. Soderberg, 99 Fed. 506, 104 Fed. 425, 43 C. C. A. 620; affirmed in 188 U. S. 526, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

[88] Pacific Coast Marble Co. v. Northern Pac. R. R. Co., 25 L. D. 233; Aldritt v. Northern Pac. R. R. Co., Id. 349; Morrill v. Northern Pac. R. R. Co., 30 L. D. 475; Elliott v. Southern Pacific R. R., 35 L. D. 149. For the construction of the term "mineral lands" under the timber cutting act of 1878, which interpretation is somewhat analogous to the one here under discussion, see United States v. Plowman, 216 U. S. 372, 30 Sup. Ct. Rep. 299, 54 L. ed. 523.

[89] §§ 97, 98, 323, 420, 421 et seq.

§ 159. Test of mineral character of land applied to railroad grants.—We think we are amply justified in here reiterating the doctrine applied by us to the administration of school land grants.

The question whether a given tract of land within the primary or place limits of a railroad grant is mineral, and therefore excepted out of the grant, is to be determined according to the state of the law and the facts as they exist at the time the railroad company applies for its patent. If the mineral character is then established according to the rules announced in section ninety-eight, it does not pass under the grant.

An adjudication by the land department, in a proceeding in which that question is in issue, that lands within the primary limits of a railroad grant were at the date of the grant mineral in character, so long as it stands unimpeached, excepts them from the operation of the grant; and no rights attach thereto under the grant upon a subsequent adjudication by that department in another proceeding that the lands in question are at that time nonmineral.[90]

There may, however, be a retrial as to the correctness of the original adjudication, and in the event it is found that the prior adjudication fixing the status of the land as of the date of the application was erroneous, it may be vacated and title will be held to have vested.[91]

Where a mining location is made within the primary limits of a railroad grant upon lands returned as agricultural and listed under the grant, and hearing is ordered at the instigation of the mineral claimant, the railroad company is entitled to personal notice of the

[90] Central Pacific R. R. v. Rego, 39 L. D. 288.
[91] Oregon & California R. R., 39 L. D. 169.

hearing,—posting and publication not being sufficient.[92]

Where, however, a mineral claimant applies for a patent and proceeds with the posting and publication required by section twenty-three hundred and twenty-five of the Revised Statutes,—the proceeding being characterized as one essentially *in rem*,[93]—such posting and publication are sufficient.[94]

Under existing departmental instructions the local land officers are required to give the railroad grantee prompt and appropriate notice of the filing of every application for mineral patent which embraces any portion of an odd-numbered section of surveyed lands within the primary limits of a railroad grant.[95]

With respect to indemnity selections, the state of the law and the facts as they exist at the time of the selection are alone to be considered. If the lands sought to be selected fall within the rules announced in section ninety-eight of this treatise, they cannot be selected by the railroad company.

These rules apply to all railroad grants to the extent that they remain unadministered. As we shall hereafter see, a patent issued to such companies is conclusive evidence that the lands are nonmineral. Consequently, changed conditions arising after the issuance of patents or final approval of selections cannot affect the title.

While courts do not attempt to determine the mineral character of lands[96] falling within the limits of a railroad grant in advance of the decision of the land

92 McCloud v. Central Pac. R. R. Co., 29 L. D. 27.

93 *Post*, § 713.

94 Northern Pac. R. R. Co. v. Cannon, 54 Fed. 252, 4 C. C. A. 303.

95 Instructions, 33 L. D. 262.

96 *Ante*, § 108.

department upon the subject, they will protect the land from irreparable injury or destruction in a suit by a railroad company prior to such decision by the department.[97]

§ 160. Classification of railroad lands under special laws in Idaho and Montana.—To facilitate the administration of the land grants to the Northern Pacific Railroad, and to provide for a more expeditious method of determining the character of lands within the primary and indemnity limits of this grant in the states of Idaho and Montana, congress, on February 26, 1895, passed an act, entitled "An act to provide for the examination and classification of certain mineral lands in the states of Montana and Idaho."[98]

It established an auxiliary board, consisting of three commissioners for each state, appointed by the president, whose duties were to make examinations in their respective districts, take testimony of witnesses, and generally to investigate the mineral or nonmineral character of the lands within the railroad limits in their respective jurisdictions.

The act made provision for determining protests and controversies relative to the character of lands, the results of all such investigations to be reported through the customary channels to the land department. The action of this board only became final upon the approval of its reports by the secretary of the interior.[99]

It is unnecessary here to detail the particulars of the act. The functions of the board were largely those of

[97] Northern Pac. R. R. Co. v. Soderberg, 86 Fed. 49; S. C., 99 Fed. 506, 188 U. S. 526, 23 Sup. Ct. Rep. 365, 47 L. ed. 575; Northern Pac. R. R. Co. v. Hussey, 61 Fed. 231, 9 C. C. A. 463.

[98] 28 Stats. at Large, p. 683; 6 Fed. Stats. Ann. 451.

[99] Northern Pacific Ry. v. Ledoux, 32 L. D. 24.

referees or "roving commissioners" under the equity practice; and in this aspect it is a mere adjunct of the land department. A mineral return by the commissioners would not prevent the commissioner of the general land office from making such disposition of the land as is proper upon a subsequent showing as to its character,[100] but the classification should be considered as of the same effect as the returns of mineral lands made by the government surveyor.[1]

The act does not contemplate the classification of even sections,[2] and the character of these sections is only considered when the mineral or nonmineral character of the odd sections cannot be otherwise satisfactorily ascertained.[3] The secretary of the interior, shortly after the passage of the act, issued elaborate instructions,[4] prescribing the duties of the commissioners, under which they acted until by later act of congress their duties were transferred to the interior department and are now being performed by the geological survey as hereinafter noted.

The act, however, possesses some general features of more than passing interest. In addition to the definition of the term "mineral lands," referred to in a preceding section,[5] it provides that in determining the character of the lands the commissioners may take into consideration certain conditions which, according to the previous rulings of the department and the courts, have not been considered as elements of controlling weight.

[100] Lynch v. United States, 138 Fed. 535, 543, 71 C. C. A. 59.
[1] Circ. Inst., 25 L. D. 446.
[2] State of Idaho v. Northern Pacific Ry., 37 L. D. 135.
[3] Id., 26 L. D. 684.
[4] 20 L. D. 351.
[5] § 158.

Thus, where mining locations have been made or patents issued for mining ground in any section of land, this shall be taken as *prima facie* evidence that the forty-acre subdivision within which it is located is mineral land.[6] It is further provided that the examination and classification of lands shall be made without reference or regard to any previous examination, report, or classification; that the commissioners shall take into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands *adjacent* thereto, and the *reasonable probabilities* of such land containing valuable mineral deposits because of its formation, location, or character.

These provisions seem wise and beneficent. As the railroad company has no vested right to any particular class of lands, the rules established by the act can work no legal hardship. What is lost to the company in the place limits may be compensated by selections within the indemnity limits. Nor do we think, taking a common-sense view of the situation, that any cause of complaint could be urged by any land grant road to which similar laws might be made applicable, even where there are no provisions for indemnity selections. Judge Sawyer[7] and Judge Hawley[8] have both held that lands *reasonably supposed* to be mineral do not pass to the railroad companies; and the mineral character of a given tract may be reasonably inferred from geological conditions and local environment.

Under an act of congress passed June 25, 1910,[9] an appropriation was made to expedite the classification

[6] Holter v. Northern Pac. R. R. Co., 30 L. D. 442.
[7] Francoeur v. Newhouse, 40 Fed. 618.
[8] Valentine v. Valentine, 47 Fed. 597.
[9] 36 Stats. at Large, p. 739.

of these lands by the land department, such classification when approved by the secretary of the interior to have the same effect as a classification by the commissioners appointed under the original act. A plan has been adopted whereby the geological survey undertakes the work of examination and classification, which work had theretofore been performed by the commissioners. The effect of the later act is to practically substitute the geological survey for the commissioners, which should result in an accurate and scientific classification of the lands.[10]

§ 161. Effect of patents issued to railroad companies.—The general rule applicable to all classes of patents is thus stated by the supreme court of the United States:—

> The land department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation.[11]

> It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land de-

[10] See Circulars and Plan, 39 L. D. 113, 116.

[11] Steel v. St. Louis Smelting Co., 106 U. S. 447, 450, 1 Sup. Ct. Rep. 389, 27 L. ed. 226.

partment and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to those questions is conclusive and not open to relitigation in the courts except in those cases of fraud, etc., which permit any determination to be re-examined.[12]

One of the clearest expositions of this rule is found in a decision of the supreme court of California in the case of Gale v. Best,[13] which we quote as follows:—

The rule is well settled by numerous decisions of the supreme court of the United States that when a law of congress provides for the disposal and patenting of certain public lands upon the ascertainment of certain facts, the proper officers of the land department of the general government have jurisdiction to inquire into and determine those facts; that the issuance of a patent is an official declaration that such facts have been found in favor of the patentee; and that in such a case the patent is conclusive in a court of law, and cannot be attacked collaterally. Of course, if the patent be void upon its face, or if, looking beyond the patent for a law upon which it is based, it is found that there is no law which authorized such a patent under any state of facts or that the particular tract named in the patent has been absolutely reserved from disposal, then the patent would be worthless and assailable from any quarter. For instance, if a certain section or a certain township described by legal subdivisions should be expressly and unconditionally reserved by congress from disposal under any statute, a patent for any part of such tract would be void. But if a

[12] Burfenning v. Chicago St. P. Ry. Co., 163 U. S. 321, 323, 16 Sup. Ct. Rep. 1018, 41 L. ed. 175.

[13] 78 Cal. 235, 237, 12 Am. St. Rep. 44, 20 Pac. 550, 551, 17 Morr. Min. Rep. 186.

large body of public lands be subjected to sale or other disposition under a law which has merely a general reservation of such parts of those lands as may be found to be of a particular character—such as swamp or mineral—then the land department has jurisdiction to determine the character of any part thereof, and a patent is conclusive evidence that such jurisdiction has been exercised. In such a case the patent could be attacked only by a direct proceeding, and by a person who connects himself directly with the title of the government.[14]

There is no judicial dissent from these general principles.[15]

[14] See, also, Dreyfus v. Badger, 108 Cal. 58, 64, 41 Pac. 279, 280; Klauber v. Higgins, 117 Cal. 451, 458, 49 Pac. 466; Saunders v. La Purisima, 125 Cal. 159, 57 Pac. 657, 20 Morr. Min. Rep. 93; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 118, 64 Pac. 113, 115; Paterson v. Ogden, 141 Cal. 43, 74 Pac. 443; Jameson v. James, 155 Cal. 275, 100 Pac. 700, 701; Traphagen v. Kirk, 30 Mont. 562, 77 Pac. 58, 60.

[15] Barden v. Northern Pacific R. R. Co., 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992; French v. Fyan, 93 U. S. 169, 23 L. ed. 812; Johnston v. Towsley, 13 Wall. 72, 20 L. ed. 485; Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848; St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Dahl v. Raunheim, 132 U. S. 260, 10 Sup. Ct. Rep. 74, 33 L. ed. 324, 16 Morr. Min. Rep. 214; Parley's Park S. M. Co. v. Kerr, 130 U. S. 256, 9 Sup. Ct. Rep. 511, 32 L. ed. 906, 17 Morr. Min. Rep. 201; United States v. Winona & St. P. R. R. Co., 67 Fed. 948, 15 C. C. A. 96; Carter v. Thompson, 65 Fed. 329, 18 Morr. Min. Rep. 134; Scott v. Lockey Inv. Co., 60 Fed. 34; United States v. Mackintosh, 85 Fed. 333, 336, 29 C. C. A. 176; Northern Pac. R. R. Co. v. Soderberg, 86 Fed. 49; Mendota Club v. Anderson, 101 Wis. 479, 78 N. W. 185; Rood v. Wallace, 109 Iowa, 5, 79 N. W. 449; United States v. Budd, 144 U. S. 167, 12 Sup. Ct. Rep. 575, 36 L. ed. 388; Peabody G. M. Co. v. Gold Hill M. Co., 111 Fed. 817, 49 C. C. A. 637, 21 Morr. Min. Rep. 591; Garrard v. Silver Peak Mines, 82 Fed. 578, 94 Fed. 983, 36 C. C. A. 603; Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 112 Fed. 4, 50 C. C. A. 79, 21 Morr. Min. Rep. 633, 190 U. S. 301, 23 Sup. Ct. Rep. 692, 47 L. ed. 1064; Potter v. Randolph, 126 Cal. 458, 58 Pac. 905; Traphagen v. Kirk, 30 Mont. 562, 77 Pac. 58. See, also, King v. Thomas, 6 Mont. 409, 12 Pac. 865; Manning v. San Jacinto Tin Co., 7 Saw. 419, 9 Fed. 726; Butte and B. M. Co. v. Sloan, 16 Mont. 97,

In other portions of this treatise we have considered these general rules and their application to other classes of patents.[16]

The present inquiry is as to whether there is anything in the nature of the railroad grants, the acts creating them, or the prescribed administrative methods by which patents are obtained which differentiates this class of patents from others or which requires the application of different rules as to the conclusive effect of such patents or the manner in which they may be assailed. This inquiry, considering the scope of this treatise, is limited to controversies arising between railroad patentees, or their grantees and claimants under the mining laws.

The earliest as well as the latest conflicts between mining claimants and the holders of railroad titles arose in the state of California under the grants to the Central and Southern Pacific companies. The decisions of the courts of this state are, therefore, instructive, as affording the basis of discussion and comparison with the views of courts of other jurisdictions.

In McLaughlin v. Powell [17] the grantee under a railroad patent issued in 1870 brought ejectment against a mining claimant. The patent excluded and excepted "all mineral lands should any be found to exist." The defendant proffered proof that he had held the land as a mining claim since 1866 under the rules, regulations and customs of miners. The court below refused to permit the evidence to be introduced and plaintiff had judgment. The supreme court reversed

40 Pac. 217; Ah Yew v. Choate, 24 Cal. 562 (state patent); Poire v. Wells, 6 Colo. 406; Meyendorf v. Frohner, 3 Mont. 282; Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57, 22 Morr. Min. Rep. 575; Northern Pacific Ry., 32 L. D. 342; Southern Development Co. v. Endersen, 200 Fed. 272.

16 §§ 80, 175, 177, 208, 777, 778, 781.

17 50 Cal. 64, 68.

the judgment, resting its decision on the exception contained in the patent. Said the court:

> The exception contained in the patent, introduced by the plaintiff, is part of the description, and is equivalent to an exception of all the subdivisions of land mentioned, which were "mineral" lands. In other words, the patent grants all of the tracts named in it which are not mineral lands. If all are mineral lands, it may be that the exception is void; but the fact cannot be assumed as by its terms the exception is limited to such as are mineral lands, and does not necessarily extend to all the tracts granted.

This rule was applied and followed by the same court in Chicago Quartz M. Co. v. Oliver [18] upon a parallel state of facts.

The effect of the exception inserted in these patents was considered by the United States circuit court of California in the case of Cowell v. Lammers,[19] wherein the mining claimant's rights did not originate until after the issuance of the railroad patent. The facts, therefore, differed essentially from those in the McLaughlin-Powell and the Chicago Q. M.–Oliver case, in that the mineral locations were subsequent in point of time to the issuance of the patent.

The circuit court held that the exception was unauthorized and void, that there was no more justification for incorporating it into a railroad patent than there was for inserting it in homestead and pre-emption patents. The court further held that the issuance of the patent to the railroad company was a conclusive determination that the lands were nonmineral and that the patent was not subject to collateral attack.

The legal effect of this exception was mooted and the decision in Cowell v. Lammers characterized by

[18] 75 Cal. 194, 7 Am. St. Rep. 143, 16 Pac. 780, 781.
[19] 21 Fed. 200, 10 Saw. 246.

the supreme court of California as being one of great force and ability in the case of Gale v. Best.[20]

The facts of this case were similar to those in Cowell v. Lammers, the mining claimant asserting rights junior to the date of the patent. The patent in the Gale-Best case, however, contained no clauses of exception or reservation, and the decision therefore holding that the patent was not open to collateral attack, was held not to disturb the doctrine of the earlier California cases of McLaughlin v. Powell and Chicago Q. M. Co. v. Oliver.

Tracing the subsequent judicial comments or rulings as to the effect of the excepting clause in these patents, we find that the United States circuit court for the southern district of California has held the reservation void,[21] holding that a junior mining claimant cannot collaterally assail a patent issued to a railroad company. Secretary of the Interior Hitchcock, in a somewhat elaborate discussion and review of authorities, reached the same conclusion as to the invalidity of the excepting clause and for a time patents were issued without reservation or exception.[22]

Subsequently, acting under the advice of the attorney-general, the department returned to the original practice of inserting the excepting clause, and the rule was adopted that until a final decision by the supreme court of the United States in the Burke case, hereinafter discussed, all railroad patents thereafter issued should contain such a clause.[23]

20 78 Cal. 235, 12 Am. St. Rep. 44, 20 Pac. 550, 17 Morr. Min. Rep. 186. See, also, Paterson v. Ogden, 141 Cal. 43, 45, 99 Am. St. Rep. 31, 74 Pac. 443.

21 Roberts v. Southern Pac. R. R., 186 Fed. 934.

22 Northern Pacific Ry., 32 L. D. 342.

23 Attorney-General to Secretary of Interior, March 18, 1911, March 29, 1911; Secretary of Interior to Commissioner of General Land Office,

The United States circuit court for the district of Oregon holds that a similar exception in a wagon road grant is valid on the ground that its insertion

> manifests an unmistakable intention on the part of the government not to convey mineral lands, and repels any inference that the department adjudicated or intended to adjudicate that no part of the land described in the patent was mineral.[24]

In the case of Van Ness v. Rooney[25] the validity of this exception is upheld and relied upon to support the right of a senior mining locator to quiet his title as against the later railroad patent. It is conceded in this case that the patent could not be assailed by a junior mining locator.

This ruling of the supreme court of California does not seem to accord in principle with some of its decisions dealing with certain other classes of patents, except in so far as the decision rests on the exception in the patent.

For example, it has held that a homestead patent cannot be assailed on the ground that the land was within a townsite,[26] or that it was mineral and held under a location prior to the issuance of the agricultural patent.[27] Even a state patent for a sixteenth or a thirty-sixth section cannot be assailed on the ground that the land was mineral in character at the date of the survey, and was then held under mining locations.[28]

April 22, 1911; Secretary of Interior to Attorney-General, January 30, 1912—all unreported.

[24] Eastern Oregon Land Co. v. Willow River L. & Irr. Co., 187 Fed. 466, 468.

[25] 160 Cal. 131, 116 Pac. 392.

[26] Irvine v. Tarbat, 105 Cal. 237, 38 Pac. 896.

[27] Paterson v. Ogden, 141 Cal. 43, 99 Am. St. Rep. 31, 74 Pac. 443; Jameson v. James, 155 Cal. 275, 100 Pac. 700.

[28] Worcester v. Kitts, 8 Cal. App. 181, 96 Pac. 335, and cases cited.

It is manifest that the California decisions differentiate the rule in the railroad cases, by applying the test to the language of the patent. If the *patent* contains the exception, it may be collaterally attacked. If it does not, no such attack is permissible, and this although the patents are all issued under the same law, which law must be the measure of title granted.

> . . . . The officers of the land department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion, they could limit or enlarge their effect without warrant of law.[29]

The language of the supreme court of the United States in Shaw v. Kellogg [30] is quite pertinent. Speaking of the power and duty of the land department in administering the land laws, the court said:

> We are of the opinion that the insertion of any such stipulation and limitation was beyond the power of the land department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of congress. It could not deal with land as an owner and prescribe the conditions on which title might be transferred. It was agent and not principal.

It seems obvious that if the law itself reserved out of a grant a specific thing susceptible of identification, e. g., "known mines" in the pre-emption laws [31] and "lodes known to exist" in the placer laws,[32] and the

[29] Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238.

[30] 170 U. S. 312, 337, 18 Sup. Ct. Rep. 632, 42 L. ed. 1050.

[31] *Post*, § 209.

[32] *Post*, § 781.

patent issued under the law failed to make the reservation in terms, the thing reserved by the law would not pass by the patent. *A fortiori*, when the law itself makes no such reservation, the insertion of clauses of exception in the patent would seem to be unauthorized, and this on the principles enunciated in Davis v. Weibbold and Shaw v. Kellogg, *supra*.

The discovery in recent years of oil in the Central California valleys in the heart of territory over which the grant of alternate sections to the Southern Pacific Railroad extended,[33] giving the appearance of a checker-board when platted on the map of the region, has brought into the courts acute controversies between holders of the railroad title and claimants under the placer laws locating lands within patented railroad sections for oil, and a vigorous attack on the railroad title is being prosecuted in the courts. In the case of Roberts v. Southern Pacific R. R.[34] a locator initiating a location some fifteen years after the railroad patent issued attempted to collaterally attack the patent, resting his claim upon the excepting clause in that instrument. A demurrer to the bill was sustained and the action dismissed, the court applying to the railroad patent in question the general rules applicable to all classes of patents hereinabove stated. No appeal appears to have been taken, but in the case of Burke v. Southern Pacific Railroad Company—a somewhat similar case wherein a similar ruling had been made—an appeal was taken to the circuit court of appeals, ninth circuit. That court, being unable to agree upon a decision, certified the case to the supreme court of the United States. A brief outline of the facts and

[33] Under the act of July 27, 1866, 14 Stats. at Large, 567; Joint Resolution of Congress, June 28, 1870, 16 Stats. at Large, 382.

[34] 186 Fed. 934.

contention is worth while in the light of the importance of the questions raised. Such outline is also essential to a correct appreciation of the questions certified by the court of appeals.

The land in controversy was patented to the railroad company July 10, 1894. At the time the suit was commenced it was leased by the railroad company to the Kern Trading and Oil Company, alleged to be dominated, controlled and owned by the lessor. The amended bill of complaint alleged among other things the following:—

1. That the lands in question were known mineral lands and subject to location as such since January 1, 1865, and that they are now mineral lands of great value containing minerals in commercial quantities.

2. That the railroad company, its officers and agents, at all such times knew the mineral character of the land.

3. That prior to May 9, 1892, all of said lands were covered by valid subsisting mining locations and remained so covered at the time the patents issued, and, therefore, at the time of the issuance of the railroad patent the lands were not public lands and were not the property of the United States. The mining locations had been recorded in the mining district and the railroad company had knowledge of this fact.

4. That on May 9, 1892, the railroad company falsely and corruptly caused its land agent to make a false, fraudulent and corrupt affidavit and application for patent, wherein he falsely made oath that said lands "are vacant, unappropriated and are not interdicted mineral or reserved lands and are of the character contemplated by the grant." Thereafter the patent in question was issued containing the reservation of "all mineral lands should any be found in the tracts aforesaid."

5. That the railroad company assented to all the terms and conditions of the act of congress of July 27, 1866, and the joint resolution of congress June 28, 1870, and agreed for itself, its assigns and successors, that they should recognize, respect and be held by the reservation, exception and exclusion of all mineral lands contained in said grant, and that such exclusive exception and reservation did not convey to said railroad company the lands in controversy, and that said exception, exclusion and reservation was a term of description which was accepted by the railroad company at the time the patent was issued.

6. That prior to the issuance of the patent the lands had been examined by the interior department through the geological department and determined to be mineral lands.

7. That there was no physical occupation of the premises by anyone.

8. That no notice was given to the mining locators of the application of the railroad company for patent, that no notice of any hearing was given, nor was any hearing as to the character of the land had, and that said patent issued without any determination as to the character of the land, said patent reserving the determination of the quality of said lands for the subsequent consideration of a court of equity.

9. That the mining locations subsisting at the time the patent was issued were abandoned prior to March 2, 1909, upon which date the plaintiff and those associated with him relocated the lands under the placer laws after making discovery and otherwise complying with the mining laws.

The relief prayed for was that title to the mining claims be quieted as against the railroad patent.

It may here be noted that there was no allegation in the bill that the mining claims were pending of record in the general land office at the time the patent issued, so as to bring the case within the ruling of the

supreme court of the United States in Northern Pacific R. R. v. Sanders.[35]

A demurrer to the bill having been sustained and the bill having been ordered dismissed by the court below following the decision in Roberts v. Southern Pacific R. R., *supra,* an appeal was taken, whereupon the appellate court certified to the supreme court the following questions:

1. Did the said grant to the Southern Pacific Company include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894? [36]

2. Does a patent to a railroad company under a grant which excluded mineral lands as in the present case, but which is issued without any investigation upon the part of the officers of the land department or of the department of the interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral? [37]

[35] 166 U. S. 620, 17 Sup. Ct. Rep. 671, 41 L. ed. 1139, heretofore discussed in § 154. The language of the act of July 27, 1866, 14 Stats. at Large, 567, and Joint Resolution of June 28, 1870, 16 Stats. at Large, 382, as to character of "claims" reserved, is substantially the same as in the grant to the Northern Pacific, July 2, 1864, 13 Stats. at Large, 365, and the Joint Resolution of January 30, 1865, 13 Stats. at Large, 567.

[36] The supreme court of Oregon has answered this question in the negative. Loney et al. v. Scott, 57 Or. 378, 112 Pac. 172, 174.

[37] The supreme court of Arizona would probably answer this question in the negative. This court seems to have reached the conclusion that the conclusiveness of a patent depends on the fact as to whether or no the question of the character of the land had been litigated before the land department. Old Dominion Copper Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333. If it had been litigated the patent is conclusive; otherwise not. Of course, evidence of the antecedent litigation does not appear upon the face of the patent, and evidence *aliunde* is necessary according to the Arizona view.

3. Is the reservation and exception contained in the patent to the Southern Pacific Company void and of no effect?[38]

4. If the reservation of mineral land as expressed in the patent is void, then is the patent upon a collateral attack a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?[38a]

5. Is petroleum or mineral oil within the meaning of the term "mineral" as it was used in said acts of congress reserving mineral land from the railroad land grants?[39]

6. Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill?

7. If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Company, and under an understanding and agreement between it and the officers of the interior department, that said clause should be effec-

[38] The United States district court of Oregon would undoubtedly answer this in the negative. Eastern Oregon Land Co. v. Willow River L. & Irr. Co., 187 Fed. 466, 468.

The supreme court of California has decided to the same effect. McLaughlin v. Powell, 50 Cal. 64; Chicago Quartz M. Co. v. Oliver, 75 Cal. 194, 7 Am. St. Rep. 143, 16 Pac. 780; Van Ness v. Rooney, 160 Cal. 131, 116 Pac. 392. The United States circuit courts in California hold the reservation void. Cowell v. Lammus, 21 Fed. 200, 10 Saw. 246; Roberts v. Southern Pac. R. R., 186 Fed. 934.

[38a] An interesting discussion of immunity of patents and certification from attack on the question of the character of the land is found, and many of the leading cases reviewed by Judge Farrington, United States district judge of Nevada, in Southern Development Co. v. Endersen, 200 Fed. 272.

[39] The land department holds that it is. Southern Pacific R. R. Co., 41 L. D. 264. This question is discussed *ante*, § 158. As to mineral character of petroleum generally, see *ante*, § 93; *post*, § 422.

tive to keep in the United States title to such of the land described in the patent as was, in fact, mineral, are the defendants, Southern Pacific Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

With these questions pending before the supreme court of the United States, the author, holding a brief for neither party, is not called upon to make further comment except to restate his position as taken in previous editions of this work published at a time when the existence of oil deposits in the locality involved in the Burke case had not been made known. Briefly, the author's previously expressed views are as follows:

A railroad patent is not open to collateral attack any more than a homestead pre-emption, desert land, or any other kind of a patent. The rules applicable to patents generally apply with equal force to railroad patents. If such an attack may be made on a railroad patent, it may be made on all land patents, and there is an end to the security of titles resting on United States patents.

If mineral lands have been patented under railroad or homestead laws, and were known to be mineral prior to final entry and certification, such patents may be vacated by the United States.[40] But private individuals asserting rights arising subsequent to the issuance of the patent cannot impeach that instrument. The

[40] Western Pacific R. Co. v. United States, 108 U. S. 510, 2 Sup. Ct. Rep. 802, 27 L. ed. 806; McLaughlin v. United States, 107 U. S. 526, 528, 2 Sup. Ct. Rep. 802, 27 L. ed. 806; Mullan v. United States, 118 U. S. 271, 278, 6 Sup. Ct. Rep. 1041, 30 L. ed. 170; United States v. Mullan, 7 Saw. 466, 10 Fed. 785, 790; United States v. Reed, 12 Saw. 99, 28 Fed. 482, 485; United States v. Culver, 52 Fed. 81, 83; Finn v. Hoyt, Id. 83, 85; United States v. Central Pac. R. R. Co., 84 Fed. 218, 219, 93 Fed. 871; Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 39; Gold Hill Q. M. Co. v. Ish, 5 Or. 104.

lands are not held in trust by the patentee for the benefit of subsequent mineral locators.[40a]

If the rule were otherwise, to quote from Judge Farrington's decision in Southern Development Co. v. Endersen,[40b]—

> A title which to-day is valuable because the land is apparently nonmineral, to-morrow may become utterly void and worthless by reason of the discovery of mineral. Methods of extraction and reduction may be devised of such cheapness and efficiency as to render mining highly profitable on lands which at the date of selection and listing[40c] had and could have had no value for mineral purposes. The courts have never yielded to the argument that congress intended to provide for titles so elusive.

In a suit by the United States to vacate a patent issued under a railroad grant on the ground that the land was, at the date of its issuance, mineral, the burden rests on the complainant to overcome the presumption in favor of the patent by satisfactory proof, not only that the land was known mineral land at the time the patent was issued, but that it is chiefly valuable for mineral purposes.[41] Evidence that gold placer mining had formerly been carried on in a stream on the tract, but that it had been abandoned as worked out prior to the date of the patent, and neither at that time nor since had there been any mines on the land producing mineral and capable of being worked at a profit, is in-

[40a] Southern Development Co. v. Endersen, 200 Fed. 272, 284.

[40b] 200 Fed. 272, 275.

[40c] In this case selection and listing was the only method provided for the passing of title. As stated by the court, the certification of approved selections performed the functions of a patent.

[41] This is the rule approved in defining "mineral land" as that term is employed in the timber-cutting act following the definition in Davis v. Weibbold. United States v. Plowman, 216 U. S. 372, 373, 30 Sup. Ct. Rep. 299, 54 L. ed. 523.

sufficient, as is also evidence of the mineral character of adjoining land.[42]

§ 162. Conclusions.—Upon the present state of judicial decision we think we are authorized to deduce the following general conclusions:—

(1) That lands embraced within the primary or place limits of a railroad grant, whose mineral character is known or established at any time prior to the issuance of a patent, are not patentable to the railroad company, and are excepted out of the grant.

(2) Lands mineral in character within the indemnity limits of any railroad grant, where indemnity selections are authorized by the act, cannot be selected in lieu of lands lost to the company within the place limits.

(3) Whether a given tract within either the primary or indemnity limits is mineral or not must be determined according to the state of the law and facts as they exist at the time patent is applied for or application to select is made, unless the act under which the grant is claimed specifies a different period (as, for example, the date of survey).[43] Until patent is issued or selections are finally approved, the land department retains jurisdiction to pass upon the character of the land; and its judgment, culminating in the issuance

[42] United States v. Central Pac. R. R. Co., 93 Fed. 871. At the time this edition goes to press there are pending in the federal courts in California numerous suits brought by the government to vacate and set aside patents theretofore issued to the railroad companies, the lands involved lying within the oil belt of that state, and now known to contain petroleum in paying quantities. As to the right of the government to attack these patents in a direct proceeding, on the ground of fraud, there can be no question. As to the period of time within which such suits may be brought, see *post*, § 784.

[43] Bedal v. St. Paul, M. & M. Ry. Co., 29 L. D. 254.

of a patent or final approval of a selection, is conclusive, and not open to collateral attack.

(4) The term "mineral land," as used in the excepting clauses of railroad grants, includes all valuable deposits, metallic and nonmetallic, which are or may be subject to entry under the mining laws, except coal and iron, where these substances are excepted out of the mineral reservation.[44]

(5) Mineral lands within either the primary or indemnity limits of railroad grants, prior to patent or certification, belong to the public domain, and are open to exploration and purchase under the mining laws, the same as any other public mineral lands.

ARTICLE V. TOWNSITES.

[44] Northern Pac. Ry. Co. v. Soderberg, 99 Fed. 506, 188 U. S. 526, 529, 23 Sup. Ct. Rep. 365, 47 L. ed. 575.

§ 166. Laws regulating the entry of townsites.— The laws of the United States providing for the reservation and sale of townsites on the public lands are found in title thirty-two, chapter eight, of the Revised Statutes, sections twenty-three hundred and eighty to twenty-three hundred and ninety, supplemented by section sixteen of the act of March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes."[45]

These laws provide three methods of acquiring title to town property on the public domain:—

(1) Where the president of the United States has directed the reservation provided for by section twenty-three hundred and eighty of the Revised Statutes;

(2) In cases where towns have already been established, or parties desire to found a town under the provisions of section twenty-three hundred and eighty-two;

(3) Under section twenty-three hundred and eighty-seven, by the terms of which the entry of land settled and occupied as a townsite may be made by the corporate authorities if the town be incorporated, or, if un-

[45] 26 Stats. at Large, p. 1095; Comp. Stats. 1901, p. 1535; 6 Fed. Stats. Ann. 494. See, also, Circular Instructions relating to "Townsites, Parks and Cemeteries," approved August 7, 1909. 38 L. D. 92. For former regulations, see 5 L. D. 265, and 32 L. D. 156. For instructions relative to "Townsites on Public Lands in Alaska," see Circular of General Land Office of August 1, 1904.

incorporated, by the county judge (or the judicial officer performing his functions), for the use and benefit of the several occupants.

We have no particular concern with townsites falling within sections twenty-three hundred and eighty or twenty-three hundred and eighty-two.

Section twenty-three hundred and eighty-seven is but a restatement or codification of the law as it existed at the time of the revision.[46]

It is under this section and the acts from which it was framed that most of the flourishing towns of the west have applied for and received patents, and it is the only one of the three methods of acquiring title to town property on the public lands which requires particular consideration at our hands,[47] although the principles of law discussed apply to all classes of townsites, by whatsoever method they are sought to be acquired.

Section twenty-three hundred and eighty-seven of the Revised Statutes is as follows:—

> Whenever any portion of the public lands have been or may be settled upon and occupied as a townsite, not subject to entry under the agricultural preemption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as

[46] Act of March 2, 1867, 14 Stats. at Large, p. 541; Act of June 8, 1868, 15 Stats. at Large, p. 67.

[47] Public Domain, pp. 298, 299.

may be prescribed by the legislative authority of the state or territory in which the same may be situated.

This section is applicable only where the land applied for as a townsite is the subject of actual urban settlement, occupancy and use, and mere speculative promoters cannot, in advance of such settlement and use, take advantage of its provisions.[48]

The townsite acts and the chapter of the Revised Statutes into which their provisions are incorporated contain certain restrictions and limitations upon the subject of mineral lands, which are necessary to be considered for the purpose of obtaining a proper understanding of the adjudicated cases, and to enable us to draw correct conclusions as to the rules of interpretation to be applied. These restrictions and limitations are as follows:—

Section twenty-three hundred and eighty-six of the Revised Statutes provides that,—

> . . . . where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in the possessors for mining purposes as against the United States.

This is but a re-enactment of the proviso contained in the act of March 3, 1865,[49] and, of course, its original enactment antedates all legislation of congress, granting in express terms the right to explore and acquire by location any class of public mineral lands. Since the original act was passed, congress, by its leg-

[48] Townsite of Cement, 36 L. D. 85.

[49] 13 Stats. at Large, p. 530; Comp. Stats. 1901, p. 1457; 6 Fed. Stats. Ann. 344.

islation, has given to valid mining locations the *status* of legal estates. As the law now stands, no possession of public mineral lands can be lawfully recognized by local authority which possession is not acquired and held under the sanction of the general mining laws. So far as an intelligent interpretation of the townsite laws is sought, under existing conditions, section twenty-three hundred and eighty-six performs but little, if any, function beyond that of an historical landmark or a link in the chain of evolution.

The act of March 2, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon public lands," contained the following provision:—

> No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar, or copper.[50]

At the time this act was passed, the first mining act of July 26, 1866, was in full force, which declared that the mineral lands of the public domain should thereafter be free and open to exploration and occupation, and provided for the acquisition of title to veins, or lodes, of quartz or other rock in place bearing gold, silver, cinnabar, and copper. It is obvious that the townsite act of 1867 was framed in the light of the first mining act. The act of June 8, 1868, added to the above-quoted provisions of the act of March 2, 1867, the following clause:—

> . . . . or to any valid mining claim or possession held under existing laws.[51]

The foregoing provisions of the two acts were united and incorporated into the Revised Statutes,

[50] 14 Stats. at Large, p. 541; Comp. Stats. 1901, p. 1457; 6 Fed. Stats. Ann. 344.

[51] 15 Stats. at Large, p. 67; Comp. Stats. 1901, p. 1460; 6 Fed. Stats. Ann. 353.

and are embodied in section twenty-three hundred and ninety-two of the chapter relating to townsites, which now reads as follows:—

> Sec. 2392. No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws.

It may be noted that the mining act of May 10, 1872, which was in force when the Revised Statutes went into effect, covered claims for lands bearing gold, silver, cinnabar, *lead*, *tin*, copper, *or other valuable deposits*, the words in italics not appearing in either the act of 1866 or the townsite laws.

As thus outlined, these laws stood, and were construed and interpreted by the highest courts in the land, and a fair understanding of their provisions was about being reached, when congress, by a provision inserted in the "Act to repeal the timber-culture laws, and for other purposes," passed March 3, 1891 (principally *for other purposes*),[52] injected some new elements into the townsite laws which thus far have not received any extended consideration by the courts. The provisions referred to are found in section sixteen of the act in question, and are as follows:—

> Sec. 16. That townsite entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the

[52] 26 Stats. at Large, p. 1095; Comp. Stats. 1901, p. 1535; 6 Fed. Stats. Ann. 494.

United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof; and when entry has been made or patent issued for such townsites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein and the surface ground appertaining thereto; *provided*, that no entry shall be made by such mineral vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral vein applicant.

To what extent this act is an innovation upon the system theretofore existing, and how far the rules of law theretofore established by the current of judicial authority are strengthened, weakened, or have become obsolete, will be noted as we proceed.

It appears, however, that the act is limited in its application to incorporated cities or towns, and its provisions do not apply to cases of townsite entries made by the county judge or the judicial officer performing his functions for the use and benefit of the occupants, or entries made by trustees appointed by the secretary of the interior.[53] In enumerating the minerals, the act adds *lead* to the category, as found in section twenty-three hundred and ninety-two of the Revised Statutes.

§ 167. Rules of interpretation applied to townsite laws.—It is not to be inferred from the caption to this section that in construing the townsite laws we are authorized or required to invoke any rules of interpretation peculiar to this branch of the public land laws. We are called upon simply to apply general rules, and note the instances where special application

[53] Lalande v. Townsite of Saltese, 32 L. D. 211.

of these rules to the laws under consideration has been made by the courts.

The townsite laws, as they now exist, consist simply of a chronological arrangement of past legislation, an aggregation of fragments, a sort of "crazy quilt," in the sense that they lack harmonious blending. This may be said truthfully of the general body of the mining laws.[54] The rules adopted for the interpretation of the one apply with equal force to the other.

We have endeavored to formulate these rules in a preceding section.[55] We may supplement these with another rule specially applicable; *i. e.*, the townsite laws are to be read and construed in connection with all the existing legislation of congress regulating the sale and disposal of the public lands—that is, these laws are to be considered with all other laws which are essentially *in pari materia.*

§ 168. Occupancy of public mineral lands for purposes of trade or business.—Important mineral discoveries in new quarters, however remote from civilized centers, are invariably followed by a large influx of population. The advance guard sets its stakes upon the most convenient spot, erects tents, or constructs primitive habitations, which form the nucleus of the future town. As was said by Judge Field, speaking for the supreme court of the United States,—

> Some of the most valuable mines in the country are within the limits of incorporated cities which have grown up on what was, on its first settlement, part of the public domain; and many of such mines were located and patented after a regular munici-

[54] This expression of opinion by the author has since met with the approval of the United States supreme court. Clipper M. Co. v. Eli M. Co., 194 U. S. 220, 234, 24 Sup. Ct. Rep. 632, 48 L. ed. 944.

[55] *Ante,* § 96.

pal government had been established. Such is the case with some of the famous mines of Virginia City, in Nevada. Indeed, the discovery of a rich mine in any quarter is usually followed by a large settlement in its immediate neighborhood, and the consequent organization of some form of local government for the protection of its members. Exploration in the vicinity for other mines is pushed in such case by newcomers with vigor, and is often rewarded with the discovery of valuable claims.[56]

That conflicts should arise between mineral claimants and occupants of lands for purposes of business and trade in the newly discovered mineral regions is but natural. Frequently these controversies are of an aggravated nature, and resort to force is a matter of common occurrence, particularly so before the organization of any form of local government. But eventually the more important ones found their way into the courts, whose decisions have resulted in establishing certain definite rules of law, governing the respective rights of the miner and the merchant within the limits of the settlement. These limits are not always well defined. Until application is made to enter and purchase the townsite, the exact area which may properly be considered as within the site of the future town may be limited by the extent of actual occupancy. In some instances, some enterprising individual surveys a tract of land into lots and blocks, streets and alleys, thus giving a semblance to a claim within the exterior limits of the survey. When such town is incorporated, the territorial limits over which municipal jurisdiction is asserted are, of course, defined by the act of incorporation. When application is made to enter the townsite

[56] Steel v. St. Louis Smelting Co., 106 U. S. 447, 449, 1 Sup. Ct. Rep. 389, 27 L. ed. 226; Deffeback v. Hawke, 115 U. S. 392, 406, 6 Sup. Ct. Rep. 95, 29 L. ed. 423.

by the town authorities, if incorporated, or by the county judge, if unincorporated, the area which may be thus entered will depend upon the number of inhabitants, the maximum area allowed being twenty-five hundred and sixty acres.[57]

It frequently happens that a large portion of this area, as finally entered and patented, is unoccupied, and remains so indefinitely. We are called upon to determine the respective rights of the two classes of claimants within the asserted limits of the townsite, both before and after patents are issued to one or the other.

§ 169. **Rights of mining locator upon unoccupied lands within unpatented townsite limits.**—It is hardly necessary to state that the owner of a valid and subsisting mining location which had its inception at a time prior to any occupancy within the surface limits of his claim, for purposes of trade or business, cannot be deprived of any of his rights flowing from such location by settlement thereon of later arrivals desiring to engage in commercial traffic or to assist in the founding of a city. As to such locator the land embraced within the mining location is just as much withdrawn from the public domain as the fee is by a valid grant from the United States under authority.[58] Such location is a grant from the government [59] to the locator

[57] Rev. Stats., § 2389; Comp. Stats. 1901, p. 1458; 6 Fed. Stats. Ann. 350.

[58] Silver Bow M. & M. Co. v. Clark, 5 Mont. 406, 5 Pac. 570.

[59] Butte City Smokehouse Lode Cases, 6 Mont. 397, 12 Pac. 858; Belk v. Meagher, 104 U. S. 284, 26 L. ed. 737, 1 Morr. Min. Rep. 510; Gwillim v. Donnellan, 115 U. S. 45, 49, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482. See, also, Noyes v. Mantle, 127 U. S. 348, 8 Sup. Ct. Rep. 1132, 32 L. ed. 168, 15 Morr. Min. Rep. 611; Teller v. United States, 113 Fed. 273, 51 C. C. A. 230; Stratton v. Gold Sovereign M. &

and his grantees.[59a]

There is no room for a further grant; for the government would have nothing to convey.[60]

That the mining location is within the claimed or actual limits of the unpatented townsite is therefore of no moment. As was said by the supreme court of the United States,—

> To such claims, though within the limits of what may be termed the site of the settlement or new town, the miner acquires as good a right as though his discovery was in a wilderness.[61]

§ 170. Prior occupancy of public mineral lands within unpatented townsites for purposes of trade, as affecting the appropriation of such lands under the mining laws—The rule prior to the passage of the act of March 3, 1891.—In discussing the effect of a prior occupancy of public mineral lands for townsite purposes, upon the right of subsequent appropriation under the mining laws, it is our purpose to first arrive at a correct understanding, if it be possible, of the state of the law as it existed prior to the passage of the act of March 3, 1891. This will enable us to consider "the old law, the mischief, and the remedy" in logical order.

T. Co., 1 Leg. Adv. 350; Peoria & Colo. M. & M. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915; Nash v. McNamara, 30 Nev. 114, 133 Am. St. Rep. 694, 16 L. R. A., N. S., 168, 93 Pac. 405; Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. Rep. 681, 52 L. ed. 994, 16 L. R. A., N. S., 162. See *post*, § 322.

59a Of course laches and delay in asserting a right based on such a location or the abandonment of the location by the locator or his grantees may preclude the successful assertion of a mineral title of this character. See a further discussion of this situation in § 177, *post*.

60 Silver Bow M. & M. Co. v. Clark, 5 Mont. 406, 5 Pac. 570.

61 Steel v. St. Louis Smelting Co., 106 U. S. 447, 449, 1 Sup. Ct. Rep. 389, 27 L. ed. 226; Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29 L. ed. 423.

In a subsequent article,[62] we have endeavored to state the law, generally, with reference to the right of mere occupants of public lands without color of title, as against one seeking to appropriate such lands under the mining laws. Much that is there said will apply to the subject presently under consideration, and need not be here repeated. We deem it sufficient for our present purpose to deal with those cases wherein the courts have had under consideration controversies between mining claimants and prior occupants for the purposes of trade or business—*i. e.*, under the townsite laws.

In reviewing the decisions of the supreme court of the United States upon this and kindred subjects, we meet with apparent contradictions, rendering it difficult to reach satisfactory conclusions. Language employed in one decision, construed literally, cannot be harmonized with expressions found in another. One case does not necessarily overrule the other, as the ultimate results reached are consistent; but an analysis of the reasoning employed and the terms used in reference to the question now being considered have a tendency to raise different inferences in different cases.[63]

In none of the reported cases, other than those decided by the land department, do we find the question presented between the two classes of claimants unaided by presumptions flowing from a patent.

In all such cases coming under our observation an attempt has been made to collaterally assail a federal patent, issued to either the townsite or the mineral

[62] *Post*, art. x, §§ 216–219.

[63] A similar opinion with reference to decisions of the supreme court of the United States involving contests between agricultural and mineral claimants has been voiced in the case of Old Dominion Copper M. Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333, 339.

claimant. In some instances both classes of claimants possessed patents. In all of these cases the operative force of the patent as a judgment, and its conclusiveness against collateral attack, have rendered the consideration of conditions existing prior to its issuance to a large extent unnecessary. With these preliminary suggestions, we proceed to examine the decisions.

The supreme court of the United States has made use of the following language:—

> Land embraced within a townsite on the public domain, when *unoccupied*, is not exempt from location and sale for mining purposes. Its exemption is only from settlement and sale under the pre-emption laws of the United States. . . . . The acts of congress relating to townsites recognize the possession of mining claims within their limits, and forbid the acquisition of any mine of gold, silver, cinnabar, or copper within them under proceedings by which title to other lands there situated are secured, thus leaving the mineral deposits within the townsites open to exploration, and the land in which they are found to occupation and purchase in the same manner as such deposits are elsewhere explored and possessed and the lands containing them are acquired. Whenever, therefore, mines are found in lands belonging to the United States, whether within or without townsites, they may be claimed and worked, provided existing *rights of others from prior occupation* are not interfered with.[64]

The italics employed in the excerpt are ours. Literally construed, it would appear that the supreme court had in mind all classes of occupancy of the public lands, thus giving sanction to the rule that occupancy for trade or business purposes on lands confessedly mineral prevents their appropriation under the mining

[64] Steel v. St. Louis Smelting Co., 106 U. S. 447, 449, 1 Sup. Ct. Rep. 389, 27 L. ed. 226.

laws, although such appropriation might be effected without force or violence.[65]

In the case of Davis v. Weibbold, the same court, referring to its language used in Steel v. Smelting Company, says:—

> It was in reference to mines in *unoccupied* public lands in unpatented townsites that the language was used; and to them, and to mines in public lands in patented townsites outside of the limits of the patent, it is only applicable.[66]

This seems to strengthen the inference that prior occupancy for townsite purposes, although upon land confessedly mineral, withdraws it from appropriation under the mining laws.

In the same case, the court, referring to the case of Deffeback v. Hawke,[67] thus states its views:—

> In Deffeback v. Hawke, the mining patentee's rights antedated those of the occupants under the townsite law, and wherever such is the case his rights will be enforced against the pretensions of the townsite holder; but where the latter has acquired his rights in advance of the discovery of any mines, and the initiation of proceedings for the acquisition of their title or possession, his rights will be deemed superior to those of the mining claimant.[68]

When we consider the circumstances surrounding the Deffeback-Hawke case (hereafter more fully discussed), where there were two patents issued,—one to the mining claimant, and one to the townsite, the

[65] The land department, however, cites this case as authority for the rule that the occupancy of land by townsite settlers is no bar to its entry under the mining laws, provided the land is mineral, and belongs to the United States. In re Rankin, 7 L. D. 411.

[66] 139 U. S. 507, 529, 11 Sup. Ct. Rep. 628, 35 L. ed. 238.

[67] 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29 L. ed. 423.

[68] 139 U. S. 526, 11 Sup. Ct. Rep. 628, 35 L. ed. 245.

former by relation to the certificate of purchase being the senior,—and the admitted facts that the land was occupied for townsite purposes prior to the inception of the mineral right, we must conclude that the supreme court, in speaking of the *rights* of a townsite claimant, referred to *rights under the townsite patent.* Otherwise, the statement that the "mining patentee's rights antedated those of the occupants" would be in direct conflict with the facts which were admitted for the purpose of the decision.

In Steel v. Smelting Company, an action of ejectment, the townsite claimants endeavored to assail a patent issued to a mineral claimant upon the ground that the land embraced in such patent was, prior to the initiation of the mining right, occupied and improved for townsite purposes. It was held that the patent could not be thus collaterally assailed.[69]

Davis v. Weibbold was a case involving a tract of land in the townsite of Butte, Montana, for which a patent had been issued in 1877. There was no suggestion that at the time the townsite was patented the land was known to be mineral, or that there were any valuable mineral lands within the townsite. The mineral claimant asserted rights under a mineral patent issued in 1880, based upon a discovery and appropriation made years after the issuance of a patent to the townsite. It was held that the discovery of minerals after the issuance of the townsite patent could not affect the holder of the townsite title.[70]

The case of Hawke v. Deffeback [71] was an action of ejectment. It involved a placer claim within the limits of the townsite of Deadwood, Dakota. The land be-

69 106 U. S. 447, 1 Sup. Ct. Rep. 389, 27 L. ed. 226.
70 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238.
71 4 Dak. 21, 22 N. W. 480.

came subject to the operation of the public land laws, February 28, 1877, by the extinguishment of the Indian title, by treaty with the Sioux Indians. The precise date of the location of the mining claim does not appear. The application for patent therefor was filed on November 10, 1877, the entry and payment were made on January 31, 1878, and patent issued on January 31, 1882. No protest or adverse claim was filed. In July, 1878, the town of Deadwood being unincorporated, the probate judge entered at the local land office the townsite, paid the government price therefor, and received duplicate receipt, in trust for the use and benefit of the occupants.

The defendant, Deffeback, was the owner of a lot within the townsite. His contention was that upon the extinguishment of the Indian title the tract in question was, with other lands, laid out into lots, blocks, streets, and alleys, for municipal purposes and for trade; that the land in controversy was one of the lots originally laid out and occupied for townsite purposes, and had always been thus occupied by defendant and his grantor, with the buildings and improvements thereon, for the purposes of business and trade, and not for agriculture; that the placer mining claim was not located or claimed by plaintiff or any other person until after the selection and settlement upon, and appropriation of, that and adjacent lands for townsite purposes.

The mineral character of the land was not disputed. The foregoing facts were deemed admitted for the purpose of the decision. They were set up as an equitable defense, and a decree was asked by the owner of the town lot adjudging that the holder of the placer patent was a trustee for the benefit of the prior townsite occupant.

The supreme court of Dakota, in an able opinion, sustained a demurrer interposed to the equitable defense, and, the defendant failing to amend, judgment was entered for the mining patentee.

The case was appealed to the supreme court of the United States, from whose opinion we select the following extracts:—

> It is plain, from this brief statement of the legislation of congress, that no title from the United States to land known at the time of the sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws, or the townsite laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the state of Michigan (and other states). . . . . In the present case there is no dispute as to the mineral character of the land claimed by plaintiff. It is upon the alleged prior occupation of it for trade and business, the same being within the settlement or townsite of Deadwood, that defendant relies, as giving him a better right to the property. But the title to the land being in the United States, its occupation for trade or business did not and could not initiate any right to it, the same being mineral land, nor delay proceedings for the acquisition of the title under the laws providing for the sale of lands of that character.[72]

In a later portion of the decision, when dealing with the effects of a townsite patent within the limits of which are found land that was known to be mineral at the date of the townsite patent, and also lands that were not so known, the supreme court supplements the foregoing with the following:—

72 Deffeback v. Hawke, 115 U. S. 392, 405, 6 Sup. Ct. Rep. 95, 29 L. ed. 423.

> Whilst we hold that a title to known valuable mineral land cannot be acquired under the townsite laws, and therefore could not be acquired to the land in controversy under the entry of the townsite of Deadwood by the probate judge of the county in which that town is situated, we do not wish to be understood as expressing any opinion against the validity of the entry, so far as it affected property other than mineral lands, if there were any such at the time of entry. . . . . It would seem, therefore, that the entry of a townsite, even though within its limits mineral lands are found, would be as important to the occupants of other lands as if no mineral lands existed. Nor do we see any injury resulting therefrom, nor any departure from the policy of the government, the entry and the patent being inoperative as to all lands known at the time to be valuable for their minerals or discovered *to be such before their occupation or improvement for residences or business under the townsite title.*[73]

The language last quoted has led some of the trial courts into the error of ruling that mines discovered within *patented* townsites before the occupation of a lot for business or residence purposes could be held as against the grantee from the townsite, although not discovered until after patent to the townsite had issued.[74]

The question as to whether a mining location could be legally made on mineral lands in possession of a prior occupant for business purposes within the limits of an unpatented townsite *was* raised in the Deffeback-Hawke case, and while the issuance of a patent to the mineral claimant, without any adverse claim or protest on the part of the townsite claimant, and prior to the

[73] Deffeback v. Hawke, 115 U. S. 392, 407, 6 Sup. Ct. Rep. 95, 29 L. ed. 428.

[74] McCormick v. Sutton, 97 Cal. 375, 32 Pac. 444.

entry of the townsite, was a conclusive determination that the lands were mineral and rightfully patented to the mineral claimant, the decision of the supreme court of the United States does hold, as that court has uniformly held, that mineral lands could only be appropriated under the mining laws, and that no title to such lands could be initiated by mere occupancy under the townsite laws. The time when the character of the land within a claimed townsite is to be determined is when application to enter is made. This is the rule as to all classes of grants, such as grants to states of other than sixteenth or thirty-sixth sections,[75] grants to railroads within both place and indemnity limits,[76] and entries under the pre-emption and homestead laws.[77] If the lands are mineral, the fact of their mere occupancy for purposes of trade or business is of no moment. Such occupancy is not color of title as against the government or those in privity with it, and a mining locator is in such privity.

The case of Sparks v. Pierce was considered by the supreme court of the United States at the same time as Deffeback v. Hawke, and involved the same controversies, with the exception that no application to enter the townsite (Central City, Dakota) had been made. The case presented was that of occupants of the public lands without title resisting the enforcement of the patent of the United States, on the ground of occupation antedating the acquisition of any mining right or claim of right.

The court held that—

> Mere occupancy of the public lands and improvements thereon give no vested right therein as against

[75] *Ante*, §§ 140, 143.
[76] *Ante*, §§ 156, 157.
[77] *Post*, § 207.

the United States, and consequently not against any purchaser from them.[78]

When the application for the mineral patent in this case was before the land department, the commissioner of the general land office held that, although it was sufficiently established that the land was occupied for townsite purposes prior to the initiation of rights under the mining claim, yet, as the lands were in fact mineral, the occupants had no right to it. Patent was issued to the mineral claimant in accordance with this ruling, without any reservation. The townsite claimants endeavored to erect a trust upon the mineral patent, on the ground that the commissioner erred as a matter of law in issuing the mineral patent without reserving their asserted rights as occupants. Concerning this plea, the supreme court held that "to entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the land department, and, being respected, would have given him the patent."

There can be no doubt that the case clearly indicates that priority of occupation of mineral lands for townsite purposes establishes no claim which the government is called upon to recognize, as against a subsequent appropriation under the mining laws.

[78] 115 U. S. 408, 413, 6 Sup. Ct. Rep. 95, 29 L. ed. 428; United States v. Holmes, 105 Fed. 41; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; Buxton v. Traver, 130 U. S. 232, 9 Sup. Ct. Rep. 509, 32 L. ed. 920; Cook v. Klonos, 164 Fed. 529, 90 C. C. A. 403; S. C., on rehearing, 168 Fed. 700, 94 C. C. A. 144. But see Bonner v. Meikle, 82 Fed. 697, 19 Morr. Min. Rep. 83, and Young v. Goldsteen, 97 Fed. 303. The secretary of the interior in commenting on these two latter cases says: "They are not only not of binding authority but are not persuasive and are wholly at variance with a number of cases adjudicated in the courts and land department." Grand Canyon Ry. Co. v. Cameron, 35 L. D. 495.

In the case of Bonner v. Meikle,[79] Judge Hawley, sitting as circuit judge, announced the view that occupants of town lots in a town situated upon unsurveyed public lands of the United States have rights which will prevail over those of a mineral claimant, unless the latter can show that at the time the townsite claimants acquired or purchased the lots, the land was known to contain mineral of such extent and value as to justify expenditures for the purpose of extracting it. He held that the fact that the townsite claimants had taken no steps to obtain title would not affect the rule. It was further pointed out that the mineral claimant had acquired no title from the United States, and therefore was in no better position than the townsite claimant.

The action arose out of an application for a patent for a mining claim. The lot owners filed an adverse claim in the land office under section twenty-three hundred and twenty-six of the Revised Statutes, and later instituted the suit in support of it.

The character of the land at the time the lot owners took possession seems to have been the sole fact sought to be inquired into and adjudicated. This being true, it is difficult to perceive how the court could entertain jurisdiction of the cause.[80] The filing of the application for the mining patent set the jurisdiction of the land department in motion. The commencement of the suit only suspended its jurisdiction to enable the court to pass upon such questions as the law contemplates should be litigated in the courts. The question of the character of the land under such circumstances is one which the courts cannot pass upon.[81]

[79] 82 Fed. 697, 19 Morr. Min. Rep. 83.

[80] The secretary of the interior says that the case "is not only not binding on the department but is not even persuasive." Grand Canyon Ry. Co. v. Cameron, 35 L. D. 495.

[81] *Ante*, § 108.

A claimant asserting only rights of occupancy under the townsite laws cannot maintain an adverse suit under section twenty-three hundred and twenty-six of the Revised Statutes.[82]

Be this as it may, we find some difficulty in reconciling the ruling of Judge Hawley with the previous decisions of the supreme court of the United States heretofore cited.

Considering the facts involved in the several cases which we have heretofore reviewed, and construing the townsite laws in connection with the general mining laws and other enactments *in pari materia*, we feel that we are justified in the conclusion that the supreme court of the United States never intended to establish the rule that prior occupancy of the public mineral lands for trade or business purposes operated to withdraw such lands prior to the issuance of a townsite patent from appropriation under the mining laws, provided always that such appropriation was effected by peaceable methods, and without resort to force or violence. The expressions found in the cases noted leading to a contrary inference were not intended to be of controlling weight. There may be some room for doubt as to the correctness of the conclusions reached by us; but we are forced to accept one of the two constructions. We have adopted that which to us seems to be in consonance with the general theories of the public land laws, according to the tenor of all the decisions promulgated by the court of last resort. We can conceive of no middle ground. If prior occupants for townsite purposes were to be considered as being entitled to equities as against the subsequent mining

[82] Ryan v. Granite Hill M. & D. Co., 29 L. D. 522; Grand Canyon Ry. Co. v. Cameron, 35 L. D. 495. *Post*, § 723.

locators, there would have been no necessity for the legislation found in section sixteen of the act of March 3, 1891. The conclusions here reached are in harmony with the views of the supreme court of Montana [83] and the supreme court of Arizona.[84]

§ 171. Correlative rights of mining and townsite claimants recognized by the land department prior to the act of March 3, 1891.—In passing upon applications for patents to mineral lands within the claimed limits of townsites, the land department at one time proceeded upon the theory that there were correlative or reciprocal rights existing between townsite occupants and mineral claimants which were to be regarded and properly provided for when patents were issued.

General Burdett, when commissioner of the general land office, thus expressed his views:—

> The townsite laws clearly contemplate that towns will exist in mining localities; by clear implication, townsite entries are to be permitted on mineral lands. This is indicated by the clause excepting title to mines from the title acquired by the town. It is inevitable that where the surface is suitable, it will, in a mining vicinity, be populated, and attain the character of a town or city. Where any branch of business flourishes there capital and population will concentrate. The various trades and callings will center there. Hotels will be a necessity. Dwellings will be built, and permanent homes established; all the various interests which constitute valuable property rights as connected with the soil will be created. And this is not necessarily antagonistic to the miners. The protection of municipal government is

[83] Talbott v. King, 6 Mont. 76, 9 Pac. 434; Silver Bow M. & M. Co. v. Clark, 5 Mont. 406, 5 Pac. 570; Butte City Smokehouse Lode Cases, 6 Mont. 397, 12 Pac. 858; Chambers v. Jones, 17 Mont. 156, 42 Pac. 758.

[84] Tombstone Townsite Cases, 2 Ariz. 272, 15 Pac. 26; Blackmore v. Reilly, 2 Ariz. 442, 17 Pac. 72.

in the miner's interest, as it is in the interest of any other class of business men.[85]

The secretary of the interior had previously held that persons in possession of the surface of a lode claim were adverse claimants within the meaning of the mining law of 1866, and were entitled to be heard in the local courts before patent was issued.[86]

Out of this and similar rulings originated the practice of inserting reservation clauses in mineral patents to lode claims of the following character:—

> Excepting and excluding from said patent all townsite property rights upon the surface, and all houses, buildings, lots, blocks, streets, alleys, or other municipal improvements on the surface of said mining claim not belonging to the grantees, and all rights necessary or proper to the occupation, possession, and enjoyment of the same.

Such reservations, however, were not inserted, it seems, where the discovery and location of the mining claim antedated the town settlement.[87]

In townsite patents, in addition to the limiting clause sanctioned by section twenty-three hundred and ninety-two of the Revised Statutes the following proviso, or its equivalent, was inserted:—

> That the grant hereby made is held and declared to be subject to all the conditions and restrictions contained in section twenty-three hundred and eighty-six of the Revised Statutes of the United States, so far as the same are applicable thereto.[88]

[85] Townsite of Central City, Colo., 2 Copp's L. O. 150.

[86] Becker v. Central City Townsite, Id. 98. See, also, Papina v. Alderson, 10 Copp's L. O. 52.

[87] Monroe Lode, 4 L. D. 273.

[88] Turner v. Lang, 1 Copp's L. O. 51; Central City Townsite, 2 Copp's L. O. 150; Butte City Townsite, 3 Copp's L. O. 114, 131; Hickey's Appeal, 3 L. D. 83; Commissioners' Letter, Copp's Min. Dec., p. 207; Townsite of Eureka Springs v. Conant, 8 Copp's L. O. 3; Papina v. Alderson,

A different rule prevailed with reference to placer patents, for the reason that in cases of ordinary surface deposits usually embraced within this class of mining claims the surface of the ground is absolutely necessary to the successful working of the mine; therefore, it could not be included in a townsite entry or patent, nor could any surface rights therein be reserved, under any circumstances, to the townsite occupant.[89]

But the courts have uniformly held these reservations void. The officers of the land department are merely agents of the government, and have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents of their own description, they could limit or enlarge without warrant of law.[90]

In accordance with this action by the courts, the land department considers it to be fully established as a principle of law that the government could not (at least prior to March 3, 1891) by its patent "partition lands horizontally," and the practice of inserting these correlative reservations ceased.[91]

10 Copp's L. O. 52; Rico Townsite, 1 L. D. 556; Vizina Cons. M. Co., 9 Copp's L. O. 92; Esler v. Townsite of Cooke, 4 L. D. 212.

[89] Townsite of Butte, 3 Copp's L. O. 114; Townsite of Deadwood, 8 Copp's L. O. 18, 153; Commissioners' Letter, Copp's Min. Dec., p. 156; Kemp v. Starr, 5 Copp's L. O. 130.

[90] Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29 L. ed. 423; Talbott v. King, 6 Mont. 76, 9 Pac. 434; Butte City Smokehouse Lode Cases, 6 Mont. 397, 12 Pac. 858; McCorkell v. Herron, 128 Iowa, 324, 111 Am. St. Rep. 201, 103 N. W. 988.

[91] W. A. Simmons et al., 7 L. D. 283; Antediluvian Lode and Millsite, 8 L. D. 602; Secretary's Letter, 5 L. D. 256.

§ 172. Section sixteen of the act of March 3, 1891, is limited in its application to incorporated towns and cities.—We have in a previous section [92] quoted the provisions of the act of March 3, 1891, so far as it supplements the prior existing townsite laws. It is manifest that this supplemental legislation was intended to apply only to cases of *incorporated* towns, the territorial limits of which are subject to an organized form of municipal government. As to towns and settlements upon the public mineral domain for townsite purposes which are unincorporated, including those which must be entered and patented to the county judge, or the judicial officer performing his functions, as well as all other classes of townsites, the townsite laws, as heretofore understood and explained by the courts, as shown in the preceding sections, remain in force, and are unaffected by the act of March 3, 1891. The land department in its circular relating to townsites approved August 7, 1909,[93] states that the "section in terms announces the right to enter mineral lands," and that "the protection afforded to mineral claims by the body of sec. 16 is similar to that given generally in said secs. 2386 and 2392, Rev. Stats."; but the closing proviso of section 16

> creates one distinction between unincorporated and incorporated towns as regards the relative rights of townsite occupants and mineral claimants, which is, that whereas the townsite patent will in either case carry absolute title to any mineral not known to exist at the date of townsite entry, the adverse rights of mineral and town lot claimants within incorporated towns are hinged upon priority of initiation. That is to say, that after entry is made for such town, no entry by a mineral vein applicant will be allowed for any land owned and occupied under the townsite law by a party whose possession ante-

[92] *Ante*, § 166.

[93] 38 L. D. 114.

dated the inception of the mineral applicant's claim, even though such land was known, at date of the townsite entry, to contain valuable minerals.

The department adds that it has never viewed said proviso as warranting, under any circumstances, the allowance of entry for a mineral vein independently of the surface ground appertaining thereto, nor is such entry provided for in the general mining laws.

The act has also been referred to by the department in a case involving the townsite of Juneau, in the district of Alaska.

The act providing a civil government for Alaska, passed May 17, 1884,[94] provided for a government for this district, and made it a land district of the United States, over which was extended only the mineral laws of the United States. The general laws of Oregon, then in force, were declared to be the law of the district. The act also preserved the *status quo* as to use and occupancy for other than mining purposes until congress should act, and declared that nothing in the act should be construed to put in force in said district the general land laws of the United States.

By section eleven of the act of March 3, 1891 (section sixteen of which we are now considering), the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes (the townsite law) were made applicable to Alaska, with the proviso that the entry of the townsites should be made by a trustee or trustees designated by the secretary of the interior, for the use and benefit of the occupants.

The trustee appointed by the secretary made application to enter the townsite of Juneau, against which a protest was filed by a mineral claimant, and the ques-

[94] 23 Stats. at Large, p. 24; 1 Fed. Stats. Ann. 24.

tion involved was the mineral or nonmineral character of the land.

Upon the first hearing the burden of proof was placed upon the townsite claimants; the finding was, that the land was mineral, and the secretary directed that the townsite entry should be canceled as to the land covered by the mineral location. He considered as a factor section sixteen of the act of March 3, 1891.[95] Subsequently the department vacated this decision, reinstated the entry, and announced the rule that in order to except mineral land from the operation of a townsite or other entry made in pursuance of law, the land must be known at the time of the entry to contain minerals of such character and value as to justify expenditures for the purpose of extracting them.[96] In the later decision no reference is made to the act of March 3, 1891. The general mining laws having been put in force by the act of 1884,[97] the townsite provisions, subsequently made applicable by section eleven of the act of 1891, are necessarily to be construed in the light of the mining laws theretofore in force. It follows that the rules of construction, as applied by the courts to the system thus extended to Alaska, have the same controlling force there as elsewhere. The act seems to be clear and unambiguous in this respect.[98]

§ 173. **The object and intent of section sixteen of the act of March 3, 1891 (further considered).**—We think that an analysis of this act, when considered with reference to the state of the law as it existed at the time

[95] Goldstein v. Townsite of Juneau, 23 L. D. 417.

[96] Harkrader v. Goldstein, 31 L. D. 87.

[97] The act of June 6, 1900, making further provision for a civil government for Alaska, re-enacts this provision, subject to certain limitations not necessary to here note.

[98] See Young v. Goldsteen, 97 Fed. 303.

of its enactment, viewed in connection with those statutes *in pari materia* remaining in force, justifies us in deducing the following as the true object and intent of the law:—

(1) The old law inhibited the acquisition of title to mineral lands under townsite laws, whether located as such under the mining laws at the time of the proposed townsite entry or not. The land department at the time application was made to enter under the townsite was called upon to investigate the character of the land. If its mineral character was established, patent could not issue, although it might be unoccupied or unclaimed by anyone under the mining laws. The new law permits mineral lands within incorporated towns, if so unoccupied and unclaimed, to be entered under the townsite law. It would therefore seem that, as to future entries applied for by this class of towns, the character of the land, if unoccupied and unclaimed under the mining laws, is not a fact necessarily to be passed upon by the department. If mineral, the fact of the existence or nonexistence of such occupancy or claim must necessarily be adjudicated prior to the issuance of a patent. The probable force of such a patent and its unassailable character on collateral attack will be considered in a subsequent section.[99] This much may be here said, however. The issuance of such patent to an incorporated city or town is no longer a conclusive determination that the land was nonmineral in character, as the department has now, under a certain state of facts, the power to issue townsite patents for mineral lands.

(2) The provisions of section twenty-three hundred and ninety-two of the Revised Statutes, that

[99] § 175.

> . . . . no title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession under existing laws,

and of section twenty-three hundred and eighty-six, that

> . . . . where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof,

are re-enacted. To this last provision, which, as we have heretofore shown,[100] was passed prior to the enactment of the lode law of July 26, 1866, is added the following:—

> . . . . and when entry has been made or patent issued for such townsites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto.[1]

The purpose of this supplemental clause is evidently to relieve the land department from embarrassments caused by their previous construction of the prior existing law. That department had held that with the issuance of a townsite patent their jurisdiction as to all land embraced therein terminated, and that, although the law as well as the patent contained the proviso that no title should be thereby acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws, and although it may be sufficiently established that at the date of the issuance of the patent there existed within the limits of the townsite as patented such a mine or claim as was

[100] *Ante*, § 166.

[1] 26 Stats. at Large, p. 1095, § 16; Comp. Stats. 1901, p. 1535; 6 Fed. Stats. Ann. 494.

clearly within the proviso, yet it had no power to issue a patent to such claim; that the only remedy was by a proceeding in equity, brought by the United States to annul the townsite patent.[2]

At one time a contrary rule obtained,[3] and in 1897 the department again announced the rule that it had power to issue a patent for mineral veins expressly excepted from a townsite patent previously issued. The decisions in Pacific Slope Lode and Cameron Lode (*supra*) were overruled.[4] While the department in the cases last cited did not base its conclusions upon the act of 1891, in a later case its decision was directly referable to that act.[5]

In more recent decisions the land department has further construed this section and held that an incorporated town under this section is authorized to make townsite entry on mineral lands of the United States, the title when acquired to be subject to the conditions and limitations prescribed in that act. The townsite application must conform to legal subdivisions, and the fact that portions of such subdivisions are mineral in character furnishes no excuse for not conforming the entry in its exterior limits to legal subdivisions as required by law. When a townsite claimant does exclude any vein or valid mining claim or possession held under existing laws, satisfactory proof of the existence of such vein or mining claim

[2] Pacific Slope Lode, 12 L. D. 686; Cameron Lode, 13 L. D. 369; Protector Lode, 12 L. D. 662; Plymouth Lode, Id. 513. And see Horsky v. Moran, 21 Mont. 345, 53 Pac. 1064.

[3] South Comstock G. & S. M. Co., 2 Copp's L. O. 146; Townsite of Butte, 3 Copp's L. O. 114; Id. 130.

[4] Pacific Slope Lode v. Butte Townsite, 25 L. D. 518. Followed in Gregory Lode, 26 L. D. 144; Brady's Mortgagee v. Harris (on review), 29 L. D. 426.

[5] Hulings v. Ward Townsite, 29 L. D. 21.

must be shown,[6] and the exception contained in the section is applicable to placer as well as to lode mining claims.[7]

Mineral protestants have no standing before the land department, for they have no rights that can be affected by the issuance of a townsite patent. The law preserves to the protestants all rights they may have acquired under the mining laws prior to the townsite entry. A patent may be obtained by them for lands claimed, upon proper proceedings, and a showing that at the date of the townsite entry the lands were known to be valuable for minerals, and that such lands were possessed by them by virtue of a compliance with the law, notwithstanding the issuance of the townsite patent.[8]

Should the claimed possessory rights of mineral locators be invaded by those claiming under the townsite entry, the remedy of the former will be in the courts where such matters are clearly cognizable.[9]

The correctness of this interpretation by the land department of its reserved powers in this regard depends upon the effect to be given a townsite patent, a question which is discussed in succeeding sections.[10]

(3) As to placers, if they are unclaimed under the mining laws, they may be patented by an incorporated city or town. Patents may issue on valid placer locations within such limits, independently of prior occupation, for purposes of trade or business; but only one patent may issue, as no correlative rights between townsite and mineral claimants are possible.

6 Telluride Additional Townsite, 33 L. D. 542.
7 Nome & Sinook Co. v. Townsite of Nome, 34 L. D. 102.
8 Id. See, also, same case on review, 34 L. D. 276.
9 34 L. D. 276.
10 *Post*, §§ 175, 177.

(4) Where the right to a lode claim within the limits of an incorporated town or city originates after settlement within the surface boundaries for townsite purposes, the prior townsite occupant is entitled to be protected in his surface rights, if they are not on the vein or lode; and it is probable that the extent and boundaries of such surface occupation will be required to be shown through adverse proceedings. Heretofore such adverse proceedings were not sanctioned, as nothing could inure to the townsite claimant by virtue of such proceedings. He could obtain no patent, and the law made no provision for the severance of any portion of the surface for his benefit.[11]

The department has announced the rule that under this act a townsite entry should not be permitted to include lands theretofore patented under the mining law.[12]

Except as herein stated, we do not understand that the townsite laws, as they existed prior to March 3, 1891, have been modified.

§ 174. The act of March 3, 1891, not retroactive.— There is nothing in the terms of the act making it retrospective in its operation. The language clearly indicates that it was intended to apply only to entries made after its passage. This is the view taken by the land department, and it is manifestly correct.[13]

11 We are aware that there are several cases arising under the law as it existed prior to March 3, 1891, which, in discussing mining patents within townsites, seem to lay some stress upon the failure of the townsite claimant to adverse the mineral applicant. But, as we understand the cases, such ruling was not necessary for the purpose of the case under consideration. We shall discuss this question further when dealing with the subject of adverse claims. *Post*, §§ 722, 723.

12 Hulings v. Ward Townsite, 29 L. D. 21.

13 Plymouth Lode, 12 L. D. 513; Protector Lode, Id. 662; Pacific Slope Lode, Id. 686.

§ 175. Effect of patents issued for lands within townsites.—It is difficult to intelligently discuss the force and effect of patents for any particular class of lands without involving the consideration of the general principles of law applicable to all land patents issued by the government. We appreciate the fact that at some place in this treatise the full consideration of such general principles will be a necessity; but we doubt the propriety of doing so every time we are called upon to deal with patents of an individual class. When we shall have passed that portion of the work dealing with the method of initiating and perfecting title to mineral lands, and have outlined the proceedings culminating in the issuance of the patent, we hope to present the subject fully. For the present, we are considering the question of patents for lands issued within townsites, a somewhat limited, though by no means unimportant, class. In doing so it will be sufficient to simply epitomize what we understand to be the underlying principles controlling the courts in determining the operative force and effect of a federal patent.

We understand the general rules to be as follows:—

(1) A patent for land is the highest evidence of title, and is conclusive against the government and all claiming under junior patents or titles, until set aside or annulled;[14]

(2) The land department is a tribunal appointed by congress to decide certain questions relating to the public lands, and its decision upon matters of fact

[14] Stone v. United States, 2 Wall. 525, 17 L. ed. 765; Hooper v. Scheimer, 23 How. 235, 16 L. ed. 452; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 486; Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534; Warren v. Van Brunt, 19 Wall. 646, 22 L. ed. 219; St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Hoofnagle v. Anderson, 7 Wheat. 212, 5 L. ed. 437.

cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else.[15]

When a patent is attacked, two questions are presented: Did the department have power to issue the patent and to determine the questions which conditioned its issue? and, Was the judgment induced by fraud, mistake of fact, or error in law? [16]

(3) The government, having issued a patent, cannot by the authority of its own officers invalidate that patent by the issuing of a second one for the same property; [17]

(4) A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not pro-

[15] Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. Rep. 249, 29 L. ed. 570; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 486; Warren v. Van Brunt, 19 Wall. 646, 22 L. ed. 219; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848; Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800; Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929; Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800; St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Steel v. St. Louis Smelting Co., 106 U. S. 447, 1 Sup. Ct. Rep. 389, 27 L. ed. 226; Baldwin v. Starks, 107 U. S. 463, 2 Sup. Ct. Rep. 473, 27 L. ed. 526; United States v. Minor, 114 U. S. 233, 5 Sup. Ct. Rep. 236, 29 L. ed. 110; Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; Barden v. N. P. R. R., 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992; Waterloo M. Co. v. Doe, 82 Fed. 45, 51, 27 C. C. A. 50, 19 Morr. Min. Rep. 1; New Dunderberg M. Co. v. Old, 79 Fed. 598, 25 C. C. A. 116; Mendota Club v. Anderson, 101 Wis. 479, 78 N. W. 185; United States v. Northern Pac. Ry., 95 Fed. 864, 37 C. C. A. 290; Bunker Hill & Sullivan M. & C. Co. v. Empire State-Idaho Co., 109 Fed. 538, 48 C. C. A. 665, 21 Morr. Min. Rep. 317; Peabody Gold M. Co. v. Gold Hill M. Co., 111 Fed. 817, 49 C. C. A. 637, 21 Morr. Min. Rep. 591; King v. McAndrews, 111 Fed. 860, 50 C. C. A. 29.

[16] United States v. Northern Pac. Ry. Co., 95 Fed. 864, 37 C. C. A. 290.

[17] Iron S. M. Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. Rep. 765, 34 L. ed. 155, 16 Morr. Min. Rep. 218; Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238.

vide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others.[18] The test of jurisdiction is whether or not the tribunal has power to enter upon the inquiry, not whether its conclusion in the course of it is right or wrong.[19]

Applying these principles to the class of patents under consideration, we are justified in deducing the following:—

(A) A mining patent issued prior to the final entry of a townsite is conclusive evidence that all antecedent steps necessary to its issue have been properly and legally taken,[20] and necessarily inhibits the issuance of a subsequent patent to the townsite claimants covering the same property.[21]

[18] Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. Rep. 985, 30 L. ed. 1039; Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838, 35 L. ed. 428; United States v. Winona & St. P. R. R. Co., 67 Fed. 948, 15 C. C. A. 96; Garrard v. Silver Peak Mines, 82 Fed. 578, 583; Smyth v. New Orleans Canal & Bank Co., 93 Fed. 899, 35 C. C. A. 646; Eastern Oregon Land Co. v. Brosnan, 147 Fed. 807. And see Kansas City M. & M. Co. v. Clay, 3 Ariz. 326, 29 Pac. 9.

[19] New Dunderberg M. Co. v. Old, 79 Fed. 598, 25 C. C. A. 116; Bradley v. Dells Lumber Co., 105 Wis. 245, 81 N. W. 394; King v. McAndrews, 111 Fed. 860, 50 C. C. A. 29; note to Hartman v. Warren, 76 Fed. 157, 22 C. C. A. 30; Goldstein v. Behrends, 123 Fed. 399, 59 C. C. A. 203; Work M. & M. Co. v. Doctor Jack Pot M. Co., 194 Fed. 620; Southern Development Co. v. Endersen, 200 Fed. 272; Old Dominion Copper Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333. This latter case attempts to distinguish a former case decided by the same court. Kansas City M. & M. Co. v. Clay, 3 Ariz. 326, 29 Pac. 9, but the reasoning is not persuasive.

[20] Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; Iron S. M. Co. v. Campbell, 17 Colo. 267, 29 Pac. 513; Kahn v. Old Tel. Co., 2 Utah, 174; Chambers v. Jones, 17 Mont. 156, 42 Pac. 758; Poire v. Wells, 6 Colo. 406; Justice M. Co. v. Lee, 21 Colo. 260, 52 Am. St. Rep. 216, 40 Pac. 444, 18 Morr. Min. Rep. 220; United States v. Iron S. M. Co., 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32 L. ed. 571; Montana Cent. Ry. Co. v. Migeon, 68 Fed. 811.

[21] Hulings v. Ward Townsite, 29 L. D. 21.

In cases of incorporated cities and towns, under the present state of the law granting certain surface privileges to prior occupants of the surface of lode claims, we think the law gives this prior occupant the *status* of an adverse claimant, and that, to protect his rights to the surface, he must file his adverse claim and pursue his remedy in the courts.[22] Failing in this, the patent issued will be a conclusive adjudication that no such prior occupancy existed. We might go a step further, and assert that a general reservation in a patent of surface rights would not protect the prior occupant or enable him to collaterally assail the mineral patent. The fact and extent of his occupancy should be definitely determined when the mineral patent is issued, and the boundaries and extent inserted in a special reserving clause. This would enable the government to subsequently patent the surface under a townsite application, and the two patents, when taken together, would clearly show jurisdiction in the land department to issue both. The thing reserved by one would be granted by the other.[23]

That the government, as the paramount proprietor, can create such a severance of title, cannot be denied. It was of frequent occurrence under the common law.[24] And the right of a private owner to separate the ownership of the minerals from that of the overlying surface has always been recognized in America.[25]

22 Nome & Sinook Co. v. Townsite of Nome, 34 L. D. 102; S. C., on review, 34 L. D. 276.

23 Iron S. M. Co. v. Campbell, 135 U. S. 286–292, 10 Sup. Ct. Rep. 765, 34 L. ed. 155.

24 See *ante*, § 9; *post*, §§ 812–814.

25 Hartwell v. Camman, 2 Stock. Ch. 128, 64 Am. Dec. 448; Stewart v. Chadwick, 8 Iowa, 463; Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760; Arnold v. Stevens, 24 Pick. 106, 35 Am. Dec. 305; Johnstown I. Co. v. Cambria I. Co., 32 Pa. 241, 72 Am. Dec. 783; Knight v. Indiana C. & I. Co., 47 Ind. 105, 110, 47 Am. Rep. 692; Marble Co. v. Ripley, 10 Wall.

The surface proprietor, as an incident to his grant, would, of course, be entitled to the right of subjacent support; and the mineral patentee would be compelled to so conduct mining operations underneath the surface as not to interfere with the full enjoyment of the surface and the buildings and improvements thereon.[26] This subject is more fully treated in a subsequent chapter of this work.[27]

(B) When a townsite patent is issued, it is in law such a declaration of the patentability of the land under the townsite laws that no subsequent discovery of minerals can deprive the townsite owner of his property. The patent to the townsite effectually withdraws the land from the body of the public domain, and it is no longer subject to exploration and purchase under the mining laws, based upon discoveries subsequent to the townsite patent.[28]

(C) In the case of patents to incorporated cities or towns issued under the act of March 3, 1891, the patent is no longer conclusive evidence of the fact that the lands are nonmineral, as the department is no longer called upon to determine the character of the land, unless it be to segregate the known veins, or lodes, and determine upon proper proceedings in that behalf the fact of the existence of such veins, or lodes, or of valid subsisting mining claims, and segregating them from

339, 19 L. ed. 955; Riddle v. Brown, 20 Ala. 412, 56 Am. Dec. 202; French v. Brewer, 3 Wall. Jr. 346, Fed. Cas. No. 5096.

[26] 6 Lawson's Rights and Remedies, § 2787, p. 4544, and cases there cited.

[27] See *post*, §§ 818, 823.

[28] Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; McCormick v. Sutton, 97 Cal. 373, 32 Pac. 444; Smith v. Hill, 89 Cal. 122, 26 Pac. 644; Carter v. Thompson, 65 Fed. 329, 18 Morr. Min. Rep. 134; Larned v. Jenkins, 113 Fed. 634, 51 C. C. A. 344, 22 Morr. Min. Rep. 94; Board of Education v. Mansfield, 17 S. D. 72, 106 Am. St. Rep. 771, 95 N. W. 286.

the other lands subject to entry under the townsite, that patents may issue ultimately to the mineral claimant, as contemplated in the act.[29] We doubt the propriety of inserting general clauses of reservation. The two patents when issued should show that the property granted by the junior patent is identically that which is reserved out of the senior patent. A reservation of a specific boundary, laid down so as to be identified in the first patent, needs no judicial action to determine what it is that is reserved.[30]

§ 175a. Difficulty in the application of principles suggested.—The foregoing principles, except so far as we have dealt with the effect of patents issued for townsite lands within the limits of incorporated cities or towns—as to which there are no adjudications—are well settled. Some difficulty is encountered in applying these principles to cases involving the operation of so much of the statute as inhibits the acquisition of title under the townsite laws to mines of gold, silver, and cinnabar, or to valid mining claims or possessions under existing laws. The crucial questions presented for consideration may be thus stated: (1) What constitutes a mine or valid mining claim the title to which cannot be acquired under the townsite laws? (2) On whom devolves the duty of determining the existence of such mine or mining claim—the land department prior to the issuance of a townsite patent, or the courts after its issuance? Or, in other words, can a townsite patent, valid on its face and purporting to convey all the lands within defined boundaries, be as-

[29] Old Dominion Copper M. Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333 (arguendo).

[30] Iron S. M. Co. v. Campbell, 135 U. S. 286, 292, 10 Sup. Ct. Rep. 765, 34 L. ed. 155, 16 Morr. Min. Rep. 218.

sailed by mineral claimants asserting title to mines or claims within the townsite limits originating prior to the townsite entry? We shall discuss the questions in the order stated.

§ 176. What constitutes a mine or valid mining claim within the meaning of section twenty-three hundred and ninety-two of the Revised Statutes.— Section twenty-three hundred and ninety-two of the Revised Statutes provides that no title can be acquired under the townsite laws to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession under existing laws.

What is meant by the term "mine," as used in this section?

We have heretofore had occasion to discuss the meaning of the word "mine" in its etymological sense, and have shown that the word is not a definite term, but is susceptible of limitation, according to the intention with which it is used. We have also traced what we have called the evolution of denotation, showing the gradual extension of the meaning, from an underground excavation made for the purpose of getting minerals, to its use as an equivalent for "vein," "seam," or "lode." [31]

A valid mining claim can only be based upon a discovery within the limits of the claim, and the existence of mineral in such quantities as to render the land more valuable for mining than for any other purpose, or as will justify a prudent man in the expenditure of time and money in its exploitation and development.[32]

[31] *Ante*, §§ 88, 89.

[32] *Ante*, §§ 98, 106; *post*, §§ 207, 392; Golden v. Murphy, 31 Nev. 395, 103 Pac. 394, 105 Pac. 99. In the case of Callahan v. James, 141 Cal.

The existence of a mere location is not of itself evidence of the mineral character of the land.[33]

The character of the land being thus established, its proper location, marking of boundaries, and compliance with the local laws, if any such exist, is necessary to perfect a valid mining claim.

In order to exempt such veins, lodes, or claims from the operation of the townsite laws, they must at the time of its issuance be *known* to be valuable for their minerals. To use the language of the supreme court of the United States:—

> We say "land *known* at the time of the sale to be *valuable* for its minerals," as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. . . . . We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land in which years afterward rich deposits of mineral may be discovered.[34]
>
> It is established by former decisions of this court that under the acts of congress which govern this case, in order to except mines or mineral lands from

291, 74 Pac. 853, it is said that it is immaterial whether the claim was known to contain minerals of sufficient value to justify exploration where a valid mining claim is relied on to constitute the exception.

[33] Harkrader v. Goldstein, 31 L. D. 87. In several decisions the land department has intimated that there may be a discovery of mineral on which a valid location may be predicated and yet the mineral character of the land not sufficiently established to justify the issuance of patent, a higher degree of proof being required in the latter case. Clipper M. Co. v. Eli M. & L. Co., 33 L. D. 660; S. C., on review, 34 L. D. 401; Brophy v. O'Hare, 34 L. D. 596; Mill Side Lode, 39 L. D. 356. The same rule is applicable to contests where mineral claimants only are involved and contests between mineral and agricultural claimants, the test of mineral character in the latter case being more rigid. See *post*, § 336.

[34] Deffeback v. Hawke, 115 U. S. 392, 404, 6 Sup. Ct. Rep. 95, 29 L. ed. 423.

the operation of a townsite patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the townsite patents take effect, but that they must at that time be known to contain minerals to such extent and value as to justify expenditures for the purpose of extracting them; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable or are afterward discovered to be still valuable for such purposes does not defeat or impair the title of persons claiming under the townsite patent.[35]

The case from which the last quotation is made was taken to the supreme court of the United States on writ of error to the supreme court of California.[35a]

It appears from the facts in this case that the defendant, Dower, claimed that the portion of the lot which was in his possession was not granted by the patent, being reserved or excepted out of its operation, by reason of the fact that it contained a gold-bearing quartz vein, the existence of which was known at and before the date of the patent. The defendant did not claim under a location made prior to the patent to the townsite, but his asserted rights accrued under a location made subsequent to the issuance of such patent. It appeared that at one time during the history of the town, but prior to the patent, the lode in question was successfully and profitably worked, but that it had been abandoned, and work thereon had ceased for a number of years before the defendant's location.

[35] Dower v. Richards, 151 U. S. 658, 663, 14 Sup. Ct. Rep. 452, 38 L. ed. 307, 17 Morr. Min. Rep. 704 (citing Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29 L. ed. 423; Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; quoted in Harkrader v. Goldstein, 31 L. D. 87, 95); Mill Side Lode, 39 L. D. 356.

[35a] Dower v. Richards, 151 U. S. 658, 14 Sup. Ct. Rep. 452, 38 L. ed. 305.

Upon this state of facts the supreme court of the state of California thus announced its views:—

> Assuming, then, that at the date of the issuance of the townsite patent that part of the Wagner ledge embraced in these lots was regarded as worked out and as of no further value for mining purposes, we find that the predecessors of plaintiffs purchased the lots from the patentee, went into possession of them, fenced them, divided them into different inclosures, built valuable houses and outhouses upon them, planted them with fruit trees, filled up the old mining excavations, and, in short, devoted them to the purposes of a home.
>
> After fifteen years, and more, during which there was a complete cessation of mining on the lode, the defendants entered upon the possession of the plaintiffs, made a location of the ledge, claiming three hundred feet of surface on each side of the croppings, —a strip of six hundred feet in width across plaintiffs' lots,—and proceeded to dig up their garden and orchard, demolish their fences, and undermine their houses.
>
> All this the defendants justify upon the ground that the ledge and adjacent surface which they have located was reserved by the United States out of the land patented to the townsite trustee. It remains to consider whether they are correct in their construction of the law upon this point. . . . .
>
> The question, then, is reduced to this: What was a mine of gold within the meaning of the act of 1867? Without the aid of any judicial or legislative construction, we should say, without hesitation, that one essential requisite of a gold mine would be a natural deposit of rock or earth containing a sufficient quantity of gold to admit of profitable working. If lands are known to contain precious metals, but in quantities so small as not to justify the attempt to extract them, they are not properly called mineral lands; and even if they might be mined at a very small profit, but are clearly of more value for agriculture than for

mining, they are agricultural rather than mineral lands.[36]

In a later case a similar rule was declared by the same court:—

> The term "mine of gold, silver, cinnabar, or copper," as used in the exception found in the act, and in the reservation of the patent, means a paying mine known to exist at the time of the grant to the county judge, or one which there was good reason to believe then existed.[37]

The supreme court of the United States announced similar doctrines in reference to "known mines," as that term was used in the pre-emption act of 1841,[38] and with reference to lodes within patented placers known to exist at the time of the application for patent, and which are unclaimed by the applicant.[39]

Following the construction given to placer patents reserving lodes known to exist prior to the filing of the placer application and not claimed by the applicant, it would seem that where a location of a vein or lode of mineral or other deposits has, prior to the issuance of

[36] Richards v. Dower, 81 Cal. 44, 49, 22 Pac. 304. The case of Board of Education v. Mansfield, 17 S. D. 72, 106 Am. St. Rep. 771, 95 N. W. 286, is similar to the Dower-Richards case and was similarly decided.

[37] Smith v. Hill, 89 Cal. 122, 125, 26 Pac. 644.

[38] Colorado C. & I. Co. v. United States, 123 U. S. 307, 328, 8 Sup. Ct. Rep. 131, 31 L. ed. 182.

[39] United States v. Iron S. M. Co., 128 U. S. 673–683, 9 Sup. Ct. Rep. 195, 32 L. ed. 571; Iron S. M. Co. v. Mike & Starr Co., 143 U. S. 394–404, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436. The supreme court of Montana in the case of Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842, does not think that the townsite rule as to "known mines" applies to known lodes within placers. That court is of the opinion that in the latter case it is sufficient if the lode has a known value which will "support a location on the public domain," and it is not necessary that it "must have sufficient value to justify working it as a mine by reason of the ores known to exist therein." But see *contra*, McConaghy v. Doyle, 32 Colo. 92, 75 Pac. 419, and see, also, Mutchmor v. McCarty, 149 Cal. 603, 87 Pac. 85.

a townsite patent, been made under the law, and its boundaries have been specifically marked on the surface so as to be readily traced, and notice of the location has been recorded in the usual books of record, that vein is such a "mine" as is, under the terms of the law, reserved from the operation of the townsite patent, although personal knowledge of its existence may not be possessed by the applicant for patent. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the placer applicant with the existence of the vein or lode.[40]

If it were a valid perfected lode claim, it would be embraced within the last clause of section twenty-three hundred and ninety-two of the Revised Statutes, and there is no necessity to resort to the rule in the case of lodes within placers for analogy. In this class of cases it has been held to be immaterial whether the claim was known to contain minerals of sufficient value to justify exploration or not.[41]

[40] Noyes v. Mantle, 127 U. S. 348, 8 Sup. Ct. Rep. 1132, 32 L. ed. 168, 15 Morr. Min. Rep. 611.

[41] Callaghan v. James, 141 Cal. 291, 74 Pac. 853, overruling same case in (Cal.) 71 Pac. 104. The first decision in department had held that the mining location is excepted from the townsite patent as long as the annual labor is regularly performed, but the townsite patent absorbs the mining title on failure to thus perpetuate it. The court *en banc*, inferentially at least, agreed with the department, but held that proof of forfeiture is a burden devolving on the party assailing the mineral title and need not be established affirmatively by the mineral claimant.

A somewhat similar situation arose in the case of Golden v. Murphy, 31 Nev. 395, 103 Pac. 394, 105 Pac. 99, and that court is of the opinion that a location made subsequently to the issuance of the townsite patent is valid, provided the ground was embraced in locations existing prior to and at the date of the townsite patent. The case is not entirely satisfactory, as the evidence on the question of previous existence of valid locations, particularly at the date of the townsite patent, is far from convincing.

But where there is no location embracing it, if we accept the analogies of lodes within placers, the vein, or lode, or "mine," if falling within the designation as heretofore defined, is just as much excepted from the operation of the townsite patent as if it were a located lode.

If it is such a known vein, it may be located at any time. This is the rule applied by the supreme court of the United States in the case of known lodes within patented placers.[42]

As to the valid mining claim which is reserved from the operation of the townsite patent, it must necessarily have been located with all the formalities required by law, and be subsisting at the time the townsite patent takes effect. If the location were fatally defective at that time, an amended location, made subsequent to the issuance of the townsite patent, would not relate back to the original invalid location.

A case of this character was considered by the supreme court of Arizona, which court thus states its views:—

The case of Board of Education v. Mansfield, 17 S. D. 72, 106 Am. St. Rep. 771, 95 N. W. 286, involved somewhat similar facts. The locator of mining claims subsequent to the issuance of the townsite patent attempted to justify on the theory that they embraced ground "known to contain valuable deposits of gold-bearing quartz rock, and were claimed, located, worked, and held under the then existing laws prior to and at the time the townsite of Deadwood was entered for patent." The court decided that "no provision has been made for the location of valuable mineral deposits in lands which have ceased to be public, and which have become the property of private parties under any proceedings under the land department or otherwise," and that lands held under townsite patent cannot "be entered upon and prospected for a mine by any parties who choose to do so upon the theory that such property was known to contain valuable deposits of mineral-bearing rock before the patent was issued and the land can be located."

[42] Iron S. M. Co. v. Mike & Starr etc. Co., 143 U. S. 394, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436.

A location of a mining claim, to fix the title as against after-acquired rights by entry and patent, should be sufficiently clear to designate the ground claimed, and should be marked on the ground by monuments, showing the extent of possession. If the location on its face be uncertain, the uncertainty could be aided by evidence of the possession, or of monuments; but a location notice, on its face uncertain and without evidence of what land was occupied, cannot be evidence for any purpose. An amendment, afterward made, describing different land or making certain what was uncertain, cannot revert back to the original defective location. The entry of the townsite intervening after the first location and before the amendment, must be prior in right, as it is prior in time.[43]

In the absence of any intervening right a certificate void under the territorial law may be cured by amendment and the doctrine of relation applied.[44]

§ 177. In what manner may a townsite patent be assailed by the owner of a mine or mining claim.—Where a mine or valid mining claim exists within the patented townsite at the time the patent is issued,—or, to be more exact, at the time final entry thereof is made, and certificate of purchase is issued,—does the title to such mine or claim pass to the townsite patentee, or may the mineral claimant defend against the patent by showing the prior existence of said mine or claim, on the theory that title to such mine or claim is reserved by the law under which the patent issued?

Upon this question there is much confusion of thought observable in the judicial decisions, and the

[43] Tombstone Townsite Cases, 2 Ariz. 272, 15 Pac. 26. For an analogous case, see Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054, where the original location was void for lack of discovery.

[44] Kinney v. Lundy, 11 Ariz. 75, 89 Pac. 496.

rule may be said to be involved in doubt.[45] A review of these decisions is necessary to a proper understanding of the situation.

It was said by the supreme court of Montana, in the Smokehouse Lode cases,—

> An exception in a townsite patent, excluding from its operation all mines, mining claims, and possessions held under existing laws, is an exception required by the law, and is made by the law itself, and is conclusive upon the question that the government did not, and did not intend, by such townsite patent to convey any valid mine or mining claim or possession held under existing laws; and it is therefore impossible, under a patent to a townsite, to acquire any interest in any valid mine or mining claim, or in the surface thereof. . . . . A valid location of a quartz lode mining claim on the public mineral lands of the United States is a grant from the government to the locator thereof, and carries with it the right, by a compliance with the law, of obtaining a full and complete title to all the lands included within the boundaries of the claim, which by the location are withdrawn from sale or pre-emption; and the patent, when issued, relates back to the location, and is not a distinct grant, but the consummation of the grant which had its inception in the location of the claim.[46]

The same court, in a previous case, thus states its views:—

> If, then, the location of a mining claim has the effect of a grant by the United States to the locator of the right to the present and exclusive possession of the ground located, it follows that there could not

[45] The supreme court of Arizona, speaking of the assailability of agricultural patents, says (Kent, C. J., in concurring opinion): "The various decisions of the supreme court of the United States are difficult of reconciliation and give us no clear, authoritative expression on which we may rely." Old Dominion Copper M. Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333.

[46] Butte City Smokehouse Lode Cases, 6 Mont. 397, 401, 12 Pac. 858.

be a like grant of the same property to any other person. There would be no room for a further grant; for the government would have nothing further to convey. After such a grant, which also carries with it the right to purchase the absolute title, the land described within the grant ceases to be public land, and the pre-emption laws, and laws providing for the sale and purchase of the public domain, have no application to it or effect upon it. It is just as much withdrawn from the public domain as the fee is by a valid grant from the United States under authority, or the possession by a valid and subsisting homestead or pre-emption entry. It is already sold, and becomes private property, which may be disposed of at the will of the owner. And so land thus sold and disposed of is not affected one way or another by the subsequent acts of congress providing for the entry of townsites upon the public lands. The application and entry for townsites is only authorized on the public lands; and after the lands have been granted and sold, as in the case of a valid mining location and claim, the entry of a townsite does not affect such claim, though situate within the boundaries of the townsite. The reason is that the mining claim and ground has already been granted and sold, and has thereby ceased to be a portion of the public lands, for which only the townsite entry could be made; and, for a further reason, the townsite act expressly provides that no title shall be acquired under the provisions of said act to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession under existing laws. If no title can be acquired to a mining claim or possession by virtue of the townsite act, then the defendants herein, who claim by virtue of a subsequent townsite entry and patent, cannot disturb the exclusive possession of the plaintiff, who claims by virtue of a prior valid location and patent of the mining claim in question.[47]

[47] Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 415, 5 Pac. 570.

To the same purport is the case of Talbott v. King, decided by the same court.[48]

These Montana cases were not appealed to the supreme court of the United States, but were referred to by that tribunal in the case of Davis v. Weibbold;[49] and the language then used would seem to imply a sanction of the doctrine announced by the supreme court of Montana.[50]

The force of this rule was recognized by the court of appeals of Colorado, although the question there raised in this respect was merely collateral to the main issue. This court, speaking through Presiding Judge Reed, says:—

> The first contention of appellant is, that the court erred in refusing to allow the plaintiff to prove that the discovery of the "Lady B" was within the patented limits of the town of Blackhawk. All the evidence shows that the existence of a mineral-bearing vein at the place the discoveries were made was known long previous to the application for a receipt of the title by the town. That under the statute was sufficient. The town took no title.[51]

This rule is necessarily based upon the theory that the land department had no jurisdiction to convey to the townsite that which had already been withdrawn from the public domain by appropriation under the mining laws. The results reached seem illogical. With the exception of the case of incorporated cities and towns, townsite entries cannot be permitted upon mineral lands. The patent when issued is entitled to

[48] 6 Mont. 76, 9 Pac. 434.

[49] 139 U. S. 530, 11 Sup. Ct. Rep. 628, 35 L. ed. 247.

[50] King v. Thomas, 6 Mont. 409, 12 Pac. 865. See, also, decision of Judge De Witt in Chambers v. Jones, 17 Mont. 156, 42 Pac. 758; Tombstone Townsite Cases, 2 Ariz. 272, 15 Pac. 26; Blackmore v. Reilly, 2 Ariz. 442, 17 Pac. 72.

[51] Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69, 71.

the presumption that the lands are nonmineral. In the case of Davis v. Weibbold, just referred to, Justice Field said: "The [townsite] grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated," viz., the exception of mineral lands from grant in the acts of congress. In discussing the Davis-Weibbold case Justice Field subsequently declared that "The [townsite] patent was in law a declaration that minerals did not exist in the premises when it was issued. . . . ."[52] As the supreme court of the United States has said, the presumption in favor of the validity of a patent is so potential and efficacious that it has been frequently held by the supreme court of the United States that if under any circumstances in the case the patent might have been rightfully issued, it will be presumed on collateral attack that such circumstances existed.[53]

If there existed at the time of the townsite entry a mine or valid mining claim within the limits of the town, it necessarily follows that some of the lands, at least, were mineral, and the patent was to such extent wrongfully issued. If it is necessary to determine the fact of the existence or nonexistence of mineral in paying quantities within the limits of a townsite before patent could issue, why is the patent not a judgment that it is nonmineral,—therefore, that no mine or valid

[52] Barden v. Northern Pacific R. R., 154 U. S. 288, 324, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992. See, also, Board of Education v. Mansfield, 17 S. D. 72, 106 Am. St. Rep. 771, 95 N. W. 286, 288.

[53] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 646, 26 L. ed. 875, 11 Morr. Min. Rep. 673. See, also, dissenting opinion in Iron S. M. Co. v. Mike & Starr etc. Co., 143 U. S. 394, 407, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436; Barden v. Northern Pacific R. R., 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992.

mining claim exists? This question was presented and the conclusion was reached by the trial court in Horsky v. Moran,[54] that a patent issued under such circumstances was not open to collateral attack. A majority of the members of the appellate court concurred in this view, though the decision was based upon another question. The case was taken to the supreme court of the United States, but that court, after an able and elaborate discussion of the question, held that it had no jurisdiction, because of the existence of a nonfederal question broad enough to sustain the judgment.[55]

The difficulties of the situation were appreciated by the supreme court of the United States in a case involving a claimed known lode within a prior placer patent to which the placer applicant asserted no right at the time of filing his application, a junior patent to the lode claimant having been issued. The supreme court thus announced its views:—

> We are not ignorant of the many decisions by which it has been held that the rulings of the land officers in regard to the facts on which patents for lands are issued are decisive in actions at law, and that such patents can only be impeached in regard to those facts by a suit in chancery, brought to set the grant aside. But these are cases in which no prior patent had been issued for the same land, and where the party contesting the patent had no evidence of a superior legal title, but was compelled to rely on the equity growing out of frauds and mistakes in issuing the patent to his opponent.
>
> Where each party has a patent from the government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, we

[54] 21 Mont. 345, 53 Pac. 1064.

[55] Moran v. Horsky, 178 U. S. 205, 20 Sup. Ct. Rep. 856, 44 L. ed. 1034.

think it is competent in any judicial proceeding where this question of superiority of title arises to establish it by proof of these facts. We do not believe that the government of the United States, having issued a patent, can, by the authority of its own officers, invalidate that patent by the issuance of a second one for the same ground.[56]

From the doctrine as announced by the majority court in this case, the chief justice and Justice Brewer dissented. Justice Brewer, speaking for the minority of the court, said:—

From Johnson v. Towsley (13 Wall. 72) to the present time, the uniform ruling of this court has been that questions of fact passed upon by the land department are conclusively determined, and that only questions of law can be brought into court. The right to this patent depends solely upon these two questions of fact, which were considered by the land office when the original patent was issued. I think that its determination was conclusive.

In a later case before the same tribunal,[57] the lode claimant had no patent, but rested his case upon a location made after the final entry of the placer claim, but upon a lode which, it was claimed, was known to exist at the time of the application for the placer patent, and which was not included in the application. The right to establish these facts by extrinsic evidence, and thus to limit the operation of the placer patent, was upheld by the majority of the court. The minority of the court, speaking through Justice Field, thus presented its views:—

I am unable to agree with my associates in the disposal of this case. The decision and the opinion

[56] Iron S. M. Co. v. Campbell, 135 U. S. 286, 292, 10 Sup. Ct. Rep. 765, 34 L. ed. 155, 16 Morr. Min. Rep. 218.

[57] Iron S. M. Co. v. Mike & Starr etc. Co., 143 U. S. 394, 407, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436.

upon which it is founded will do much, in my judgment, to weaken the security of patents of the United States for mineral lands, and leave them open to attack and overthrow upon mere surmises, notions, and loose gossip of the neighborhood, which ought not to interfere with any rights of property resting upon the solemn record of the government.

In Dahl v. Raunheim,[58] Judge Field, speaking for the entire court, in a case of the same class, says:—

> That it was *placer* ground is conclusively established in this controversy against the defendant by the fact no adverse claim was asserted by him to the plaintiff's application for patent of the premises as such ground. That question is not now open to litigation by private parties seeking to avoid the effect of plaintiff's proceedings.

In Moran v. Horsky,[59] Justice Brewer said:—

> Now, as we have heretofore noticed, the patent in the case before us for the townsite purported to convey the entire tract. On the face of the instrument there was nothing to suggest any exception. While it may be conceded under the authorities which are referred to, that, in an action at law by a claimant under that patent, the existence of a mining claim at the time of its issue might be shown and be a valid defense to a recovery of so much of the ground as was included within the mining claim, and in that view it may perhaps be not inaptly said that the patent was to that extent void. But be this as it may, whenever the invalidity of a patent does not appear upon the face of the instrument, or by matters of which the courts will take judicial notice, and the land is apparently within the jurisdiction of the land department as ordinary public land of the United States, then it would seem to be technically more accurate to say that the patent was voidable, not void.

[58] 132 U. S. 260, 263, 10 Sup. Ct. Rep. 74, 33 L. ed. 324, 16 Morr. Min. Rep. 214.

[59] 178 U. S. 205, 211, 20 Sup. Ct. Rep. 856, 44 L. ed. 1038.

In perfecting mining locations the government is not an actor. It assures to the explorer the right to his mining location, but it does not surrender the right to determine for itself the qualifications of the locator, the fact of his discovery, his compliance with the law, and the character of the land. A judgment by a court of competent jurisdiction in proceedings brought upon adverse claims does not conclude the government as to these matters. There is no notice brought to the attention of the government of the existence of mining locations or known lodes prior to the application for patent. The only record made is with an officer who has no connection with the land department, and who owes no responsibility to the government. And yet a townsite patent issued by the government may be assailed in an action between individuals, and its operation defeated by showing facts the existence of which the government neither actually nor constructively could have any knowledge, unless it was a part of its duty to ascertain them when the townsite patent was applied for; and if it was a part of its duty, the patent should be conclusive evidence that that duty was performed. To say that a perfected mining claim is a grant from the government, is true in one sense; but it does not follow that in establishing the existence of such a grant the government has no voice. It is not a grant in the sense that the government has absolutely parted with its title. It does not seem just where only one patent is issued, and where the government has not attempted to issue a second one covering any portion of the premises described in the first, that the operative effect of the prior patent should be limited by judgments in actions to which the government is in no sense a party. It would seem that the remedy in such cases should be by

action instituted by the government to vacate the patent, after notice of the facts brought to its attention.[60]

The supreme court of California has expressed the view in unequivocal language that the holder of a valid mining location, subsisting at the date of issuance of the townsite patent, may set up his location title to defeat the townsite patent to the extent of the conflict area, and that in this class of cases it is immaterial whether the claim was known to contain minerals of sufficient value to justify exploration, provided of course there was a valid discovery. The court also held, inferentially at least, and on this point agreed with the department opinion,[61] that such location must be perpetuated by the performance of annual labor after the issuance of the townsite patent, but overruled the department opinion on the question of the burden of establishing the failure to perform the annual labor, which burden, the supreme court held, rested with the townsite claimant and need not be affirmatively shown by the mineral claimant.[62]

The supreme court of Montana in the Horsky-Moran case adopts the views of the trial court where it is intimated that the mineral claimant who attacks a townsite patent must connect himself with "the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent."

Logically, it would seem that if existing valid mining claims or known mines should be excepted from the operation of the townsite patent as the California court holds, that they must remain distinct entities and

[60] See Horsky v. Moran, 21 Mont. 345, 53 Pac. 1064; S. C., 178 U. S. 205, 20 Sup. Ct. Rep. 856, 44 L. ed. 1038; Hulings v. Ward Townsite, 29 L. D. 21; Board of Education v. Mansfield, 17 S. D. 72, 106 Am. St. Rep. 771, 95 N. W. 285, 288.

[61] 71 Pac. 104.

[62] Callahan v. James, 141 Cal. 291, 74 Pac. 853.

be classed as a part of the public domain subject to the operation of the mining laws. The known mines would remain subject to location, and the mining claims, if forfeited or abandoned, would be subject to relocation, or the original locator would be entitled to resume work after a period of delinquency on his part, provided there were no intervening rights, for under ordinary circumstances the estate of a locator does not become forfeited for mere failure to perform assessment work in the absence of ouster and some new intervening right. Perhaps the California court was influenced by the argument that the exception of a valid mining claim from a townsite patent is intended to operate only in favor of the then owner of such claim and his successors, and that if his title is terminated by abandonment or forfeiture, a new locator cannot take advantage of the original locator's rights and *status*, but must locate the ground on the theory that it was a known mine and it is therefore subject to the more rigid test of mineral character, or it may have had in mind the argument that the abandonment or forfeiture of the claim gives rise to a presumption that the claim was not mineral in character and was not excepted from the townsite patent.

It is little wonder that the courts are inclined to rigidly limit the operation of this exception, for it has so frequently been taken advantage of for purely speculative purposes. The land "department itself has, in a number of cases recently decided, expressed its unwillingness to disturb, in favor of the lode mining applicants, titles based upon patents, presumptively complete, issued on townsite or placer entries where such patents . . . . had remained for many years unchallenged, except on the clearest proof that the conflicting area was known, at the date of the patented entry, to

occupy such a *status* or possess such a character, that complete title thereto could not be held to have passed thereunder."[63] A review of the decided townsite cases involving mining claims indicates that the great majority of them have been decided adversely to the mineral applicants. This has been particularly true where laches or lapse of time in asserting the alleged mineral title has existed.

The practical necessity for the statutory exception of "known mines" hardly seems to exist unless we accept the suggestion that the more rigid test of the "known mine" rule is to be applied where valid mining claims or possessions have become forfeited and strangers to the original excepted title have relocated. We can scarcely conceive of a mine *known* to contain mineral of sufficient value to justify extraction that would not also be included within a valid mining claim. Since in the case of known mines there is no claimant at the date of the townsite patent contemplated, it is pertinent to inquire for what length of time the exception will continue to exist and can be taken advantage of by a subsequent locator. Probably the courts will hold that when a length of time reasonable in view of all the attendant circumstances has elapsed and no claim been made, an indisputable presumption will arise which will prevent anyone from thereafter questioning the right of the townsite patentee. Such presumptions are frequently indulged in by the courts, and are founded on general principles of public policy adopted for the "peace of society and the security of property."[64]

[63] Mill Side Lode, 39 L. D. 356.

[64] United States v. Beebee, 17 Fed. 36, 4 McCrary, 12; S. C., on appeal, 127 U. S. 338, 8 Sup. Ct. Rep. 1083, 32 L. ed. 121; Moran v. Horsky, 178 U. S. 205, 20 Sup. Ct. Rep. 856, 44 L. ed. 1038.

The land department at one time took the position that its jurisdiction was exhausted by the issuance of a prior patent to a townsite, and until that was set aside it was not authorized to issue a junior mineral patent within the limits of the townsite.[65]

The department subsequently abandoned this doctrine, overruled the cases which established it, and now holds that it may issue a patent to a mineral claimant after having issued a townsite patent.[66]

Under the latest ruling the department will entertain an application for patent for a lode claim within a previously patented townsite, but will insist on a hearing in a proceeding to which the townsite patentee, or his successor, is a party, to determine whether such lode was known to exist at the date of the townsite entry.[67]

If the lode or mining claim is by operation of law reserved out of the patent, it certainly follows that the department may subsequently issue a patent for the thing so reserved. This is the rule now followed by the department with reference to lodes known to exist within patented placers.[68]

Of course, the propriety of this departmental practice depends on the correct determination of the ques-

[65] See *ante*, § 173; Pacific Slope Lode, 12 L. D. 686; Cameron Lode, 13 L. D. 369; Protector Lode, 12 L. D. 662; Plymouth Lode, Id. 513.

[66] Pacific Slope Lode v. Butte Townsite, 25 L. D. 518; Gregory Lode, 26 L. D. 144; Hulings v. Ward Townsite, 29 L. D. 21; Brady's Mortgagee v. Harris, Id. 89; S. C., on review, Id. 426. Section 16 of the act of March 3, 1891, so specifically provides. Nome & Sinook Co. v. Townsite of Nome, 34 L. D. 102; S. C., on review, 34 L. D. 276.

[67] Mill Side Lode, 39 L. D. 356.

[68] South Star Lode, 20 L. D. 204 (on review); Butte & Boston M. Co., 21 L. D. 125, reversing Pike's Peak Lode, 14 L. D. 47, and commissioners' decision, South Star Lode, 17 L. D. 280; *post*, § 413.

See Pacific Slope Lode v. Butte Townsite, 25 L. D. 518, where the analogy is recognized.

tion as to the conclusiveness of the townsite patent. Logically, we think the mineral claimant's remedy in this class of cases is in equity to erect a trust on the townsite patent; or, perhaps, an application to the land department to institute a suit to vacate the patent *pro tanto*.

§ 178. Ownership of minerals under streets in townsites.—It cannot be doubted that a patent issued by the government under the townsite laws vests in the grantee the complete title to all the land described, regardless of the fact that some of the land may have become dedicated to a public use by the laying out of streets and highways. If it is subsequently ascertained that minerals underlie these portions of the tract which are subject to the public easement, it cannot be said that the title to these minerals remains in the United States. This ownership must primarily vest in the immediate grantee from the government,—*i. e.*, either in the municipality, if the town be incorporated, or in the county or superior judge in trust for the inhabitants. Whether the title to the minerals underlying the streets and alleys remains in the municipality, or judge as trustee, as the case may be, or passes to the abutting lot owners, will depend entirely upon the laws of the particular state wherein the townsite is situated. A mineral location on public land dedicated to a city for street purposes is not necessarily in conflict with the rights of the city. The title to the mining claim would be held subject to the public easement.[69]

The federal townsite laws contemplate that each state or territory shall appropriately provide by legislation for the disposal of the lots within the tract em-

[69] City of Butte v. Mikosowitz, 39 Mont. 350, 102 Pac. 593.

braced within the townsite.[70] In determining the nature and character of the title conveyed by the trust patentee, and the boundaries of the several tracts conveyed, resort must in each instance be had to this supplemental state or territorial legislation. Without attempting any critical analysis of this class of legislation, we apprehend that whether the lot owners take by virtue of their conveyance to the middle of the street, or their rights are to be determined by the abutting line of the street, will depend largely upon whether or not the common law or its statutory re-enactment is in force in that particular state, or the rules of the common law have been abrogated by legislative action.

At common law the public has a mere easement in highways to use them for passage to and fro and for other purely public purposes appropriate to their nature as such. The fee of the soil and mineral therein belongs to the abutting owners, whose titles, presumptively at least, extend to the middle of the highway.[71]

This presumption may, of course, be overcome where it clearly appears from the instrument of conveyance that the parties intended that the side line of the street should form the boundary.

We are not here concerned, however, with the interpretation of conveyances, but deal with the subject from the standpoint of general law.

In some states the common law is operative by general legislative adoption. In others the common-law rule on the particular subject under discussion has received express legislative sanction. This is the case in

[70] Rev. Stats., § 2387; Comp. Stats. 1901, p. 1458; 6 Fed. Stats. Ann. 344.

[71] Barclay v. Howell's Lessee, 6 Pet. 498, 513, 8 L. ed. 477; Harris v. Elliott, 10 Pet. 25, 55, 9 L. ed. 333; Dubuque v. Maloney, 9 Iowa, 450, 74 Am. Dec. 358.

California.[72] In still others the common law has been so modified as to provide that a dedication of streets and alleys shall vest a fee simple in the municipality or the public.[73] This seems to be the rule in Colorado.[74]

Article VI. Indian Reservations.

§ 181. Nature of Indian title.—The scope of this treatise neither calls for nor permits elaborate discussion of the legal or ethical relationship existing between the government of the United States and the "wards of the nation," as the Indian tribes within our borders are popularly styled. The government legislates upon the conduct of strangers or citizens within the limits of their reservations, and for many years innumerable treaties formed with them acknowledged them to be independent people.[75]

But by the act of congress passed March 3, 1871,[76] it was declared that no Indian nation or tribe within

[72] Cal. Civ. Code, § 831.

[73] Des Moines v. Hall, 24 Iowa, 234; Trustees v. Haven, 11 Ill. 554; Chaliss v. Atchison Union Depot, 45 Kan. 398, 25 Pac. 894; Lindsay v. Omaha, 30 Neb. 512, 27 Am. St. Rep. 415, 46 N. W. 627. Compare Thomas v. Hunt, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857.

[74] Mills' Ann. Stats. 1891, § 4360; Rev. Stats. 1908, § 6519; City of Leadville v. Coronado M. Co., 29 Colo. 17, 67 Pac. 289; City of Leadville v. St. Louis S. & R. Co., 29 Colo. 40, 67 Pac. 1126.

[75] Fletcher v. Peck, 6 Cranch, 87, 147, 3 L. ed. 162.

[76] 16 Stats. at Large, p. 566.

the territory of the United States should thereafter be recognized as an independent nation, tribe, or power with whom the United States might contract by treaty.[77]

It was determined in the early history of our country that the absolute, ultimate title to lands in the possession of the Indians was acquired by the discoverers of the country, subject only to the Indian title of occupancy, and that the discoverers possessed the exclusive right of acquiring this title; or, in other words, the exclusive right of pre-emption. As was said by Chief Justice Marshall,—

> It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of the government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.[78]

Indians have a right to the lands they occupy until that right is extinguished by voluntary cession to the government.[79]

The courts have said of the interest of the Indians:—

> For all practical purposes they owned it; as the actual right of possession, the only thing they deemed of value, was secured to them by treaty until they should elect to surrender it to the United States.[80]

77 Public Domain, p. 244; Stephens v. Cherokee Nation, 174 U. S. 445, 483, 19 Sup. Ct. Rep. 722, 43 L. ed. 1041.

78 Johnson & Graham's Lessees v. McIntosh, 8 Wheat. 543, 603, 5 L. ed. 681.

79 Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25; Godfrey v. Beardsley, 2 McLean, 412, Fed. Cas. No. 5497; Holden & Warner v. Joy, 17 Wall. 211, 21 L. ed. 523.

80 Leavenworth L. & G. R. Co. v. United States, 92 U. S. 743, 23 L. ed. 638; Bardon v. Northern Pac. R. R. Co., 145 U. S. 535, 543, 12

But they do not hold a fee in the land of their original occupation, but only a usufruct, the fee being in the United States, if within the public land states or territories, or in some of the several states, if the national government acquired no lands therein.[81]

Lands conveyed by the government to an Indian nation in lieu of original territory surrendered by them under treaties, for the purpose of inducing a change of habitat, are alike subject to the preferred right of the government to extinguish or acquire the Indian title.

§ 182. Manner of creating and abolishing Indian reservations.—Mr. Donaldson thus explains the manner of creating and abolishing Indian reservations:—

> The method of making an Indian reservation is by an executive order withdrawing certain lands from sale or entry and setting them apart for the use and occupancy of the Indians, such reservation previously having been selected by officers acting under the direction of the commissioner of Indian affairs or that of the secretary of the interior, and recommended by the secretary of the interior to the president. The executive order is sent to the office of Indian affairs, and copy thereof is furnished by that office to the general land office, upon receipt of which the reservation is noted upon the land office records, and local land officers are furnished with a copy of

Sup. Ct. Rep. 856, 36 L. ed. 806; King v. McAndrews, 111 Fed. 860, 870, 50 C. C. A. 29.

[81] United States v. Cook, 19 Wall. 591, 22 L. ed. 210; Marsh v. Brooks, 8 How. 223, 12 L. ed. 1056; Doe v. Wilson, 23 How. 457, 16 L. ed. 584; Minter v. Crommelin, 18 How. 87, 15 L. ed. 279; Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; Worcester v. State of Georgia, 6 Pet. 515, 8 L. ed. 483; United States v. Cook, 19 Wall. 591, 22 L. ed. 210; State v. Kennard (on rehearing), 57 Neb. 711, 78 N. W. 282; S. C., 56 Neb. 254, 76 N. W. 545. And see Buttz v. Railroad Co., 119 U. S. 55, 7 Sup. Ct. Rep. 100, 30 L. ed. 330; and Leavenworth L. & G. R. Co. v. United States, 92 U. S. 753, 23 L. ed. 642.

the order, and are directed to protect the reservation from interference.

When such reservation is no longer required, and the president is so informed by the secretary of the interior, an executive order is issued restoring the lands to the public domain, and the order being received by the commissioner of Indian affairs, a copy thereof is furnished to the general land office, where it is noted, and information is communicated to the United States land officers, after which the lands are disposed of as other public lands.[82]

Indian reservations existing by virtue of treaty stipulations are usually abolished, and the Indian title extinguished, by compact between chiefs of the tribes and agents of the government, the agreement being subject to approval by congress and the president.[83]

§ 183. Lands within Indian reservations are not open to settlement or purchase under the public land laws.—It has been the policy of the government from the beginning to prohibit the settlement of lands in the occupation of the Indians.[84]

As was said by the supreme court of the United States,—

> That lands dedicated to the use of the Indians should upon every principle of natural right be carefully guarded by the government and saved from a possible grant, is a proposition which will command universal assent.[85]

While the government may dispose of the fee of the land, it remains burdened with the right of occupancy

82 Public Domain, p. 243.

83 Id., p. 244.

84 Hot Springs Cases, Rector & Hale v. United States, 92 U. S. 698, 23 L. ed. 690.

85 Leavenworth L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Missouri, K. & T. Ry. Co. v. United States, Id. 760, 23 L. ed. 645.

in the Indians.[86] This right of occupancy cannot be interfered with nor determined, except by the United States. No private individual can invade it, and the manner, time, and conditions of its extinguishment are matters solely for the consideration of the government, and are open to contestation in the judicial tribunals.[87] Where land is reserved for the use of an Indian tribe by treaty, the treaty is notice that the land will be retained for the use of the Indians, and this purpose cannot be defeated by the action of any officers of the land department.[88] The lands embraced therein are no longer public lands.[89]

The nature of this use requires the absolute reservation and withdrawal of every foot of land within the defined limits, and no portion of it is disposable to settlers or to purchasers so as to enable them to invade the Indian occupancy. In this respect Indian reservations differ from that class of Mexican grants called "floats," within the exterior boundaries of which the government may grant lands to others than the claimants, so long as sufficient land remains to satisfy the grant.[90]

In most of the compacts entered into between the government and Indian tribes, the United States has

[86] Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; Buttz v. N. P. R. R., 119 U. S. 55, 7 Sup. Ct. Rep. 100, 30 L. ed. 330.

[87] Id.

[88] United States v. Carpenter, 111 U. S. 347, 4 Sup. Ct. Rep. 435, 28 L. ed. 451.

[89] Missouri, K. & T. Ry. Co. v. Roberts, 152 U. S. 114, 14 Sup. Ct. Rep. 114, 38 L. ed. 377; Spalding v. Chandler, 160 U. S. 394, 405, 16 Sup. Ct. Rep. 360, 40 L. ed. 469; King v. McAndrews, 111 Fed. 860, 870, 50 C. C. A. 29; McFadden v. Mountain View M. & M. Co., 97 Fed. 670, 38 C. C. A. 354.

[90] United States v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, 32 L. ed. 213; Carr v. Quigley, 149 U. S. 652, 13 Sup. Ct. Rep. 961, 37 L. ed. 885. See, *ante*, § 124.

agreed that only such persons as were specified in the treaty should ever be permitted to pass over, settle upon, or reside in the territory so set apart for the use of the Indians. The treaty with the Sioux Indians, proclaimed February 24, 1869, embracing within its limits the famous Black Hills, in Dakota, and with the confederated band of Ute Indians, in Colorado, contained these stipulations.[91]

But in the absence of such specific stipulations, the policy of the government has been to preserve the reservation from invasion by those seeking to establish settlement within the boundaries.

Specific provision has been made by statute for leasing of mineral lands of particular tribes remaining under government tutelage,[92] and for the leasing of allotments under general allotment act.[93] Congress has also apparently recognized an equity acquired by leases made by the secretary of the interior without specific statutory authority.[94]

§ 184. Status of mining claims located within limits of an Indian reservation prior to the extinguishment of the Indian title.—It logically follows from the nature and object of a reservation of land for the use and occupancy of the Indians that no rights can be lawfully initiated to mineral lands within the limits of such reservation. It would be a violation of public faith to permit these lands, so long as the Indian title remains unextinguished, to be invaded with a view to their

[91] Uhlig v. Garrison, 2 Dak. 71–95, 2 N. W. 253; Kendall v. San Juan S. M. Co., 9 Colo. 349, 12 Pac. 198.

[92] Act of Congress, June 28, 1898, 30 Stats. at Large, 495.

[93] Act of June 7, 1897, 30 Stats. at Large, 85; February 8, 1887, 24 Stats. at Large, 388.

[94] Act of May 27, 1902, 32 Stats. at Large, 245, 263; Raven Mining Company, 34 L. D. 307.

exploration and appropriation for mining purposes. Such invasion, although peaceful in its inception, would invariably end in conflicts. The government could not lend its sanction to such intrusion without being charged with a violation of its solemn obligations.[95]

The supreme court of Colorado, in a case which involved a mining claim within the limits of what was at the time of its discovery and location the Ute Indian reservation in that state, clearly announced the rule:—

> The effect of the treaty was to withdraw the whole of the land embraced within the reservation from private entry or appropriation, and during its existence the government could not have authorized the plaintiffs to enter upon the ground in controversy for the purpose of discovering and locating a mining claim. On the contrary, the government stood pledged to prevent its citizens from entering upon the reservation for any such purposes. The right to locate mineral lands of the United States is declared to be a privilege granted by congress. No such grant including the premises in controversy existed at the time of the plaintiff's location. It is also held that a location to be effective must be good at the time it was made, and that it cannot be good when made if there is then an outstanding grant of the exclusive right of possession to another. The possession of the plaintiffs at the time of their location of the Bear lode was tortious. Such being the character of their possession, and assuming to locate a claim, not only *without legal* authority, but in violation of law, the attempted location was a nullity. It was just as if it had never been made.[96]

[95] See the interesting account of the settlement of Deadwood and the Black Hills region, in 8 Copp's L. O. 153.

[96] Kendall v. San Juan S. M. Co., 9 Colo. 349, 357, 12 Pac. 198 (citing United States v. Carpenter, 111 U. S. 347, 4 Sup. Ct. Rep. 435, 28 L. ed. 451; Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, 1 Morr. Min. Rep. 510).

The supreme court of the United States affirmed the rule thus announced. Said that court:—

> The effect of the treaty was to exclude all intrusion for mining or other private pursuits upon the territory thus reserved for the Indians. It prohibited any entry of the kind upon the premises, and no interest could be claimed or enforced in disregard of this provision. Not until the withdrawal of the land from this reservation of the treaty by a new convention with the Indians, and one which would throw the lands open, could a mining location therein be initiated by the plaintiffs. The location of the Bear lode, having been made whilst the treaty was in force, was inoperative to confer any rights upon the plaintiffs.[97]

The supreme court of Dakota set its seal of condemnation upon the attempted assertion of rights to occupy lands within the Black Hills region prior to the extinguishment of the title of the Sioux Indians;[98] and with reference to attempted mining locations it established the rule that a party cannot acquire a mining claim by acts performed within an Indian reservation. But it was also held that a party in possession on the day the Indian title became extinguished, with the requisite discovery, with surface boundaries marked and notice posted, could adopt these antecedent steps, and manifest their adoption by then recording his notice of location in the proper office, and by so doing and performing the amount of labor and making improvements could date his rights from that day;[99] and this doc-

[97] Kendall v. San Juan S. M. Co., 144 U. S. 658, 663, 12 Sup. Ct. Rep. 779, 36 L. ed. 583, 17 Morr. Min. Rep. 475. Followed in McFadden v. Mountain View M. & M. Co., 97 Fed. 670, 38 C. C. A. 354; Gibson v. Anderson, 131 Fed. 39, 42, 65 C. C. A. 277. A reservation by executive proclamation stands upon the same plane as a reservation made by treaty or an act of congress. Id.

[98] Uhlig v. Garrison, 2 Dak. 71, 95, 2 N. W. 253.

[99] Caledonia G. M. Co. v. Noonan, 3 Dak. 189, 14 N. W. 426.

trine also met with the approval of the supreme court of the United States.[100]

The general rule with reference to mining claims within Indian reservations was first announced by the supreme court of Dakota in the case of French v. Lancaster;[1] but no written opinion was filed. In this case it seems that both parties litigant, being rival mineral claimants *in pari delicto*, stipulated to waive all objections that might have been raised to evidence of acts of location and appropriation performed prior to the extinguishment of the Indian title. The trial court acted upon the stipulation, and determined the case regardless of the existence of the reservation.[2]

The appellate court, however, held that public policy required that notice should be taken of the facts, and held the attempted locations invalid.

The general doctrine announced in this case was followed by the same court in a later case.[3]

The land department has uniformly adhered to the doctrine that the occupancy and location of a mining claim within an Indian reservation prior to the extinguishment of the Indian title is an open violation of solemn treaty obligations, and without even a shadow of right.[4]

100 Noonan v. Caledonia G. M. Co., 121 U. S. 393, 7 Sup. Ct. Rep. 911, 30 L. ed. 1061. See Bay v. Oklahoma S. G. & O. Co., 13 Okl. 425, 73 Pac. 936; Le Clair v. Hawley, 18 Wyo. 23, 102 Pac. 853.

1 2 Dak. 346, 47 N. W. 395.

2 See Golden Terra M. Co. v. Mahler, 4 Morr. Min. Rep. 390, 405, 4 Pac. Coast L. J. 405.

3 Golden Terra M. Co. v. Smith, 2 Dak. 374, 462, 11 N. W. 97.

4 Townsite of Deadwood v. Mineral Claimants, 8 Copp's L. O. 153; Rattlesnake Jack Placer, 10 Copp's L. O. 87; Crow Indian Reservation, Copp's Min. Lands, p. 236; Circ. Instructions, 3 L. D. 371, 6 L. D. 341; In re Meeks, 29 L. D. 456. And see King v. McAndrews, 111 Fed. 860, 50 C. C. A. 29, reversing 104 Fed. 430; Acme Cement and Placer Co., 31 L. D. 125.

In the case of the Colville reservation in Washington, created by an executive order, the circuit court of appeals for the ninth circuit held that an act of congress providing for the restoration of the lands included within the reservation did not operate of itself, in advance of a proclamation by the president, to give a right to locate mining claims therein.[5] Judge Hanford, sitting in the circuit, had reached an opposite conclusion.[6] Subsequently, by act of congress, the mineral land laws were expressly extended to the north half of this reservation.[7]

Manifestly, the precise time when the Indian title becomes effectually extinguished, and the reserved lands become open to entry and occupation for any purpose, depends upon the facts of each particular case.[8]

The land department has held, that under an act passed June 6, 1900,[9] extending the mining laws over

[5] McFadden v. Mountain View M. & M. Co., 97 Fed. 670, 38 C. C. A. 354.

[6] McFadden v. Mountain View M. & M. Co., 87 Fed. 154; Collins v. Bubb, 73 Fed. 735.

[7] 29 Stats. at Large, p. 9.

[8] See McFadden v. Mountain View M. & M. Co., 97 Fed. 670, 38 C. C. A. 354. Congress has passed several special acts opening lands within Indian reservations to occupation, location, and purchase, under the provisions of the mineral laws only, with a preference right of purchase to those who had located prior to the opening of the reservation—for example, the Blackfeet, Fort Belknap (Eureka, and Try Again Lodes, 29 L. D. 158), and San Carlos reservations. (1st Sess. 54 Cong.) As to lands in Oklahoma ceded by the Comanche, Kiowa and Apache tribes, see Bay v. Oklahoma S. G. & O. Co., 13 Okl. 425, 73 Pac. 936; Instructions, 32 L. D. 54; Gypsite Placer Claim, 34 L. D. 54. As to same character of lands ceded by Wichita and affiliated bands, see Instructions, 32 L. D. 95. Under special acts of congress right was given to certain parties to locate mining claims in the Unitah and White River reservations. Act of May 27, 1902, 32 Stats. 245, 263. See Raven Mining Co., 34 L. D. 306. A special act of congress was passed providing for the sale of lands containing gilsonite, elaterite and other like substances in the Uncompahgre reservation. See Proclamation, 34 L. D. 648.

[9] 31 Stats. at Large, pp. 672, 680.

the Fort Hall reservation in Idaho, and providing that lands allotted to Indians should be subject to exploration for mining purposes, after an allotment had been made to an Indian the land embraced therein could not be explored for minerals and was not subject to exploration; but prior to such allotment mineral location might be made.[10] This ruling seems to us to be correct and in accordance with the spirit of the act.[11]

§ 185. Effect of creating an Indian reservation embracing prior valid and subsisting mining claims.—The land department, following the opinion of the attorney-general with reference to military reservations,[12] has held that mining claims valid and subsisting cannot be included within an Indian reservation set apart after the location of such claims so as to deprive the locator of his previously acquired rights. Where an Indian reservation has been made including such claim, the locators may show by proper proof that their claims were valid and subsisting at the date of such reservation.[13]

Considering the dignity accorded to a mining title perfected and acquired at a time when the lands were a part of the public domain, we think the ruling in harmony with the spirit and intent of the mining laws. Such locators have the right to go upon or across the reservation for the purpose of maintaining their right to their claims and to develop them. If their claims are abandoned or become subject to relocation, they do not lapse into the reservation, but may be relocated,

10 Acme Cement and Plaster Co., 31 L. D. 125.

11 See, to same effect, instructions, 31 L. D. 154.

12 *Post*, § 192.

13 Chief Moses Indian Reservation, 9 Copp's L. O. 189; Navajo Indian Reservation, 30 L. D. 515. See, for an analogous case, Hibberd v. Slack, 84 Fed. 571.

and the relocator is entitled to the same privileges as are accorded to the original locator.[14]

§ 186. Conclusions.—We announce the following as our conclusions from the foregoing exposition of the law:—

No right to appropriate a mining claim within the limits of an Indian reservation can be initiated so long as the Indian title remains unextinguished. Acts which in the absence of such reservation might be valid may be adopted upon the extinguishment of the Indian title, if such adoption is manifested by perfection of the location and the performance of the required work or making improvements. Otherwise, the claim may be located by the first-comer, regardless of the acts done by others while the land was withdrawn from the public domain. A mining claim valid and subsisting at the time an Indian reservation is created is not affected by such reservation, nor are the rights of the prior locator impaired, so long as he perpetuates his estate by the performance of the requisite annual labor; and upon the abandonment or forfeiture of the claim, it does not become subject to the reservation; the estate of the original locator may be restored by resumption of work, or the claim may in default of this be relocated.

[14] Navajo Indian Reservation, 30 L. D. 515.

Article VII. Military Reservations.

§ 190. Manner of creating and abolishing military reservations.—The method of creating military reservations is thus outlined by Mr. Donaldson:—

> The commanding officer of a military department recommends the establishment of a reservation, with certain boundaries; the secretary of war refers the papers to the interior department, to know whether any objection exists to the declaration of the reserve by the president. If no objection is known to the general land office, and it is so reported, the reservation is declared by the president, upon application of the secretary of war for that purpose, and the papers are sent to the general land office, through the secretary of the interior, for annotation upon the proper records. If upon surveyed land, the United States land officers are at once instructed to withhold the same from disposal, and respect the reservation. If upon unsurveyed land, the United States surveyor-general is furnished with a full description of the tract, and is instructed to close the lines of public surveys upon the outboundaries of the reserve; the United States land officers are also instructed not to receive any filing of any kind for the reserved lands.[15]

The authority of the president, acting through the secretary of war and his officers, to have posts and forts established, with a proper quantity of ground appropriated for military purposes, is unquestioned.[16]

[15] Public Domain, p. 249.

[16] Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; Stone v. United States, 2 Wall. 525, 17 L. ed. 765; Grisar v. McDowell, 6 Wall. 381, 18 L. ed. 868; Scott v. Carew, 196 U. S. 100, 49 L. ed. 403.

This authority has been held to extend to Hawaii, where a military reservation may be carved out of the public lands.[17]

Such reservation is vacated, or "reduced," by executive proclamation.

Whenever in the opinion of the president of the United States the lands, or any portion of them, included within the limits of any military reservation have become useless for military purposes, he causes the same, or so much thereof as he shall designate, to be placed under the control of the secretary of the interior for disposition under the general laws relating to the public lands, and causes to be filed with the secretary of the interior a notice thereof.[18]

The lands thus restored are not always opened immediately for entry and settlement for agricultural purposes. Congress usually provides for their sale or extends the privilege of settlement upon them under the homestead laws. But with reference to mineral lands, the act of July 5, 1884,[19] in terms provides that whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of the act, the same shall be disposed of exclusively under the mineral land laws of the United States.

§ 191. Status of mining claims located within the limits of a subsisting military reservation.—Every tract set apart for some special use is reserved to the

[17] Opinion Atty.-Gen., 29 L. D. 32.

[18] Act of July 5, 1884, 23 Stats. at Large, p. 103; Comp. Stats. 1901, p. 1607; 6 Fed. Stats. Ann. 423. See, also, Act of Aug. 23, 1894, 28 Stats. at Large, p. 491; Comp. Stats. 1901, p. 1611; 6 Fed. Stats. Ann. 425, 426; Act of Feb. 15, 1895, 28 Stats. at Large, p. 664; Comp. Stats. 1901, p. 1612; 6 Fed. Stats. Ann. 426.

[19] 23 Stats. at Large, p. 103; Comp. Stats. 1901, p. 1607; 6 Fed. Stats. Ann. 423.

government, to enable it to enforce that use; and there is no difference in this respect, whether it be appropriated for Indian occupancy or for other purposes. There is an equal obligation resting on the government to see that neither class of reservation is diverted from the uses to which it was assigned.[20]

Much that has been said in the preceding articles with reference to Indian reservations applies with equal force to military reservations. In an opinion given by Attorney-General McVeagh to the secretary of war, that officer was advised that mineral lands might be included in reservations for military purposes, and they are not subject to appropriation by mineral claimants while such reservation exists.[21] And this is the rule recognized by the land department.[22]

The law is too well settled to require discussion that no right exists under any of the public land laws to invade the limits of a subsisting reservation for the purpose of initiating a title to the lands therein.[23]

The creation of the reservation is a withdrawal of the lands from the operation of the public land laws; and so long as such reservation remains in force, no entry thereon can be lawfully made under the mining or other public land laws.

§ 192. Effect of creating a military reservation embracing prior valid and subsisting mining claims.— Mr. Armstrong, while acting commissioner of the general land office, held that the subsequent enlargement of a military reservation, so as to include within its

[20] Leavenworth L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Scott v. Carew, 196 U. S. 100, 49 L. ed. 403.

[21] Fort Maginnis, 1 L. D. 552.

[22] Sucia Islands, 23 L. D. 329.

[23] Scott v. Carew, 196 U. S. 100, 49 L. ed. 403.

limits previously located mining claims, prevented the locator from perpetuating his title by performance of annual work, his only remedy being to relocate the claim upon the restoration of the reservation to the public domain.[24]

But in the opinion given by Attorney-General McVeagh at the request of the secretary of war, referred to in the preceding section, a contrary rule is stated. Mr. McVeagh thus expresses his views:—

> It seems to me that where such rights have attached to mineral lands in favor of the locator of a mining claim, the land during the continuance of the claim (i. e., so long as it is maintained in accordance with law) becomes by force of the mining laws appropriated to a specific purpose—namely, the development and working of the mine located; and unless congress otherwise provides, it cannot, while that right exists, notwithstanding the title thereto remains in the government, be set apart for public uses.[25]

Ever since the promulgation of this opinion the land department has accepted the rule as stated by the attorney-general, and has applied it to the Yosemite national park,[26] and to reservoir sites.[27]

This is the accepted doctrine of that department with reference to previously located mining claims within Indian reservations.[28]

The rule is different with reference to inchoate preemption claims. As to such classes of claims, the government does not enter into any contract with the settler or incur any obligation that the land occupied by

24 Camp Bowie Reservation, 7 Copp's L. O. 4.
25 1 L. D. 552, 554; 8 Copp's L. O. 137.
26 25 L. D. 50.
27 15 L. D. 418.
28 *Ante*, § 185.

him shall ever be put up for sale. Whatever may be the possessory rights of such occupant as against other claimants under the ordinary land laws, such rights cannot avail against the power of congress to make whatsoever disposition of such lands it pleases at any time prior to the final entry and purchase.[29]

As was said by the supreme court of the United States,—

> Mere settlement upon the public lands with the intention to obtain title under the pre-emption laws does not create in the settler such a vested interest as deprives congress of the power to dispose of the property.[30]

But a mining claim perfected under the law is property, in the highest sense of that term. It has the effect of a grant by the government of the right of present and exclusive possession of the lands located [31] against everyone including the United States itself.[32]

A patent issued to the locator adds but little to the security of his title.[33] Mineral lands of the government are always for sale.[34]

[29] Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Hutchins v. Low (Yosemite Valley Case), 15 Wall. 77, 21 L. ed. 82.

[30] Shepley v. Cowan, 91 U. S. 330, 338, 23 L. ed. 424; Gonzales v. French, 164 U. S. 338, 17 Sup. Ct. Rep. 102, 41 L. ed. 458.

[31] Belk v. Meagher, 104 U. S. 279, 284, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. Rep. 1110, 29 L. ed. 348, 15 Morr. Min. Rep. 482; Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. Rep. 681, 54 L. ed. 994, 16 L. R. A., N. S., 162; Nash v. McNamara, 30 Nev. 114, 133 Am. St. Rep. 694, 93 Pac. 405, 16 L. R. A., N. S., 168; Stratton v. Gold Sovereign M. & T. Co., 1 Leg. Adv. 350, 32 C. C. A. 607 (appeal dismissed on stipulation, 89 Fed. 1016). See *post*, § 322.

[32] McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 15 Pac. 1076; Gold Hill Q. M. Co. v. Ish, 5 Or. 104; Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240.

[33] Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. Rep. 428, 28 L. ed. 452; Shafer v. Constans, 3 Mont. 369.

[34] Rev. Stats., § 2319.

One locating them does so upon the express invitation of the government, and under a compact by which he is secured the absolute and exclusive right of enjoyment of his properly discovered and located claim, so long as he complies with the law. While the right of the government undoubtedly exists to extinguish an imperfect and incomplete pre-emption claim, we cannot admit that a similar right exists with reference to perfected mining claims. The nature of the estate held by a pre-emptor and that owned by a locator of a valid and subsisting mining claim is essentially different.

If the rule is correctly stated, it follows necessarily that a locator holding a valid mining claim, subsisting at the time the reservation for military purposes is created, has a right to perpetuate his estate and enjoy his property by operating and developing it, and should be entitled to the right of ingress and egress at all reasonable times over the reservation, as well as to all other privileges reasonably necessary or incident to the full and fair enjoyment of the property granted to him by the government. These privileges include the right to appropriate water for mining purposes, notwithstanding the fact that a military reservation had been previously created below the point of diversion. Of course, only such water as had not been appropriated for the use of the reservation could be appropriated by the mineral claimant.[35]

The conclusions reached in reference to Indian reservations, announced in section one hundred and eighty-six, are equally applicable to military reservations.

[35] Krall v. United States, 79 Fed. 241, 24 C. C. A. 543.

Article VIII. National Parks and Monuments, Reservations for Reservoir Sites and Reclamation Projects.

§ 196. Manner of creating national parks and purposes for which they are created.—National parks are the playgrounds of the people. They are invariably created by acts of congress, are permanent in character and when once established are usually closed to all forms of location, entry, occupation and settlement under the public land laws. They are no longer a part of the "public lands." Occasionally the act creating the park permits certain privileges within the park limits, but the general policy of the government is to preserve them as public parks and pleasure grounds, the administration of which is not to be embarrassed by the existence within the park of privately owned lands. In this respect national parks are practically on the same footing as Indian and military reservations discussed in previous articles. As will be explained hereafter, they differ materially from national forests.[36]

The most renowned of all national parks is the "Yellowstone," embracing within its limits two million one hundred and forty-two thousand acres, the largest reservation of its kind in the world. It was dedicated and set apart as a public park and pleasure ground

[36] *Post*, § 197.

for the benefit and enjoyment of the people by a special act of congress passed March 1, 1872.[37]

All lands within its limits were by the terms of the act withdrawn from settlement, occupancy or sale under the laws of the United States. The direct control of the park is confided to the secretary of the interior, who is authorized to make regulations for its government. These regulations provide among other things for the preservation from injury or spoliation of all timber, mineral deposits, natural curiosities or wonders within the park and their retention in their natural condition. The act declares that all persons who shall locate, settle upon or occupy the same or any part thereof, except for certain prescribed purposes under a permit from the secretary of the interior, shall be considered as trespassers.

Since the creation of the Yellowstone National Park, the following additional parks have been established by acts of congress: Hot Springs, Arkansas;[38] Casa Grande, Arizona;[39] Sequoia, California;[40] Yosemite, California;[41] General Grant, California;[42] Mount

[37] Rev. Stats., §§ 2474, 2475; Comp. Stats. 1901, pp. 1559, 1560; 6 Fed. Stats. Ann. 616, 617.

[38] June 16, 1880, 21 Stats. at Large, 289.

[39] March 2, 1889, 25 Stats. at Large, 961.

[40] September 25, 1890, 26 Stats. at Large, 478; Rev. Stats., sec. 2475; Comp. Stats. (Supp. 1911), p. 686; 6 Fed. Stats. Ann. 623.

[41] Oct. 1, 1890, 26 Stats. at Large, 650; Rev. Stats. sec. 9463; Comp. Stats. (Supp. 1911), 631; 7 Fed. Stats. Ann. 309, 310. The Yosemite Valley was originally ceded to the state of California by act of Congress June 30, 1864. It was receded by the state to the United States, which recession was accepted by congress by joint resolution June 11, 1906, 34 Stats. at Large, 831, U. S. Comp. Stats. (Supp. 1911), p. 642, by which joint resolution the Yosemite Valley became part of the Yosemite National Park.

[42] Oct. 1, 1890, 26 Stats. at Large, 650; Comp. Stats. (Supp. 1911), p. 631; 7 Fed. Stats. Ann. 309, 310.

Rainier, Washington;[43] Crater Lake, Oregon;[44] Wind Cave, South Dakota;[45] Sully's Hill, South Dakota;[46] Mesa Verde, Colorado;[47] Platt, Oklahoma;[48] Glacier, Montana.[49] With a few minor exceptions, the acts dedicating these parks are framed generally on the lines of the act creating the Yellowstone Park. The act creating the Mount Rainier National Park provided that the mineral land laws should be extended to lands lying within the reserved area, but by subsequent act of congress this privilege was withdrawn and mining locations within this park are now prohibited, without prejudice, however, to mining rights acquired prior to the passage of the repealing act.[50]

The act creating the Mesa Verde National Park provides that the secretary of the interior may allow scientists and representatives of educational institutions to make excavations, and a subsequent act authorizes him to grant leases and permits for the use of lands and development of resources therein.[51]

The acts creating the General Grant, Yosemite and Wind Cave National Parks specifically protect mining rights which were in existence at the date of the respective dedications.

[43] March 2, 1899, 30 Stats. at Large, 993.

[44] May 22, 1902, 32 Stats. at Large, 202; Comp. Stats. (Supp. 1911), p. 690; 6 Fed. Stats. Ann. 624.

[45] January 9, 1903, 32 Stats. at Large, 765; Rev. Stats., sec. 2475; Comp. Stats. (Supp. 1911), p. 691; 10 Fed. Stats. Ann. 367.

[46] April 27, 1904, 33 Stats. at Large, 323.

[47] June 29, 1906, 34 Stats. at Large, 616; Comp. Stats. (Supp. 1911), p. 700; Fed. Stats. Ann. (Supp. 1909), p. 569.

[48] June 29, 1906, 34 Stats. at Large, 837.

[49] May 11, 1910, 36 Stats. at Large, 354; Comp. Stats. (Supp. 1911), p. 704; 1 Fed. Stats. Ann. (Supp. 1912), p. 328.

[50] May 27, 1908, 35 Stats. at Large, 365; Comp. Stats. (Supp. 1911), p. 703.

[51] 36 Stats. at Large, 796; Comp. Stats. (Supp. 1911), p. 705.

It will thus be seen that all the areas included within the limits of these parks are closed to the miner unless his rights antedated the creation of the reserves.

Those who had initiated rights through valid mining locations prior to the establishment of the parks may enjoy them. While the secretary of the interior has no power to limit the uses to which patented lands in the park held in private ownership may be put,[52] the mining claimant in enjoying his rights within the park will be required to comply with such reasonable rules as may be prescribed regulating ingress and egress over the park lands. Whether an unpatented mining claim is within a national park or not, the government asserts the right to limit its use to purposes directly connected with mining.[53]

It also asserts the right to inquire into and determine on its own initiative whether mining locations within national reserves were preceded by the requisite discovery of mineral and whether the lands are of the character subject to occupation and purchase under the mining laws.[54]

If a valid mining claim subsisting at the date of the establishment of the reserve is abandoned or becomes subject to relocation, it does not lapse into the reservation, but may be relocated, and the relocator is entitled to the same privileges as are accorded to the original locator. At least this is the rule announced by the secretary of the interior in the case of mining claims within Indian reservations.[55]

[52] Curtin v. Benson, 222 U. S. 78, 32 Sup. Ct. Rep. 31, 56 L. ed. —, reversing 158 Fed. 383.

[53] United States v. Rizzinelli, 182 Fed. 675, a case where parties undertook to conduct a saloon on a mining claim in a national forest.

[54] In re Yard, 38 L. D. 59.

[55] Navajo Indian Reservation, 30 L. D. 515.

National parks may, of course, be abolished or their areas may be from time to time reduced by act of congress, or more extended privileges may be granted to individuals than are now enjoyed. But the present tendency is rather in the contrary direction. The parks now existing may be considered as permanent withdrawals from the body of public lands from which both settler and prospector are excluded. The number of this class of reserves is likely to increase rather than diminish.

§ 196a. Manner of establishing national monuments and purposes for which they are created.—Under the act of June 8, 1906,[56] the president is authorized to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon lands owned or controlled by the government of the United States, to be national monuments. This discretionary power has been liberally exercised and many tracts containing objects of scientific interest have been reserved. In most instances the areas involved are negligible. In others, such as the Grand Canyon and Mount Olympus, extensive areas have been withdrawn. The lands are reserved from all occupation and entry, but scientific exploration is allowed under certain conditions and under joint regulations approved by the secretaries of the interior, agriculture and war.[57]

The administrative control of national monuments rests with the secretaries of war, agriculture, or interior, according to their *situs* within the exterior limits of lands over which the three departments exercise

[56] 34 Stats. at Large, 225; Comp. Stats. (Supp. 1911), p. 1075; Fed. Stats. Ann. (Supp. 1909), p. 53.

[57] Promulgated December 28, 1906.

their respective jurisdictions. Permits for such privileges as are sanctioned by the act must be secured from the department in charge. The appropriation, excavation or injury of any historic or prehistoric ruin or monument is prohibited by the act, whether it is situated within the area embracing the monument or not.[58]

Obviously areas thus segregated cannot be entered by the prospector for the purpose of locating mining claims.[59]

§ 196b. Reservations for reservoir sites and reclamation projects.—In addition to the reservations of public lands heretofore discussed and national forests, which remain to be considered, two other classes should be noted.

Congress has provided for the selection of land by the government for reservoir sites and for irrigation purposes, and has provided for the location of reservoir sites by individuals and corporations engaged in the business of raising of livestock.

An act approved October 2, 1888,[60] provided that the director of the geological survey, under the supervision of the secretary of the interior, should investigate the extent to which the arid regions of the United States could be redeemed by irrigation, and select sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows. The act contained the following reservation:—

[58] Act June 8, 1906, 34 Stats. at Large, 225; Comp. Stats. (Supp. 1911), p. 1075; Fed. Stats. Ann. (Supp. 1909), 53.

[59] An attempt was made to control the approach to the floor of the gorge of the Grand Canyon, by locating mining claims prior to its dedication as a national monument. Fortunately it was not successful. Grand Canyon Ry. Co. v. Cameron, 36 L. D. 66.

[60] 25 Stats. at Large, p. 526; Comp. Stats. 1901, pp. 1552, 1553.

> And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches, or canals for irrigation purposes, and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals, are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act to entry, settlement, or occupation, until further provided by law.

So much of the foregoing act as provided for the withdrawal of the public lands from entry, occupation and settlement was repealed by the act of August 30, 1890,[61] which provided that settlement and entries might be made upon said lands in the same manner as if said law (i. e., the law of 1888) had not been enacted, adding, however,—

> Except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, unless otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of location or selection thereof.

The seventeenth section of the act of March 3, 1891,[62] provided that reservoir sites theretofore selected and thereafter to be selected should contain only so much land as might be necessary for the maintenance of reservoirs, excluding, so far as possible, lands occupied by actual settlers at the date of selection.

The reclamation act[63] provides for the application of moneys received from the sale of public lands in the

[61] 26 Stats. at Large, p. 391; Comp. Stats. 1901, p. 1553, 7 Fed. Stats. Ann. 1097.

[62] 26 Stats. at Large, p. 1095; Comp. Stats. 1901, p. 1554; 7 Fed. Stats. Ann. 1097.

[63] Act June 17, 1902, 32 Stats. at Large, p. 388; Comp. Stats. (Supp. 1911), p. 662; 7 Fed. Stats. Ann., p. 1098.

western states to the reclamation of arid and semi-arid lands in those states. The act provides for the withdrawal from all entry of lands required for the construction of irrigation works and the withdrawal from entry, "except under the homestead law,"[64] of public lands which may be irrigated from the works constructed by the government. Under these two provisions, withdrawals are made by the secretary of interior. They are known as "first form," which embraces lands that may possibly be needed in the construction and maintenance of irrigation works, and "second form," which embraces lands not supposed to be needed for such purposes but which may possibly be irrigated.[65]

The act of June 25, 1910,[66] amending the reclamation act,[67] provides,—

> that no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the secretary of the interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and made public announcement of the same.

Under these acts, reservoir sites and irrigable lands have been selected and reserved by the government. The land department held that under the act of 1888 a selection of a reservoir site took effect as of the date of the act, and that rights of settlers which accrued

[64] But see Instructions, 35 L. D. 216, and 36 Stats. at Large, p. 836; Comp. Stats. (Supp. 1911), p. 679; 1 Fed. Stats. Ann. (Supp. 1912), pp. 415, 416.

[65] 33 L. D. 608.

[66] 36 Stats. at Large, p. 836; Comp. Stats. (Supp. 1911), p. 678; 1 Fed. Stats. Ann. (Supp. 1912), p. 414.

[67] 32 Stats. at Large, 388; Comp. Stats. (Supp. 1911), p. 662; 7 Fed. Stats. Ann. 1098.

subsequent thereto would be invalidated by the selection of the reservoir site.[68]

Under the act of 1902,[69] the selection becomes effective at the date of the order of the secretary of interior.[70]

By the act of 1888 rights of settlers which accrued after the selection and prior to the act of August 30, 1890, are not protected.[71] Mineral or other entries made under such circumstances may be suspended by the department to await the determination of the authorities in the matter of the actual location of the reservoir; and if it appears that the lands are not necessary for that purpose, the entries may be completed.[72]

Under the reclamation act,[73] however, it has been decided that an application to make entry for land within a first form withdrawal will not be received and suspended to await the possible restoration of the lands to entry.[74] Nor will an application to enter be received until the order revoking the withdrawal is received at the local land office.[75]

The act of October 2, 1888, did not except mineral lands from selection as reservoir sites.[76] But a mineral location made subsequent to the act of August 30, 1890 (which repealed parts of the earlier act), and

[68] Attorney-General's Opinion, 11 L. D. 220; Mary E. Bisbing, 13 L. D. 45; Newton Austin, 18 L. D. 4.

[69] 32 Stats. at Large, 388; Comp. Stats. (Supp. 1911), p. 662; 7 Fed. Stats. Ann., p. 1098.

[70] 33 L. D. 607.

[71] George A. Cram, 14 L. D. 514.

[72] Newton Austin, 18 L. D. 4; Colomokas Gold M. Co., 28 L. D. 172; Mary E. Bisbing, 13 L. D. 45.

[73] 32 Stats. at Large, 388; Comp. Stats. (Supp. 1911), p. 662; 7 Fed. Stats. Ann., p. 1098.

[74] In re Woodcock, 38 L. D. 349.

[75] In re George B. Pratt et al., 38 L. D. 146.

[76] Colomokas Gold M. Co., 28 L. D. 172.

prior to the selection of a reservoir site, operated to defeat the selection in so far as the land selected was in conflict with the mineral location.[77] But even after the act of 1890, if a reservoir site has been selected prior to the location of a mining claim, the mineral claimant acquires no rights.[78]

Under the reclamation act the land department recognizes no exception from the order of withdrawal of the first form except in cases where vested rights have been acquired from the government, but holds that a valid mineral location, made prior to the withdrawal and legally maintained, is excepted from the operation of a withdrawal.[79]

This holding is upon the theory that a claimant of a valid mining claim has a vested possessory right, which is subject to defeat only by failure of performance of the conditions imposed by statute.[80]

The land department and the supreme court of Oregon have held that although a first form withdrawal is intended as a permanent reservation for governmental use, and amounts to a legislative withdrawal, lands within the exterior limits of a second form withdrawal are subject not only to the homestead entry provided for in the act, but also to mineral locations, including coal entries.[81]

This holding is based upon the theory that the reclamation act does not authorize second form withdrawals of lands, valuable for mineral, from the operation of the mining laws. The latest instructions of the secre-

[77] John Gabathuler, 15 L. D. 418.

[78] Colomokas Gold M. Co., 28 L. D. 172.

[79] Instructions, 32 L. D. 387.

[80] Id.

[81] Instructions, 35 L. D. 216; In re Crafts, 36 L. D. 138; Loney v. Scott, 57 Or. 378, 112 Pac. 172.

tary of interior provide that "land withdrawn under the second form can be entered only under the homestead laws, and subject to the provisions, limitations, charges, terms and conditions of the reclamation act, and all applications to make selections, locations or entries of any other kind on such lands should be rejected, regardless of whether they are presented before or after the lands are withdrawn." [82]

These instructions are not inconsistent with the former rulings, since mineral lands are held not to be affected by the withdrawal.

Withdrawal of lands classified as or known to be coal lands may be made under the reclamation acts but are subject to entry under the coal land laws as provided in the act of June 22, 1910.[83] Express notice of this fact is given in the withdrawal order.[84]

In addition to the provisions for the selection of reservoir sites and irrigable lands, by the government, for irrigation purposes heretofore outlined, congress has provided for the location and purchase of individuals of public lands for reservoir sites.[85]

The legislation upon this subject was enacted for the benefit of persons and corporations engaged in raising livestock. Any person or corporation desiring to secure the benefit of the laws upon the subject must file a declaratory statement in the district land office. After the approval of a map showing the location of the reservoir, the land necessary for the proper use thereof is reserved from other disposition so long as the same is maintained and water kept therein. The

[82] Instructions, May 31, 1910, 38 L. D. 629.

[83] 36 Stats. at Large, 583.

[84] Circ. Inst., 39 L. D. 184; Comp. Stats. (Supp. 1911), p. 614; 1 Fed. Stats. Ann. (Supp. 1912), p. 317.

[85] Act of January 13, 1897, 29 Stats. at Large, p. 484; Comp. Stats. 1901, p. 1574; 6 Fed. Stats. Ann. 511.

secretary of the interior is given power to administer the act, and has prescribed certain regulations governing the subject.[86]

An exhaustive discussion of this legislation would not come within the legitimate scope of this work. It is sufficient to say that by the express provisions of the act authorizing the location of such reservoir sites by individuals, mineral lands are excepted from selection.[87]

Article VIIIa. National Forests.

§ 197. Manner of creating national forests and purposes for which they are created.—National forests[88] are the most extensive and important of the government reservations. They are in a class by themselves. They differ materially from other classes of reservations such as Indian, military, national park, and national monument reserves, in that they are open to some extent to the miner and to certain classes of agricultural settlers. They are also unique by reason of the manner in which they are administered. Indian and national park reservations are under the exclusive

[86] 27 L. D. 200; 28 L. D. 552; In re Maier, 29 L. D. 400; 36 L. D. 576.

[87] 29 Stats. at Large, p. 484; Comp. Stats. 1901, p. 1574; 6 Fed. Stats. Ann. 511.

[88] The act of March 4, 1907, 34 Stats. at Large, 1256, Comp. Stats. (Supp. 1911), p. 647, provides that forest reserves shall hereafter be known as national forests.

control of the secretary of the interior. Military reservations are under the control of the secretary of war. Jurisdiction over the forests was originally exercised by the department of the interior, but by the act of February 1, 1905,[89] most of the administrative functions were transferred to the department of agriculture. The department of the interior retains jurisdiction for the purpose of conveying title to lands within the forests and the granting of easements running with the land. Grants of rights or privileges within forests which do not affect the title to the land or cloud the fee are under the jurisdiction of the secretary of agriculture.[90] A few national forests have been created by special acts of congress,[91] but the great majority have heretofore been established by proclamation of the president under the authority of the act of March 3, 1891.[92]

By the former of these acts the president was authorized to set apart and reserve from time to time in any state or territory having public lands bearing forests any part of such lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, the establishment of such reservations and their limits to be declared by executive proclamation. Under these laws in the neighborhood of one hundred and seventy-five national forests have been established in the public land states, embracing an aggregate area of approximately two

[89] 33 Stats. at Large, p. 628; Comp. Stats. (Supp. 1911), p. 635.

[90] 33 L. D. 609. Use Book of the Forest Service (1908), p. 218.

[91] Act of Oct. 1, 1890, 26 Stats. at Large, p. 650; Comp. Stats. (Supp. 1911), p. 631; Act of March 3, 1905, 33 Stats. at Large, p. 1070; Act of May 23, 1908, 35 Stats. at Large, p. 268; Comp. Stats. (Supp. 1911), p. 703.

[92] 26 Stats. at Large, p. 1103, and the Supplemental Act of June 4, 1897, 30 Stats. at Large, p. 11, 34 et seq.

hundred million acres. No useful purpose will be subserved by enumerating them. Maps prepared by the department of the interior, indicating their *situs* and extent, are obtainable from that department.

By the acts of March 4, 1907,[93] and June 25, 1910,[94] the authority to create or to extend the boundaries of any national forest in the states of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of congress, was withdrawn. By act of congress approved August 24, 1912, the state of California was added to this list.[94a]

The several acts of congress legislating in regard to national forests and the general practice of the departments have made no distinction between those created by congressional enactment and those established under authority of the act of March 3, 1891.[95]

The original object of these reservations was to reserve public lands in mountainous and other regions which are covered with timber or undergrowth, at the head waters of rivers, and along the banks of streams, creeks, and ravines, where such timber or undergrowth is the means provided by nature to absorb and check the mountain torrents and to prevent the sudden and rapid melting of the winter snows and the resultant inundations of the valleys below.[96]

By the act of 1897, the purpose was declared to be to improve and protect the forests within the reservations, or for the purpose of securing favorable condi-

[93] 34 Stats. at Large, p. 1252.

[94] 36 Stats. at Large, p. 847; Comp. Stats. (Supp. 1911), p. 593; 1 Fed. Stats. Ann. (Supp. 1912), p. 321.

[94a] 37 Stats. at Large, 497.

[95] 26 Stats. at Large, p. 1103; Comp. Stats. 1901, p. 1537; 7 Fed. Stats. Ann., p. 310.

[96] See Instructions relating to timber reservations, May 15, 1891, 12 L. D. 499.

tions of waterflows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.[97]

In states where the power to create these reservations is lodged with the executive, proceedings to establish a national forest are initiated through agents of the forest service (a bureau of the department of agriculture), who examine and report upon forested areas of the public lands. Upon the report and recommendation of these agents the secretary of agriculture requests the secretary of interior to withdraw the lands temporarily pending the formal proclamation of the president. Such withdrawals are in law the action of the president, and are effective either through the general supervisory power of the executive to withdraw in aid of existing legislation,[98] or under the explicit authority given by the act of June 25, 1910.[99]

A temporary withdrawal by the secretary of the interior or by the president made with a view of establishing a national forest precludes entry under the public land laws,[100] but all mineral lands were excepted by executive regulation from the operation of the order of temporary withdrawals of this class.[1]

[97] 30 Stats. at Large, 11, 35; Comp. Stats. 1901, p. 1539; 7 Fed. Stats. Ann. 312.

[98] Wolsey v. Chapman, 101 U. S. 755, 769, 25 L. ed. 915; Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; In re State of California, 20 L. D. 327; Battlement Mesa Forest Reserve, 16 L. D. 190; Union Pac. Ry. Co., 29 L. D. 261; In re Court, 29 L. D. 638.

[99] 36 Stats. at Large, p. 847; Comp. Stats. (Supp. 1911), p. 593; 1 Fed. Stats. Ann. (1912), p. 321.

[100] John M. Kane, 37 L. D. 277.

[1] 32 L. D. 307. We shall have occasion to note in a subsequent section withdrawals for other purposes which include lands containing oil, coal, natural gas and phosphates.

An order of withdrawal takes effect on the day of its date, not on the date notice is received at the local office.[2] As was said by Judge Bellinger, sitting as circuit judge for the district of Oregon,[3]—

> the reservation of these lands is an appropriation to a special public use, and is therefore a disposal of them, so far as the public domain is concerned.

Reservations of this class may be restored to the public domain by executive proclamation, or may be reduced or changed, without special authority of congress, but may not be enlarged in the states heretofore named without an act of congress.[4] Congress itself suspended certain of the proclamations for a limited time.[5]

§ 198. Status of mining claims within national forests.—In the case of national forests the proclamations themselves provide specially for preserving the status of mining claims valid and subsisting at the date of the withdrawal, and with the minor exceptions hereinafter noted, mineral lands situated within the various national forests are open to location, exploration and purchase as completely as if these lands existed in unreserved portions of the public domain. In a monograph published in the transactions of the American Institute of Mining Engineers, Mr. Pinchot, then chief of the bureau of forestry, points out that it was not the intention of the government in creating

2 In re Zunwalt, 20 L. D. 32; Currie v. State of California, 21 L. D. 134; In re Coffin, 31 L. D. 252; In re Smith, 33 L. D. 677.

3 United States v. Tygh Valley Co., 76 Fed. 693.

4 Opinion of Asst. Atty.-Gen. Shields, 14 L. D. 209; 30 Stats. at Large, pp. 34, 36.

5 30 Stats. at Large, p. 34; Comp. Stats. 1901, p. 1538; 7 Fed. Stats. Ann. 311.

national forests to antagonize the mining industry. The object was to protect the timber from destructive fires and other waste, in order that it might be used in such legitimate industries as mining and agriculture.[6]

All the proclamations creating national forests or amending former proclamations now contain provisions similar to the following:—

> The withdrawal made by this proclamation shall, as to all lands which are at this date legally appropriated under the public land laws or reserved for any public purpose, be subjected to, and shall not prevent or interfere with or defeat legal rights under such appropriation, nor prevent the use for such public purpose of lands so observed, so long as such appropriation is legally maintained or such reservation remains in force.

Prior to the passage of the act of June 4, 1897,[7] certain national forests were opened to the location of mining claims by special legislation. The act of February 20, 1896,[8] provides that the Pike's Peak, Plum Creek and South Platte national forests in Colorado

> shall be open to the location of mining claims therein for gold, silver, and cinnabar, and that title to such mining claims may be acquired in the same manner as it may be acquired to mining claims upon the other mineral lands of the United States for such purposes; *provided*, that all locations of mining claims heretofore made in good faith within said reservation, and which have been held and worked under existing law upon the public domain, are validated by this act.

In the sundry civil appropriation bill passed June 4, 1897, congress declared with reference to national forests:—

[6] 28 Trans. Am. Inst. M. E., p. 339.

[7] 30 Stats. at Large, p. 11; Comp. Stats. 1901, p. 1538; 7 Fed. Stats. Ann., p. 311.

[8] 29 Stats. at Large, p. 11; Comp. Stats. 1901, p. 1537; 7 Fed. Stats. Ann., p. 307.

It is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.[9]

And in the same act it is provided:—

Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof; *provided*, that such persons comply with the rules and regulations covering such forest reservations.[10]

The act provides for the restoration to the public domain of tracts more valuable for mining or agricultural purposes, and then proceeds:—

And any mineral lands in any forest reservation which have been or may be shown to be such and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.[11]

Under these statutes it is now held by the land department that all national forests are open to the location of mining claims.[12]

These lands are subject to the operation of the mining laws as completely as lands in the unreserved public domain, except in specific cases where congress has

[9] 30 Stats. at Large, p. 35; Comp. Stats. 1901, p. 1539; 7 Fed. Stats. Ann., p. 312.

[10] 30 Stats. at Large, p. 36; Comp. Stats. 1901, p. 1541; 7 Fed. Stats. Ann., p. 314.

[11] 30 Stats. at Large, p. 36; Comp. Stats. 1901, p. 1542; 7 Fed. Stats. Ann., p. 315.

[12] Regulations of April 4, 1900, 30 L. D. 28.

legislated to the contrary.[13] The wording of the act of 1897 shows an intention that the mining industry should not be interrupted by the creation of national forests, and for this reason neither department has attempted to prevent the location and patenting of mill-sites.[14]

The jurisdiction of the forest service over mining claims within national forests is granted and limited by the single clause in the act of June 4, 1897, "*Provided*, that such persons (prospectors and locators) comply with the rules and regulations covering such forest reservations." Under this authority the secretary has forbidden the use, except under permit, of unperfected mining claims within national forests for purposes other than the development of the claim.

The regulations of 1908 provide as follows:—

[13] The act of April 28, 1904, 33 Stats. at Large, 526, 10 Fed. Stats. Ann. 406, excludes all persons, with certain exceptions, from trespassing upon the Bull Run national forest in Oregon.

[14] See 1908 Use Book, p. 40, providing for the examination of mill-sites within national forests.

By act of congress approved June 25, 1910 (36 Stats. at Large, p. 847; Comp. Stats. (Supp. 1911), p. 593; 1 Fed. Stats. Ann., p. 310), the president was authorized to temporarily withdraw from settlement, location or entry any of the public lands and reserve the same for water-power sites, irrigation, classification of lands, or *other public purposes* to be specified in the orders of withdrawal, such withdrawals or reservations to remain in force until revoked.

It was also provided that all lands withdrawn under the provisions of the acts shall be open to exploration, discovery, occupation and purchase under the mining laws of the United States in so far as the same apply to minerals other than coal, oil, gas and phosphates. By act of August 24, 1912 (37 Stats. at Large, 497), this provision was amended so as to limit the right of exploration, discovery, occupation and purchase under the mining laws to *metalliferous minerals*. The use of the term "other public purposes" under the first-named act might lead to the inference that this limitation was operative on lands withdrawn for forest purposes. But obviously this is not true. The act simply provides for temporary withdrawals for purposes not cognate to the national forests. As to these, the rule is correctly stated in the text.

> Permits are necessary for all occupancy, uses, operations or enterprises of any kind within national forests, whether begun before or after the national forest was established, except: (a) upon patented lands; (b) upon valid claims for purposes necessary to their actual development and consistent with their character; (c) upon rights of way amounting to easements for the purposes named in the grants; (d) prospecting for minerals, transient camping, hunting, fishing, and surveying for lawful projects.[15]

Whether the regulations promulgated under authority of the act of June 4, 1897, constitute an unconstitutional exercise of legislative power by the executive, so that infraction is not subject to the penalty provided for in the act, has been a question upon which the courts have been divided.[16]

The supreme court has recently affirmed the validity of the regulations, after having denied them, by an equally divided court.[17] In civil cases the authority of the secretary has been uniformly upheld, though no reason for any distinction was readily apparent.[18]

In the only case in which the validity of the regulations, as applied to mining locations, has been adjudicated, the constitutional question was decided in favor of the statute, on the principle of *stare decisis*, and the

[15] 1908 Use Book, p. 54.

[16] Dent v. United States, 8 Ariz. 413, 76 Pac. 455; United States v. Domingo, 152 Fed. 566; United States v. Deguirro, 152 Fed. 568; United States v. Bale, 156 Fed. 687; United States v. Blasingame, 116 Fed. 654; United States v. Matthews, 146 Fed. 306; 22 Opinions Atty.-Gen. 266.

[17] United States v. Grimaud et al., 216 U. S. 614, 30 Sup. Ct. Rep. 576, 54 L. ed. 639; reargued and affirmed, 220 U. S. 506, 31 Sup. Ct. Rep. 480, 55 L. ed. 563.

[18] United States v. Dastervignes et al., 118 Fed. 199; affirmed, 122 Fed. 30, 58 C. C. A. 346; United States v. Shannon, 151 Fed. 863; affirmed, 160 Fed. 870; Light v. United States, 220 U. S. 524, 31 Sup. Ct. Rep. 485, 55 L. ed. 571.

right to exclusive possession for purposes in contravention to the regulations was denied. The decision is based upon the ground that the exclusive possession accorded by section 2339 of the Revised Statutes contemplates merely exclusive possession for purposes consistent with the development of the claim,[19] and does not deprive the government of its jurisdiction over the lands.

As to invalid locations, the forest service claims the same right to contest as any individual citizen, and the land department has repeatedly recognized this right in its regulations.[20] It has been held that forest officers may, upon their own initiative, contest locations before any application for purchase has been made.[21]

Nothing in a decision canceling a location would prevent an immediate relocation of the same land, but a decision upon the validity of a location is of importance to the forest service in respect to making timber sales and otherwise exercising a jurisdiction which it undoubtedly has over these lands after the location has been declared invalid, and before a valid location is made.

Under the former regulations of the department, forest officers examined and reported upon all mining claims within their jurisdiction, with especial attention to supposedly invalid locations which were actually asserted, or which were injurious to the interests of the national forests.[22]

[19] United States v. Rizzinelli, 182 Fed. 675. See, also, Teller v. United States, 113 Fed. 273, 51 C. C. A. 230.

[20] Regulations, 35 L. D. 547, 632, 36 L. D. 535.

[21] In re H. H. Yard et al., 38 L. D. 59. See, also, Instructions, 35 L. D. 565.

[22] 1908 Use Book, pp. 46–49.

This procedure was later modified by excluding from investigation all claims which could have no value other than for their mineral.

The right of a claimant to cut timber from his location, for use in connection with its development, has not been questioned. The rule that timber may not be cut from unperfected claims for any other purpose [23] is, of course, applicable with even more force, because of the regulations of the secretary of agriculture, than upon the public domain.

It has been held that prior to purchase, a locator could not prevent the cutting and removal of timber from his location by a purchaser from the forest service.[24] But the forest service does not attempt to make sales of timber from a location, except in extraordinary emergency, as, for example, the removal of insect-infested trees.

Mineral claimants may secure permits to use a limited amount of timber from national forests without charge. This privilege does not extend to corporations.[25]

National forest lands, with the exception of a few forests, are subject at the discretion of the secretary of agriculture, to a modified form of entry under the homestead laws.[26]

§ 198a. **Administrative sites.**—A large acreage within or adjoining national forests has been withdrawn for use as administrative sites of the forest ser-

[23] Teller v. United States, 113 Fed. 273, 51 C. C. A. 230.

[24] Lewis v. Garlock et al., United States, Intervener, 168 Fed. 153.

[25] 1908 Use Book, p. 70.

[26] Act of June 11, 1906, 34 Stats. at Large, 233; Comp. Stats. (Supp. 1911), p. 640; Fed. Stats. Ann. (Supp. 1909), p. 662. Amended by act of Mar. 30, 1908, 35 Stats. at Large, 554; Comp. Stats. (Supp. 1911), p. 649.

vice. These withdrawals were at one time stated by the department of interior to be made under the authority of the executive in aid of future or existing legislation, and not under the act of June 4, 1897.[27] Under this interpretation they were not subject to the mineral entry provisions of that act, at least if they were not known to be mineral at the time the withdrawal was made.[28]

The acts of June 25, 1910, and August 24, 1912, however, which authorize temporary withdrawals by the executive, provide that withdrawals made under its authority shall be subject to mineral entry of certain classes. This act was not necessary to increase the power of the executive to withdraw public lands for purposes authorized by law,[29] at least in relation to land not known to be mineral at the time of withdrawal.

Apparently, therefore, withdrawals for administrative sites, unless specifically stated to be made under one of these acts, are not covered by their provisions, and are valid against attempted mineral entry. All late withdrawals, however, have been made with reference to the acts of 1910 or 1912. With full appreciation of the consideration which this question must have had by the department, it is difficult to believe that congress, by the general terms used in the acts of 1910 and 1912, intended to jeopardize the possession of the government in lands upon which it has placed extensive improvements.

[27] 36 L. D. 314.

[28] 35 L. D. 262.

[29] Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; Grisar v. McDowell, 6 Wall. 363, 18 L. ed. 863; Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915. Congress has for several years authorized the erection of buildings for administrative use in the various appropriations for the forest service of the department of agriculture.

§ 198b. Rights of way across national forests for water used in mining and for tramways.—Section 4 of the act of February 1, 1905,[30] provides that

> rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals within and across the forest reserves of the United States are hereby granted to citizens and corporations of the United States for municipal and mining purposes, and for the purpose of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the secretary of interior in which the reserves are respectively situated.

By the act of February 15, 1901,[31] upon the approval of the heads of the several departments having jurisdiction, the secretary of the interior is authorized to permit the use of rights of way through national forest and other lands of the United States, for reservoirs, tunnels, pipe-lines, etc., to be used for mining and other purposes. By the terms of the act, the license is to be granted only when it is not incompatible with the public interest (which is interpreted broadly and not restricted to the interest which the government or public may have in the reservations),[32] and is revocable at the discretion of the secretary of interior.[32a]

[30] 33 Stats. at Large, p. 628; Comp. Stats. (Supp. 1911), p. 636, 10 Fed. Stats. Ann., p. 405. Enlarging the scope of the prior act of May 11, 1898, 30 Stats. at Large, p. 404; Comp. Stats. 1901, p. 1575; 6 Fed. Stats. Ann., p. 512.

[31] 31 Stats. at Large, p. 790; Comp. Stats. 1901, pp. 1584, 1585; 6 Fed. Stats. Ann., p. 513.

[32] In re City of San Francisco, 36 L. D. 409.

[32a] The solicitor of the department of agriculture has expressed the opinion (March 21, 1912, unpublished) that this act does not apply to Alaska.

The secretary of the interior has prescribed regulations for application made under each of these acts.[33]

These regulations provide that in all cases where a right of way through a national forest is applied for, the applicant must enter into a stipulation and execute a bond, if required to do so by the secretary of agriculture.

The act of June 4, 1897,[34] gives authority to the executive, in reference to national forests, to make such rules and regulations, and establish such service as will insure the object of such reservations, namely, to regulate their occupancy and use, and preserve the forests thereon from destruction. Subsequently, provision was made for the disposal of all money received "for the use of any land or resources" of the national forests.[35]

Under the authority of these two acts, the secretary of agriculture has permitted and made charge for the use of national forests, for many purposes, including rights of way.[36]

The rights of way secured by the act of 1905 are easements, but rights under the acts of 1901 and 1897 are mere licenses, which, by the rulings of the land department upon similar acts, are subject to be defeated by any other disposition of the land by the United States and will not interrupt the application of the general land laws.[37]

The secretary of interior, by the terms of the act of 1901, may undoubtedly, at his discretion, terminate the

[33] 36 L. D. 567.

[34] 30 Stats. at Large, pp. 11, 35 et seq.; Comp. Stats. 1901, p. 1538; 7 Fed. Stats. Ann., p. 311.

[35] Act of February 1, 1905, 33 Stats. at Large, p. 628; Comp. Stats. (Supp. 1911), p. 636; 10 Fed. Stats. Ann., p. 405.

[36] 1908 Use Book, pp. 68, 69.

[37] 20 L. D. 164; Mountain Power Co. v. Newman, 31 L. D. 360.

license by other disposition of the entire title; but the terms of the act, and the purposes for which it was passed, seem to indicate that it was not the intention of congress to make these rights of way subject to defeat by the action of any entryman, or any person other than the executive.

Since the act of 1905 is restricted to municipal and mining purposes, applications for rights of way thereunder are carefully scrutinized, in order not to allow approval of rights of way for electrical power purposes, for which no present legislation grants a fee in the lands of the United States.[38]

Under the act of May 11, 1898, permission to construct tramways may be secured and the terms of the act of 1897 are also equally applicable. The secretary of interior has promulgated regulations in regard to tramways.[39]

§ 199. Forest lieu selections under the act of June 4, 1897.—The sundry civil expense act of June 4, 1897,[40] contained the following provision relating to national forests:—

> That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of *vacant land open to settlement*, not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected; *provided further*, that in cases of unperfected claims the re-

[38] In re Northern California Power Co., 37 L. D. 80.

[39] 36 L. D. 583.

[40] 30 Stats. at Large, pp. 11, 34–36; Comp. Stats. 1901, p. 1538; 7 Fed. Stats. Ann., p. 307.

quirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

By a subsequent act[41] it was provided that the selections should be confined to "*vacant, surveyed, nonmineral public lands which are subject to homestead entry*," with the proviso that the act should not affect the rights of those who, previous to October 1, 1900, should have relinquished their claims and should make application for specific tracts in lieu thereof.

The lieu selection provisions of the act of June 4, 1897, were repealed by the act of March 3, 1905,[42] entitled "An act prohibiting the selection of timber lands in forest reserves." The body of the act, however, prohibits any further forest lieu selections of any class of land. The validity of contracts which had previously been made by the secretary of interior was preserved, as well as selections then outstanding.[43] Selectors whose pending selections might thereafter be declared invalid through no fault of their own were protected by a provision that a substitution of lieu land might be made. Since the secretary of interior had made contracts for the future selection of large quantities of land in lieu of lands already surrendered to the government, questions relating to lieu selections continue to be important.

The purpose of the lieu selection act, as stated by the land department, was to relieve the situation in which the settlers were placed by the creation of the national forests, and to promote the objects for which the reser-

[41] 31 Stats. at Large, pp. 588, 614.

[42] 33 Stats. at Large, p. 1264; Comp. Stats. (Supp. 1911), p. 639; 10 Fed. Stats. Ann., p. 406.

[43] Santa Fe Pacific R. R. Co., 40 L. D. 360.

vations were established. Settlers and other claimants, by the establishment of the forests, were placed in a state of greater or less isolation from market, business centers, churches, schools, and social advantages. The object of the government being to improve and protect the forests, it would be greatly assisted in accomplishing that object by securing exclusive control of the lands within the reservation; and at the same time the settlers would be benefited by an opportunity to exchange their claims for those less isolated. The act in question contained an offer by the government to exchange any of its lands that were vacant and open to settlement for a like quantity of lands within a national forest for which a patent had been issued, or to which an unperfected *bona fide* claim had been acquired.[44]

The lieu selection under this act is confined to vacant lands open to settlement. The lieu lands must not be occupied lands or lands reserved from settlement because of their mineral character.[45]

The land department has held that in case of forest lieu selections, lands must be shown by the selector to be nonmineral in character at the time the selection is approved.[46]

> Nor can selections be lawfully accepted until there is a showing that the selected land is vacant and not known to be valuable for minerals. No other lands are subject to selection, and no selection can be regarded as complete until these essential conditions are made to appear.[47]

[44] Kern Oil Co. v. Clarke, 30 L. D. 550, 555; Farnum v. Clarke, 148 Cal. 610, 84 Pac. 166.

[45] Kern Oil Co. v. Clarke, *supra.*

[46] Id., S. C., on review, 31 L. D. 288.

[47] Leaming v. McKenna, 31 L. D. 318; Kern Oil Co. v. Clotfelter, 30 L. D. 583.

> For the purpose of such determination resort must generally be had to outside evidence. This evidence must be furnished by the selector. It is his duty to show, in so far as physical conditions are concerned, that the land to which he seeks title is of the class and character subject to selection. He cannot entitle himself to a patent until he has made such showing. Until then his selection is not complete. Until then he has not complied with the terms and conditions necessary to the acquisition of a patent, and cannot be regarded as having acquired any vested interest in the selected land.[48]

A pending unapproved application to make forest lieu selection will not prevent withdrawal of the lands embraced therein for the purpose of reserving the power sites thereon for public uses.[49]

It is for the land department to determine whether good title to the base land has passed to the United States. Until it has formally adjudicated this question, no equitable title to the selected land passes to the selector.[50]

The department has interpreted the Cosmos Exploration Company case [51] to imply that the converse is true, so that no title in the base land passes to the

[48] Kern Oil Co. v. Clarke (on review), 31 L. D. 288; Bakersfield Fuel & Oil Co. v. Saalburg, 31 L. D. 312; In re Cobb, 31 L. D. 220; Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20 (Circuit Court), 112 Fed. 4, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; affirmed, 190 U. S. 301, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064. See Garrard v. Silver Peak Mines, 82 Fed. 578; Wisconsin Cent. R. R. Co. v. Price, 133 U. S. 496, 10 Sup. Ct. Rep. 341, 33 L. ed. 687; Olive Land & D. Co. v. Olmstead, 103 Fed. 568, 20 Morr. Min. Rep. 700; In re Harrel, 29 L. D. 553; Pacific Livestock Co. v. Isaacs, 52 Or. 54, 96 Pac. 460.

[49] Sherar v. Veazie, 40 L. D. 549.

[50] Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064; Miller v. Thompson, 36 L. D. 492.

[51] 190 U. S. 301.

United States until it has been approved,[52] but upon this point the courts are not wholly in accord.[53]

The selection is protected from the date of the application from intervening adverse claims, if the selection is valid, but the question of the character of the land remains open until equitable title vests,[54] which is at the date of the approval of the selection.

As between private individuals asserting rights under contract in selected land, an equity or inchoate right may arise by virtue of the selection prior to approval, which will be protected by the courts.[55] Whatever may have been the rule prior to October, 1900,[56] subsequent to that time only such lands might be selected as were subject to homestead entry.

If the land sought to be selected is occupied by others who have performed all the acts of location of a mining claim, excepting discovery, and who are diligently prosecuting work with a view to discovering mineral, the lands are not vacant or subject to selection.[57] And mere adverse occupancy will defeat a forest lieu selection thereof.[58]

The act permitting the exchange of lands situated within national forests did not contemplate the relin-

[52] In re Clarke, 32 L. D. 233; In re W. E. Moses Land Scrip Realty Co., 34 L. D. 458; In re Moses, 33 L. D. 333; In re Austin, 33 L. D. 589.

[53] United States v. McClure, 174 Fed. 510; Territory ex rel. Devine v. Perrin, 9 Ariz. 316, 83 Pac. 361.

[54] Weyerhauser v. Hoyt, 219 U. S. 380, 31 Sup. Ct. Rep. 300, 55 L. ed. 258; In re Walker, 36 L. D. 495.

[55] Farnum v. Clarke, 148 Cal. 610, 84 Pac. 166.

[56] 31 Stats. at Large, p. 614.

[57] Kern Oil Co. v. Clarke (on review), 31 L. D. 288; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; affirmed, 190 U. S. 301, 24 Sup. Ct. Rep. 860, 47 L. ed. 1064.

[58] Bergman v. Clarke, 40 L. D. 231.

quishment of a mineral claim as a basis for lieu selection.[59]

Lands patented as agricultural but shown to be mineral prior to an attempted relinquishment cannot be used as base.[60]

The department at one time ruled that unsurveyed as well as surveyed lands might be selected in lieu of those relinquished.[61] But by the later statute, congress provided that surveyed lands only were subject to selection.[62]

Scrip may not be issued in lieu of lands patented within the forest.[63]

A mere relinquishment and filing of a conveyance with abstract, unaccompanied by any application to select, is of no effect as against the repeal of the statute.[64] Consequently, record title to a large amount of land, which was relinquished prior to the repeal of the statute, and for which no lieu selection was made, remains in the United States, and the department has no authority to reconvey. The unsuccessful applicant has no recourse in the absence of remedial legislation.[65]

[59] Instructions, 28 L. D. 328; 31 Stats. at Large, pp. 558, 614.

[60] In re Goetjen, 32 L. D. 410; In re Riley, 33 L. D. 68.

[61] In re Hyde, 28 L. D. 284.

[62] 31 Stats. at Large, pp. 588, 614. See In re L. Smith, 31 L. D. 184; In re Peavey, 31 L. D. 186.

[63] Opinion, 28 L. D. 472.

As to the right of the state to exchange sixteenth and thirty-sixth sections within the limits of national forests for other lands, see Hibberd v. Slack, 84 Fed. 571; State of California, 28 L. D. 57; Circ., 28 L. D. 195; In re Hyde, 28 L. D. 284; State of Montana, 38 L. D. 247; S. D. v. Riley, 34 L. D. 657; S. D. v. Thomas, 35 L. D. 171; Clemmons v. Gillette et al., 33 Mont. 821, 114 Am. St. Rep. 814, 83 Pac. 879.

[64] Roughton v. Knight, 156 Cal. 123, 103 Pac. 844; affirmed, 219 U. S. 537, 31 Sup. Ct. Rep. 297, 55 L. ed. 326; In re W. E. Moses Land, Scrip and Realty Co., 34 L. D. 458.

[65] In re W. E. Moses Land, Scrip and Realty Co., 34 L. D. 458.

Article VIIIb. Conservation Measures and Their Effect on the Mining Industry.

§ 200. **Conservation measures.**—It is not necessary to either accurately define or extensively debate what have come to be generally and popularly known as the governmental conservation measures urged and formulated by President Roosevelt and members of his official family, except for the very limited purpose of discussing the validity of certain withdrawals made with a view to the ultimate adoption by congress of these measures.

The proponents of these measures advocate remodeling the public land laws, and effecting a radical change in the existing method of disposing of the public lands containing nonmetalliferous minerals. Mr. George Otis Smith, director of the Geological Survey, thus states the ultimate purpose of these proposed measures:—

> The objects to be sought by amendment of the public land laws are, first, purposeful and economical development of resources for which there is present demand with retention of such control as may insure against unnecessary waste or excessive charges to the consumer, and, second, the reservation of title in the people to all resources the utilization of which is conjectural or the need of which is at least not immediate. The means that are essential to the attainment of these objects are, first, the classification of public lands; second, the separation of the surface and mineral rights; and third, the disposition of lands on terms that will secure the

highest use, enforce development and protect the public interest. Legislation based on these principles will not only secure the positive benefit of immediate utilization, but will also avoid the evils of speculative holdings of lands by fictitious use or by admitted nonuse, for the future enjoyment of the unearned increment or of the profits of monopolization.[66]

Stated in another form, national conservation, as we understand it, is a policy of primarily placing the remnant of the public domain, other than that portion of it which is essentially agricultural in character, in a state of reservation and subsequently dealing with it or its natural resources in such a manner as will economically yield the best results to all the people. Its principal aim is to obtain a maximum economic production at a minimum of waste; to prevent individuals or aggregations of individuals from securing monopolies; and to exact some equivalent for the privileges granted.[67]

Congress has already enacted a law which permits agricultural entries to be made and patents to issue for lands containing or supposed to contain coal, reserving the coal to the United States, with the right to prospect for or mine and market the coal,[68] and has also passed an act, applicable, however, only to the state of Utah, providing for the same class of entries and limited patents for lands containing oil and gas.[68a] But as yet

[66] Mining & Scientific Press, Aug. 12, 1911.

[67] Address of the author on "Conservation" before the Commonwealth Club of San Francisco, March 27, 1911.

[68] Act March 3, 1909, 35 Stats. at Large, 844; Comp. Stats. (Supp. 1911), p. 613; Fed. Stats. Ann. (Supp. 1909), p. 563; Circular, 38 L. D. 183; Act of June 22, 1910, 36 Stats. at Large, 583; Comp. Stats. (Supp. 1911), p. 614; 1 Fed. Stats. Ann. (Supp. 1912), p. 317.

[68a] Act of August 24, 1912; 37 Stats. at Large, 497.

no legislation has been passed modifying the general mining laws.[69]

The withdrawals discussed in the next section were made avowedly in aid of these proposed conservation measures.

§ 200a. Petroleum reserves in the oil belt of California.—The plan of temporary reserves in aid of contemplated conservation legislation was first put into effect in the rock phosphate regions of Idaho and Wyoming. The plan was later introduced into the oil region of Central California, a region which was being actively exploited, and an area exceeding two million acres of oil-bearing lands or lands theretofore classified by the Geological Survey as oil-bearing were placed in a state of temporary reservation "in aid of proposed legislation affecting the use and disposition of the petroleum deposits in the public domain."[70]

A larger part of this area was covered by oil placer locations at the date of the withdrawal. The oil is found at considerable depth, with rarely any surface indication which would satisfy the land office as to discovery. In some cases wells had been bored and oil produced. In others boring was in process. In some there was no serious effort being made to develop the ground. In others litigation arose between conflicting claimants and retarded development. Some of the locations were probably speculative. Between the date of these withdrawals in September, 1909, and the passage of the act of Congress of June 25, 1910, to be hereafter referred to, other locations were made, abandoned ground was relocated, and the questions pre-

[69] Bills are now pending in congress putting into effect these proposed measures affecting oil, natural gas and phosphates.

[70] See In re Lowell, 40 L. D. 303, 304.

sented by this situation involve the determination of the validity of these temporary withdrawal orders as to some of the claims at least. The land department has ruled that the withdrawal orders are valid,[71] and inhibited location within the area withdrawn to abide the outcome of proposed legislation, carrying into effect the tentative conservation measures.

§ 200b. **Executive withdrawals.**—The right of the executive to place any part of the public domain in a state of temporary reservation for a definite public use in the furtherance of any purpose recognized by existing law or sanctioned either by governmental necessity or by a well-established public policy may not be seriously questioned. For example, the courts have held that the executive might without special legislative authority withdraw lands for a lighthouse;[72] for military purposes;[73] for aiding in the improvement of a navigable river;[74] or to abide the adjustment of disputes between conflicting claimants to the public lands.[75] It may also be considered as well settled that where congress invests the executive with power to create permanent reservations of any class, the power to temporarily place areas in a state of reservation with a view to ultimate permanency may be implied as being in aid of an unquestioned public purpose. But we think it will be readily recognized that the power of withdrawal is not an arbitrary one;[76] that in its exercise the executive cannot impinge upon

[71] In re Lowell, 40 L. D. 303.

[72] Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264.

[73] Grisar v. McDowell, 6 Wall. 363, 18 L. ed. 863.

[74] Wolcott v. Des Moines Co., 72 U. S. 681, 18 L. ed. 689.

[75] Wolsey v. Chapman, 101 U. S. 755, 25 L. ed. 915.

[76] Sjoli v. Dreschel, 199 U. S. 564, 26 Sup. Ct. Rep. 154, 50 L. ed. 311, and cases cited in marginal note to the opinion.

the powers of congress to regulate and control the disposition of the public lands or establish a definite policy regarding such disposition in advance of some declaration by the legislative branch of the government.

> Public lands belonging to the United States for whose sale or other disposition congress has made provision by its general laws are to be regarded as legally open for entry and sale under such laws unless some particular lands have been withdrawn from sale by congressional authority or by an executive withdrawal under such authority, either express or implied.[76a]

We have said that a temporary withdrawal might be made by the executive if sanctioned by a well-recognized public policy. In determining what is "public policy," we are not at liberty to look at general considerations of the supposed public interests and policy of the nation upon this subject beyond what its constitution, laws and judicial decisions make known to us.[77] Remote inferences, or possible results or speculative tendencies, are not to be indulged in for such purposes.[78]

"Public policy" is not to be determined by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public.[79] It will also be readily conceded that any executive withdrawal which is avowedly for a purpose which contravenes a recognized existing public policy readily deducible from the constitution, laws and judicial decisions cannot be upheld.

[76a] Lockhart v. Johnson, 181 U. S. 516, 520, 21 Sup. Ct. Rep. 665, 45 L. ed. 979.

[77] Vidal v. Girard's Exrs., 2 How. 127, 198, 11 L. ed. 205.

[78] Id.

[79] Hartford Fire Ins. Co. v. Chicago M. & St. P. Ry., 70 Fed. 201, 202, 17 C. C. A. 62, 30 L. R. A. 193.

Considering comparatively recent legislation by congress, the question may be deemed somewhat academic. But the situation in the oil belts of California and Wyoming and in the phosphate regions of Idaho, Wyoming and Utah, where certain executive withdrawals were made without direct authority of congress, render it expedient for the author to present his views, or rather reiterate his views, heretofore publicly expressed.[80]

In this discussion we eliminate from present consideration the acts of June 25, 1910,[81] March 2, 1911,[82] and August 24, 1912,[82a] and their possible effect as retroactively validating the temporary withdrawals made prior to their passage.

On September 29, 1909, a departmental order was issued known as "Temporary Petroleum Withdrawal No. 5," which was in the following terms:—

> In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, selection, filing, entry or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination.

After the date of the withdrawal and prior to the passage of any act of congress giving the executive specific authority to make withdrawals for purposes of

[80] Address by the author before the Bar Association of San Francisco, April 29, 1910, "Conservation of Natural Resources and Its Possible Effect on Mining, Irrigation and Hydro-electric Industries."

[81] 36 Stats. at Large, 847; Comp. Stats. (Supp. 1911), p. 593; 1 Fed. Stats. Ann. (Supp. 1912), p. 321.

[82] 36 Stats. at Large, 1015; Comp. Stats. (Supp. 1911), p. 612; 1 Fed. Stats. Ann. (Supp. 1912), p. 271.

[82a] 37 Stats. at Large, 497.

classification, a locator makes a valid discovery of petroleum on land which is within the limits defined in the withdrawal order and which were it not for the order would be unquestionably subject to location. He perfects the location by complying with the federal and state mining laws. Is the location void?

There are no judicial decisions directly in point, nor are there likely to be until the United States institutes a suit in the courts against the locator to test the question. The land department, as heretofore noted, has ruled that the order is valid and that such a location would be void, and there is no appeal to the courts to review the ruling. With all due deference to the ruling of the department, and recognizing the rule that the courts usually follow the departmental construction of statutes which the land office is called upon to administer, we are constrained to dissent from the views of the department for the following reasons:

First: The order was made confessedly in aid of proposed legislation and therefore not in pursuance of any duty, express or implied, enjoined upon the executive under any existing law.

Second: It was not made for any definite recognized public governmental purpose, to satisfy any governmental necessity or to aid in the performance of any public governmental function.

Third: It was not made in the furtherance of any recognized or defined public policy, but in an attempt to advocate a change in that policy.

A small group of men in official life, considering that our public land laws as they exist in the statute books were unwise, unsuited to our industrial and economic conditions and should therefore be modified or repealed, may properly recommend to the law-making body modifications in or change of the system. But

this does not establish a public policy, nor authorize the executive to withdraw any part of the public domain from mineral location to await the action of congress on their proposals. Such withdrawal is practically the nullification or absolute suspension of the operation of laws over withdrawn areas, to abide an event which may never happen. Existing "public policy" is found in the statutes of the United States opening the public domain to location under the mineral land laws, and not in the conception of government officials that the laws and the policy should be changed. Under acts of congress dealing with national forests, the executive is prohibited from closing the areas, temporary or permanent, from the prospector and the miner.[83] Does this not establish a public policy, and is not the withdrawal under consideration an attempt to sequester a part of the public domain in order to give congress the opportunity of changing the policy? We think that the location in the instance assumed perfectly valid, and the withdrawal order ineffectual. We are not concerned with the wisdom or unwisdom of the proposed changes in law and policy. Our inquiry is limited to the sole question of power of the executive to exercise a function which under the constitution is confided to congress. We do not think the executive has that power.[83a]

§ 200c. The withdrawal acts of June 25, 1910, March 2, 1911, and August 24, 1912.—On June 25, 1910,

[83] See discussion, *ante*, §§ 197, 198.

[83a] Since the foregoing was set in type Judge Riner, United States District Judge of Wyoming, in the case of United States v. Midway Northern Oil Co., held that the withdrawal order discussed in this section was void. No written opinion was filed. It was an oral decision from the bench and not stenographically reported.

congress enacted a law[84] specifically conferring upon the president the power to temporarily withdraw from settlement, location, sale or entry any of the public lands and reserve the same for water-power sites, irrigation, classification of lands or other public purposes to be specified in the orders of withdrawal, such withdrawals or reservations to remain in force until revoked by the president or congress. Such withdrawn lands, however, to remain open to exploration, discovery, occupation and purchase under the mining laws of the United States so far as the same apply to minerals other than coal, oil, gas and phosphates. This gives the president unquestioned power to make such withdrawals. The very fact that the act was deemed necessary indicates that in the opinion of the president and his advisers the power of withdrawal was at least theretofore questionable.

The act contains the following proviso:—

> Provided that the rights of any person who at the date of any order of withdrawal heretofore or hereafter made is a *bona fide* occupant or claimant of oil or gas-bearing lands and who at such date is in diligent prosecution of work leading to discovery of oil or gas shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of the work.

This condones a lack of discovery if the locator was in possession at the date of withdrawal and was prosecuting the work in search of oil. The term "withdrawal heretofore made" must of course be construed to mean a withdrawal which was authorized by some existing law.

A second proviso that the act shall not be construed as a recognition, abridgment or enlargement of any

[84] 36 Stats. at Large, 847; Comp. Stats. (Supp. 1911), p. 593; 1 Fed. Stats. Ann. (Supp. 1912), 321.

asserted rights or claims initiated upon any oil or gas-bearing lands after any withdrawal of such lands made prior to the passage of the act is a clear indication of the intent of congress to leave the question of the validity of the location to be determined upon the law as it existed at the date of the location, and a disavowal of any retroactive effect to be given to the statute. This act was amended August 24, 1912,[84a] limiting the rights of exploration, discovery, occupation and purchase under the mining laws to lands in the withdrawn area containing metalliferous minerals.[84b]

The act of March 2, 1911,[85] was intended to override certain decisions of the land department which had limited to twenty acres an entry made by a patent applicant who was the grantee of a placer location exceeding twenty acres originally made by an association of locators, and who had conveyed prior to discovery, and a discovery made by the individual grantee subsequent to the conveyance,[85a] a subject to be discussed hereafter.[86]

The act contains the proviso that such lands intended by the act to be benefited must not at the time of inception of development on or under such claim be withdrawn from mineral entry—meaning, of course, withdrawn under a valid order.

We do not think either of the acts under consideration affect the question of the validity of the with-

[84a] 37 Stats. at Large, 497.

[84b] For circular instructions under this act, see 41 L. D. 345, supplementing circular, 39 L. D. 544.

[85] 36 Stats. at Large, 1015; Comp. Stats. (Supp. 1911), p. 612; 1 Fed. Stats. (Supp. 1912), p. 271.

[85a] For instructions governing field examinations in cases where parties are claiming the benefit of the act of March 2, 1911, see 41 L. D. 91.

[86] § 438.

drawal discussed in the previous section. If the withdrawal was invalid, the location heretofore assumed to have been made was valid, and congress could not by retroactive legislation destroy the property right arising from a perfected valid location.[87]

Construing the acts either as *in pari materia* or as distinct and unrelated enactments, there is no serious ground for the contention that they or either of them were intended to confirm, ratify or declare valid the previous withdrawals.

Article IX. Homestead and Other Agricultural Claims.

§ 202. **Introductory.**—We have no particular concern with the manner of acquiring title to lands of the public domain, other than those falling within the purview of the mining laws, except in so far as the administration of the public land system requires the adjustment of controversies between mineral claimants and those asserting privileges under the homestead and other laws applicable to public lands which are nonmineral in character. Incidentally, we are called upon to investigate the general scope of the latter class of laws, the character of lands to which they relate, the

[87] *Post*, § 539.

rules governing the determination of conflicts arising between mineral and other claimants, and the point of time in the proceedings seeking the transmission of title when these controversies are to be finally determined.

§ 203. Classification of laws providing for the disposal of the public lands.—The existing laws providing for the disposal of the public domain may be thus classified:—

(1) Those regulating the acquisition and enjoyment of rights upon public mineral lands, including in this designation laws applicable to coal and salines;

(2) The townsite laws;

(3) The homestead laws;

(4) Laws regulating the sale of lands chiefly valuable for timber or stone;

(5) Laws applicable to desert lands;

(6) The appropriation of lands by "covering" with bounty land warrants, agricultural college, private land, and other classes of "scrip," or lieu selections under special laws.

The pre-emption laws which, in one form or another, existed from an early period of our history until March 3, 1891, were repealed on that date,[88] and no longer form a part of our public land system, except so far as may be necessary to preserve and perfect rights accruing prior to the passage of the repealing act.

The timber-culture laws, originally enacted March 3, 1873,[89] a substitute for which was passed June 14, 1878,[90] were abrogated by section 1 of the same act, which effected the repeal of the pre-emption laws.

As to sales at public auction, they are no longer per-

[88] 26 Stats. at Large, p. 1093; Comp. Stats. 1901, p. 1531.
[89] 17 Stats. at Large, p. 605.
[90] 20 Stats. at Large, p. 113.

mitted,[91] except in cases of abandoned military or other reservations, isolated and disconnected fractional tracts authorized to be sold by section twenty-four hundred and fifty-five of the Revised Statutes,[92] and other lands under special acts having local application.[93]

Since March 2, 1889, with the exception of lands in the state of Missouri and in other specified localities, no sales or locations by private entry are allowed.[94]

As to the townsite laws, we have in a preceding article [95] fully discussed their provisions, and it is unnecessary to further consider them.

For the purposes announced in the introduction to this article, we need devote our attention only to those branches of the public land system which deal with homesteads, timber and stone lands, desert lands, and scrip locations. For certain illustrative purposes, we may also include in the category deserving consideration the repealed pre-emption laws.[96]

§ 204. Manner of acquiring homestead claims.— The homestead laws secure to the head of a family, of lawful age, who is a citizen of the United States, or who has declared his intention to become such, the

[91] Act of March 3, 1891, §§ 9, 10; 26 Stats. at Large, p. 1099; Comp. Stats. 1901, pp. 1443, 1617; 6 Fed. Stats. Ann. 331.

[92] Amended June 27, 1906, 34 Stats. at Large, 517; Comp. Stats. (Supp. 1911), p. 627; Fed. Stats. Ann. (Supp.), p. 543; Instructions, 39 L. D. 10; 40 L. D. 363.

[93] See act of March 28, 1912, permitting land too rough or mountainous for cultivation to be sold even if not isolated. Circular Instructions, 40 L. D. 584.

[94] 25 Stats. at Large, p. 854; Comp. Stats. 1901, p. 1445; 6 Fed. Stats. Ann. 334.

[95] *Ante*, art. v, §§ 166–177.

[96] Act of May 18, 1898, abolishes the distinction previously obtaining between offered and unoffered lands. All are to be treated hereafter as unoffered (Missouri excepted). 30 Stats. at Large, p. 418; Comp. Stats. 1901, p. 1446; 6 Fed. Stats. Ann. 335.

right to settle upon, enter, and acquire title to not exceeding one hundred and sixty acres of unappropriated nonmineral public lands, by establishing and maintaining residence thereon, and improving and cultivating the land for the continuous period of three years,[97] reduced recently from five years.[98]

[97] Rev. Stats., §§ 2289–2294; 6 Fed. Stats. Ann. 285–304; 10 Fed. Stats. Ann. 358; Rev. Stats., §§ 2296–2302; 6 Fed. Stats. Ann. 307–321; Act of March 3, 1879; 20 Stats. 472; Comp. Stats. 1901, p. 1401; 6 Fed. Stats. Ann. 315; Act of May 14, 1880; 21 Stats. 140; Comp. Stats. 1901, p. 1392; 6 Fed. Stats. Ann. 300; Act of June 8, 1880; 21 Stats. 166; Comp. Stats. 1901, p. 1395; 6 Fed. Stats. Ann. 302; Act of March 3, 1881; Act of March 2, 1889; 25 Stats. 854; Comp. Stats. 1901, p. 1445; 6 Fed. Stats. Ann. 334; Act of August 30, 1890; 26 Stats. 391; Comp. Stats. 1901, p. 1404; 6 Fed. Stats. Ann. 313; Act of March 3, 1891; 26 Stats. 1095; Comp. Stats. 1901, p. 1535; 6 Fed. Stats. Ann. 497; Act of June 3, 1896; 29 Stats. 197; Comp. Stats. 1901, p. 1409; 6 Fed. Stats. Ann. 318; Act of May 17, 1900; 31 Stats. 179; Comp. Stats. 1901, p. 1618; 6 Fed. Stats. Ann. 320; Act of June 5, 1900; 31 Stats. 267; Comp. Stats. 1901, p. 1405; 6 Fed. Stats. Ann. 319; Act of June 6, 1900; 31 Stats. 683; Comp. Stats. 1901, p. 1393; 6 Fed. Stats. Ann. 301; Act of January 26, 1901; 31 Stats. 740; Comp. Stats. 1901, p. 1620; 6 Fed. Stats. Ann. 320; Act of May 22, 1902; 32 Stats. 203; Comp. Stats. (Supp. 1911), p. 733; 6 Fed. Stats. Ann. 321; Act of March 4, 1904; Act of April 28, 1904; 33 Stats. 527; Comp. Stats. (Supp. 1911), p. 597; 10 Fed. Stats. Ann. 359; Act of March 3, 1905; Act of February 8, 1908; 35 Stats. 6; Comp. Stats. (Supp. 1911), p. 600; Fed. Stats. Ann. (Supp.), p. 547; Act of May 29, 1908.

The acts of February 19, 1909, 35 Stats. 639, Comp. Stats. (Supp. 1911), p. 601, Fed. Stats. Ann. (Supp.), p. 560, and June 17, 1910, 36 Stats. 531, Comp. Stats. (Supp. 1911), p. 602, 1 Fed. Stats. Ann. (Supp.), p. 316, provide for enlarged homesteads in certain states of three hundred and twenty acres of arid land suitable for "dry farming." See, also, Instructions, 37 L. D. 546; Id. 697; 38 L. D. 361.

§§ 2304, 2305, 2307, 2309, Rev. Stats., 6 Fed. Stats. Ann., pp. 322, 323, 327, 328, provide for soldiers and sailors' homesteads.

Consult various circulars and instructions concerning homesteads issued from time to time by the department of the interior, especially "Suggestions to Homesteaders," approved September 24, 1910; 40 L. D. 39 (amending Circular, 39 L. D. 232); Circular No. 46, dated August 18, 1911, and Circular No. 142, dated July 15, 1912.

Agricultural lands in forest reserves may be taken up as homesteads under certain conditions. See Circular, 38 L. D. 278.

[98] Act of June 6, 1912.

To obtain an inceptive right to a homestead, the applicant files with the register of the local land office an application, stating his qualifications, and describing the land he desires to enter. If it appears from the tract-books that the land is of the character subject to entry under the law, and is clear,—that is, unappropriated,—the applicant is permitted to make entry of the land;[99] the receiver of the land office issues a receipt for the fees paid for filing the application, a record is made in the local office, and the fact reported to the general land office. If the lands are returned as mineral, and borne on the tract-books as such, the homestead claimant will not be permitted to initiate his right until a hearing is had for the purpose of determining the character of the land. To use the common expression, the mineral must be "proved off," before any right to the land can be inaugurated under the agricultural land laws.[100] If there has been one hearing and an adjudication that the land is mineral, it is improper to allow a homestead application to be filed until a hearing has been had as to conditions arising subsequent to the former adjudication.[1] The prior adjudication is conclusive, and the department will not order another hearing as to the conditions existing prior to first adjudication.[2] If, upon a hearing, land is adjudged to be agricultural, the burden is upon a

[99] As to practice in this regard, see Germania Iron Co. v. James, 89 Fed. 811, 32 C. C. A. 348.

[100] The report of the United States Geological Survey determining lands to be mineral in character has been accepted and such report given the effect of a surveyor general's return. Instructions, 37 L. D. 17.

[1] Coleman v. McKenzie, 28 L. D. 348; S. C., on review, 29 L. D. 359; Caldwell v. Gold Bar M. Co., 24 L. D. 258.

[2] Mackall v. Goodsell, 24 L. D. 553; Leach v. Potter, 24 L. D. 573.

mineral claimant thereafter asserting the mineral character to prove that fact.[3] Whatever may be the effect of the surveyor-general's return as evidence in litigated cases involving the character of the land,[4] the land officers in administering the land laws accept such return as controlling their action in the first instance.

Exceptions to the general rule governing the character of land which may be taken up as a homestead are found in the act of June 22, 1910,[5] which provides that surface rights to coal lands which have been withdrawn or classified as coal may be acquired by homesteaders, and the act of August 24, 1912,[5a] which permits similar entries on oil and gas lands, the latter act, however, being limited in its application to the state of Utah. Of course, no rights to the underlying minerals of these classes are obtained by such filings, the title to such minerals remaining in the United States subject to disposal in such manner as congress may determine. These exceptions are the result of the general policy of conservation which has assumed such prominence in the past few years.

§ 205. Nature of inceptive right acquired by homestead claimant.—It would seem that the estate acquired by a homestead claimant who has filed his application and received his preliminary receipt from the receiver of the land office is similar to that acquired by filing a declaratory statement under the pre-emption laws.[6] By the pre-emption laws the United States did

[3] Majors v. Rinda, 24 L. D. 277.

[4] *Ante*, §§ 105–107.

[5] 36 Stats. 583; Comp. Stats. (Supp. 1911), p. 614; 1 Fed. Stats. Ann. (Supp.), p. 317.

[5a] 37 Stats. at Large, —.

[6] Shiver v. United States, 159 U. S. 491, 495, 16 Sup. Ct. Rep. 54, 40 L. ed. 231; Norton v. Evans, 82 Fed. 804, 807, 27 C. C. A. 168.

not enter into any contract with the settler, or incur any obligation that the land occupied by him should ever be offered for sale. They simply declared that, in case their lands were thrown open for sale, the privilege to purchase should be first given to parties who had settled upon and improved them.[7]

Public land covered by a pre-emption filing, as to which there has been no payment made or final certificate issued, may be appropriated by congress to public purposes, or otherwise disposed of, without infringing any legal right held by the pre-emptioner. A similar rule is applied to inchoate homesteads.[8]

The supreme court of the United States has defined the estate of a homestead claimant in the following language:—

> The right which is given to a person or corporation by a reservation of public lands in his favor is intended to protect him against the actions of third parties, as to whom his right to the same may be absolute. But, as to the government, his right is only conditional and inchoate. . . . . From this *résumé* of the homestead act it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued; second, that such property is subject to divestiture upon proof of the continued residence of the settler upon the land for five years; third, that meantime such settler has the right to

[7] Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Hutchins v. Low (Yosemite Valley Case), 15 Wall. 77, 21 L. ed. 82; Campbell v. Wade, 132 U. S. 34, 10 Sup. Ct. Rep. 9, 33 L. ed. 240; Black v. Elkhorn M. Co., 49 Fed. 549.

[8] Wagstaff v. Collins, 97 Fed. 3, 38 C. C. A. 19; Norton v. Evans, 82 Fed. 804, 27 C. C. A. 168; Manners Construction Co. v. Rees, 31 L. D. 408; In re Maney, 35 L. D. 250; United States v. Hanson, 167 Fed. 881, 93 C. C. A. 371; Union Pacific R. R. v. Harris, 215 U. S. 386, 30 Sup. Ct. Rep. 138, 54 L. ed. 246.

treat the land as his own, so far, and so far only, as is necessary to carry out the purposes of the act.[9]

Innumerable filings under the pre-emption laws have been accepted for the same tract by the land office; but from the moment a homestead entry is accepted and the preliminary receipt issued no further applications or filings for the tract are permitted, so long as the entry remains uncanceled.

Although the land may be in fact mineral in character, and a mining claim be located thereon, no application to patent such mining claim will be received by the land officers until a hearing is had to determine the character of the land.[10]

If the land be found at such hearing to be mineral in character, a cancellation *pro tanto* of the homestead entry will be ordered, and the mineral lands will be segregated, whereupon the mineral applicant may proceed to patent. The extent of the segregation will necessarily depend upon the circumstances of each particular case.

The filing of the preliminary homestead declaratory statement, accompanied by nonmineral affidavits, establishes *prima facie* the agricultural character of the land.[11]

§ 206. Location of mining claims within homestead entries.—It would seem that when a given tract of land

[9] Shiver v. United States, 159 U. S. 491, 496, 497, 16 Sup. Ct. Rep. 54, 40 L. ed. 231; Hastings etc. R. R. Co. v. Whitney, 132 U. S. 357, 364, 10 Sup. Ct. Rep. 112, 33 L. ed. 363; Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; The Yosemite Valley Case, 15 Wall. 77, 21 L. ed. 82; Norton v. Evans, 82 Fed. 804, 807, 27 C. C. A. 168; Wagstaff v. Collins, 97 Fed. 3, 38 C. C. A. 19; Crocker v. Donovan, 1 Okl. 165, 30 Pac. 374. But see Opinion of Attorney-General, 2 Copp's Pub. Land Laws, p. 1198.

[10] Hooper v. Ferguson, 2 L. D. 712; Elda M. & M. Co., 29 L. D. 279.

[11] Elda M. & M. Co., 29 L. D. 279; Bay v. Oklahoma Southern Gas & Oil Co., 13 Okl. 425, 73 Pac. 936.

is lawfully covered by a homestead declaratory statement, and the claimant enters into possession, the land being *prima facie* nonmineral, the right of the homestead claimant against everyone save the government immediately attaches. In a case involving priorities as between a pre-emption claim and a railroad grant the supreme court of the United States has said that

> While the power of congress over lands which an individual is seeking to acquire under either the pre-emption or the homestead law remains until the payment of the full purchase price required by the former law or the full occupation prescribed by the latter, yet under the general land laws of the United States one who, having made an entry, is in actual occupation under the pre-emption or homestead law cannot be dispossessed of his priority at the instance of any individual. . . . . [He] acquires an equity of which he cannot be deprived by any individual under the like laws.[12]

The entry has been held to be complete for homestead purposes when the applicant has made an affidavit setting forth the facts which entitle him to make such entry; has made formal application; and paid the filing fee required.[13] So long as the entry remains uncanceled it segregates the tract entered from the public domain and precludes any person from acquiring an inceptive right by settlement or residence.[14] If a patent is subsequently issued, the title would relate back to the first act in the series of acts,—to wit, settle-

[12] Union Pacific R. R. Co. v. Harris, 215 U. S. 386, 30 Sup. Ct. Rep. 138, 54 L. ed. 246.

[13] McLemore v. Express Oil Co., 158 Cal. 559, 139 Am. St. Rep. 147, 112 Pac. 59.

[14] King v. Great Northern Ry. Co., 20 Idaho, 627, 119 Pac. 709. Citing McMichael v. Murphy, 197 U. S. 304, 25 Sup. Ct. Rep. 460, 49 L. ed. 766.

ment,[15] or the filing of the declaratory statement. It might also be plausibly asserted that in investigations which are subsequently instituted for the purpose of determining the character of the land, the time to which inquiry in this behalf should be directed would be the date of the inception of the rights of the homestead claimant. But this is not the rule followed by the land department. That tribunal proceeds upon the principle that a preliminary homestead filing and entry will not interdict mining locations within the land filed upon; that by such filing and entry the homestead claimant acquires no vested rights to the land, and if it is mineral in character, it is subject to location and purchase under the mining laws.[16]

This interpretation of the law by the land department receives considerable support from a case involving a soldier's additional homestead decided by the circuit court of appeals, eighth circuit.[17] The homestead applicant had presented his application, which was complete and perfect in the sense that nothing remained to be done to entitle him to a patent except to furnish a nonsaline affidavit. Before this was furnished another party made application to purchase the tract under the coal land law, which led to a contest and hearing, as a result of which the land was found

[15] St. Onge v. Day, 11 Colo. 368, 18 Pac. 278; Manitou & P. P. Ry. Co. v. Harris, 45 Colo. 185, 132 Am. St. Rep. 140, 101 Pac. 61; Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 519, 91 N. W. 352. Where a certificate of final entry recites the date of settlement, such recital is evidence of the date. Davis v. Chamberlain, 51 Or. 304, 98 Pac. 154.

[16] Manners Construction Co. v. Rees, 31 L. D. 408. The department has ruled that it has the power to inquire into the character of the land (coal) as of the date of the final entry by the homesteader (Herman v. Chase, 37 L. D. 590); and in the case of a soldier's additional homestead, the time to which the inquiry is directed is the date of completion of the proof of publication and the posting of notice. Skinner v. Fisher and Hirshfeld v. Chrisman, 40 L. D. 112.

[17] Leonard v. Lenox, 181 Fed. 760.

to be chiefly valuable for its deposits of coal, the finding being largely based upon exploration and discoveries of coal made after the homestead application and prior to the contest. The court held that the character of the land must be determined according to the conditions existing at the time when the applicant does all that he is required to do to entitle him to a patent, and that until the homestead applicant had filed the required nonsaline affidavit, his rights were not perfected so as to prevent the land department from considering evidence of explorations and discoveries of mineral made subsequent to his application.[18]

These rulings are deducible from a consideration of the nature of the inceptive right acquired by a homestead claimant outlined in the preceding section. But there is another important principle which is also to be recognized. No rights under the public land laws can be initiated through a trespass.[19] We do not think the law would sanction an invasion of a homestead claimant's inclosure for the purpose of prospecting for minerals.[20] If the existence of minerals within the

[18] It must be borne in mind, however, that actual residence and cultivation are not required in the case of a soldier's additional homestead, the filing in this respect being more or less analogous to the filing of scrip or forest reserve lieu where there is but one entry, and hence the case does not present the situation furnished by an ordinary homestead filing where there is a preliminary entry followed by a period of actual residence before a final entry is possible. See Circular of January 25, 1905, issued by the Department of the Interior, "Relative to Soldiers and Sailors' Homestead Rights and Soldiers' Additional Homestead Entries."

[19] *Post*, § 218.

[20] Bay v. Oklahoma Southern Gas & Oil Co., 13 Okl. 427, 73 Pac. 936. The views of the author announced in the text have been upheld by the supreme court of California in a case where the right to enter upon an existing homestead entry was asserted for the purpose of exploiting it to see if perchance it contained mineral oil. The court held that without proof of the present value of the land for mineral purposes, and in the absence of a discovery of oil, such an adverse entry was not jus-

limits of an inchoate homestead become known, a mineral claimant might enter peaceably, without force and in good faith, for the purpose of perfecting a mining location, and thus acquire a *status* which would enable him to initiate a contest as to the character of the land, and if it were shown to be mineral, secure a cancellation of the homestead claims *pro tanto*.[21]

Our conclusion may be summarized as follows: Arguing from the analogy afforded by the disposition of other classes of public land, one would logically assume that the doctrine of relation would apply with equal force to homesteads, and that when the initial entry had been made upon the land by the homesteader and the other preliminary steps taken by him in good faith while the land was not known to be mineral in character, his rights would be thereafter determined by relation as of that date and according to the conditions existing when he has complied with all of the requirements of the statute and the authoritative regulations.[22] Having done all that he possibly could do to perfect his rights, it would seem as if his right to a patent should not be disturbed by a subsequent change of conditions and subsequent discovery of mineral, even if made prior to his final entry. The Union Pacific v. Harris case, quoted above, would seem to sustain our reasoning. However, that case was between rival agricultural claimants, and did not present the situation existing where a mineral claimant contests an agricultural filing, and is not final authority

tified. McLemore v. Express Oil Co., 158 Cal. 559, 139 Am. St. Rep. 147, 112 Pac. 59.

[21] As to the protection afforded one who has secured a homestead receipt or patent, see *post*, §§ 208, 779.

[22] See the case of Weyerhaeuser v. Hoyt, 219 U. S. 380, 388, 31 Sup. Ct. Rep. 300, 55 L. ed. 258, for a good exposition of the principle of relation.

on the question involved. Undoubtedly, the attitude of the land department on this question is to a certain extent influenced by the opportunities presented for perpetrating fraud on the government, if the date of inquiry as to the character of the land is confined to the date of the preliminary homestead entry. Very frequently speculative homesteads are filed on land for the sole purpose of securing title in the hope and expectation that it may eventually prove valuable for its mineral content, though at the date of the filing it has no demonstrated mineral value. This is the case in many of the oil-bearing districts, where homesteads have been filed in advance of actual oil development on land that normally would not have attracted the homesteader, which cannot be definitely proven to be mineral in value at the date of his filing, but which he expects will subsequently be proved to be valuable for oil with the extension of the known oil-bearing areas. It is often difficult to prove fraudulent intent on the part of the homesteader. The land department is charged with the duty of disposing of the lands under its control in accordance with their known character, and it is no more inequitable that a homesteader should be refused a patent for land which has been demonstrated to be mineral land before the land department allows final entry, even though its mineral character may have been demonstrated subsequent to the preliminary entry, than it is for the department to refuse to issue a mineral patent to land which has been clearly demonstrated by subsequent exploration and development to be agricultural in character, though at the date of the original location it could have been established to be mineral land from the then known indications.[22a]

[22a] See Dargin v. Koch, 20 L. D. 384; Oregon & Cal. R. R. Co. v. Puckett, 39 L. D. 169. See, also, Grand Canyon Ry. Co. v. Cameron, 36 L. D. 66, 71, 72.

In the case of millsites the department holds that the known character of the land at the date of the patent application and not as of the date of the mill site location is the test.[22b]

It is impossible to work out any plan that will not result in hardship in individual instances. As against trespassers, the homesteader, during his period of residence, has the right to the exclusive possession of his tract, and can ordinarily protect himself against prospectors. If his land acquires known mineral value, his remedy is to relinquish his homestead to the extent of the demonstrated mineral land and file a mineral location or locations to cover the relinquished area.

§ 207. Proceedings to determine the character of the land.—As heretofore indicated,[23] a mineral claimant may take the initiative in securing an investigation as to the character of the land covered by a homestead filing for the purpose of clearing the records and enabling him to proceed to his patent. Should this not be done, the determination of the quality and character of the land necessarily arises at the time the homestead claimant presents his application to make final proof for the purpose of obtaining his patent.[24]

[22b] Reed v. Bowson, 32 L. D. 383.

[23] *Ante*, § 205.

[24] Such determination by the issuance of patent is conclusive on collateral attack. Paterson v. Ogden, 141 Cal. 43, 99 Am. St. Rep. 31, 74 Pac. 443; Jameson v. James, 155 Cal. 275, 100 Pac. 700. But see *contra*, Kansas City M. & M. Co. v. Clay, 3 Ariz. 326, 29 Pac. 9, where the court held that an agricultural patent could be collaterally assailed by a prior mining locator, if it did not appear that there had been any contest before the land department involving the character of the land. The same court later held that where it appeared that there had been such a contest and the finding of the land department was against the mineral claimant, that the agricultural patent was not open to collateral attack.

The practice governing these proceedings is controlled by the regulations prescribed by the secretary of the interior, and will be found in the appendix to this treatise. Provisions are made for citing the interested parties to appear before the local land officers, where testimony may be adduced in support of their respective contentions. In these proceedings the return of the surveyor-general is *prima facie* evidence of the character of the land, and the burden of proof rests upon him who seeks to contradict the return.[25] The mineral character of the land must be established as a present fact,[26] or where entry has been made and certificate of purchase issued the time to which the inquiry is to be addressed is the date of the entry.[27]

The question is really one of comparative value. Is the tract more valuable as a present fact for the mineral which it contains than for agricultural purposes?[28]

We have heretofore endeavored to formulate such rules for the determination of this question as seem to

Old Dominion Copper M. Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333. The argument of the court in attempting to differentiate between the two cases is labored and the reasoning unsound.

25 *Ante*, § 106, and notes; Richter v. Utah, 27 L. D. 95; Tulare Oil & M. Co. v. Southern Pacific R. R. Co., 29 L. D. 269; Olive Land & D. Co. v. Olmstead, 103 Fed. 568, 20 Morr. Min. Rep. 700; Bay v. Oklahoma Southern Gas & Oil Co., 13 Okl. 427, 73 Pac. 936.

26 Hamilton v. Anderson, 19 L. D. 168; Magalia G. M. Co. v. Ferguson, 6 L. D. 218; Dughi v. Harkins, 2 L. D. 721; Cleghorn v. Bird, 4 L. D. 478; Roberts v. Jepson, 4 L. D. 60. See *ante*, §§ 94, 98.

27 Aspen M. Co. v. Williams, 27 L. D. 1; Olive Land & D. Co. v. Olmstead, 103 Fed. 568, 20 Morr. Min. Rep. 700; Herman v. Chase, 37 L. D. 590.

28 Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; United States v. Reed, 28 Fed. 482; Ah Yew v. Choate, 24 Cal. 562; Mitchell v. Brown, 3 L. D. 65; Magalia G. M. Co. v. Ferguson, 3 L. D. 234; Peirano v. Pendola, 10 L. D. 536; Tinkham v. McCaffrey, 13 L. D. 517; Winters v. Bliss, 14 L. D. 59; Savage v. Boynton, 12 L. D. 612; Walton v. Batten, 14 L. D. 54.

fall within the sanction of the law as determined by the courts and the land department. These rules will be found stated in a previous chapter,[29] and repetition is unnecessary. The land sought to be subjected to the operation of the mining laws must be mineral in fact, and not in theory. Mere indications are insufficient.[30]

Proximity to other mining claims does not establish the land as mineral;[31] neither does the circumstance that the land has been located as a mining claim establish such fact.[32]

A tract of land containing mineral products in quantities sufficient to justify a prudent man in the expenditure of time and money in extracting or developing it is mineral in fact;[33] but the law cannot be subverted to gratify a mere whim. One claiming land as a mining location must establish, as against a prior location of another class, that the ground so claimed is valuable to operate as a mine, and unless this does appear as a fact he will not be permitted to take it from another who has previously located it in good faith for a different purpose.[34]

[29] Tit. iii, ch. i, §§ 94–98.

[30] Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 676, 20 Morr. Min. Rep. 283; Cleary v. Skiffich, 28 Colo. 362, 89 Am. St. Rep. 207, 65 Pac. 59, 21 Morr. Min. Rep. 284; Tulare Oil & M. Co. v. S. P. R. R. Co., 29 L. D. 269; Olive Land & D. Co. v. Olmstead, 103 Fed. 568, 20 Morr. Min. Rep. 700; Bay v. Oklahoma Southern Gas & Oil Co., 13 Okl. 425, 73 Pac. 936.

[31] Elda Mining & Milling Co., 29 L. D. 279. The department has ruled, however, that in the case of coal and oil lands it will accept geological evidence and evidence of discovery and development of adjacent lands to aid in establishing mineral character. Skinner v. Fisher and Hirshfeld v. Chrisman, 40 L. D. 112.

[32] Harkrader v. Goldstein, 31 L. D. 87. See *ante*, §§ 106, 107.

[33] *Ante*, § 98.

[34] Cleary v. Skiffich, 28 Colo. 362, 89 Am. St. Rep. 207, 65 Pac. 59, 60, 21 Morr. Min. Rep. 284; McConaghy v. Doyle, 32 Colo. 92, 75 Pac. 419;

While the mining interests are entitled to and must receive protection against the encroachments of persons who, under the guise of agricultural claimants, seek to secure title to large tracts of mining land, the rights of *bona fide* homestead claimants to lands clearly agricultural in character are also entitled to the same protection against adverse combinations of miners.[35]

The question of the character of land is always one of fact; and the decisions of the land department upon questions of fact in cases clearly within its jurisdiction are conclusive.[36] The supreme court of Arizona rec-

McLemore v. Express Oil Co., 158 Cal. 559, 139 Am. St. Rep. 147, 112 Pac. 59.

[35] Kenna v. Dillon, Copp's Min. Dec., p. 93. Mere "paper locations" unaccompanied by discovery or prosecution of work for making a discovery of mineral do not prevent appropriation by soldier's additional homestead entry. Skinner v. Fisher and Hirshfeld v. Chrisman, 40 L. D. 112.

[36] Parley's Park v. Kerr, 130 U. S. 256, 9 Sup. Ct. Rep. 511, 32 L. ed. 906, 17 Morr. Min. Rep. 201; Pac. M. & M. Co. v. Spargo, 8 Saw. 645, 16 Fed. 348, 16 Morr. Min. Rep. 75; Cowell v. Lammers, 10 Saw. 248, 257, 21 Fed. 200; Barden v. N. P. R. R. Co., 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992; United States v. Winona & St. P. R. R. Co., 67 Fed. 948, 15 C. C. A. 96; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. Rep. 249, 29 L. ed. 570; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Warren v. Van Brunt, 19 Wall. 646, 22 L. ed. 219; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848; Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800; Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929; Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800; St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875, 11 Morr. Min. Rep. 673; Steel v. St. Louis Smelting Co., 106 U. S. 447, 1 Sup. Ct. Rep. 389, 27 L. ed. 226; Baldwin v. Stark, 107 U. S. 463, 2 Sup. Ct. Rep. 473, 27 L. ed. 526; United States v. Minor, 114 U. S. 233, 5 Sup. Ct. Rep. 836, 29 L. ed. 110; Grant v. Oliver, 91 Cal. 158, 27 Pac. 596, 861; Shanklin v. McNamara, 87 Cal. 371, 26 Pac. 345; Powers v. Leith, 53 Cal. 711; Hays v. Steiger, 76 Cal. 555, 18 Pac. 670; Hess v. Bolinger, 48 Cal. 349; Caldwell v. Bush, 6 Wyo. 342, 45 Pac. 488; United States v. Budd, 144 U. S. 167, 12 Sup. Ct. Rep. 575, 36 L. ed. 388; United States v. Mackintosh, 85 Fed. 333, 29 C. C. A. 176; Northern Pac. R. R. Co. v. Soderberg, 86 Fed. 49; Mendota Club v. Anderson,

ognizes the binding force of this rule in cases where the character of the land was brought into question, litigated and determined by the land department,[37] but illogically adheres to its earlier ruling that a prior locator of a mining claim may collaterally attack an agricultural patent where it did not appear that there was any contest respecting the character of the land in the land department.[38]

The courts will not interfere with the officers of the government while in the discharge of their duties in disposing of the public lands.[39]

§ 208. When decision of land department becomes final.—Before final certificate issues, a homestead entry is open to attack on the ground that the land embraced therein is mineral in character, without regard to the date of the alleged discovery.[40]

The submission of final homestead proof will not preclude a hearing as to the subsequent discovery of mineral upon the land involved, where final certificate is

101 Wis. 479, 78 N. W. 185; Rood v. Wallace, 109 Iowa, 5, 79 N. W. 449; Potter v. Randolph, 126 Cal. 458, 58 Pac. 905; Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113; Peabody Gold M. Co. v. Gold Hill M. Co., 111 Fed. 817, 49 C. C. A. 637, 21 Morr. Min. Rep. 59[illegible]; Paterson v. Ogden, 141 Cal. 43, 74 Pac. 443; Traphagen v. Kirk, 30 Mont. 562, 77 Pac. 58; Le Fevre v. Amonson, 11 Idaho, 45, 81 Pac. 71; Morrow v. Warner Valley Stock Co., 56 Or. 312, 101 Pac. 171.

[37] Old Dominion Copper M. Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333.

[38] Kansas M. & M. Co. v. Clay, 3 Ariz. 326, 29 Pac. 9.

[39] For discussion of this subject, see *ante*, § 108; Litchfield v. The Register, 9 Wall. 575, 19 L. ed. 681; Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62; Cox v. McGarrahan, 9 Wall. 298, 19 L. ed. 579; Savage v. Worsham, 104 Fed. 18; Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20; S. C., on appeal, 112 Fed. 4, 50 C. C. A. 79, 21 Morr. Min. Rep. 633, and 190 U. S. 301, 23 Sup. Ct. Rep. 692, 47 L. ed. 1064. See, also, Potter v. Randolph, 126 Cal. 458, 58 Pac. 905.

[40] Jones v. Driver, 15 L. D. 514. Note the difference in case of forest lieu selections (Kern Oil Co. v. Clarke, 30 L. D. 550; S. C., on review, 31 L. D. 288).

not issued and the general land office requires new proof to be made.[41]

Any intermediate determination of the character of the land which does not result, and which is not intended to result, in its final disposal to one claimant or the other, does not preclude subsequent investigation on the part of the department as to the character of such land, inasmuch as the department retains jurisdiction to consider and determine the character of the land claimed until deprived thereof by the issuance of the patent.[42]

A decision of the department in such intermediate proceedings, holding a tract to be nonmineral, is conclusive up to the period covered by the hearing; but such decision will not preclude a further consideration, based on subsequent exploration.[43]

When the land has once been adjudged to be mineral, if subsequent development prior to patent demonstrates that the mineral then found has disappeared, or that it is worthless and unprofitable to work as a mining claim, and abandoned as such, it is not in any sense a readjudication of the former issues.[44] But the

41 Spratt v. Edwards, 15 L. D. 290.

42 Searle v. Placer, 11 L. D. 441; In re Bunte, 41 L. D. 520.

43 Stinchfield v. Pierce, 19 L. D. 12; McCharles v. Roberts, 20 L. D. 564; Dargin v. Koch, 20 L. D. 384; Caldwell v. Gold Bar M. Co., 24 L. D. 258; Mackall v. Goodsell, 24 L. D. 553; Leach v. Potter, 24 L. D. 573; Town of Aldrich v. Craig, 25 L. D. 505; Wilson v. Davis, 25 L. D. 514; Coleman v. McKenzie, 28 L. D. 348; Majors v. Rinda, 24 L. D. 277; In re Bunte, 41 L. D. 520.

44 Dargin v. Koch, 20 L. D. 384. In the administration of railroad grants it has been held that an adjudication by the land department that a tract of land within a railroad grant is mineral in character is not effective to except it from the grant in the face of a subsequent adjudication as the result of a hearing that the tract is not, and never was, mineral in character; and having passed to the company under the grant the land department is without authority to make other disposition thereof. Oregon & Cal. R. R. v. Puckett, 39 L. D. 169.

effect of the prior adjudication could not be overcome by the mere allegation that the land contained no valuable mineral; nor could the mineral claimant be called upon to sustain the mineral character of the land upon a mere repetition of the allegation made by the original agricultural claimant, that it is not mineral land.[45] A failure of the mineral claimant to perform his annual labor after a decision in his favor establishing the mineral character of the land will not inure to the benefit of the agricultural claimant.[46]

Lands duly and properly entered for a homestead under the homestead laws are, and continue to be, from the time of entry and pending proceedings before the land department, lands of the United States until patent is issued.[47]

The patent, when issued, is the judgment of a tribunal charged under the law with investigating the facts, and thereafter the character of the land is no longer open to contestation,[48] and the same rule applies to lands which are listed instead of having patents issue therefor.[48a]

The final certificate issued by the receiver of a United States land office after the submission of final proof and payment of the purchase price, where such is required, has been repeatedly held to be the equivalent of a patent.

The holder of such certificate is vested with the complete equitable title; and after its issuance the govern-

[45] Coleman v. McKenzie, 28 L. D. 348, 353.

[46] Coleman v. McKenzie (2d review), 29 L. D. 359.

[47] Shiver v. United States, 159 U. S. 491, 16 Sup. Ct. Rep. 54, 40 L ed. 231; Wagstaff v. Collins, 97 Fed. 3, 38 C. C. A. 19.

[48] *Post*, § 779.

[48a] Southern Development Co. v. Endersen, 200 Fed. 272, 283.

ment holds the dry legal title for the benefit of such holder.[49]

Such certificate having been once issued upon a perfected final agricultural entry, no subsequent discovery of mineral can defeat the title of the holder.[50]

A hearing will not be ordered to determine the character of land to which a certificate has been issued to a homestead claimant, unless the protestant alleges that the land was known to be valuable for minerals at the date of the issuance of final certificate.[51]

While such certificate, so long as it remains uncanceled, possesses the force of the patent, yet the power of supervision by the commissioner of the general land office over the acts of the register and receiver of the local land office in the disposition of the public lands

[49] Witherspoon v. Duncan, 4 Wall. 210, 18 L. ed. 339; Carroll v. Safford, 3 How. 441, 11 L. ed. 671; Wisconsin R. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. Rep. 341, 33 L. ed. 687; Cornelius v. Kessel, 128 U. S. 456, 9 Sup. Ct. Rep. 122, 32 L. ed. 482; Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29 L. ed. 423; Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428, 12 Sup. Ct. Rep. 877, 36 L. ed. 762, 17 Morr. Min. Rep. 488; Hamilton v. Southern Nev. G. & S. M. Co., 13 Saw. 113, 33 Fed. 562, 15 Morr. Min. Rep. 314; Amador Medean Co. v. S. Spring Hill Co., 13 Saw. 523, 36 Fed. 668; Aurora Hill Cons. M. Co. v. 85 M. Co., 12 Saw. 355, 34 Fed. 515, 15 Morr. Min. Rep. 581; Pac. Coast M. & M. Co. v. Spargo, 8 Saw. 645, 16 Fed. 348, 16 Morr. Min. Rep. 75; Deno v. Griffin, 20 Nev. 249, 20 Pac. 308; Gulf C. & S. F. Ry. Co. v. Clark, 101 Fed. 678, 141 C. C. A. 597; Crane's Gulch M. Co. v. Scherer, 134 Cal. 350, 86 Am. St. Rep. 279, 66 Pac. 487, 21 Morr. Min. Rep. 549; Horsky v. Moran, 21 Mont. 345, 53 Pac. 1064.

[50] Pac. Coast M. & M. Co. v. Spargo, 8 Saw. 645, 16 Fed. 348, 16 Morr. Min. Rep. 75; Arthur v. Earle, 21 L. D. 92; Rea v. Stephenson, 15 L. D. 37; Dufrene v. Mace's Heirs, 30 L. D. 216; Reid v. Lavallee, 26 L. D. 100. See, also, Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 44; S. C., on appeal, 112 Fed. 4, 11, 50 C. C. A. 79, 21 Morr. Min. Rep. 633, and 190 U. S. 301, 23 Sup. Ct. Rep. 692, 47 L. ed. 1064; Harkrader v. Goldstein, 31 L. D. 87; Chormicle v. Hiller, 26 L. D. 9; Aspen Min. Co. v. Williams, 27 L. D. 1; Bay v. Oklahoma Southern Gas & Oil Co., 13 Okl. 425, 73 Pac. 936.

[51] Dufrene v. Mace's Heirs, 30 L. D. 216.

undoubtedly authorizes him, in proper cases, to correct and annul entries of land allowed by them. The exercise of such power is necessary to the administration of the land department.[52]

If the proceedings before the register and receiver are defective, or the proofs insufficient or fraudulent, or the jurisdictional facts wanting, the certificate may afterward be canceled by the commissioner or secretary of the interior; or the entry may be suspended, a hearing ordered, and the party notified to show, by supplemental proof, a full compliance with the law, and on failure to do so, the entry may then be canceled.[53]

An agricultural entry covering land that is mineral in character, with the knowledge of prior mineral locations thereon, and of the fact that the land was at such time regarded by many in the vicinity as valuable for the mineral therein, must be canceled, as having been improperly allowed for "known" mineral land.[54]

When such certificate is suspended, it cannot be used as evidence so long as the suspension continues,[55]

[52] Harkness v. Underhill, 1 Black, 316, 17 L. ed. 208; Knight v. U. S. Land Assn., 142 U. S. 161, 12 Sup. Ct. Rep. 258, 35 L. ed. 974; Cornelius v. Kessel, 128 U. S. 456, 461, 9 Sup. Ct. Rep. 122, 32 L. ed. 482; Ger. Ins. Co. v. Hayden, 21 Colo. 127, 52 Am. St. Rep. 206, 40 Pac. 453; Orchard v. Alexander, 157 U. S. 372, 383, 15 Sup. Ct. Rep. 635, 39 L. ed. 737; Michigan Lumber Co. v. Rust, 168 U. S. 589, 593, 18 Sup. Ct. Rep. 218, 42 L. ed. 591; Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. Rep. 986, 44 L. ed. 1157.

[53] Hastings etc. R. R. Co. v. Whitney, 132 U. S. 357, 364, 10 Sup. Ct. Rep. 112, 33 L. ed. 363; Caldwell v. Bush, 6 Wyo. 342, 45 Pac. 488; Hosmer v. Wallace, 47 Cal. 461; Hays v. Steiger, 76 Cal. 555, 18 Pac. 670; Michigan Lumber Co. v. Rust, 168 U. S. 589, 593, 18 Sup. Ct. Rep. 208, 42 L. ed. 591; Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. Rep. 986, 44 L. ed. 1157. See *post*, § 772.

[54] Aspen Cons. M. Co. v. Williams, 23 L. D. 34.

[55] Figg v. Handley, 52 Cal. 295; Vance v. Kohlberg, 50 Cal. 346; Vantongeren v. Heffernan, 5 Dak. 180, 226, 38 N. W. 52; Hestres v.

though the mere suspension of the entry for the purpose of requiring compliance with departmental regulations, supplying supplemental proofs, or curing apparent defects will not destroy the force of the certificate or enable third parties to attack its validity.[56] Its cancellation, of course, deprives it of all force.[57]

This power of supervision and correction, however, is not an unlimited or arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered.[58]

Generally speaking, and for all practical purposes, the issuance of the final certificate to an agricultural entryman closes the case, and no collateral attack on the certificate so issued is allowed.

The land embraced in such final entry is absolutely withdrawn from the public domain, and is no longer subject to exploration or purchase under the mining laws, although it may subsequently appear that the lands are essentially mineral. Where a contest is pending, as a rule the certificate does not issue until final disposal is made, on appeal to the commissioner, and from him to the secretary, if such appeals be taken. Under ordinary circumstances, the supervision of the general land office at Washington is confined to

Brennan, 50 Cal. 211; United States v. Steenerson, 50 Fed. 504, 1 C. C. A. 552.

[56] Last Chance M. Co. v. Tyler M. Co., 61 Fed. 557, 561, 9 C. C. A. 613; Gurney v. Brown, 32 Colo. 472, 77 Pac. 357; affirmed in Brown v. Gurney, 201 U. S. 184, 26 Sup. Ct. Rep. 509, 50 L. ed. 717; also see § 772, *post*.

[57] Murray v. Polglase, 17 Mont. 455, 43 Pac. 505.

[58] Cornelius v. Kessel, 128 U. S. 456, 461, 9 Sup. Ct. Rep. 122, 32 L. ed. 482; Michigan Lumber Co. v. Rust, 168 U. S. 589, 18 Sup. Ct. Rep. 208, 42 L. ed. 591; Ballinger v. United States, 216 U. S. 240, 30 Sup. Ct. Rep. 338, 54 L. ed. 464.

an examination of the record as made in the local offices, for the purpose of ascertaining whether the facts presented justify the conclusions reached, the requisite jurisdictional facts appearing.

§ 209. The reservation of "known mines" in the pre-emption laws.—We have heretofore said [59] that the term "known mines," as used in the pre-emption act of 1841, and incorporated into the homestead laws by adoption under the provisions of section twenty-two hundred and eighty-nine of the Revised Statutes,[60] is not the precise equivalent of the term "mineral lands," as used in the mining laws, and should undoubtedly receive a more limited interpretation.[61] It will be borne in mind that when this pre-emption act was passed the only mines of which the government had any knowledge were those containing copper, in the region of the great lakes, and those containing lead, in the Mississippi valley.[62]

The privilege of pre-emption during that period could be exercised only as to surveyed lands, and the public surveys had not been extended west of the Mississippi river. The government had at that time inaugurated a policy of leasing lead mines, and it is probable that the framers of these earlier laws had particular reference to those which came within the category of opened mines. In construing the term "known mines," as used in this law, which was subsequently re-enacted in later acts, and incorporated into the homestead law by adoption,[63] the supreme

[59] *Ante*, § 86.

[60] Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 46.

[61] Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20; Old Dominion Copper M. Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333.

[62] *Ante*, § 36.

[63] Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 46.

court of the United States announced its opinion that, so far as the decision of that court had gone, no lands had been held to be "known mines," unless at the time the rights of the purchaser accrued there was upon the ground an actual and opened mine which had been worked or was capable of being worked.[64]

Said that court, after reviewing the case of Deffeback v. Hawke:[65]—

> If upon the premises at that time there were not actual "known mines" capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed.[66]

We think we are justified in our view, that "known mines" and "mineral lands" are not legal equivalents. As was said by Judge Ross, the words "mineral lands" are certainly more general and much broader than the words, "lands on which are situated any known salines or mines."[67] At all events, the pre-emption laws have been repealed, and the term "known mines" has been eliminated from the homestead laws.[68] The nearest approach to an equivalent still remaining in the public land laws is the word "mine," as used in

[64] Colo. C. & I. Co. v. United States, 123 U. S. 307, 327, 8 Sup. Ct. Rep. 131, 31 L. ed. 182; Standard Quicksilver M. Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113.

[65] 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29 L. ed. 423.

[66] Colo. C. & I. Co. v. United States, 123 U. S. 307, 328, 8 Sup. Ct. Rep. 131, 31 L. ed. 182. See, also, Richards v. Dower, 81 Cal. 44, 22 Pac. 304; United States v. Reed, 28 Fed. 482; Gold Hill Q. M. Co. v. Ish, 5 Or. 104; In re Abercrombie, 6 L. D. 393; Bellows v. Champion, 4 Copp's L. O. 17; Nancy Ann Caste, 3 L. D. 169; Harnish v. Wallace, 13 L. D. 108; United States v. Blackburn (Ariz.), 48 Pac. 904.

[67] Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 46. But see Brady v. Harris, 29 L. D. 426.

[68] Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 46.

the townsite laws,[69] which laws have been fully discussed in a previous article.[70]

§ 210. Timber and stone lands.—The act of June 3, 1878,[71] commonly called the "timber and stone act," was originally confined in its operations to California, Oregon, Nevada, and Washington;[72] but by an amendatory act, passed August 4, 1892, its provisions were extended to all the public land states.[73]

Under this act unreserved, unappropriated, nonmineral, surveyed public lands chiefly valuable for timber[74] or stone, unfit for cultivation at the date of sale and consequently not subject to disposal under the homestead laws, may be entered and purchased. The quantity is limited to one hundred and sixty acres to any one person, and is appraised by smallest legal subdivisions at their reasonable value and sold at such appraised value, but in no case less than two dollars and fifty cents per acre.

An application to purchase under this act must be supported by evidence that the tract contains no min-

69 Rev. Stats., § 2392; 6 Fed. Stats. Ann. 351.

70 See *ante*, art. v, § 176. For comparison of various classes of patents, see Horsky v. Moran, 21 Mont. 345, 53 Pac. 1064.

71 20 Stats. at Large, p. 89; Comp. Stats. 1901, p. 1545; 7 Fed. Stats. Ann. 300.

72 United States v. Smith, 8 Saw. 101, 11 Fed. 487; United States v. Benjamin, 10 Saw. 264, 21 Fed. 285.

73 27 Stats. at Large, p. 348; Comp. Stats. 1901, p. 1434; 5 Fed. Stats. Ann. 47. For "Regulations Under Timber and Stone Law," see 37 L. D. 289; 40 L. D. 238.

74 The word "timber" is employed in its ordinary and popular sense, and means such trees as, when severed from the soil, have some commercial or marketable value for agricultural, manufacturing or domestic purposes. Sontag v. Reid, 33 L. D. 34. It includes such trees, regardless of their dimensions, as may be used in erecting buildings or irrigation works, constructing railways, tramways or canals, building fences or corrals, timbering mining shafts or tunnels, or which may be utilized in the manufacture of any useful article. Andrew v. Stuart, 31 L. D. 264. See, also, Regulations, 40 L. D. 239.

ing or other improvements, belonging to any person who has initiated and is properly maintaining a valid mining or other claim to such lands under the public land laws, except improvements for ditch or canal purposes (when any such exist), nor any valuable deposit of gold, silver, cinnabar, copper, or coal. Abandoned and unused mines, shafts, tunnels and buildings occupied by mere trespassers not seeking title under any law of the United States do not prevent timber and stone entries if the land is otherwise capable of being so entered.[75] If the tract embraces a mining location based upon a discovery of a lode, and the showing is such as would justify a prudent man in spending his money in developing the same, the mining location may be segregated, and the balance of the land passed to entry under the stone and timber act.[76]

Provision is made for the determination of the character of the lands prior to the issuance of patents, and for the issuance of final certificates of entry upon payment.

No rights vest under this act until the applicant has, in due form, submitted his final proofs and paid the purchase price and fees,[77] and until that time the lands are subject to exploration and purchase under the mining laws, if they are, in fact, mineral in character.[78]

[75] Regulations, 40 L. D. 238.

[76] Michie v. Gothberg, 30 L. D. 407.

[77] Instructions, 32 L. D. 387; Board of Control v. Torrence, 32 L. D. 472; In re Brice, 37 L. D. 145. See, also, paragraphs 27 and 30 of Regulations, 40 L. D. 238.

[78] Kaweah Colony, 12 L. D. 326. In an unreported decision by the secretary of the interior dated May 2, 1907, involving timber land applications, it was held that the mineral character of the land was sufficiently established by taking into consideration the geological formation, the disclosures of valuable deposits in adjoining and surrounding lands, and the general trend and pitch of the known [ancient river] channels toward these tracts. No discovery of mineral had been made on the tracts in question because of the lava cap overlying the placer

The same principles of law in this respect apply to timber and stone entries as to inchoate homestead entries, discussed in preceding sections. The judgment of the department, culminating in the issuance of the final receipt or certificate, is final and conclusive as to the character of the land, and no subsequent discovery of mineral can affect the title of the purchaser.[79] This is a universal rule governing all classes of entries on the public domain.

With particular reference to lands chiefly valuable for building-stone, the department had held at different times that prior to passage of the stone and timber act such lands might be entered under the placer mining laws,[80] which practice was sustained by some of the courts,[81] and denied by others.[82]

The passage of the act of August 4, 1892,[83] however, restored this class of lands to the category of mineral lands, and henceforward they are subject to entry under the so-called placer mining laws.[84] Such lands are mineral within the meaning of the railroad

deposits. In spite of this fact the department held that the land was not subject to disposition under the provisions of the timber-land act.

79 Chormicle v. Hiller, 26 L. D. 9.

80 Bennett's Placer, 3 L. D. 116; McGlenn v. Weinbroeer, 15 L. D. 370; Vandoren v. Plested, 16 L. D. 508; Maxwell v. Brierly, 10 Copp's L. O. 50; Hayden v. Jamison, 26 L. D. 373 (reversing S. C., 24 L. D. 403). *Contra:* In re Delaney, 17 L. D. 120; Clark v. Ervin, 17 L. D. 550; Id., 16 L. D. 122; Conlin v. Kelly, 12 L. D. 1; In re Simon Randolph, 23 L. D. 329. See *ante*, § 139.

81 Freezer v. Sweeney, 8 Mont. 508, 21 Pac. 20, 17 Morr. Min. Rep. 179; Johnson v. Harrington, 5 Wash. 93, 31 Pac. 316.

82 Wheeler v. Smith, 5 Wash. 704, 32 Pac. 784. This case was overruled by the later case decided by the same court. State v. Evans, 46 Wash. 219, 10 L. R. A., N. S., 1163, 89 Pac. 565.

83 27 Stats. at Large, p. 348; Comp. Stats. 1901, p. 1434; 5 Fed. Stats. Ann. 47.

84 Webb v. American Asphaltum Co., 157 Fed. 203, 205, 84 C. C. A. 651.

grants;[85] but are not reserved from grants to the state of sixteenth and thirty-sixth sections.[86] In the opinion of the land department, this last act did not withdraw such lands from entry under the stone and timber act,[87] thus holding that stone lands may be entered either as placers or under the stone and timber act, at the option of the claimant.[88]

The filing of an application under the terms of this act for land subject thereto and to the completion of which filing the government interposes no obstacle exhausts the right of the applicant under the act.[89] Lands must be unoccupied to be subject to entry under this act.[90]

§ 211. **Scrip.**—There are innumerable classes of so-called land scrip—such as agricultural college, Porterfield, Valentine, Sioux half-breed, supreme court, and others in infinite variety, issued under special laws of congress, enabling the holder to "cover" unappropriated public lands, surrendering such scrip in payment for the lands sought to be entered. The term "scrip" is frequently used in connection with forest lieu lands, but no scrip is in fact issued in lieu of land contained in forest reserves.[91] The subject of forest lieu selections has already been discussed.[92] Mineral lands cannot be so selected or covered with any class of scrip.[93]

85 See *ante*, §§ 158–159.

86 See *ante*, § 139.

87 See Circular, 15 L. D. 360; 23 L. D. 322.

88 Forsythe v. Weingart, 27 L. D. 680.

89 In re Geo. F. Brice, 37 L. D. 145, overruling Pietkiewicz v. Richmond, 29 L. D. 195.

90 Bateman v. Carroll, 24 L. D. 144.

91 Opinion Attorney-General, 28 L. D. 472.

92 *Ante*, § 200.

93 In re A. V. Weise, 2 Copp's L. O. 130; In re Nerce Valle, Id. 178; Commissioner's Letter, 3 Copp's L. O. 83.

Selections of land for the purpose of utilizing scrip are, of course, under the supervision of the land department, whose jurisdiction over the land is retained until the selection is finally approved, a certificate to that effect issued, and the scrip surrendered. As in case of other entries, the land department passes upon the character of the land applied for. A scrip entry, whether void or valid, segregates the land from the public domain and appropriates it to private use, so that no legal entry of it can be made by anyone so long as such scrip entry remains uncanceled on the tract-books.[94] But this does not necessarily inhibit a mining location from being made on the land if such land was in fact at the time of the scrip entry mineral in character, if such location is made peaceably and in good faith. Upon cancellation of the entry and clearing the tract-books the mineral claimant could proceed to patent. The mining location would give the locator the *status* of a claimant such as would enable him to apply for a cancellation of the scrip entry.

§ 212. **Desert lands.**—By the act of March 3, 1877,[95] provision was made for the reclamation of desert lands and the transmission of the title in quantities not exceeding six hundred and forty acres.[96] This act was supplemented by the act of March 3, 1891,[97] and the

[94] James v. Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476.

[95] 19 Stats. at Large, p. 377; Comp. Stats. 1901, p. 1548; 6 Fed. Stats. Ann. 392.

[96] See "Statutes and Regulations Governing Entries and Proof Under the Desert-land Laws," issued by the department of the interior. Approved September 30, 1910. Reprinted with additions, November 20, 1911.

[97] 26 Stats. at Large, p. 1095; Comp. Stats. 1901, p. 1535; 6 Fed. Stats. Ann. 497. See, also, Act of June 27, 1906 (34 Stats. 520), Comp. Stats. (Supp. 1911), p. 672; Fed. Stats. Ann. (Supp.), p. 544; Act of March 26, 1908 (35 Stats. 48), Comp. Stats. (Supp. 1911), p. 659; Fed.

area that may be embraced in a desert entry was reduced to three hundred and twenty acres as the maximum. Mineral lands cannot be acquired under this act. Desert land claimants will rarely come in conflict with mining claimants. Of course, beds of gypsum, borax, nitrate, and carbonate of soda are found in the desert regions, but their mineral character is generally so obvious that no controversy is likely to arise. It would be much cheaper and more expeditious for a claimant to enter these classes of lands under the placer laws than to attempt to acquire title under the onerous provisions of the desert land laws. Should such conflicts arise, they would be governed by the same general rules of law applicable to other classes of entries discussed in the preceding sections of this article. Lands withdrawn or classified as coal lands or valuable for coal are subject to appropriate entry under the desert land law, with a reservation by the United States of the coal in such lands and of the right to prospect for, mine and remove the same. But such desert entries are limited to one hundred and sixty acres. The coal deposits in such lands are subject to disposal by the United States in accordance with the provisions of the coal-land laws.[98]

Stats. Ann. (Supp.), p. 549; Act of March 28, 1908 (35 Stats. 52), Comp. Stats. (Supp. 1911), p. 660; Fed. Stats. Ann., p. 550; Act of June 25, 1910, Comp. Stats. (Supp. 1911), p. 678.

[98] Act of June 22, 1910 (36 Stats. 583), Comp. Stats. (Supp. 1911), p. 614; 1 Fed. Stats. Ann. (Supp.), p. 317.

Article X. Occupancy Without Color of Title.

§ 216. Naked occupancy of the public mineral lands confers no title—Rights of such occupant.—Title to mineral lands of the public domain can be initiated and acquired only under the mining laws.[99] As was said by the supreme court of the United States,—

> No title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the pre-emption, homestead, or townsite laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands.[100]

There can be no strictly lawful possession of such lands, unless that possession is referable to the mining laws.

> There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law purporting to transfer to him the title, or to give to him the right of possession. And there can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that under

[99] Burns v. Clark, 133 Cal. 634, 85 Am. St. Rep. 233, 66 Pac. 12, 21 Morr. Min. Rep. 489.

[100] Deffeback v. Hawke, 115 U. S. 392, 404, 6 Sup. Ct. Rep. 95, 29 L. ed. 423; Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; Walker v. Southern Pac. R. R. Co., 24 L. D. 172; Coleman v. McKenzie, 28 L. D. 348, 352; S. C., on review, 29 L. D. 359.

the law, which he is presumed to know, he can acquire none by his occupation.[1]

As heretofore shown,[2] it is a general rule that mere occupancy of the public lands and placing improvements thereon give no vested right therein as against the United States, or one connecting himself with the government, by compliance with the law.[3]

[1] Deffeback v. Hawke, 115 U. S. 392, 404, 6 Sup. Ct. Rep. 95, 29 L. ed. 423.

[2] *Ante*, § 170.

[3] Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. Rep. 102, 29 L. ed. 428; Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Hutchings v. Low, 15 Wall. 77, 21 L. ed. 82; Campbell v. Wade, 132 U. S. 34, 10 Sup. Ct. Rep. 9, 33 L. ed. 240; Jourdan v. Barrett, 4 How. 169, 11 L. ed. 924; Burgess v. Gray, 16 How. 48, 14 L. ed. 839; Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534; Oaksmith v. Johnston, 92 U. S. 343, 23 L. ed. 682; Morrow v. Whitney, 95 U. S. 551, 24 L. ed. 456; Buxton v. Travers, 130 U. S. 232, 9 Sup. Ct. Rep. 509, 32 L. ed. 920; Northern Pac. R. R. Co. v. Colburn, 164 U. S. 383, 17 Sup. Ct. Rep. 98, 41 L. ed. 479. Justice Brewer in a dissenting opinion in the case of Nelson v. Northern Pacific Ry., 188 U. S. 108, 23 Sup. Ct. Rep. 302, 47 L. ed. 406, holds that the doctrine of the Colburn case is overruled by the majority opinion in the Nelson case in so far as it gave priority over the railroad title to a homestead settler who settled on land within the grant subsequent to the fixing of the general route but prior to filing its map of definite location. Such settler had never filed his application with the land office because the officials refused to accept it. See Weyerhaeuser v. Hoyt, 219 U. S. 380, 31 Sup. Ct. Rep. 300, 55 L. ed. 258; Northern Pac. Ry. Co. v. Smith, 171 U. S. 260, 18 Sup. Ct. Rep. 794, 43 L. ed. 157; Olive Land & D. Co. v. Olmstead, 103 Fed. 568, 20 Morr. Min. Rep. 700; Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20, 46; S. C., on appeal, 112 Fed. 4, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; United States v. Holmes, 105 Fed. 41; Helstrom v. Rodes, 30 Utah, 122, 83 Pac. 730; Pacific Livestock Co. v. Isaacs, 52 Or. 54, 96 Pac. 460; Ritter v. Lynch, 123 Fed. 930; Cook v. Klonos, 164 Fed. 529, 90 C. C. A. 403; S. C., on rehearing, 168 Fed. 700, 94 C. C. A. 144; Town of Red Bluff v. Walbridge, 15 Cal. App. 770, 116 Pac. 77; Zeiger v. Dowdy, 13 Ariz. 331, 114 Pac. 565; Ferris v. McNally (Mont.), 121 Pac. 889. Judge Hawley held that a prior occupant of public land for business purposes could not be deprived of the same by a mineral claimant, unless the land was known to be mineral before the townsite claimant acquired or purchased his lot. Bonner v. Meikle, 82 Fed. 697, 19 Morr. Min. Rep. 83. The value of this latter

While this is true, the occupant has certain rights based upon the fact of actual possession, which, from motives of public policy, are accorded to him.

As was said by the supreme court of California,—

> As against a mere trespasser, one in possession of a portion of the public land will be presumed to be the owner, notwithstanding the circumstance that the court has judicial notice that he is not the owner, but that the government is. This rule has been maintained from motives of public policy, and to secure the quiet enjoyment of possessions which are intrusions upon the United States alone.[4]

This is nothing more than a reiteration of the familiar rule that, as against a mere intruder, or one claiming no higher or better right than the occupant, possession is *prima facie* evidence of title.[5]

But this is all that can be claimed. As against one connecting himself with the government, this occupancy must yield to the higher right.[6]

In Crossman v. Pendery,[7] Justice Miller said:—

> A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral. His posses-

case as an authority is very much "shattered" in the opinion of the secretary of the interior. Grand Canyon Ry. Co. v. Cameron, 35 L. D. 495. See, also, Tarpey v. Madsen, 178 U. S. 215, 220, 20 Sup. Ct. Rep. 849, 44 L. ed. 1042.

[4] Brandt v. Wheaton, 52 Cal. 430; Wilson v. Triumph Consol. M. Co., 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300; Ramus v. Humphreys (Cal.), 65 Pac. 875, 21 Morr. Min. Rep. 450; Biglow v. Conradt, 159 Fed. 868, 87 C. C. A. 48.

[5] Campbell v. Rankin, 99 U. S. 261, 25 L. ed. 435, 12 Morr. Min. Rep. 257; Attwood v. Fricot, 17 Cal. 38, 76 Am. Dec. 567; English v. Johnson, 17 Cal. 108, 76 Am. Dec. 574; Hess v. Winder, 30 Cal. 349; Tarpey v. Madsen, 178 U. S. 215, 220, 20 Sup. Ct. Rep. 849, 44 L. ed. 1042; Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633, 21 Morr. Min. Rep. 393.

[6] Wilson v. Triumph Consol. M. Co., 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300.

[7] 8 Fed. 693, 2 McCrary, 139, 4 Morr. Min. Rep. 431.

sion so held is good as a possessory title against all the world, except the government of the United States. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such first discoverer a title to the mineral so first discovered, against which the mere possession of the surface cannot prevail.[8]

The case of Miller v. Chrisman,[9] in discussing the nature and extent of the right acquired by a locator prior to discovery, said:—

One who thus in good faith makes his location, remains in possession and with due diligence prosecutes his work toward a discovery is fully protected against all forms of forcible, fraudulent, surreptitious or clandestine entries and intrusions upon his possession. Such entry must always be peaceable, open and above board, and made in good faith or no right can be founded on it.[10]

In the case of Cosmos Exploration Co. v. Gray Eagle Oil Co.,[11] the court held that lands which were actually occupied and which were being explored for mineral were not subject to selection in lieu of lands surrendered under the forest reserve act of June 4, 1897. That act permitted only such lands to be selected as were vacant and open to settlement. The court recog-

[8] Cited and followed in Johanson v. White, 88 C. C. A. 83, 160 Fed. 901; Ferris v. McNally (Mont.), 121 Pac. 889.

[9] 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444.

[10] S. C., on appeal, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49 L. ed. 770. See, also, views of Beatty, C. J., in same case in his opinion dissenting from an order denying a rehearing. 74 Pac. 444; New England & Coalinga Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180; Whiting v. Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849; Phillips v. Brill, 17 Wyo. 26, 95 Pac. 856; Merced Oil Co. v. Patterson, 153 Cal. 624, 96 Pac. 90; Hanson v. Craig, 170 Fed. 62, 95 C. C. A. 338; on rehearing reversing S. C., 161 Fed. 861, 89 C. C. A. 55.

[11] 112 Fed. 4, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; S. C., on appeal, 190 U. S. 301, 23 Sup. Ct. Rep. 692, 47 L. ed. 1064.

nizes the general rule that a mere occupant acquires no right against one who is authorized to acquire the government title, but in this case held that the forest lieu claimant was not authorized to acquire the government title to occupied land.[12]

In Ritter v. Lynch,[13] a case said to be *sui generis*, a party impounded tailings in the beds of streams by constructing a dam on unappropriated public land and thereafter paid taxes on his possessory right, made repairs and performed work to prevent the tailings from being washed away, and employed agents to keep off trespassers. This was held a sufficient possession of the land to prevent its location by a stranger as a tailings placer, the latter's discovery and work being confined to such tailings.

A full discussion of this important subject of *pedis possessio*, and citation of authoritative cases will be found in a succeeding paragraph.[14]

§ 217. Rights upon the public domain cannot be initiated by forcible entry upon the actual possession of another.—To what extent actual possession of any portion of the public mineral lands prevents their valid appropriation under the mining laws depends upon the facts and circumstances of each particular case. There are certain recognized principles, however, which are necessarily involved in all such cases, the application of which will, generally speaking, result in their proper solution.

It is a doctrine well established that no rights upon the public domain can be initiated by a forcible entry upon the possession of another. A forcible and tortious

12 See, also, Kern Oil Co. v. Clarke, 30 L. D. 550.

13 123 Fed. 930.

14 *Post*, § 218.

invasion of such possession confers no privilege upon the invader, and cannot be made the basis of a possessory title. A rightful seisin cannot flow from a wrongful disseisin.[15] The federal circuit court for Nevada in discussing what constitutes possession says:—

> The law does not require such land to be fenced in order to subject it to the dominion and control of the claimant. The evidence of acts sufficient to constitute possession of land must always, in a great measure, depend upon the character of the land, its locality and the object and purpose for which it was taken up and claimed. The law does not require vain and useless things to be done. It only requires such acts to be performed as are necessary to subject the land to the will and control of the claimant sufficient to notify the public that the land is claimed and occupied and is in the possession of claimant.[16]

It has been distinctly held in cases arising under the former pre-emption laws that no right of possession

[15] Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 20 Morr. Min. Rep. 283; Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 40, 46; S. C., on appeal, 112 Fed. 4, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; 190 U. S. 301, 23 Sup. Ct. Rep. 692, 47 L. ed. 1064; Thallmann v. Thomas, 111 Fed. 277, 49 C. C. A. 317, 21 Morr. Min. Rep. 573; Bay v. Oklahoma Southern Gas & Oil Co., 13 Okl. 425, 73 Pac. 936; Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444; S. C., in error, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49 L. ed. 770; Traphagen v. Kirk, 30 Mont. 562, 77 Pac. 58; Weed v. Snook, 144 Cal. 439, 77 Pac. 1023; Merced Oil Co. v. Patterson, 153 Cal. 624, 96 Pac. 90; S. C., on second appeal (Cal.), 122 Pac. 950; Garvey v. Elder, 21 S. D. 77, 130 Am. St. Rep. 704, 109 N. W. 508; Fee v. Durham, 121 Fed. 468, 57 C. C. A. 584; McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136; Ritter v. Lynch, 123 Fed. 930; Willitt v. Baker, 133 Fed. 937; Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 226, 24 Sup. Ct. Rep. 632, 48 L. ed. 944; Bergquist v. West Virginia Wyo. Copper Co., 18 Wyo. 234, 106 Pac. 673, 684; Duffield v. San Francisco Chemical Co., 198 Fed. 942; Borgwardt v. McKittrick Oil Co., 164 Cal. 650, 130 Pac. 417 (Sept. 3, 1912).

[16] Garrard v. Silver Peak Mines, 82 Fed. 578, 591. See Ritter v. Lynch, 123 Fed. 930, 934.

could be established by settlement and improvement upon a tract of land conceded to be public where the pre-emption claimant forcibly intruded upon the actual possession of another who, having no other valid title than possession, had already settled upon, inclosed, and improved the tract; that such an intrusion was but a naked and unlawful trespass, and could not initiate a right of pre-emption.[17]

In conformity with this rule, it was wisely said by the late Judge Sawyer, in the ninth circuit, district of California, that the laws no more authorize a trespass upon the actual possession and occupation of another claiming a pre-emption right, for the purpose of locating and acquiring the title to a piece of mineral land, than to initiate an ordinary pre-emption right to a tract of agricultural land; that the law does not encourage or permit for any purpose unlawful intrusions and trespasses upon the actual occupation and possession of another. To permit a right to accrue or confer authority to thus initiate a title to the public land, would be to encourage strife, breaches of the peace, and violence of such character as to greatly disturb the public tranquillity.[18]

§ 218. Appropriation of public mineral lands by peaceable entry in good faith upon the possession of a mere occupant without color of title.—Conceding that the law is correctly stated in the three preceding sections, it is not to be understood that a mere occupant

[17] Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732; Quinby v. Conlan, 104 U. S. 421, 26 L. ed. 800; Hosmer v. Wallace, 97 U. S. 575, 24 L. ed. 1130; Justin v. Adams, 87 Fed. 377; Lyle v. Patterson, 176 Fed. 909, 100 C. C. A. 379.

[18] Cowell v. Lammers, 10 Saw. 246, 21 Fed. 200; Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 20 Morr. Min. Rep. 283; Thallmann v. Thomas, 111 Fed. 277, 49 C. C. A. 317, 21 Morr. Min. Rep. 573.

of the public mineral lands can by virtue of such occupancy prevent, under all circumstances, their appropriation for mining purposes. The law interdicts entries effected with force and violence for any purpose. But a mere intruder upon the public lands, a mere occupant, whose possession is not referable to some law or right conferred by virtue of an instrument giving color of title, cannot, by reason of such occupancy, prevent a peaceable entry in good faith by one seeking to avail himself of the privilege vouchsafed by the mining laws.[19]

The doctrine that by mere entry and possession a right may be acquired to the exclusive enjoyment of any given quantity of the public mineral lands was condemned by the supreme court of California in its earliest decisions. If such doctrine could be maintained, said that court,—

> It would be fraught with the most pernicious and disastrous consequences. The appropriation of these lands in large tracts for agricultural and grazing purposes, and the concentration of the mining interest in the hands of a few persons, to the exclusion of the mass of the people of the state, are some of the evils which would necessarily result from such a doctrine.[20]

There is no grant from the government under the acts of congress regulating the disposal of mineral lands, unless there is a location according to law and the local rules and regulations. Such a location is a condition precedent to the grant. If a party enters

[19] Hahn v. James, 29 Mont. 1, 73 Pac. 965. Principle stated *arguendo* in Cunningham v. Pirrung, 9 Ariz. 288, 80 Pac. 329; Ritter v. Lynch, 123 Fed. 930; Hanson v. Craig, on rehearing, 170 Fed. 62, 95 C. C. A. 338; Ferris v. McNally (Mont.), 121 Pac. 889.

[20] Smith v. Doe, 15 Cal. 101, 105; Gillan v. Hutchinson, 16 Cal. 154.

into possession, marks his boundaries, and performs his work for the period equal to the statute of limitations, such possession may ripen into a title equivalent to a location.[21] But mere possession for a shorter period, not based upon a valid location, would not prevent a valid location under the law.[22] This doctrine is clearly established by the supreme court of the United States in Belk v. Meagher,[23] affirming the decision of the supreme court of Montana. In that case Belk undertook to locate a mining claim. His entry was peaceable, and he did all that was necessary to perfect his rights, if the premises had been at the time open for that purpose. But at the time of such attempted appropriation the ground was covered by a prior, and, as the court found, a valid, subsisting location. Subsequently this prior subsisting location lapsed, and thereafter Meagher relocated the claim, his entry for that purpose being made peaceably and without force. Belk brought ejectment, and being unsuccessful in the territorial courts, took the case on writ of error to the supreme court of the United States.

It having been established that when Belk made his relocation, in December, 1876, the claim of the original locators was still subsisting and valid, and remained so until January 1, 1877; the supreme court considered three propositions of law as necessarily arising in the case:—

(1) Whether Belk's relocation was valid as against everybody but the original locators, his entry being peaceable and without force;

21 *Post*, § 688; Risch v. Wiseman, 36 Or. 484, 78 Am. St. Rep. 783, 59 Pac. 1111, 20 Morr. Min. Rep. 409.

22 Belk v. Meagher, 3 Mont. 65, 80.

23 104 U. S. 279, 284, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Ferris v. McNally (Mont.), 121 Pac. 889.

(2) Whether, if Belk's relocation was invalid when made, it became effectual in law on the 1st of January, 1877, when the original claims lapsed;

(3) Whether, even if the relocation of Belk was invalid, Meagher could, after the 1st of January, 1877, make a relocation which would give him, as against Belk, an exclusive right to the possession and enjoyment of the property, the entry for that purpose being made peaceably and without force.

All three propositions were resolved against Belk, the court holding that he had made no such location as prevented the lands from being in law vacant, and that others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. His possession might have been such as would have enabled him to bring an action of trespass against one who entered without any color of right, but it was not enough to prevent an entry made peaceably and in good faith for the purpose of securing a right under the acts of congress to the exclusive possession and enjoyment of the property.

This doctrine was held not to be in conflict with the rule announced by the same court in Atherton v. Fowler,[24] cited in a preceding section, wherein it was determined that a right of pre-emption could not be established by a *forcible* intrusion upon the possession of one who had already settled upon, improved, and inclosed the property.

The controlling force of the doctrine of Belk v. Meagher has been abundantly recognized by the courts since its promulgation.[25]

[24] 96 U. S. 513, 24 L. ed. 732.

[25] Noyes v. Black, 4 Mont. 527, 2 Pac. 769; Hopkins v. Noyes, 4 Mont. 550, 2 Pac. 280, 15 Morr. Min. Rep. 287; Sweet v. Weber, 7 Colo. 443, 4 Pac. 752; Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197, 15 Morr. Min.

> Any other rule would make the wrongful occupation of public land by a trespasser superior in right to a lawful entry of it under the acts of congress by a competent locator.[26]

A similar doctrine had been previously announced by Judge Deady, United States district judge, in Oregon,[27] where a location of mining ground in the possession of Chinese was upheld, on the theory that this class of aliens could acquire no rights by location, purchase, or occupancy upon the mineral lands of the public domain.

As was said by the supreme court of Montana,—

> Possession within a mining district, to be protected or to give vitality to a title, must be in pursuance of the law and the local rules and regulations. Possession, in order to be available, must be properly supported. . . . . The mere naked possession of a mining claim upon the public lands is not sufficient to hold such claim against a subsequent location made in pursuance of the law, and kept alive by a compliance therewith.[28]

Rep. 488; Russell v. Hoyt, 4 Mont. 412, 2 Pac. 25; Du Prat v. James, 65 Cal. 555, 4 Pac. 562, 15 Morr. Min. Rep. 341; Russell v. Brosseau, 65 Cal. 605, 4 Pac. 643; Garthe v. Hart, 73 Cal. 541, 15 Pac. 93, 15 Morr. Min. Rep. 492; Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, 20 Morr. Min. Rep. 283; Thallmann v. Thomas, 111 Fed. 277, 49 C. C. A. 317, 21 Morr. Min. Rep. 573; Holmes v. Salamanca A. M. & M. Co., 5 Cal. App. 659, 91 Pac. 160; Pacific Livestock Co. v. Isaacs, 52 Or. 54, 96 Pac. 460; Malone v. Jackson, 137 Fed. 878, 70 C. C. A. 216; Saxton v. Perry, 47 Colo. 263, 107 Pac. 281; Farrell v. Lockhart, 210 U. S. 142, 147, 28 Sup. Ct. Rep. 681, 52 L. ed. 994; Swanson v. Sears, 224 U. S. 180, 32 Sup. Ct. Rep. 455, 56 L. ed. —

[26] Thallmann v. Thomas, 111 Fed. 277, 49 C. C. A. 317, 21 Morr. Min. Rep. 573.

[27] Chapman v. Toy Long, 4 Saw. 28, Fed. Cas. No. 2610, 1 Morr. Min. Rep. 497.

[28] Hopkins v. Noyes, 4 Mont. 550, 556, 2 Pac. 280, 15 Morr. Min. Rep. 287.

And the same court later held that,—

> So long as public lands are not appropriated under the provision of some statute, or are in the actual possession of the claimant by personal presence thereon or by substantial inclosure, they are free and open to all persons whomsoever, to be occupied or appropriated as they may wish.[29]

The right of possession comes only from a valid location.[30]

Parties may not go on the public domain and acquire the right of possession by the mere performance of the acts prescribed for location (that is, where there is no discovery).[31]

Mere "paper locations" do not prevent appropriation of land under agricultural laws.[32]

The circuit court of appeals for the eighth circuit said:—

> Every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or to hold the possession. . . . . Any other rule would make the wrongful occupation of the public land by a trespasser superior in right to

[29] Hahn v. James, 29 Mont. 1, 73 Pac. 965.

[30] Russell v. Hoyt, 4 Mont. 412, 2 Pac. 25; Belk v. Meagher, 104 U. S. 284, 26 L. ed. 737, 1 Morr. Min. Rep. 510; Hamilton v. Huson, 21 Mont. 9, 53 Pac. 101, 19 Morr. Min. Rep. 274.

[31] Creede & Cripple Creek M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337, 353, 25 Sup. Ct. Rep. 266, 49 L. ed. 501; Cook v. Klonos, 164 Fed. 529, 536, 90 C. C. A. 403; S. C., on rehearing, 168 Fed. 700, 94 C. C. A. 144; Hanson v. Craig, on rehearing, 170 Fed. 62, 95 C. C. A. 338; McLemore v. Express Oil Co., 158 Cal. 559, 139 Am. St. Rep. 147, 112 Pac. 59; Ferris v. McNally (Mont.), 121 Pac. 889.

[32] Hirshfeld v. Chrisman, 40 L. D. 112.

a lawful entry of it under the acts of congress by a competent locator.[33]

Possession is good as against mere intruders;[34] but it is not good as against one who has complied with the mining laws.[35] A prospector may protect himself in his *pedis possessio*, while searching for mineral.[36]

An interesting question arises on which there is a marked divergence of opinion on the part of the courts as to the extent of the protection that should be given to a prospector entering on the public domain in advance of discovery. These views find expression in two distinct lines of authority.

On the one hand, the rule has been announced that a prospector entering upon the public domain for the purpose of searching for mineral cannot, prior to discovery, exclude other prospectors from entering for a similar purpose, provided that such entry is peaceable and does not disturb the *pedis possessio* of the first prospector. The right of possession of such prospector does not extend beyond the limits of his actual "*pedis possessio.*" [37]

[33] Thallmann v. Thomas, 111 Fed. 277, 279, 49 C. C. A. 317, 21 Morr. Min. Rep. 573.

[34] Meydenbauer v. Stevens, 78 Fed. 787, 18 Morr. Min. Rep. 578; Wilson v. Triumph Consol. M. Co., 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300.

[35] Garthe v. Hart, 73 Cal. 541, 543, 15 Pac. 93, 15 Morr. Min. Rep. 492; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 14, 50 C. C. A. 79, 21 Morr. Min. Rep. 633.

[36] Crossman v. Pendery, 8 Fed. 693, 2 McCrary, 139, 4 Morr. Min. Rep. 431; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 21 Morr. Min. Rep. 633; Rooney v. Barnette, 200 Fed. 700, 710.

[37] Gemmell v. Swain, 28 Mont. 331, 98 Am. St. Rep. 570, 72 Pac. 662, 22 Morr. Min. Rep. 716; Hanson v. Craig, on rehearing, 170 Fed. 62, 95 C. C. A. 338; reversing S. C., 161 Fed. 861, 89 C. C. A. 55; Hahn v. James, 29 Mont. 1, 73 Pac. 965.

The other line of cases holds that the law must be given a liberal and equitable interpretation with a view of protecting prior rights, and that while a locator who has made his location is in possession, engaged in good faith in actively and diligently prospecting it for minerals and at work for the purpose of making a discovery, the land is not open to location by others.[38] But mere watching of the ground in the absence of diligent exploration looking toward a discovery will not suffice,[39] for it was not the intention to permit a locator of mineral land to hold it against the world for an indefinite time without doing any development work whatever.[40] A location unaccompanied by a discovery or possession where the land is not apparently mineral will not preclude a subsequent homesteader from making entry.[41]

As the citation of authorities indicates, the decisions of the supreme court of California are mainly responsible for the more liberal rule which would protect the possession of a *bona fide* prospector to the full extent of his located ground. The frequent expression of this rule by that court was largely due to the peculiar condition arising in the oil districts of California. Immensely valuable deposits of petroleum oil had been discovered and known or believed to exist in adjoin-

[38] Weed v. Snook, 144 Cal. 439, 77 Pac. 1023; Phillips v. Smith, 11 Ariz. 309, 95 Pac. 91; Whitney v. Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849; Merced Oil Co. v. Patterson, 153 Cal. 624, 96 Pac. 90; S. C., second appeal (Cal.), 122 Pac. 950; Miller v. Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63, 73 Pac. 1083; S. C., in error, 197 U. S. 313, 25 Sup. Ct. Rep. 468, 49 L. ed. 770; Borgwardt v. McKittrick Oil Co., 164 Cal. 650, 130 Pac. 417.

[39] New England & Coalinga Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180; Whitney v. Straup, *supra*.

[40] Goldberg v. Brutschi, 146 Cal. 708, 81 Pac. 23.

[41] McLemore v. Express Oil Co., 158 Cal. 559, 139 Am. St. Rep. 147, 112 Pac. 59.

ing lands on the public domain. The placer law was the only law governing the disposition of public lands under which title to such mineral land could be lawfully acquired, and yet in practically every instance a discovery could only be made by the actual drilling of a well disclosing the presence of oil, which normally required considerable time and the expenditure of large sums of money. Oil was frequently discovered only after drilling three thousand feet or more at an expense of from twenty-five thousand dollars to fifty thousand dollars, and a year or more was consumed in making a discovery. It seems only equitable that *bona fide* locators, acting with due diligence, should be thus protected and unseemly contests prevented during this period of exploration and development necessarily preceding a discovery. However, in all cases where locators had slept on their rights and failed to work with diligence, the local courts refused to grant injunctions to prevent entries by rival locators.

Costigan, in his work on Mining Law, says (page 156):—

> *Pedis possessio* means actual possession, and pending a discovery by anybody the actual possession of the prior arrival will be protected to the extent needed to give him room for work and to prevent probable breaches of the peace. But while the *pedis possessio* is thus protected, it must yield to an actual location on a valid discovery made by one who has located peaceably and neither clandestinely nor with fraudulent purposes.

This statement of the rule has received the express commendation and approval of the circuit court of appeals, ninth circuit.[42]

[42] Hanson v. Craig (on rehearing), 170 Fed. 62, 95 C. C. A. 338, overruling 161 Fed. 861, 89 C. C. A. 55.

Whether a locator in possession, acting in good faith, should be protected only to the extent of his *pedis possessio*, or whether he is entitled to the exclusive control of his entire location while working diligently to make a discovery, will, in view of the conflict in the decisions, remain a debatable question until the supreme court of the United States has spoken the final word.

Speaking for the court of the effect of actual possession, Chief Justice Beatty has said:[43]—

> The working of a quartz lode inside of defined boundaries is not only a *pedis possessio* of all of the ground within such boundaries, but is in itself the substance of everything required by law to constitute a valid location. . . . . It is actual possession while a formal location is only constructive possession.

In this case a mining claim had been located under the federal laws only, the court holding that the only acts required under those laws are discovery and marking of boundaries.

There are other cases which bear on this general question which cannot be entirely harmonized.[44] Some of them recognize the doctrine as to all ground not covered by the *pedis possessio*. Others do not mention the element of force as entitled to controlling weight in determining the question. In most of these cases the statement of facts upon which the decisions are based is very meager, and we are therefore unable to say to what extent, if at all, any of them repudiate

[43] Dwinnell v. Dyer, 145 Cal. 12, 78 Pac. 247, 7 L. R. A., N. S., 763.

[44] Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66, 15 Morr. Min. Rep. 462; Armstrong v. Lower, 6 Colo. 581; Weese v. Barker, 7 Colo. 178, 2 Pac. 919; Lebanon M. Co. v. Con. Rep. M. Co., 6 Colo. 380; Faxon v. Barnard, 4 Fed. 702, 2 McCrary, 44, 9 Morr. Min. Rep. 515; North Noonday v. Orient, 6 Saw. 507, 11 Fed. 125, 9 Morr. Min. Rep. 524; Gird v. Cali-

the doctrine of Belk v. Meagher. Be that as it may, it cannot be denied that if there is any conflict between the decisions here referred to and the doctrine announced by the supreme court of the United States, they must, to the extent of such conflict, be disregarded.

While mere occupation without color of title is insufficient to prevent a competent locator from entering upon the land in a peaceable manner, for the purpose of making a location, no such entry may be made where title to the land has been secured or a valid location of the same has been made.[45] This rule is subject to the qualification that the lines of a junior lode location may be laid upon a valid senior location for the purposes of securing underground or extralateral rights not in conflict with any rights of the senior location;[46] and the land department has held that the lines of the junior claim may be so laid, though the senior claim

fornia Oil Co., 60 Fed. 531, 541, 18 Morr. Min. Rep. 45; Quinby v. Conlan, 104 U. S. 420, 423, 26 L. ed. 800; Goodwin v. McCabe, 75 Cal. 584, 588, 17 Pac. 705; Crossman v. Pendery, 8 Fed. 693, 2 McCrary, 139, 4 Morr. Min. Rep. 431; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 18, 50 C. C. A. 79, 21 Morr. Min. Rep. 663. And see Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633, 21 Morr. Min. Rep. 393.

[45] Thallmann v. Thomas, 111 Fed. 277, 49 C. C. A. 317, 21 Morr. Min. Rep. 573; Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240; Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735; Hoban v. Boyer, 37 Colo. 185, 85 Pac. 837; Nash v. Macnamara, 30 Neb. 114, 133 Am. St. Rep. 694, 93 Pac. 405, 16 L. R. A., N. S., 168; Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. Rep. 681, 52 L. ed. 994, 16 L. R. A., N. S., 162; McCulloch v. Murphy, 125 Fed. 147, 151.

[46] Del Monte Min. Co. v. Last Chance Min. Co., 171 U. S. 55, 83, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370; Crown Point Min. Co. v. Buck, 97 Fed. 462, 38 C. C. A. 278; Empire State-Idaho M. & D. Co. v. Bunker Hill & Sullivan M. & C. Co., 109 Fed. 538, 48 C. C. A. 665, 21 Morr. Min. Rep. 317; Empire State etc. Co. v. Bunker Hill etc. Co., 106 Fed. 471; Hidee Gold M. Co., 30 L. D. 420.

has been *patented;*[47] but the supreme court of Montana doubts that this is the law.[48] The land department has also permitted the lines of a location to be laid upon prior patented agricultural land.[49] This subject will be fully discussed in another portion of this work.[50]

§ 219. **Conclusions.**—We are justified in deducing the following general rules upon the subject under discussion:—

(1) Actual possession of a tract of public mineral land is valid as against a mere intruder, or one having no higher or better right than the prior occupant;[51]

(2) No mining right or title can be initiated by a violent or forcible invasion of another's actual occupancy;

(3) If a party goes upon the mineral lands of the United States and either establishes a settlement or works thereon without complying with the requirements of the mining laws, and relies exclusively upon his possession or work, a second party who locates peaceably a mining claim covering any portion of the same ground, and in all respects complies with the requirements of the mining laws, is entitled to the possession of such mineral ground to the extent of his location as against the prior occupant, who is, from

47 Hidee Gold Min. Co., 30 L. D. 420. See, also, Empire State etc. Co. v. Bunker Hill etc. Co., 106 Fed. 471; S. C., on appeal, 114 Fed. 417, 52 C. C. A. 219, 22 Morr. Min. Rep. 104.

48 State v. District Court, 25 Mont. 504, 65 Pac. 1020.

49 Alice Lode Claim, 30 L. D. 481.

50 *Post,* §§ 363, 365.

51 Quoted in Benton v. Hopkins, 31 Colo. 518, 74 Pac. 891. See, also, Davis v. Dennis, 43 Wash. 54, 85 Pac. 1079; Biglowe v. Conradt, 159 Fed. 868, 87 C. C. A. 48.

the time said second party has perfected his location and complied with the law, a trespasser.[52]

The peaceable adverse entry by the locator, coupled with the perfection of his location, operates in law as an ouster of the prior occupant.[53]

The lines of a junior lode location may be laid across a senior lode location for the purpose of defining the extralateral rights of the junior location; and the lines may be so laid across any unpatented public land, and likewise across patented land, if done openly and peaceably.

In some of the states laws are enacted protecting the right of a discoverer upon the public mineral lands for a limited period of time, to enable him to perfect his location. Where no such local statutes are in force, according to the current of authority, by the policy of the law a reasonable time is allowed to such discoverer to complete his appropriation. During such periods the possession or occupation of the discoverer will be protected as against subsequent locators.[54] This subject will be fully considered in another portion of this treatise, and the application of the doctrines above enunciated to such cases will there be fully explained.[55]

[52] This is substantially the charge to the jury upheld in Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197, 15 Morr. Min. Rep. 488; Hahn v. James, 29 Mont. 1, 73 Pac. 965; Walsh v. Henry, 38 Colo. 393, 88 Pac. 449; Phillips v. Smith, 11 Ariz. 309, 95 Pac. 91; Ferris v. McNally (Mont.), 121 Pac. 889.

[53] Belk v. Meagher, 3 Mont. 65, 80.

[54] In California the more liberal and equitable doctrine is applied to the oil regions to protect possession without discovery in the absence of any statute. See cases cited *supra*, § 218.

[55] *Post*, § 339.

CHAPTER IV.

OF THE PERSONS WHO MAY ACQUIRE RIGHTS TO PUBLIC MINERAL LANDS.

ARTICLE I. CITIZENS.

§ 223. Only citizens, or those who have declared their intention to become such, may locate mining claims.—As the paramount proprietor of its public domain, the United States has not only the right to regulate the terms and conditions under which it may be disposed of, but it is also its privilege to designate the persons who may be the recipients of its bounty, and prescribe the qualifications of those who may acquire and enjoy permanent estates on its lands. In the exercise of this privilege, it has ordained that,—

> 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.[1]

1 Rev. Stats., § 2319; 5 Fed. Stats. Ann. 4. Officers and employees in the United States land office are prohibited from becoming interested

Therefore, to lawfully locate and hold a mining claim, the locator must either be a citizen of the United States or he must have declared his intention to become such in the manner provided by the naturalization laws of congress.[2] To entitle an alien who has declared his intention of becoming a citizen of the United States to these privileges, it must appear that such intention is a *bona fide* existing one at the time of purchase.[3] Enlistment in the army is a declaration of an intention to become a citizen.[4] As to who may attack a location made by an alien, and how it may be attacked, will be fully considered in a succeeding section. We here state simply the abstract rule of law.

§ 224. Who are citizens.—It is hardly within the legitimate scope of this treatise to exhaustively discuss the law of citizenship. But as introductory to the presentation of the law governing the qualifications of locators of mining claims, and the effect of alienage upon the validity of titles during the various stages of transmission from the government, as the primary source, to the ultimate grantee, we are justified in pre-

in the purchase of any public lands. Rev. Stats., § 452; 6 Fed. Stats. Ann. 212.

[2] By statute (30 Stats. at Large, p. 409; Comp. Stats 1901, p. 1424; 5 Fed. Stats. Ann. 8), in Alaska a native-born citizen of the dominion of Canada may enjoy the same mining rights which are accorded citizens of the United States in British Columbia and the Northwest territory; but no greater rights may be accorded to such a Canadian citizen than are accorded to an American. This statute has been declared to be inoperative at present because Americans are not given any mining rights in Canada except the right to lease mines, and our system does not contemplate the leasing of mines. 27 L. D. 267.

[3] Saturday Lode Claim, 29 L. D. 627.

[4] Strickley v. Hill, 22 Utah, 257, 83 Am. St. Rep. 786, 62 Pac. 893, 20 Morr. Min. Rep. 722.

senting in general outline the laws of congress upon the subject, and the decisions of the courts construing them in cases arising under the mining laws.

The fourteenth amendment to the constitution of the United States provides that,—

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

The clause "subject to the jurisdiction of the United States" means completely subject to the political jurisdiction of the United States,—owing direct and immediate allegiance.[5]

They may be citizens of the United States without being citizens of any particular state.[6]

Neither age nor sex is involved in the definition of the word "citizen." It therefore includes men, women, and children,[7] and, for certain purposes, as we shall have occasion to observe later on, corporations organized under the laws of the several states.[8]

Citizenship is either—

(1) By birth; or

(2) By naturalization.

Citizens by birth are those born within the United States, or in a foreign country, if at the time of their birth their fathers were citizens.[9]

5 Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. Rep. 41, 28 L. ed. 643; Slaughterhouse Cases, 16 Wall. 36, 21 L. ed. 394; Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664.

6 Slaughterhouse Cases, 16 Wall. 36, 21 L. ed. 394; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588.

7 1 Bouvier's Law Dict., "Citizen."

8 *Post*, § 226.

9 Rev. Stats., § 1993; 1 Fed. Stats. Ann. 786; Ludlam v. Ludlam, 26 N. Y. 356, 84 Am. Dec. 193; Oldtown v. Bangor, 58 Me. 353; State v. Adams, 45 Iowa, 99, 24 Am. Rep. 760.

There are certain exceptions to this rule of natural citizenship.

Children born in the United States of ambassadors and diplomatic representatives, whose residence, by a fiction of law, is regarded as a part of their own country, are not citizens.[10]

Indians born members of any of the Indian tribes within the United States which still hold their tribal relations are not citizens. They are not citizens, even if they have separated themselves from their tribe and reside among white citizens of a state, but have not been naturalized, or taxed, or recognized as citizens by the United States, or by any of the states.[11]

To become citizens, they must comply with some treaty providing for their naturalization or some statute authorizing individuals of special tribes to assume citizenship by due process of law.[12]

The fact that the parents of a child (Chinese) born in the United States are prohibited from becoming citizens does not militate against the citizenship of the child. Such child is a citizen.[13]

Generally speaking, citizenship by birth is the rule. Ordinarily, a married woman partakes of the husband's nationality.[14] Formerly marriage with an alien produced no dissolution of the native allegiance of the wife,[15] unless there was a withdrawal by her from her native country, or equivalent act expressive of her

[10] In re Look Tin Sing, 21 Fed. 905.

[11] Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. Rep. 41, 28 L. ed. 643.

[12] 3 Am. & Eng. Ency. of Law, 1st ed., p. 245, note 1.

[13] United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. Rep. 456, 42 L. ed. 890; Lee Sing Far v. United States, 94 Fed. 834, 35 C. C. A 327; In re Look Tin Sing, 21 Fed. 905.

[14] Wharton on Conflict of Laws, § 11.

[15] Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666.

election to renounce her former citizenship as a consequence of her marriage.[16]

Under act of congress, March 2, 1907,[17] it was provided—

> That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or if residing in the United States at the termination of the marital relation by continuing to reside therein.

This law seems to settle definitely the citizenship of married women in this country and to settle it in accord with the adjustment of the same question by statute in most civilized countries.[18]

The marriage of an alien woman to an American citizen makes the woman a citizen under the immigration laws.[19]

[16] Ruckgaber v. Moore, 104 Fed. 947, 31 Civ. Proc. Rep. 310; Comitis v. Parkerson, 56 Fed. 556, 22 L. R. A. 148. But see Pequignot v. City of Detroit, 16 Fed. 211.

In Wallenburg v. Missouri Pac. Ry., 159 Fed. 217, 219, the court said: "The federal decisions are not uniform upon the question, as will be seen from reading the cases of Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666, Pequignot v. City of Detroit (D. C.), 16 Fed. 211, Comitis v. Parkerson, 56 Fed. 556, 22 L. R. A. 148, Jennes v. Landes, 84 Fed. 73, Ryder v. Bateman, 93 Fed. 16–21, Ruckgaber v. Moore, 104 Fed. 947, 31 Civ. Proc. Rep. 310. Without undertaking to review the reasons given for the conclusions reached in each of the foregoing cases, I am clearly of the opinion that a woman, a citizen of the United States, does not lose that citizenship by marriage to an alien, at least so long as she continues to reside in the United States." See note on this subject in 22 L. R. A. 148.

[17] 34 Stats. 1228; Comp. Stats. (Supp. 1907), p. 381; Comp. Stats. (Supp. 1911), p. 490; Fed. Stats. Ann. (Supp.), p. 68.

[18] In re Martorana, 159 Fed. 1010.

[19] United States v. Williams, 173 Fed. 626.

The law recognizes the right of expatriation; but instances of it among Americans are so rare that the subject deserves no attention here.

One not a citizen may become such by complying with the provisions of the federal naturalization laws.[20]

Naturalization gives the alien all the rights of a natural-born citizen. He thereby becomes capable of receiving property by descent and of transmitting it in the same way, whereas, as an alien, he might not so receive it.[21]

Ordinarily, naturalization is not complete until the lapse of a probationary period after a preliminary declaration of intention to become a citizen. During this period, between the taking out of "first" and "second" papers, the declarant is not considered as a citizen to the extent that he may either exercise the elective franchise or hold office. He is entitled to no privileges other than those specially vouchsafed to him by the law. In the location of mining claims he is endowed with the full rights of a citizen, to the same extent as if his naturalization were completed by taking the final oath and the issuance to him of his final papers. Therefore, for all purposes within the purview of this treatise, we shall treat an alien who has declared his intention to become a citizen as if he were fully naturalized; and when we employ the word "naturalization," it is to be understood as designating the act which confers upon the alien the right to enjoy, in common with citizens, the privilege of locating and purchasing mining claims upon the public domain.

§ 225. **Minors.**—Minors born in the United States are citizens, and may locate mining claims. There is

[20] Rev. Stats., §§ 2165–2174; 5 Fed. Stats. Ann., pp. 200–210.

[21] Jackson ex dem. Doran v. Green, 7 Wend. (N. Y.) 333.

no requirement in the general mining laws that the citizen shall be of any particular age. To say that minors are not qualified locators is to say that they are not citizens. The conclusion is strengthened by the circumstance that in some instances the statutes expressly require that the citizen shall be of a particular age before he may acquire certain classes of public lands. Thus, in reference to coal lands, the provision is, that every person above the age of twenty-one years who is a citizen of the United States may enter such lands.[22] A similar provision exists as to homesteads under the federal laws.[23] The expression of a requirement as to age in some instances, and the omission of it in others, is significant.[24] It is quite true that minors may not transmit title during infancy with the same freedom as adults. During this minority they are incapacitated from entering into binding contracts, except for necessaries, and, generally speaking, may act only through guardians, under the supervision of the courts. But this circumstance does not prevent them from acquiring property. As was said by the supreme court of California,—

> Nor is there any reason in the nature of things why a minor may not make a valid location. . . . . It may be added that, so far as we know, it is the practice in many mining communities for minors to locate claims.[25]

The fact that this is the recognized practice in many mining communities is, perhaps, not of controlling weight; but it carries with it the suggestion that a contrary rule would disturb many titles acquired in good

22 Rev. Stats., § 2347; 5 Fed. Stats. Ann. 55.

23 Rev. Stats., § 2289; 6 Fed. Stats. Ann. 285.

24 Thompson v. Spray, 72 Cal. 528, 14 Pac. 182.

25 Thompson v. Spray, 72 Cal. 528, 14 Pac. 182.

faith, and that such rule should not be invoked without the most substantial and cogent reasons.

§ 226. **Domestic corporations.**—By domestic corporations, we mean those created or organized under the laws of the several states of the Union, using the term in contradistinction to foreign corporations, or those who owe their existence to the laws of foreign countries. The latter class will receive attention when we deal with the subject of aliens. A corporation is a citizen of the state which created it.[26]

A corporation created and existing under the laws of a state is to be deemed a citizen within the meaning of the statute regulating the right to acquire public mineral lands,[27] and as such is competent to purchase and hold a mining claim.[28]

The supreme court of the United States has held that a corporation created under the laws of the states of the Union, *all of whose members are citizens* of the United States, is competent to locate, or join in the location, of a mining claim upon the public lands of the United States in like manner as individual citizens.[29]

[26] St. Louis v. Wiggin's Ferry Co., 11 Wall. 423, 20 L. ed. 192; Chicago & N. W. R. R. v. Whitton, 13 Wall. 270, 20 L. ed. 571; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Germania Fire Ins. Co. v. Francis, 78 U. S. 210, 20 L. ed. 77; Block v. Standard D. & D. Co., 95 Fed. 978; Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300.

[27] Rev. Stats., § 2319; 5 Fed. Stats. Ann. 4.

[28] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 316, 1 Fed. 522, 9 Morr. Min. Rep. 529. See, also, Tacoma Land Co. v. Northern Pac. R. R. Co., 26 L. D. 503.

[29] McKinley v. Wheeler, 130 U. S. 630, 9 Sup. Ct. Rep. 638, 32 L. ed. 1048, 16 Morr. Min. Rep. 65, followed in Dahl v. Montana C. Co., 132 U. S. 264, 10 Sup. Ct. Rep. 97, 33 L. ed. 325; Thomas v. Chisholm, 13 Colo. 105, 21 Pac. 1019, 16 Morr. Min. Rep. 122.

The italics in the above quotation are ours. Judge Knowles, speaking for the circuit court of appeals in the ninth circuit, is of the opinion that the inference to be drawn from this decision, although not so stated, is that only corporations whose stockholders are citizens can locate mining claims.[30] We do not think that the supreme court intended to lay particular stress upon the word "*all.*" If it did, it went entirely beyond the exigencies of the case under consideration. There was nothing in the facts requiring such a ruling. It is probable that the expression was used unadvisedly, and not with the intention of establishing a fixed rule that a corporation organized under the laws of a state cannot lawfully acquire or hold unpatented mining claims if one of its stockholders is an alien. In the territories, under the alien act of March 3, 1887,[31] aliens were prohibited from acquiring real estate; yet domestic corporations might freely acquire such lands, and aliens were permitted to own and hold twenty per cent of the stock of such domestic corporations. The act was subsequently superseded by an act which contained no provision with reference to corporations.[32] Is it to be presumed in the states wherein the laws make no discrimination between aliens and citizens, with regard to the acquisition and enjoyment of landed estates, that the government should insist that none of the stock of a domestic corporation holding or locating an unpatented mining claim shall be held by an alien, under penalty of being refused a title by patent, if sought, or of suffering escheat after patent, should the

30 Doe v. Waterloo M. Co., 70 Fed. 455, 17 C. C. A. 190, 18 Morr. Min. Rep. 265.

31 24 Stats. at Large, p. 477; Comp. Stats. (Supp. 1911), p. 1168.

32 29 Stats. at Large, p. 618; Comp. Stats. (Supp. 1911), p. 1168; 1 Fed. Stats. Ann., pp. 437, 438.

government see fit to enforce it? Judge Knowles, in the case above referred to,[33] gives a logical solution of the question. Where a corporation is created by the laws of a state, the legal presumption is, that its members are citizens of the same state.[34]

A suit may be brought in the federal courts by or against a corporation; but in such case it is regarded as a suit brought by or against the stockholders of a corporation, and for the purposes of jurisdiction it is *conclusively presumed* that *all* the stockholders are citizens of the state which by its laws created the corporation.[35]

In the language of Judge Knowles,—

> Congress was familiar with this rule, and, it seems probable, intended to establish a similar rule under the mineral land act of 1872.

This view is strengthened by a consideration of the section of the Revised Statutes regulating the proof of citizenship in proceedings under the mining laws.

> Proof of citizenship under this chapter may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any state or territory thereof, by the filing of their charter or certificate of incorporation.[36]

Under this section, the land department holds that a properly authenticated certificate of incorporation filed

[33] Doe v. Waterloo M. Co., 70 Fed. 455, 17 C. C. A. 190, 18 Morr. Min. Rep. 265.

[34] Ohio R. R. Co. v. Wheeler, 1 Black, 286, 17 L. ed. 130.

[35] Muller v. Dows, 94 U. S. 444, 24 L. ed. 207.

[36] Rev. Stats., § 2321; 5 Fed. Stats. Ann. 13.

by a corporation that is applying for a mineral patent is sufficient proof of citizenship.[37]

It is not within the power of the land department to determine whether such corporation is authorized under its charter to acquire patent for mineral lands.[38]

Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign (i. e., the state to which it owes its existence) alone can object. It is valid until assailed in a direct proceeding for that purpose.[39]

The supreme court of Montana has held that the fact that an alien owns stock in a corporation which has acquired title to mining claims does not disturb the title of the corporation to such claims.[40]

If it be true that all of the stockholders of a domestic corporation seeking to locate public mineral lands must be citizens, as may be inferred from the ruling of the supreme court of the United States, then a properly authenticated certificate of such corporation is conclusive evidence of such citizenship.[41]

We think we are justified in deducing the rule that domestic corporations may locate and hold mining claims, and that an inquiry as to the citizenship of stockholders is not permitted, for the simple reason that such citizenship is conclusively presumed.

37 Rose Lode Claim, 22 L. D. 83; Silver King M. Co., 20 L. D. 116; Gen. Min. Circ., par. 76. (See appendix.)

38 Rose Lode Claim, 22 L. D. 83.

39 National Bank v. Matthews, 98 U. S. 621, 628, 25 L. ed. 188.

40 Princeton M. Co. v. First Nat. Bank, 7 Mont. 530, 19 Pac. 210.

41 Doe v. Waterloo M. Co., 70 Fed. 455, 17 C. C. A. 190, 18 Morr. Min. Rep. 265; Ohio R. R. v. Wheeler, 1 Black, 286, 17 L. ed. 130; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Jackson v. White Cloud G. M. Co., 36 Colo. 122, 85 Pac. 639; Duncan v. Eagle Rock Gold M. & R. Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 Pac. 588.

The supreme court of the United States has suggested the question as to the extent of ground which may be located by a corporation; that is, whether it will be treated as one person, and is entitled to locate only to the extent permitted to a single individual, or otherwise.[42]

We do not consider that, in the case of lode claims, the situation presents any embarrassment, as no one person or association of persons can locate by one location in excess of the statutory limit of fifteen hundred by six hundred feet of surface. As to placers, it might be considered as an association of persons, which it is in one sense, and so be entitled to locate as such one hundred and sixty acres, if it had eight stockholders, and they usually have many more. We think, however, that the safer rule is to consider the corporation as a single individual and entitled to locate but twenty acres of placer ground.[43] The "association" referred to in the statute is evidently a number of individual locators, uniting for the purpose of making a joint location, and not an incorporated company.

§ 227. **Citizenship, how proved.**—Citizenship may be proved like any other fact.[44] It is a question for the jury.[45]

In proceedings before the land department, and in actions brought in the local courts under the sanction of the Revised Statutes,[46] to determine the right of

[42] McKinley v. Wheeler, 130 U. S. 630, 9 Sup. Ct. Rep. 638, 32 L. ed. 1048, 16 Morr. Min. Rep. 65.

[43] So held by the secretary of the interior in Igo Bridge Extension Placer, 38 L. D. 281; Coalinga Hub Oil Co., 40 L. D. 401.

[44] Thompson v. Spray, 72 Cal. 528, 14 Pac. 182; Strickley v. Hill, 22 Utah, 257, 83 Am. St. Rep. 786, 62 Pac. 893, 20 Morr. Min. Rep. 722.

[45] Golden Fleece M. Co. v. Cable Cons., 12 Nev. 313.

[46] Rev. Stats., § 2326; 5 Fed. Stats. Ann. 35.

possession, the judgment in such actions being advisory to the land department, the law provides that proof of citizenship may consist, in the case of an individual, of his own affidavit thereof;[47] in the case of an association of persons unincorporated, by the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any state or territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.[48] However, proof by affidavit is not the only method of establishing citizenship.[49] It may be established by any other competent legal evidence. In fact, in the case of naturalized citizens, some of the courts have insisted that exemplifications of the record of naturalization should be produced,[50] or its loss accounted for, and the foundation laid for the introduction of secondary evidence. This is not the rule in the land department, however, which is governed entirely by the provisions of the Revised Statutes.[51] Neither is it the rule sanctioned by all the courts.[52]

[47] Stolp v. Treasury G. M. Co., 38 Wash. 619, 80 Pac. 817.

[48] Rev. Stats., § 2321; North Noonday M. Co. v. Orient M. Co., 6 Saw. 503, 11 Fed. 125, 9 Morr. Min. Rep. 524; Clark's Pocket Quartz Mine, 27 L. D. 351; Jackson v. White Cloud G. M. Co., 36 Colo. 122, 85 Pac. 639; Duncan v. Eagle Rock G. M. & R. Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 Pac. 588.

[49] Thompson v. Spray, 72 Cal. 528, 14 Pac. 182; Boyd v. Nebraska, 143 U. S. 180, 12 Sup. Ct. Rep. 375, 36 L. ed. 116; Providence Gold M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 19 Morr. Min. Rep. 625; Strickley v. Hill, 22 Utah, 257, 83 Am. St. Rep. 786, 62 Pac. 893, 20 Morr. Min. Rep. 722.

[50] Wood v. Aspen M. Co., 36 Fed. 25.

[51] In re John Mooney, 3 Copp's L. O. 68; Circular Instructions, August 2, 1876, Id. 68; Mining Regulations, July 26, 1901, par. 68. (See appendix.)

[52] Strickley v. Hill, 22 Utah, 257, 83 Am. St. Rep. 786, 62 Pac. 893, 20 Morr. Min. Rep. 722.

In all actions between individuals disconnected with proceedings to obtain title under the federal mining laws, if we admit that the question of citizenship may in any such action be properly the subject of inquiry,—a proposition we are not prepared to concede,[53]—the rules of evidence prescribed by the several states would control. In such cases, we do not understand that an *ex parte* affidavit would be admissible. The opposing party could not be deprived of the right to cross-examine the witness by whose oath the fact of citizenship is sought to be proved.

It may be here noted, although we shall have occasion to again refer to the subject, that in proceedings before the land department upon applications for patents under the mining laws, proof of citizenship is not required of the original locators or intermediate owners, but of the applicant for patent or adverse claimants only.[54]

It has been said that a presumption of citizenship arises from the fact of residence.

The supreme court of Arizona has held that—

> It will be presumed that a man being a resident of the United States, and who has made a mining location, was a citizen of the United States, ... where it appears that he recorded at or near the time a location notice reciting these facts. Such evidence will make out a *prima facie* title.[55]

This was on the assumption that a location notice, when recorded, is, by reason of the law authorizing or

[53] Buckley v. Fox, 8 Idaho, 248, 67 Pac. 659; McKinley Creek M. Co. v. Alaska United M. Co., 183 U. S. 563, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, 21 Morr. Min. Rep. 730.

[54] Cash Lode, 1 Copp's L. O. 97; City Rock & Utah v. Pitts, Id. 146; Wandering Boy, 2 Copp's L. O. 2.

[55] Jantzon v. Arizona C. Co., 3 Ariz. 6, 20 Pac. 93, 94. Cited in Dean v. Omaha-Wyoming Oil Co. (Wyo.), 128 Pac. 881, 884, 885.

requiring the record, *prima facie* evidence of the facts therein recited, applying the rule approved in Colorado [56] and elsewhere,[57] which provides that such a recorded notice is evidence of the facts required by law to be stated therein. The fact of citizenship is not required by any of the state laws to be stated in the notice, and therefore it would seem that the Arizona court has misapplied the rule. Citizenship is a matter *in pais*, and must be proved like any other fact.[57a]

In the opinion of Judge Sawyer, in the class of proceedings provided for by the Revised Statutes,[58] no presumptions of fact should be indulged, but each party must establish his right by evidence.[59] These presumptions, if properly considered to any extent, are, of course, disputable.

The objection that the locators were not citizens or that the fact of their citizenship was not shown cannot be raised for the first time in the appellate court.[59a]

After patent or certificate of purchase has once issued, however, the citizenship of the patentee is conclusively presumed. This presumption arises from the accepted rule that the qualifications of an applicant for patent are necessarily involved in the inquiry made by the land department, and the patent, when issued,

[56] Strepey v. Stark, 7 Colo. 614, 5 Pac. 111, 17 Morr. Min. Rep. 28.

[57] Flick v. Gold Hill M. Co., 8 Mont. 298, 20 Pac. 807; Dillon v. Bayliss, 11 Mont. 171, 27 Pac. 725; Brady v. Husby, 21 Nev. 453, 33 Pac. 801; Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153; Hammer v. Garfield M. & M. Co., 130 U. S. 291, 9 Sup. Ct. Rep. 548, 32 L. ed. 964, 16 Morr. Min. Rep. 125; Wood v. Aspen, 36 Fed. 25.

[57a] *Post*, § 392.

[58] Rev. Stats., § 2326; 5 Fed. Stats. Ann. 35.

[59] Bay State S. M. Co. v. Brown, 10 Saw. 243, 21 Fed. 167.

[59a] Sherlock v. Leighton, 9 Wyo. 297, 309, 63 Pac. 580, 934; Dean v. Omaha-Wyoming Oil Co. (Wyo.), 128 Pac. 881, 885; O'Reilly v. Campbell, 116 U. S. 418, 6 Sup. Ct. Rep. 421, 29 L. ed. 669.

is a conclusive adjudication that the patentee possessed the *status* of a citizen.[60]

As between individuals, the question of the alienage of a locator or claimant of a mining claim can only arise in the proceedings brought before the land department upon application for patent, or in actions brought under section twenty-three hundred and twenty-six of the Revised Statutes. In all other classes of cases it is not open to question. We have attempted to demonstrate this in a succeeding section.[61]

Article II. Aliens.

§ 231. Acquisition of title to unpatented mining claims by aliens.—As we have already seen, aliens who have not declared their intention to become citizens cannot lawfully locate mining claims upon the public mineral domain. But it frequently occurs that such aliens do so locate such claims and transmit the title so acquired apparently the same as if this disqualification did not exist; and there are innumerable examples of

[60] Justice M. Co. v. Lee, 21 Colo. 260, 52 Am. St. Rep. 216, 40 Pac. 444, 18 Morr. Min. Rep. 220 (overruling the decision of the court of appeals in the same case); Lee v. Justice M. Co., 2 Colo. App. 112, 29 Pac. 1020.

[61] See § 233. See, also, Buckley v. Fox, 8 Idaho, 248, 67 Pac. 659; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 934; McKinley Creek M. Co. v. Alaska United M. Co., 183 U. S. 563, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, 21 Morr. Min. Rep. 730; Gruwell v. Rocco, 141 Cal. 417, 74 Pac. 1028; Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540.

aliens purchasing from citizen locators, and in turn transmitting the title so acquired to others. These facts suggest the following inquiries:—

(1) What is the *status* of the title to a mining claim located and held by an alien?

(2) What estate may such alien transmit to another?

(3) What is the effect of subsequent naturalization upon a location made at a time when the locator occupied the *status* of an alien?

(4) What is the *status* of the title to a mining claim located and held jointly by an alien and a citizen?

In discussing these questions and others incidentally arising out of them, we shall encounter but little difficulty in arriving at the true state of the law. Although in the decisions of the courts of last resort heretofore rendered in the several states we find differences of opinion, diversity of views, and inharmonious conclusions, the supreme court of the United States, the final arbiter of these problems, has comprehensively dealt with the situation and cleared the atmosphere.

This conflict of state decisions follows necessarily from the fact that the courts of each state act independently of the courts of other states. While all are called upon to construe the same laws in controversies between individuals arising out of rights asserted in public mineral lands, and to a limited degree in their several jurisdictions are auxiliary to the land department in administering these laws, yet no one state is bound by the rules announced by another. Results are reached on independent lines of reasoning. A rule of interpretation announced in one state is directly negative in another; in still another, the rule is accepted in a modified form.

Such questions are essentially federal in their nature, and the doctrine once definitely announced by the supreme court of the United States practically dispenses with the necessity of analyzing or attempting to harmonize the views theretofore announced by the state courts. The attitude of the state courts in the past, however, as well as of some of the subordinate federal tribunals, touching these questions is of sufficient interest to justify comment, and in this light they will be discussed in the succeeding sections.

§ 232. The effect of naturalization of an alien upon a location made by him at a time when he occupied the status of an alien.[62]—Let us first consider what effect the act of naturalization has upon the estate, if any, acquired by an alien by virtue of a discovery and location of public mineral lands, in all respects valid, except as affected by the alienage of the locator. Let us examine the adjudicated cases on this and analogous subjects, commencing with the rulings of the land department. We note the decisions of the executive department, arranged in chronological order:—

> Naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture and a confirmation of the alien's former title.[63]
>
> A foreigner may make a mining location and dispose of it, providing he becomes a citizen before disposing of the mine.[64]
>
> Naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture and a confirmation of his former title.[65]

An alien having made a homestead entry, and subsequently filed his intention to become a citizen, it is held

[62] See Van Dyne on Naturalization.

[63] Cash Lode, 1 Copp's L. O. 97.

[64] Kempton Mine, Id. 178.

[65] In re Wm. S. Wood, 3 Copp's L. O. 69.

that, in the absence of an adverse claim, the alienage at the time of entry will not defeat the right of purchase.[66]

An alien can acquire no right to public land before filing a declaration of intention to become a citizen, and his subsequent qualification will not relate back so as to defeat an intervening right.[67]

A mining location made by an alien is not void but voidable, and a subsequent declaration of intention to become a citizen made by the locator prior to the inception of any adverse right relates back to the date of the location and validates the same.[68]

In the case of Wulf v. Manuel,[69] Judge De Witt, speaking for the supreme court of Montana, in an able opinion, took the extreme view that an alien could not take title by *purchase* from a citizen locator, and therefore the subsequent naturalization (during a trial involving the alien's right to a patent in a suit upon an adverse claim) could not retroact in favor of such alien. We shall have occasion to refer particularly to this case and the reasoning of the distinguished judge when dealing with the nature of the title acquired and held by an *alien locator*. Undoubtedly, entertaining these views in the case of a purchase by an alien from a citizen locator, the supreme court of Montana would have announced in the hypothetical case under consideration that naturalization could not retroact in favor of an alien locator.

The supreme court of New York has held that naturalization gives the alien all the rights of a natural-born citizen; he thereby becomes capable of receiving property by descent, and of transmitting it in the same

[66] Ole Krogstad, 4 L. D. 564.

[67] Titamore v. S. P. R. R., 10 L. D. 463. This was the case of a preemption filing within railroad indemnity limits.

[68] McEvoy v. Megginson, 29 L. D. 164.

[69] 9 Mont. 279, 23 Pac. 723.

way. It also has a retroactive operation, and lands purchased by an alien who is afterward naturalized may be held by him and transmitted by him in the same manner as lands acquired after naturalization.[70]

The same rule is recognized in Alabama.[71]

Judge Hallett announced his views that, in the absence of any intervening rights, upon declaring his intention to become a citizen of the United States, an alien locator may have the advantage of work previously done and of a record previously made by him in locating a mining claim on the public mineral lands.[72]

And the late Judge Sawyer held that if a locator, even though not a citizen, performed all the acts necessary to make a valid location, and did the work necessary to keep his claim good, had he been a citizen, until he conveys to a citizen, such citizen grantee, taking possession and control, keeping up the monuments and markings, and performing the necessary conditions to keep the claim good, acquires a good and valid right to the claim as against those asserting rights subsequent to such conveyance.[73]

The supreme court of the United States has frequently held that if an alien holding under a purchase becomes a citizen before "office found," that the act of naturalization retroacts to the original acquirement of title, and perfects the title in the alien.[74]

In accordance with this doctrine, that tribunal has held, reversing the supreme court of Montana, that in

[70] Jackson ex dem. Doran v. Green, 7 Wend. (N. Y.) 333.

[71] Harley v. State, 40 Ala. 689.

[72] Croesus M. & M. Co. v. Colo. L. & M. Co., 19 Fed. 78.

[73] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 315, 1 Fed. 522, 9 Morr. Min. Rep. 529.

[74] Wulf v. Manuel, 9 Mont. 279, 23 Pac. 723 (citing Osterman v. Baldwin, 6 Wall. 122, 18 L. ed. 732; Craig v. Radford, 3 Wheat. 594, 4

the case of a purchase by an alien from a qualined locator, the subsequent naturalization retroacted in his favor, removed the infirmity, and entitled him to a patent.[75] The case in which this rule was established involved the right to a patent, the action being instituted under section twenty-three hundred and twenty-six of the Revised Statutes, in which form of action citizenship of the applicant for patent was necessarily involved.

§ 233. What is the legal status of a title to a mining claim located and held by an alien who has not declared his intention to become a citizen?—In the hands of a citizen locator, the estate acquired by a perfected valid location is property in the highest sense of the term; it may be conveyed, mortgaged, taxed, sold on execution, is descendible to heirs, and may be the subject of devise. It is an estate acquired by purchase. Washburn, in his treatise on real property, says:—

> In one thing all writers agree, and that is, in considering that there are two modes only, regarded as classes, of acquiring title to land,—namely, *descent* and *purchase*,—purchase including every mode of acquisition known to the law, except that by which an heir on the death of an ancestor becomes substituted in his place as owner by the act of the law.[76]
>
> Purchase, said Lord Coke, includes every other method of coming to an estate but merely that by an inheritance, wherein the title is vested in a person,

L. ed. 467; Fairfax v. Hunter, 7 Cranch, 607, 3 L. ed. 454; Governeur v. Robertson, 11 Wheat. 332, 6 L. ed. 488). See, also, Lone Jack Min. Co. v. Megginson, 82 Fed. 89, 27 C. C. A. 63.

[75] Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38 L. ed. 532, 18 Morr. Min. Rep. 85. Followed in Shea v. Nilima, 133 Fed. 209, 216, 66 C. C. A. 263.

[76] 3 Washburn on Real Property, 4.

not by his own act or agreement, but by single operation of law.[77]

Purchase denotes any means of acquiring an estate out of the common course of inheritance.[78]

> Certainly [said the supreme court of Montana] no one would contend that when a person locates mining ground he acquires a right to the same by descent. He must acquire it, then, by purchase.[79]

But the same court held in a case where an alien purchaser from a citizen locator was endeavoring to obtain a patent (having been naturalized during the trial and prior to judgment), that the parallel of the alien heir claiming by descent and the alien miner claiming under the mining laws was complete as to the principle under consideration, and that such alien was not entitled to hold the estate purchased. In fact, he took nothing.[80] This doctrine, however, was denied by the supreme court of the United States.[81]

An estate cast by descent upon one having inheritable blood might certainly be conveyed by purchase to an alien, who might hold until office found. Why should not the estate acquired by an alien from a citizen locator by purchase be subject to the same rule?

Nothing is better settled under the common law than that an alien could take by purchase and hold until deprived of his estate by action of the sovereign, in proceedings called "inquest of office."[82]

[77] Co. Litt. 18, cited in 2 Black. Com. 241; 2 Bouvier's Law Dict. 403.

[78] 2 Black. Com. 242.

[79] Meyendorf v. Frohner, 3 Mont. 282, 320.

[80] Wulff v. Manuel, 9 Mont. 279, 23 Pac. 723.

[81] Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38 L. ed. 532, 18 Morr. Min. Rep. 85.

[82] Taylor v. Benham, 5 How. 233, 12 L. ed. 130; Fairfax v. Hunter, 7 Cranch, 603, 618, 3 L. ed. 453; 2 Kent's Com. 54; 1 Washburn on Real

Said the supreme court of the United States:

> By the common law an alien cannot acquire real property by operation of law, but may take it by act of the grantor and hold it until office found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government. The proceedings which contain the finding of the fact upon the inquest of the officer is technically designated in the books of law as "office found." It removes the fact upon which the law divests the estate and transfers it to the government from the region of uncertainty, and makes it a matter of record. It was devised, according to the old law-writers, as an authentic means to give the king his right by solemn matter of record, without which he, in general, could neither take nor part with anything; for it was deemed a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possession upon bare surmises without the intervention of a jury. By the civil law some proceeding equivalent in its substantive features was also essential to take the fact of alienage from being a matter of mere surmise and conjecture and to make it a matter of record. Such a proceeding was usually had before the local magistrate or council, and might be taken at the instance of the government or upon the denouncement of a private citizen.[83]

Said the same court, in a previous case, speaking through Justice Johnson:—

> That an alien can take by deed and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It,

Property, 49; People v. Folsom, 5 Cal. 373; Territory v. Lee, 2 Mont. 124, 129; Racouillat v. Sansevain, 32 Cal. 376; De Merle v. Matthews, 26 Cal. 455.

[83] Phillips v. Moore, 100 U. S. 208, 212, 25 L. ed. 603.

> no doubt, owes its present authority, if not its origin, to a regard to the peace of society and a desire to protect the individual from arbitrary aggression. . . . . But there is one reason assigned by a very judicious compiler which for its good sense and applicability to the nature of our government makes it proper to introduce it here. I copy it from Bacon. "Every person," says he, "is supposed a natural-born subject that is resident in the kingdom and that owes a local allegiance to the king till the contrary be found by office." This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold.[84]

If the government can, by direct conveyance to an alien, vest in him a title to the absolute fee without doing a vain thing, why may not an alien acquire a more limited estate, subject to an inquiry as to his qualifications, when he seeks a conveyance of the ultimate fee?

In Governeur's Heirs v. Robertson,[85] from which we have heretofore quoted, the grant in question was by the commonwealth of Virginia to Brantz, an alien, his title being assailed by a subsequent grantee from the same commonwealth. The question argued and intended to be exclusively presented was whether a patent for land to an alien was not an absolute nullity. It was there said that the king is a competent grantor in all cases in which an individual may grant, and any person *in esse* and not *civiliter mortuus* is a competent grantee, *femes covert*, infants, aliens, persons attainted of treason or felony, and many others are expressly enumerated as competent grantees.

[84] Doe ex dem. Governeur's Heirs v. Robertson, 11 Wheat. 332, 6 L. ed. 488.

[85] 11 Wheat. 332, 355, 6 L. ed. 488.

In cases of alien locators, the objection suggests itself that the government does not *grant;* there is no act done or performed by it prior to the issuance of a patent. The alien accepts an invitation which was not extended to him, but was exclusively confined to others, and attempts by his own act to create the relationship of grantor and grantee.

The reply to this is: A citizen obtains the grant by his own act; that is, by complying with the provisions of the law laid down by the paramount proprietor. The lands are the property of the government. It alone has the power to object and inquire into the qualifications of the locator. "With a regard to the peace of society and a desire to protect the individual from arbitrary aggression," the government reserves to itself the right to inquire into these qualifications. For this purpose, at least, the presumption indulged by Bacon, quoted by the supreme court of the United States (*supra*), "that every person is supposed a natural-born subject that is resident in the kingdom and that owes allegiance to the king, till the contrary be found by office," as well as those mentioned in a preceding section,[86] may be invoked for the purpose of preserving the estate from invasion, "upon base surmises without the intervention of a jury."

It has been authoritatively determined by the supreme court of the United States that the estate created by a perfected mining location and transferred to an alien is not analogous to an estate created by descent; in other words, that it is not an estate created by operation of law.[87]

[86] § 227.

[87] Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. Rep. 651, 38 L. ed. 532, 18 Morr. Min. Rep. 85.

It has been definitely determined that a mining locator takes his estate in the claim located by purchase.[88]

We think we are justified in asserting that the following principles have been established by the weight of authority:—

(1) That a location made by an alien, if otherwise valid, creates in him an estate which can be divested only at the instigation of the government in a proceeding to which it is either directly or indirectly a party;[89]

(2) That such estate when vested in a citizen is as complete as if originally acquired by him by location;[90] and no one, not even the government, can assail his title.

While the supreme court of the United States was extremely guarded in its decision in Manuel v. Wulff (*supra*), and avoided any intimation that a transfer from an alien locator to an alien would be considered as vesting any estate, yet its use of the term "qualified locator" was simply a statement of the fact in that particular case, as there was no controversy over the qualification of the locator. He was an admitted citizen. It was not necessary, nor did the court propose, inferentially or otherwise, to rule upon a state of facts not before it. In a later case, however, the supreme court distinctly held that

> the meaning of the case of Manuel v. Wulff is, that the location by an alien and all the rights following from such location are voidable, not void, and are free from attack by anyone except the government.[91]

[88] McKinley M. Co. v. Alaska United M. Co., 183 U. S. 563, 571, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, 21 Morr. Min. Rep. 730.

[89] Shea v. Nilima, 133 Fed. 209, 216, 66 C. C. A. 263.

[90] Stewart v. Gold & Copper Co., 29 Utah, 443, 110 Am. St. Rep. 719, 82 Pac. 475.

[91] McKinley M. Co. v. Alaska United M. Co., 183 U. S. 563, 572, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, 21 Morr. Min. Rep. 730.

The circuit court of appeals of the eighth circuit had previously held, in a case where an alien was one of the locators, that mining rights acquired by such alien by his location constitute no exception to the general rule that the right to defeat a title on the ground of alienage is reserved to the government alone.[92]

This rule has been adhered to by several courts,[93] and, as heretofore observed, has been finally settled by the supreme court of the United States.[94]

A contrary rule was at one time asserted by the supreme court of Montana, that court holding that a possessory title of mineral land, founded on a valid location, and held by compliance with local mining laws, may be transferred from one to another, so long as it does not pass into the hands of one incapable of acquiring complete title, in which latter case the grant reverts to the government, and the land becomes subject to relocation.[95]

In a case where alien Chinese were in possession of public mineral lands in Oregon,[96] Judge Deady issued

92 Billings v. Aspen M. Co., 51 Fed. 338, 341, 2 C. C. A. 252; S. C., on rehearing, 52 Fed. 250, 3 C. C. A. 69.

93 Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300; Lone Jack M. Co. v. Megginson, 82 Fed. 89, 27 C. C. A. 63 (C. C. A., 9th Ct.); Tornanses v. Melsing, 109 Fed. 710, 47 C. C. A. 596; Kjellman v. Rogers, 109 Fed. 1061, 47 C. C. A. 684; Little Emily M. Co. v. Couch (U. S. C. C., Idaho, unreported); Shea v. Nilima, 133 Fed. 209, 216, 66 C. C. A. 263. See, also, Croesus M. & S. Co. v. Colorado Land & M. Co., 19 Fed. 78.

94 The supreme court of Colorado does not agree with the author's deductions as to the effect of Manuel v. Wulff, and holds to the doctrine that the citizenship of the original locators, who were grantors of the citizen patent applicant, must be shown in an adverse suit. Duncan v. Eagle Rock G. M. Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 Pac. 588.

95 Tibbitts v. Ah Tong, 4 Mont. 536, 2 Pac. 759.

96 Chapman v. Toy Long, 4 Saw. 28, Fed. Cas. No. 2610, 1 Morr. Min. Rep. 497. But see Lohman v. Helmer, 104 Fed. 178.

an injunction, at the suit of citizens who had located such lands while in the occupancy of the Chinese; but it does not appear from the report of the case that the Chinese claimed to be in possession under any location made by them or others through whom they entered. In addition, some stress was laid upon the inhibition of the constitution of that state, that "No Chinaman not a resident of the state at the adoption of this constitution shall ever hold any real estate or mining claim, or work any mining claim therein."

In California, the question is incidentally discussed in several cases, brought under the provisions of section twenty-three hundred and twenty-six of the Revised Statutes, to determine a right to a patent. We quote from the opinion of that court:—

> It would seem to follow that as the right to possession and the right to a patent are made to depend upon citizenship, the complaint which forms the basis upon which these rights are supported should show the plaintiffs to possess those qualifications without which the judgment they seek and the consequences to flow from that judgment cannot be reached. Where a right is conferred upon a particular class of persons, or by reason of possessing some special qualification or *status*, he who claims such a right must show himself to belong to the class designated or to possess the qualification prescribed or the *status* mentioned as the basis of the right.[96a]

When we come to analyze the decisions of other tribunals in the quest of apt analogies, we find much conflict of opinion. As a matter of historical interest we will review them.

Judge Sawyer, in the ninth circuit court, held that if a citizen and an alien jointly locate a claim, not exceeding the amount of ground allowed by law to one locator,

[96a] Lee Doon v. Tesh, 68 Cal. 43, 45.

such location is valid as to the citizen, and a conveyance from both of such locators to a citizen gives a valid title.[97]

The same rule has been announced in Arizona and Utah.[98]

The supreme court of Nevada has intimated that a mining claim located by an alien might be relocated and held by a citizen.[99]

The same court also announced that an alien should be protected in the possession of the public lands the same as a citizen;[100] but, in the light of its other rulings, there is but little doubt that it entertained the view that a location made by an alien was not protected from a peaceful entry by a citizen for the purpose of relocating, and that such relocation would connect the relocator with the government title. The same rule was announced by the supreme court of Utah, though that court admitted the rule that the government alone could raise the question of noncitizenship.[1]

That an alien may purchase an unpatented mining claim, and has full and complete right to convey the same, his estate being valid against every person but the government, has been determined in several of the states.[2]

[97] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 1 Fed. 522, 9 Morr. Min. Rep. 529.

[98] Providence G. M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 19 Morr. Min. Rep. 625; Strickley v. Hill, 22 Utah, 257, 83 Am. St. Rep. 786, 62 Pac. 893, 20 Morr. Min. Rep. 722; Stewart v. Gold & Copper Co., 29 Utah, 443, 110 Am. St. Rep. 719, 82 Pac. 475.

[99] Golden Fleece G. & S. M. Co. v. Cable Cons., 12 Nev. 313. See, also, McEvoy v. Megginson, 29 L. D. 164.

[100] Courtney v. Turner, 12 Nev. 345.

[1] Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300, citing Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. Rep. 102, 29 L. ed. 428; Brandt v. Wheaton, 52 Cal. 430.

[2] Ferguson v. Neville, 61 Cal. 356; Gorman Mining Co. v. Alexander, 2 S. D. 557, 51 N. W. 346; Territory v. Lee, 2 Mont. 124; Strickley v.

It has also been determined that in the absence of an inhibition in the state laws, an alien may succeed to the title to a mining claim by descent and may maintain any action to protect it which is not connected with the patent proceeding.[3]

The court in the Nevada case (*supra*) was careful to add:—

> We must not be understood as holding that in all actions in relation to mining claims it is necessary for plaintiffs to aver citizenship. We are discussing the requirements of a complaint in the special case provided by the act of congress to determine the right of possession of a mining claim under the laws of congress, in which the successful party becomes entitled on the judgment-roll to apply for patent—a case in which the parties must connect themselves with the title of the government, and show compliance with the acts of congress, and our conclusions are limited to such action.[4]

The action provided for by section twenty-three hundred and twenty-six of the Revised Statutes is undoubtedly equivalent in its legal effect to "inquest of office." Each party is called upon to establish his qualifications to receive patent, and the question of citizenship is a material one. In this class of actions, the courts have generally insisted that citizenship of the litigating parties must be alleged, and, of course,

Hill, 22 Utah, 257, 83 Am. St. Rep. 786, 62 Pac. 893, 20 Morr. Min. Rep. 722. See, also, Stewart v. Gold & Copper Co., 29 Utah, 443, 110 Am. St. Rep. 719, 82 Pac. 475.

[3] Lohmann v. Helmer, 104 Fed. 178.

[4] Lee Doon v. Tesh, on rehearing in bank, 68 Cal. 43, 8 Pac. 621. For opinion rendered by department, see 6 Pac. 97.

proved,[5] or admitted.[6] In Colorado the supreme court takes the view that the citizenship of the original locators who are grantors of the patent applicant must be established in an adverse suit.[7]

In ordinary actions, some courts have held that this is not necessary.[8] Others hold that in all classes of actions such citizenship must be averred.[9] Still others dispense with the necessity of alleging, but insist upon its being proved.[10]

The supreme court of the United States has decided that an objection to the alienage of a locator cannot be

[5] Jackson v. Dines, 13 Colo. 90, 21 Pac. 918; McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076; Lee Doon v. Tesh, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621; Keeler v. Trueman, 15 Colo. 143, 25 Pac. 311; Rosenthal v. Ives, 2 Idaho, 244, 265, 12 Pac. 904, 15 Morr. Min. Rep. 324; Strickley v. Hill, 22 Utah, 257, 83 Am. St. Rep. 786, 62 Pac. 893, 20 Morr. Min. Rep. 722; Lohman v. Helmer, 104 Fed. 179. But see Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 934; and McKinley Min. Co. v. Alaska United M. Co., 183 U. S. 563, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, 21 Morr. Min. Rep. 730.

[6] Stolp v. Treasury Gold M. Co., 38 Wash. 619, 80 Pac. 817.

[7] Duncan v. Eagle Rock G. M. & R. Co., 48 Colo. 569, 139 Am. St. Rep. 288, 111 Pac. 588.

[8] McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076; Lee Doon v. Tesh, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182; Moritz v. Lavelle, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803, 16 Morr. Min. Rep. 236; Gruwell v. Rocco, 141 Cal. 417, 74 Pac. 1028; Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540; Lohmann v. Helmer, 104 Fed. 179; Buckley v. Fox, 8 Idaho, 248, 67 Pac. 659; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 934; McKinley M. Co. v. Alaska United M. Co., 183 U. S. 563, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, 21 Morr. Min. Rep. 730; McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 50 L. R. A. 184, 19 Morr. Min. Rep. 615.

[9] Bohanon v. Howe, 2 Idaho, 417, 453, 17 Pac. 583 (but see Buckley v. Fox, 8 Idaho, 248, 67 Pac. 659); Ducie v. Ford, 8 Mont. 233, 19 Pac. 414.

[10] Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. 1047, 18 Morr. Min. Rep. 410.

taken for the first time in the appellate court.[11] As this was a suit upon an adverse claim, citizenship should have been alleged in the pleadings.

Judge Sawyer decided that the citizenship of a locator through whom a party litigant claimed must be shown in an action of trespass;[12] and this rule was followed by the supreme court of the state of California.[13]

The rule, however, as established by the supreme court of the United States, destroys the value of these state and federal decisions as precedents, and removes the question from the domain of academic discussion.[14]

§ 234. **Conclusions.**—The following conclusions are clearly deducible from the current of judicial authority:—

(1) An alien may locate or purchase a mining claim, and until "inquest of office" may hold and dispose of the same in like manner as a citizen;[15]

(2) Proceedings to obtain patents are in the nature of "inquest of office," and in such proceedings citizenship is a necessary and material fact to be alleged and proved;

11 O'Reilly v. Campbell, 116 U. S. 418, 6 Sup. Ct. Rep. 421, 29 L. ed. 669. See, also, Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 934; Jackson v. Dines, 13 Colo. 90, 21 Pac. 918; Hankins v. Helms, 12 Ariz. 178, 100 Pac. 460.

12 North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 1 Fed. 522, 9 Morr. Min. Rep. 529.

13 Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 16 Morr. Min. Rep. 26; Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. 1047, 18 Morr. Min. Rep. 410; Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540.

14 McKinley Creek M. Co. v. Alaska United M. Co., 183 U. S. 563, 572, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, 21 Morr. Min. Rep. 730.

15 McKinley M. Co. v. Alaska United M. Co., 183 U. S. 563, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, 21 Morr. Min. Rep. 730; Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300.

(3) In all other classes of actions between individuals with which the government has no concern citizenship is not a fact in issue; it need be neither alleged nor proved;

(4) Naturalization of an alien at any time subsequent to either location or purchase is retroactive and enables him to proceed to patent. The antecedent bar to patent by reason of his alienage is removed.

(5) An alien may take title by descent to an unpatented mining claim in the absence of a state law inhibiting it. He may hold such title until "office found." [16]

There is one limitation upon these conclusions which was tentatively suggested by the author and has been discussed by the courts,[17] and that is this: A qualified locator may relocate a claim in the possession of an alien who has not declared his intention to become a citizen, if such relocation may be made without force or violence and prior to the naturalization of the alien, as the alien might be deemed a mere occupant without color of title, and the rules announced in the article on "occupancy" might apply.[18]

The theory advanced in support of the speculative suggestion was, that the relocator would then be in a position to contest the alien's right to a patent; that he would have the *status* of an adverse claimant, without which he would have no standing in court; and the alienage of the original locator would not avail the subsequent citizen locator so as to permit the court to award the claim to him for that reason; but the

[16] Lohmann v. Helmer, 104 Fed. 178.

[17] Wilson v. Triumph Cons. M. Co., 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300; Golden Fleece G. & S. M. Co. v. Cable Cons. Co., 12 Nev. 313; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 934.

[18] *Ante*, §§ 216–218.

latter would be enabled through the patent proceedings, which are the equivalents of "inquests of office," to have alienage established, and thus clear the records. This same result could be accomplished by filing a protest in the land office. We have reached the conclusion, however, that this "suggestion" cannot be logically supported or plausibly maintained.

We think that the decision by the supreme court of the United States in McKinley M. Co. v. Alaska United M. Co.,[19] to the effect that a location by an alien is free from attack except by the government, establishes the law that no rights may be initiated by a citizen through a relocation of the ground appropriated by an alien, until the latter's title has been determined by the government. Prior to that time the ground would not be open to location or relocation. One attempting to relocate the ground could not connect himself with the government title, and would acquire no rights whatever. If he should institute an adverse suit based upon such pretended relocation he might assist the government in preventing the alien from securing a patent, but such a result would not validate his pretended location.[20]

Article III. General Property Rights of Aliens in the States.

[19] 183 U. S. 563, 22 Sup. Ct. Rep. 84, 46 L. ed. 331, 21 Morr. Min. Rep. 730. (Cited and followed in Stewart v. Gold & Copper Co., 29 Utah, 443, 110 Am. St. Rep. 719, 82 Pac. 475; Riverside Sand & Cement Co. v. Hardwick (N. M.), 120 Pac. 323.)

[20] See Billings v. Aspen Mining & Smelting Co., 52 Fed. 250, 3 C. C. A. 69; Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 934.

§ 237. After patent, property becomes subject to rules prescribed by the state.—The rights of aliens to acquire, hold, and transmit real property in the states, after the title to such property has passed out of the general government, are regulated exclusively, in the absence of treaty stipulations, by the constitution and laws of the several states.[21]

The mining laws contain the express provision that nothing in them shall be construed to prevent the alienation of title conveyed by a patent to any person whatever.[22]

As we have heretofore observed,[23] property in mines, once vested absolutely in the individual, becomes subject to the same rules of law as other real property within the state. The federal law remains a muniment of title, but beyond this it possesses no potential force. Its purpose has been accomplished, and, like a private vendor, the government loses all dominion over the thing granted. To determine, therefore, what disabilities, if any, are imposed upon aliens as to property in the states, held in absolute private ownership after the government has absolutely parted with its title, the constitution and laws of the several states must be consulted.

§ 238. Constitutional and statutory regulations of the precious metal bearing states on the subject of alien proprietorship.—The tendency in almost all the precious metal bearing states, and those within the purview of this treatise, has been in the line of a liberal policy on the subject of alien ownership. A treaty

21 Blythe v. Hinckley, 173 U. S. 501, 19 Sup. Ct. Rep. 497, 43 L. ed. 783; Wilcox v. McConnel, 13 Pet. 498, 10 L. ed. 264; Bahaud v. Bize, 105 Fed. 485.

22 Rev. Stats., § 2326; 5 Fed. Stats. Ann. 35.

23 *Ante*, § 22.

made by the United States is the supreme law of the land,[24] and where a treaty has been made removing the disability of aliens to hold property any state legislation would be inoperative.[25] But, in the absence of a treaty, the subject is within the exclusive power of a state.[26] For the purpose of convenient reference, we note the present *status* of aliens in the several states.

Arizona.—There are no provisions in the constitution of this state on the subject of aliens. By statute passed May 18, 1912,[26a] certain restrictions are placed on alien ownership of lands other than mineral, but these restrictions are not to be construed in any way to prevent or interfere with the ownership of mining land or land necessary for the working of mines or reduction of the products thereof.

California.—Aliens, either resident or nonresident, may take, hold, and dispose of property, real or personal.[27] A nonresident foreigner may take by succession, but must claim the estate within five years from the death of the decedent to whom he claims succession.[28]

Colorado.—All aliens may acquire, inherit, possess, enjoy, and dispose of real property as native-born citi-

[24] Const. U. S., art. vi.

[25] Bahaud v. Bize, 105 Fed. 485.

[26] Blythe v. Hinckley, 173 U. S. 501, 19 Sup. Ct. Rep. 497, 43 L. ed. 783.

[26a] Session Laws 1912, p. 350.

[27] Civ. Code, § 671; Const. (1879), art. i, § 17. An amendment to this article of the constitution was adopted November 6, 1894, which provided in part "that the legislature may, by statute, provide for the disposition of real estate which shall hereafter be acquired by such aliens by descent or devise." Billings v. Hauver, 65 Cal. 593, 4 Pac. 639; Lyons v. State, 67 Cal. 380, 7 Pac. 763; Carrasco v. State, 67 Cal. 385, 7 Pac. 766; State v. Smith, 70 Cal. 153, 12 Pac. 121; Blythe v. Hinckley, 127 Cal. 431, 59 Pac. 787.

[28] Civ. Code, §§ 672, 1404.

zens.[29] But similar rights over personal property seem to be limited to resident aliens.

Idaho.—The Civil Code of this state has the following provision:—

> Any person, whether citizen or alien (except as hereinafter provided), natural or artificial, may take, hold, and dispose of mining claims and mining property, real or personal, tunnel rights, millsites, quartz-mills and reduction works, used or necessary or proper for the reduction of ores, and water rights used for mining or milling purposes, and any other lands or property necessary for the working of mines or the reduction of the products thereof; *provided*, that Chinese, or persons of Mongolian descent not born in the United States, are not permitted to acquire title to land or any real property under the provisions of this title.[30]

But aliens are prohibited from acquiring other kinds of real property.[31]

Montana.—Aliens and denizens have the same right as citizens to acquire, purchase, possess, enjoy, convey and transmit, and inherit mines and mining property, and milling, reduction, concentrating, and other works, and real property necessary for or connected with the business of mining and treating ores and minerals.[32]

Resident aliens may take generally by succession the same as citizens, but a nonresident foreigner only if he appears and claims the succession within five years after the death of his decedent.[33]

[29] Const., art. ii, § 27; Mills' Annot. Stats. 1891, ch. iii, § 99, p. 421; Rev. Stats. 1908, § 119. See, also, as to descent, Mills' Annot. Stats., § 1529, p. 1021; Rev. Stats. 1908, § 7045.

[30] Civ. Code, § 2555; Rev. Codes 1908, § 2610.

[31] Civ. Code, § 2355; Rev. Codes 1908, § 2609.

[32] Const., art. iii, § 25.

[33] Civ. Code, § 1867; Rev. Codes 1907, § 4835.

Nebraska.—No distinction is made between resident aliens and citizens, in reference to the possession, enjoyment, or descent of property.[34] But nonresident aliens and corporations not incorporated under the laws of the state are prohibited from acquiring title to or taking or holding any lands or real estate by descent, devise, purchase, or otherwise. This provision is inoperative as against citizens of France, by reason of a treaty.[35] Exception is made in favor of a widow and heirs of aliens who acquired lands prior to the adoption of the constitution. These may hold by devise or descent for a period of ten years; but within that period they must be sold to a *bona fide* purchaser, or suffer escheat.[36]

Nevada.—Any nonresident alien, person or corporation, except subjects of the Chinese empire, may take, hold, and enjoy any real property, or any interest in lands, tenements, or hereditaments within the state of Nevada, as fully, freely, and upon the same terms and conditions as any resident, citizen, person, or domestic corporation.[37]

Foreigners who are or may hereafter become *bona fide* residents of this state shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native-born citizens.[38]

New Mexico.—No distinction shall ever be made by law between resident aliens and citizens in regard to the ownership or descent of property.[39]

[34] Const., art. i, § 25.

[35] Bahaud v. Bize, 105 Fed. 485.

[36] Comp. Stats. 1893, ch. lxxiii, § 70.

[37] Cutting's Comp. Laws of Nevada, § 2725; Rev. Laws of Nevada (1912), § 3602.

[38] Const., art. i, § 16.

[39] Const. N. M., art. ii, sec. 26.

North Dakota.—Any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this state.[40] And aliens may take by succession as well as citizens.[41]

Oregon.—"No Chinaman, not a resident of the state at the adoption of this constitution, shall ever hold any real estate or mining claim, or work any mining claim therein." [42]

White resident foreigners shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native-born citizens.[43]

Aliens may acquire and hold lands or interest therein, by purchase, devise, or descent, the same as if they were native-born citizens. Foreign corporations not prohibited by the constitution from carrying on business in the state may acquire, hold, use, and dispose of all real estate necessary or convenient to carry into effect the objects of its organization, and also any interest in real estate, by mortgage or otherwise, as security for moneys due or loans made by such corporation.[44]

An alien woman is entitled to dower in the property of the estate of her deceased husband.[45]

An alien may take title to an *unpatented* mining claim by descent in this state.[46]

South Dakota.—The constitution of this state provides that—

[40] Rev. Code 1899, § 3277, p. 834; Rev. Codes 1905, § 4713.

[41] Rev. Code 1899, p. 890; Rev. Codes 1905, § 5203.

[42] Const., art. xv, § 8. See United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. Rep. 456, 42 L. ed. 890.

[43] Const., art. i, § 31.

[44] Hill's Annot. Stats. 1892, § 2988; Lord's Or. Laws, § 7172.

[45] Hill's Annot. Stats., § 2974; Lord's Or. Laws, § 7306.

[46] Lohman v. Helmer, 104 Fed. 178.

> No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment, or descent of property.[47]

Legislation as to nonresident aliens is permissive, but there is no statute on the subject. Hence nonresident aliens occupy the *status* of citizens or resident aliens, with reference to the acquisition and enjoyment of property.

Utah.—There is nothing in the constitution or laws of this state discriminating between citizens and aliens on the question of property rights. Aliens may take in all cases by succession as well as citizens.[48]

Washington.—It is provided by the laws of this state that—

> The ownership of lands by aliens other than those who in good faith have declared their intention to become citizens of the United States is prohibited in this state, except where acquired by inheritance, under mortgage, or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of land hereafter made to any alien, directly or in trust for such alien, shall be void; provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals,[49] metals, iron, coal, or fire-clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation the majority of the capital stock of which is owned by aliens shall be considered an alien for the purposes of this prohibition.[50]

47 Const., art. vi, § 14.

48 Rev. Stats. 1898, § 2847; Comp. Laws 1907, § 2847.

49 This term is to be understood in the widest sense as including limestone, silica, silicated rock and clay. State v. Evans, 46 Wash. 219, 89 Pac. 565, 10 L. R. A., N. S., 1163, overruling Wheeler v. Smith, 5 Wash. 704, 32 Pac. 784.

50 Const., art. ii, § 33; State v. Morrison, 18 Wash. 664, 52 Pac. 228; State v. Hudson Land Co., 19 Wash. 85, 52 Pac. 574; State ex rel.

Wyoming.—There is no distinction between resident aliens and citizens with reference to property rights.[51]

Article IV. General Property Rights of Aliens in the Territories.

§ 242. Power of congress over the territories.—The power of congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States.[52]

As was said by Chief Justice Marshall,—

> Perhaps the power of governing a territory belonging to the United States, which has not by becoming a state acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the

Morrell v. Superior Court, 33 Wash. 542, 74 Pac. 686. Under this provision the transfer of title from a citizen to an alien divests the title of the former and the state could have by proper proceedings in the lifetime of the alien declared an escheat. But having failed to do so, upon his death the title passes to his heirs. In such cases citizenship or alienage of the ancestor is not material. Abrams v. State, 45 Wash. 327, 122 Am. St. Rep. 914, 13 Ann. Cas. 527, 88 Pac. 327, 9 L. R. A., N. S., 186. This decision contains quite a full discussion of the property rights of aliens. See, also, Ballinger's Annot. Codes & Stats. 1897, § 4548; Remington & Ballinger's Codes 1909, §§ 8775, 8776.

[51] Const., art. i, § 29.

[52] Justice Bradley, in Mormon Church v. United States, 136 U. S. 1, 42, 10 Sup. Ct. Rep. 792, 34 L. ed. 481.

power is derived, the possession of it is unquestioned.[53]

And by Chief Justice Waite,—

> Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people under the constitution of the United States may do for the states.[54]

These propositions are elementary and self-evident.[55]

§ 243. The alien acts of March 3, 1887, and of March 2, 1897, and the territorial limit of their operation.—Congress having this unquestioned power to establish rules of property in the territories, on March 3, 1887, passed an act entitled "An act to restrict the ownership of real estate in the territories to American citizens,"[56] the first two sections of which are as follows:—

> SEC. 1. That it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States or of some state or territory of the United States, to hereafter acquire, hold, or own real estate so hereafter ac-

[53] American Ins. Co. v. Canter, 1 Pet. 511, 542, 7 L. ed. 243.

[54] National Bank v. County of Yankton, 101 U. S. 129, 133, 25 L. ed. 1046.

[55] Mormon Church v. United States, 136 U. S. 1, 43, 10 Sup. Ct. Rep. 792, 34 L. ed. 481. The only territory remaining subject to the control of congress other than the insular possessions,—Hawaii, Porto Rico and the Philippines,—is Alaska.

[56] 24 Stats. at Large, p. 476; Comp. Stats. (Supp. 1911), p. 1168; 1 Fed. Stats. Ann. 437.

quired, or any interest therein, in any of the territories of the United States, or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created; *provided*, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer.

Sec. 2. That no corporation or association more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire, or hold, or own any real estate hereafter acquired in any of the territories of the United States or of the District of Columbia.

By section four the attorney-general is directed to enforce the forfeitures provided for by the act, by bill in equity or other proper process.

Whatever legislation theretofore existed in any of the territories upon the subject of alienage became inoperative and ineffectual, and thenceforward had no potential existence. Since the passage of this act, all of the then organized continental territories except Alaska have been admitted into the Union. Unquestionably, the alien act of 1887 remained in force in these territories until the act of 1897 was passed.

The act of March 3, 1887, was amended by an act approved March 2, 1897 [57] (except in so far as it applied to the District of Columbia). The latter act remodels the original act, and while providing that, except in certain cases, no alien or person who had not

[57] 29 Stats. at Large, p. 618; Comp. Stats. (Supp. 1911), p. 1168; 1 Fed. Stats. Ann. 439.

declared his intention to become a citizen of the United States should acquire title to or own any land in any of the territories of the United States, contained the following clauses:—

> This act shall not be construed to prevent any persons not citizens of the United States from acquiring or holding lots or parcels of land in any incorporated or platted city, town, or village, or in any mine or mining claim in any of the territories of the United States.[58]
>
> This act shall not in any manner be construed . . . . to authorize aliens to acquire title from the United States to any public lands in the United States, or to in any manner affect or change the laws regulating the disposal of the public lands of the United States.[59]

This, in our judgment, makes the last clause of section twenty-three hundred and twenty-six of the Revised Statutes—"Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent to any person whatever"—operative in the then existing territories.[60]

The rights of aliens which had been secured by treaty were protected, as well as the rights acquired by aliens prior to the original act, and the rights of *bona fide* resident aliens. No reference whatever is made in the act of 1897 to corporations. The provisions contained in the act of 1887 having been omitted, corporations organized under the laws of any state or territory may purchase lands in the territories regardless of the citizenship of the stockholders.[61]

[58] Act of March 2, 1897, § 3; 29 Stats. at Large, p. 618; Comp. Stats. (Supp. 1911), p. 1168; 1 Fed. Stats. Ann. 438.

[59] 29 Stats. at Large, 619; Comp. Stats. (Supp. 1911), p. 1168; 1 Fed. Stats. Ann. 439.

[60] See Opinion of Attorney-General, 28 L. D. 178.

[61] Id.

The admission of Arizona and New Mexico as states removed them from the control of congress in the matter of rights of aliens. None of our insular possessions are subject to the mining laws of the United States, and they are therefore outside of the scope of this treatise. Alaska is now the only territory over which the alien laws of congress are operative.

Some doubt was at one time expressed [62] as to whether Alaska was a territory of the United States within the meaning of the alien acts. But such doubts have been set at rest by judicial decision,[63] and by the recent act of congress [64] establishing a local legislative assembly and fixing definitely a more or less autonomous form of government for the territory.

The act of 1897,[65] which superseded the former act, does not prohibit the acquisition by aliens of patented mining ground in the territories, and therefore need not be discussed in this connection. This act, of course, applies to unpatented mining claims only. Unpatented mining claims in the territories may be acquired by location only by the persons authorized to acquire them in the states.[66] In 1898, congress accorded native-born citizens of the dominion of Canada the same mining rights and privileges in the district of Alaska accorded to citizens of the United States in British Columbia and the Northwest territory, with

62 See second edition of this treatise, § 243.

63 Rasmussen v. United States, 197 U. S. 516, 25 Sup. Ct. Rep. 514, 49 L. ed. 862; Nagle v. United States, 191 Fed. 141; Interstate Commerce Com. v. United States, 224 U. S. 474, 32 Sup. Ct. Rep. 556.

64 August 24, 1912, 37 Stats. at Large, 512.

65 29 Stats. at Large, p. 618; Comp. Stats. (Supp. 1911), p. 1168; 1 Fed. Stats. Ann. 437.

66 Opinion, 28 L. D. 178. By act of congress, March 2, 1897, aliens or persons who shall become *bona fide* residents of the United States were authorized to acquire lands and mining claims by purchase. Shea v. Nilima, 66 C. C. A. 263, 133 Fed. 209, 216.

the proviso that such Canadian citizens should not enjoy greater privileges in Alaska than were enjoyed by American citizens.[67] The land department has held this act to be inoperative, because no rights, except to lease from the government, are accorded to citizens of the United States in British Columbia or the Northwest territory, and as our system does not contemplate leases by the government, to accord to citizens of Canada the right to lease mining claims would be to accord them rights which are not given to our citizens.[67a]

For all practical purposes, the rule that a location by an alien is voidable at the instance of the United States government is in force everywhere within the United States.[68]

[67] 30 Stats. at Large, p. 409; Comp. Stats. 1901, p. 1412; 1 Fed. Stats. Ann. 44.

[67a] Gen. Min. Reg., Appendix, par. 112.

[68] *Ante*, §§ 231, 234.

TITLE IV.

STATE LEGISLATION AND LOCAL DISTRICT REGULATIONS SUPPLEMENTING THE CONGRESSIONAL MINING LAWS.

CHAPTER I.

STATE LEGISLATION SUPPLEMENTAL TO THE CONGRESSIONAL MINING LAWS.

§ 248. **Introductory.**—As preliminary to the analysis and general exposition of the law regulating the manner in which mining rights in the public mineral lands may be held, enjoyed, and perpetuated, it is appropriate that we define with reasonable certainty the limit and extent of legislative power conceded to the several states and territories by the express or implied sanction of the general government. We have heretofore shown that the federal system of mining law is composed of three elements:—

(1) The legislation of congress;

(2) The legislation of the various states and territories supplementing congressional legislation, and in harmony therewith;

(3) Local rules and customs, or regulations established in different localities, not in conflict with federal legislation or that of the state or territory wherein they are operative.[1]

We have traced the evolution of this system through the different periods of our national history, from the embryonic stage, which had its genesis in the local rules and customs of the mining camps of the west, to the development of higher forms of law. While in this progressive development the primitive forms have not altogether disappeared, they have been relegated from the position of controlling importance to that of mere subordinate and subsidiary functions. It is entirely unnecessary to here retrace the steps by which the present results were obtained. In the early chapters of this treatise,[2] we have endeavored to present such an historical review as will suffice for all practical purposes and enable the student to acquaint himself with the process of crystallization which has given us as a resultant the existing unique system. We are immediately concerned with the present practical operation of this system, and shall now consider the general nature and scope of state and territorial legislation supplemental to the congressional mining laws, a minor subsidiary element in the system, but in its particular sphere important.

§ 249. Limits within which state may legislate.— When it is recognized that the government simply

[1] *Ante*, § 81. See Clason v. Matko, 223 U. S. 646, 654, 32 Sup. Ct. Rep. 392, 56 L. ed. 588.

[2] *Ante*, tit. II, chs. i–vi, §§ 28–81.

occupies the *status* of a landed proprietor, holding the paramount title to its public domain, with the sole right of disposal upon such terms and conditions and subject to such limitations as it may from time to time prescribe,[3] and that the congressional mining laws are but a statement of such terms, conditions, and limitations, it follows necessarily that neither individuals nor states have the power to control, modify, or nullify any of such terms, conditions, or limitations.

If, by compliance with congressional law, an estate in public lands is granted, the state may not destroy or impair it.[4] If no such estate in such lands is created by or under the authority of federal law, the state has no power to create or transfer it.[5] After an estate is once granted, and a right of property becomes vested, it is subject to the general laws of the state the same as any other property,[6] and congress has thereafter no power to affect the property by legislation;[7] but we now speak only of the terms, conditions, and limitations under which estates, either equitable or legal, are carved out of the public lands by the act of the paramount proprietor.

If the state may prescribe any additional or supplemental rules, increasing the burdens or diminishing the benefits granted by the federal laws in lands of the public domain, it is simply because the government, as

[3] *Ante*, §§ 80, 81.

[4] The exercise of the right of eminent domain, which involves the payment of compensation, is an exception to this rule. *Post*, § 253 et seq.

[5] Gibson v. Chouteau, 13 Wall. 92, 99, 20 L. ed. 534; Irvine v. Marshall, 20 How. 558, 561, 15 L. ed. 994; Van Brocklin v. State of Tennessee, 117 U. S. 151, 168, 6 Sup. Ct. Rep. 670, 29 L. ed. 845.

[6] Wilcox v. McConnel, 13 Pet. 498, 516, 10 L. ed. 264. And see cases cited in Rose's Notes on U. S. Reports, vol. 3, p. 867.

[7] Cone v. Roxana G. M. & Tun. Co. (U. S. C. C., Colo.), 2 Leg. Adv. 350, 352.

owner of the property, sanctions, expressly or by implication, the exercise of such powers.[8]

At one period of the national history, the states assumed the right to confer possessory rights in the public lands upon its citizens. The national government acquiesced in the assumed power for a number of years. It might have repudiated this intervention by the state, and dispossessed the occupants; but having failed to do so, certain possessory privileges were acquired, to the extent and under such circumstances that the government became, morally and in good conscience, bound to recognize them.[9]

This it did gracefully. But this was before the government, by legislative enactment, adopted any general laws expressly providing for the sale or disposal of its mineral lands in the precious metal bearing states. The legislative era succeeded the period of passive recognition, and with the passage of laws providing for the method of vesting legal or equitable estates in the public lands, the right of the states to legislate in this direction was no longer recognized, except to the extent that such power was conceded by the congressional laws.

State statutes in reference to mining rights upon the public domain must therefore be construed in subordination to the laws of congress, as they are more in the nature of regulations under these laws than independent legislation.[10]

State and territorial legislation, therefore, must be entirely consistent with the federal laws, otherwise it is of no effect. The right to supplement federal legislation conceded to the state may not be arbitrarily ex-

8 Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A., N. S., 791.
9 *Ante*, § 56.
10 Eberle v. Carmichael, 8 N. M. 169, 42 Pac. 95, 98.

ercised; nor has the state the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the congressional laws. On the other hand, the state may not by its legislation dispense with the performance of the conditions imposed by the national law, nor relieve the locator from the obligation of performing in good faith those acts which are declared by it to be essential to the maintenance and perpetuation of the estate acquired by location. Within these limits, the state may legislate.[11] Beyond them the state should not be permitted to go.[12] And when the state has enacted such legislation, its provisions must be complied with before any valid right to a mining claim can be perfected.[13]

In Butte City Water Co. v. Baker,[14] an attack was made on state legislation of this class on the ground

[11] Butte City Water Co. v. Baker, 196 U. S. 119, 225, 25 Sup. Ct. Rep. 211, 49 L. ed. 409; Sissons v. Sommers, 24 Nev. 379, 388, 77 Am. St. Rep. 815, 55 Pac. 829; Clason v. Matko, 223 U. S. 646, 655, 32 Sup. Ct. Rep. 392, 56 L. ed. 588.

[12] Id.

[13] Butte City Water Co. v. Baker, 196 U. S. 119, 25 Sup. Ct. Rep. 211, 49 L. ed. 409, affirming 28 Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617; Clason v. Matko, 223 U. S. 646, 32 Sup. Ct. Rep. 392, 56 L. ed. 588; Belk v. Meager, 104 U. S. 279, 284, 26 L. ed. 735, 1 Morr. Min. Rep. 510; Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 59, 8 Pac. 153; Purdum v. Laddin, 23 Mont. 387, 389, 59 Pac. 153; Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019, 21 Morr. Min. Rep. 296; Hahn v. James, 29 Mont. 1, 73 Pac. 965; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963; Wright v. Lyons, 45 Or. 167, 77 Pac. 81; Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A., N. S., 791; Dolan v. Passmore, 34 Mont. 277, 85 Pac. 1034; Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455; Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36; Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275; Butte Consol. M. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177; McCulloch v. Murphy, 125 Fed. 147, 153; Knutson v. Fredlund, 56 Wash. 634, 106 Pac. 200; Saxton v. Perry, 47 Colo. 263, 107 Pac. 281.

[14] 196 U. S. 119, 25 Sup. Ct. Rep. 211, 49 L. ed. 409. See, also, Clason v. Matko, 223 U. S. 646, 654, 32 Sup. Ct. Rep. 392, 56 L. ed. 588, holding

that the disposition of the public lands involved the exercise of a federal legislative power which could not be delegated to the states. In disposing of this contention the court said:—

> Whatever doubts might exist, if the matter was wholly *res integra*, we have no hesitation in holding that the question must be considered as settled by prior adjudications, and cannot now be reopened.

§ 250. Scope of existing state and territorial legislation—Subjects concerning which states and territories may unquestionably legislate.—Many of the states and territories, prior to their admission as states, have enacted codes, more or less comprehensive, supplementing congressional laws, while others have but few provisions. In the appendix will be found the legislation of this character now in force in each state.

That a correct understanding of the general scope of the existing state and territorial legislation may be gleaned, we enumerate the subjects covered by such laws, indicating which states and territories have legislated upon such subjects, first considering those concerning which such legislation is unquestionably proper, within reasonable limits.

(1) *Length of lode claims.*—

Colorado,[15] South Dakota,[17]
North Dakota,[16] Utah,[18]

that a state has the power to make regulations "governing the location" of a mining claim.

[15] Same as federal law; limit, fifteen hundred feet. Mills' Annot. Stats., § 3148; Rev. Stats. 1908, § 4192.

[16] Same as federal law; limit, fifteen hundred feet. Rev. Pol. Code 1895, § 1426; Id. 1899, § 1426; Id. 1905, § 1800.

[17] Same as federal law. Pol. Code Dak. 1887, § 1997. Adopted by act of legislature—Laws 1890, ch. cv, § 1, p. 254; Grantham's Annot. Stats. (1899), § 2656; Rev. Pol. Code 1903, § 2532.

[18] Same as federal law; limit, fifteen hundred feet. Laws 1899, p. 26, § 1; Comp. Laws 1907, § 1495.

Washington,[19] Wyoming.[20]

While it is evident that under the congressional act the states and territories may limit the number of linear feet on a lode, or vein, which may be embraced within a single location to less than fifteen hundred feet, no state or territory has attempted any such restriction. Those states which have legislated at all upon the subject, simply repeat the general language of section twenty-three hundred and twenty of the Revised Statutes. Of course, this does not add any force to the federal enactment; nor does it detract from it. It is altogether harmless. Throughout the mining regions the unit of a lode location as to length is fifteen hundred feet.

(2) *Width of lode claims.*—

Colorado,[21] North Dakota,[23]
Idaho,[22] South Dakota,[24]

19 Same as federal law. Hill's Annot. Stats., § 2211; Ballinger's Annot. Codes & Stats., § 3152; Rem. & Bal. Annot. Codes & Stats., § 7352.

20 Not to exceed fifteen hundred feet. Local rules may not limit to less than that length. Laws 1888, p. 87, § 13; Rev. Stats. Wyo. (1899), § 2544; Comp. Stats. 1910, § 3465.

21 One hundred and fifty feet on each side of the middle of the vein at the surface. Mills' Annot. Stats., § 3149; Rev. Stats. 1908, § 4193; as amended, Laws 1911, p. 515.

22 May extend to three hundred feet on each side of the center of the vein. Rev. Stats., § 3100; as amended, Laws 1895, p. 25, § 1; Civ. Code 1901, § 2556; Rev. Codes 1907, § 3206.

23 One hundred and fifty feet on each side of the center of vein, unless enlarged to not more than three hundred feet or diminished by majority of votes cast at a general election in a county. Rev. Pol. Code 1895, § 1427; Id. 1899, § 1427; Id. 1905, § 1801.

24 Three hundred feet on each side of the center of the vein, unless diminished to not less than twenty-five feet by a county at a general election. Pol. Code Dak. 1887, § 1998. Adopted by South Dakota—Laws 1890, ch. cv, § 1, p. 254; as amended, Laws 1899, p. 148; Grantham's Annot. Stats. (1899), § 2657; Rev. Pol. Code 1903, § 2533.

Utah,[25] Wyoming.[27]
Washington,[26]

There can be no doubt about the power of state legislatures to limit the width of lode claims to any reasonable number of feet on each side of the center of the vein less than three hundred, and in the absence of any action in that behalf by the state, the local district organizations may regulate the subject.[28]

As to the provision of the statutes in North Dakota [29] authorizing the counties to determine upon a greater width than that fixed by the state law, by a majority of the legal votes cast at a general election, Mr. Morrison, in his "Mining Rights," [30] speaking of a former statute of Colorado since repealed, says that he knows of no instance where any such attempt had been made by any of the counties to avail themselves of the privilege. He also doubts the constitutionality of the law. It is suggested that if such action should be taken, and the result accepted and acted upon, it might have the force of a local regulation which does not acquire validity by mere adoption, but from customary obedience and acquiescence of the miners.[31]

[25] Same as federal statute. Comp. Laws 1888, vol. ii, p. 138, § 2790; as amended, Laws 1899, p. 26; Comp. Laws 1907, § 1495.

[26] Not more than three hundred feet on each side of the middle of the vein. Local rules may not restrict to less than fifty feet. Hill's Annot. Stats. (Wash.), § 2211; Ballinger's Annot. Codes & Stats., § 3152; Rem. & Bal. Annot. Codes, § 7352.

[27] Not to exceed three hundred feet. Local rules may not limit to less than one hundred and fifty feet. Laws 1888, p. 87, § 14; Rev. Stats. Wyo. 1899, § 2545; Comp. Stats. 1910, § 3466.

[28] North Noonday M. Co. v. Orient M. Co., 6 Saw. 305, 1 Fed. 522, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie M. Co., 7 Saw. 104, 11 Fed. 666, 4 Morr. Min. Rep. 411.

[29] South Dakota formerly had the same provision, but its law is now changed as above indicated.

[30] Morr. Min. Rights, 8th ed., 20; Id., 10th ed., 22; 14th ed., 25.

[31] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 307, 1 Fed. 522, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie M. Co., 7 Saw. 96,

(3) *Posting notices of location.*—

Arizona,[32]
California,[33]
Colorado,[34]
Idaho,[35]
Montana,[36]
Nevada,[37]
New Mexico,[38]
North Dakota,[39]
South Dakota,[40]
Oregon,[41]
Utah,[42]
Washington,[43]
Wyoming.[44]

106, 11 Fed. 666, 4 Morr. Min. Rep. 411; Harvey v. Ryan, 42 Cal. 626. See *post*, § 271.

[32] Rev. Stats. 1901, § 3232. Placers: Id., § 3242.

[33] Civ. Code, § 1426. Placers: Id., § 1426c; Tunnel right: Id., § 1426e; Millsite: Id., § 1426j.

[34] Placers: Mills' Annot. Stats., § 3136; Rev. Stats. 1908, § 4205. Lodes: Mills' Annot. Stats., § 3152; Rev. Stats. 1908, § 4192.

[35] Lodes: Rev. Stats., § 3101, as amended, Laws 1895, p. 26, § 2; Civ. Code 1901, § 2557; Rev. Codes 1907, § 3207. Placers: Laws 1897, p. 12; Civ. Code 1901, § 2563; Rev. Codes 1907, § 3222.

[36] Pol. Code 1895, § 3610; Rev. Codes 1907, § 2283. Held reasonable and not in conflict with federal law. Purdum v. Laddin, 23 Mont. 387, 389, 59 Pac. 153.

[37] Comp. Laws 1900, § 208; Rev. Laws 1912, § 2422. Placers: Comp. Laws 1900, § 220; Rev. Laws 1912, § 2434.

[38] Comp. Laws 1884, § 1566; Comp. Laws 1897, § 2286. Held valid and mandatory. Upton v. Santa Rita M. Co., 14 N. M. 96, 89 Pac. 275. Placers: Laws 1909, p. 190.

[39] Rev. Pol. Code 1895, § 1430; Id. 1899, § 1430; Id. 1905, § 1804.

[40] Pol. Code Dak. 1887, § 2001. Adopted by South Dakota—Laws 1890, ch. cv, § 1, as amended, Laws 1899, p. 148; Grantham's Annot. Stats. 1899, § 2660; Rev. Pol. Code 1903, § 2536.

[41] Stats. 1898, p. 16, as amended, Laws 1901, p. 140; Lord's Or. Laws, § 5128.

[42] Laws 1899, p. 26, § 2; Comp. Laws 1907, § 1496.

[43] Laws 1899, p. 70, § 2. Placers: Id., p. 71, § 10; as amended, Laws 1901, p. 292; Rem. & Bal. Annot. Codes, § 7359.

[44] Lodes: Laws 1888, p. 88, § 17; Rev. Stats. Wyo. 1899, § 2548; Comp. Stats. 1910, § 3469. Placers: Laws 1888, p. 89, § 22; Rev. Stats. Wyo., § 2553; as amended, Laws 1901, p. 104; Comp. Stats. 1910, § 3474.

(4) *Contents of notices and certificates of location.*—

Arizona,[45]
California,[46]
Colorado,[47]
Idaho,[48]
Montana,[49]
Nevada,[50]
New Mexico,[51]
North Dakota,[52]
Oregon,[53]
South Dakota,[54]

[45] Rev. Stats. 1901, § 3232. Placers: Id., § 3242.

[46] Civ. Code, § 1426. Placers: Id., § 1426c. Tunnel right: Id., § 1426e. Millsite: Id., § 1426j.

[47] Placers: Mills' Annot. Stats., § 3136; Rev. Stats. 1908, § 4205. Lodes: Mills' Annot. Stats., §§ 3150, 3151; Rev. Stats. 1908, §§ 4194, 4195. Must claim but one location. Mills' Annot. Stats., § 3163; Rev. Stats. 1908, § 4196.

[48] Lodes: Rev. Stats., § 3101; as amended, Laws 1895, p. 26, § 2; Rev. Stats., § 3102; Civ. Code 1901, § 2557; Rev. Codes 1907, § 3207. Must claim but one location. Civ. Code 1901, § 2561; Rev. Codes 1907, § 3213. Placers: Laws 1897, p. 12; Civ. Code 1901, § 2563; Rev. Codes 1907, § 3222.

[49] Pol. Code 1895, §§ 3610, 3612; as amended, Laws 1901, p. 141; Rev. Codes 1907, §§ 2283, 2284. Held reasonable and not in conflict with federal laws. Purdum v. Laddin, 23 Mont. 387, 389, 59 Pac. 153; Butte City Water Co. v. Baker, 196 U. S. 119, 25 Sup. Ct. Rep. 211, 49 L. ed. 409; affirming Baker v. Butte City Water Co., 28 Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617; Hahn v. James, 29 Mont. 1, 73 Pac. 965; Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833, note; Dolan v. Passmore, 34 Mont. 277, 85 Pac. 1034; Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455; Butte Consol. M. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177.

[50] Comp. Laws 1900, §§ 208, 210, 219, 231; Rev. Laws 1912, §§ 2422, 2424, 2433, 2445. Placers: Comp. Laws 1900, §§ 220, 221; Rev. Laws 1912, §§ 2434, 2435. Millsites: Rev. Laws 1912, §§ 2437–2439. Tunnel claims: Rev. Laws 1912, § 2440.

[51] Comp. Laws 1884, § 1566; Comp. Laws 1897, § 2286. Placers: Laws 1909, p. 190.

[52] Rev. Pol. Code 1895, § 1428; Id. 1899, §§ 1428–1430, 1440; Id. 1905, §§ 1802, 1804, 1814.

[53] Laws 1898, p. 16; as amended, Laws 1901, p. 140; Lord's Or. Laws, § 5128.

[54] Pol. Code Dak., § 1999. Adopted by South Dakota—Laws 1890, ch. cv, § 1; as amended, Laws 1899, p. 148; Grantham's Annot. Stats. (1899), § 2658; Comp. Laws Dak. (1887), § 2001; Grantham's Annot. Stats. (1899), § 2660; as amended, Laws 1899, p. 148; Comp. Laws Dak. 1887,

Utah,[55] Wyoming.[57]
Washington,[56]

Where state or territorial laws require a location notice, certificate, or declaratory statement to be recorded, the act of congress provides what such record must contain.[58] While states and territories may enlarge these requirements, they may not dispense with any of them.[59]

(5) *Recording notices and certificates of location.*—

Arizona,[60] Colorado,[63]
Arkansas,[61] Idaho,[64]
California,[62] Montana,[65]

§ 2000; Grantham's Annot. Stats. (1899), § 2659; Comp. Laws Dak. 1887, § 2011; Grantham's Annot. Stats. of S. D. (1899), § 2670; Rev. Pol. Code 1903, §§ 2534, 2546 (as amended, Laws 1903, p. 268).

[55] Laws 1899, p. 26, § 2; Comp. Laws 1907, § 1496.

[56] Lodes: Laws 1899, pp. 69, 70, §§ 1, 2; Rem. & Bal. Annot. Codes, § 7358. Held valid and mandatory. Knutson v. Freedland, 56 Wash. 634, 106 Pac. 200. Placers: Laws 1899, p. 71, § 10; as amended, Laws 1901, p. 292; Rem. & Bal. Annot. Codes, § 7367.

[57] Rev. Stats. Wyo. 1899, §§ 2539, 2546–2548; Comp. Stats. 1910, §§ 3460, 3467–3469. Placers: Rev. Stats. 1899, § 2553; as amended, Laws 1901, p. 104; Comp. Stats. 1910, § 3474. Held valid and mandatory. Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36.

[58] Rev. Stats., § 2324; 5 Fed. Stats. Ann. 19.

[59] *Ante*, § 249.

[60] Rev. Stats. 1887, p. 412, § 2349; Rev. Stats. 1901, §§ 3234, 3250. Placers: Id., §§ 3244, 3250.

[61] Acts 1899, p. 113; Digest of Stats. 1904, §§ 5360, 5361.

[62] Civ. Code, § 1426b. Placers: Id., § 1426d. Tunnel right: Id., § 1426g. Millsite: Id., § 1426k; Kern Co. v. Lee, 129 Cal. 361, 61 Pac. 1124.

[63] Placers: Mills' Annot. Stats., § 3136; Rev. Stats. 1908, § 4205. Lodes: Mills' Annot. Stats., § 3150; Rev. Stats. 1908, § 4194. Tunnel claims: Mills' Annot. Stats., § 3140; Rev. Stats. 1908, § 4207.

[64] Lodes: Laws 1895, p. 27, §§ 4, 12; p. 30, § 14; Civ. Code 1901, §§ 2559, 2568; Rev. Codes 1907, § 3209. Placers: Laws 1897, p. 12; Civ. Code 1901, §§ 2563, 2568; Rev. Codes 1907, § 3222.

[65] Pol. Code 1895, §§ 3612 (as amended, Laws 1901, p. 141, § 2), 3613; Rev. Codes 1907, § 2284.

Nevada,[66]
New Mexico,[67]
North Dakota,[68]
South Dakota,[69]
Oregon,[70]
Utah,[71]
Washington,[72]
Wyoming.[73]

(6) *Authorizing amended locations and amended location certificates.*—

Arizona,[74]
California,[75]
Colorado,[76]
Idaho,[77]
Montana,[78]
Nevada,[79]
New Mexico,[80]
North Dakota,[81]

[66] Comp. Laws Nev. 1900, §§ 210, 232; Rev. Laws 1912, §§ 2424, 2446, 2451. Placers: Comp. Laws 1900, § 221; Rev. Laws 1912, § 2435. Mill sites: Comp. Laws 1900, § 224; Rev. Laws 1912, § 2438. Tunnels: Comp. Laws 1900, § 228; Rev. Laws 1912, § 2442.

[67] Comp. Laws 1884, § 1566; Comp. Laws 1897, § 2286. Placers: Laws 1909, p. 191.

[68] Rev. Pol. Code 1895, § 1428; Id. 1899, § 1428; Id. 1905, § 1802.

[69] Pol. Code Dak. 1887, § 1999. Adopted by South Dakota—Laws 1890, ch. cv, § 1; Grantham's Annot. Stats. (1899), § 2658; as amended, Laws 1899, p. 148; Rev. Pol. Code 1903, § 2534; as amended Laws 1903, p. 268.

[70] Laws 1898, p. 17; as amended, Laws 1901, p. 140; Lord's Or. Laws, § 5129.

[71] Laws 1899, p. 26, §§ 4, 8, 9; Comp. Laws 1907, § 1498; as amended, Laws 1909, p. 79.

[72] Hill's Annot. Stats. (Wash.) §§ 2214, 2216; Ballinger's Annot. Codes & Stats., §§ 3155, 3157; Laws 1899, p. 69; Rem. & Bal. Annot. Codes, § 7358. Placers: Laws 1899, p. 72, § 10, subd. 2; as amended, Laws 1901, p. 292; Rem. & Bal. Annot. Codes, § 7367.

[73] Rev. Stats. Wyo. 1899, § 2546; Comp. Stats. 1910, § 3467. Placers: Rev. Stats. Wyo. 1899, § 2553; as amended, Laws 1901, p. 1104; Comp. Stats. 1910, § 3474.

[74] Rev. Stats. 1901, § 3238.

[75] Civ. Code, § 1426h.

[76] Mills' Annot. Stats., § 3160; Rev. Stats. 1908, § 4210.

[77] Laws 1895, p. 27, § 5; Civ. Code 1901, § 2566; Rev. Codes 1907, § 3210.

[78] Laws 1901, p. 56, §§ 1, 2; Rev. Codes 1907, §§ 2288–2291, 2295, 2296.

[79] Comp. Laws 1900, § 213; Rev. Laws 1912, § 2427.

[80] Comp. Laws 1897, § 2301.

[81] Rev. Pol. Code 1895, § 1437; Id. 1899, § 1437; Id. 1905, § 1811.

Oregon,[82] Washington,[84]
South Dakota,[83] Wyoming.[85]

(7) *Marking of boundaries and defining the character of posts and monuments.*—

Arizona,[86] Nevada,[91]
California,[87] New Mexico,[92]
Colorado,[88] North Dakota,[93]
Idaho,[89] Oregon,[94]
Montana,[90] South Dakota,[95]

[82] Laws 1905, p. 254; Lord's Or. Laws, § 5140.

[83] Comp. Laws Dak. 1887, § 2008. Adopted by South Dakota, Laws 1890, ch. cv, § 1; Grantham's Annot. Stats. S. D. (1899), § 2667; Rev. Pol. Code 1903, § 2543.

[84] Laws 1899, p. 70, § 5; Rem. & Bal. Annot. Codes, § 7362.

[85] Rev. Stats. 1899, § 2538; Comp. Stats. 1910, § 3459.

[86] Rev. Stats. 1901, §§ 3234, 3236. Placers: Stats. 1901, §§ 3242, 3243.

[87] Civ. Code, § 1426a. Placers: Id., § 1426c. Tunnel right: Id., § 1426g.

[88] Placers: Mills' Annot. Stats., § 3136; Rev. Stats. 1908, § 4205. Lodes: Mills' Annot. Stats., § 3153; Rev. Stats. 1908, § 4098.

[89] Lodes: Rev. Stats., § 3101; as amended, Laws 1895, p. 25 et seq.; Laws 1899, p. 633; Civ. Code 1901, § 2557; Rev. Codes 1907, § 3207. Placers: Laws 1897, p. 12; Civ. Code 1901, § 2563; Rev. Codes 1907, § 3222.

[90] Pol. Code 1895, § 3611; as amended, Laws 1901, p. 140, § 1; Rev. Codes 1907, § 2283. Held reasonable and not in conflict with federal laws. Purdum v. Laddin, 23 Mont. 387, 389, 59 Pac. 153; Butte City Water Co. v. Baker, 196 U. S. 119, 25 Sup. Ct. Rep. 211, 49 L. ed. 409; affirming 28 Mont. 222, 104 Am. St. Rep. 683, 72 Pac. 617; Hahn v. James, 29 Mont. 1, 73 Pac. 965; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963.

[91] Comp. Laws 1900, § 209; Rev. Laws 1912, § 2423. Placers: Comp. Laws 1900, § 220; Rev. Laws 1912, § 2434.

[92] Comp. Laws 1897, § 2286; Laws 1899, p. 111. Placers: Laws 1909, p. 191.

[93] Rev. Pol. Code 1895, § 1431; Id. 1899, §§ 1430, 1431; Id. 1905, §§ 1804, 1805.

[94] Laws 1898, p. 16; as amended, Laws 1901, p. 140; B. & C. Codes, § 3975; Lord's Or. Laws, § 5128. Held valid and mandatory. Wright v. Lyons, 45 Or. 167, 77 Pac. 81.

[95] Comp. Laws Dak. 1887, § 2002. Adopted by South Dakota—Laws 1890, ch. cv, § 1; Grantham's Annot. Stats. S. D. (1899), § 2661; Comp.

Utah,[96] Wyoming.[98]
Washington,[97]

(8) *Requiring sinking of discovery shaft or its equivalent prior to completion of location.—*

Arizona,[99] North Dakota,[5]
Colorado,[100] Oregon,[6]
Idaho,[1] South Dakota,[7]
Montana,[2] Washington,[8]
Nevada,[3] Wyoming.[9]
New Mexico,[4]

Laws Dak. 1887, § 2001; Grantham's Annot. Stats. S. D. (1899), §§ 2660, 2661; Rev. Pol. Code 1903, §§ 2536, 2537.

96 Laws 1899, p. 26, § 3; Comp. Laws 1907, § 1497.

97 Laws 1899, p. 70, § 2; Rem. & Bal. Annot. Codes, § 7359.

98 Rev. Stats. Wyo., § 2548; Comp. Stats. 1910, § 3469. Placers: Rev. Stats. 1899, § 2553; Comp. Stats. 1910, § 3474.

99 Rev. Stats. 1901, §§ 3234, 3237; as amended, Laws 1909, p. 119.

100 Mills' Annot. Stats., §§ 3152, 3154, 3155; Rev. Stats. 1908, §§ 4197, 4199, 4200.

1 Laws 1895, p. 27, § 3; Civ. Code 1901, § 2558; Rev. Codes 1907, § 3208.

2 Pol. Code 1895, § 3611; Rev. Codes 1907, § 2283. Held reasonable and not in conflict with federal laws. Sanders v. Noble, 22 Mont. 110, 117, 55 Pac. 1037; Purdum v. Laddin, 23 Mont. 387, 388, 59 Pac. 153; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963; Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833, note; Butte Consol. M. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177.

3 Comp. Laws 1900, § 209; as amended, Stats. 1901, p. 97; Stats. 1907, p. 419; Rev. Laws 1912, § 2425. Placers: Rev. Laws 1912, § 2435.

4 Comp. Laws 1897, § 2298.

5 Rev. Pol. Code 1895, §§ 1430, 1432, 1433; Id. 1899, §§ 1430, 1432, 1433; Id. 1905, §§ 1804, 1806, 1807.

6 Laws 1898, p. 17, § 3; as amended, Laws 1901, p. 141; Lord's Or. Laws, § 5130.

7 Comp. Laws Dak. 1887, §§ 2001, 2003; adopted by South Dakota—Laws 1890, ch. cv, § 1; Grantham's Annot. Stats. S. D. (1899), §§ 2660, 2662; as amended, Laws 1899, p. 148; Rev. Pol. Code, 1903, §§ 2536, 2538.

8 Laws 1899, p. 69, §§ 2, 3, p. 71, §§ 8, 9; Rem. & Bal. Annot. Codes, §§ 7359, 7360.

9 Rev. Stats. Wyo. 1899, §§ 2548, 2550; Comp. Stats. 1910, §§ 3469, 3470.

Secretary Teller expressed a doubt whether a state legislature has the right to attach this condition to the appropriation of mineral land,[10] although Commissioner Williamson held that such requirement is not in conflict with the congressional laws.[11]

The state courts have uniformly enforced this class of provisions;[12] and there being no authoritative ruling denying the right to the state to so legislate, these conditions may be assumed to be valid. All the statutes on this subject mentioned above require the sinking of a discovery shaft or its equivalent prior to the completion of location and as a necessary part of the act of location. In the case of Northmore v. Simmons,[13] however, the circuit court of appeals for the ninth circuit had under consideration a mining district regulation which required the sinking of a shaft "within ninety days of location," not as a part of the location, but as a condition to the holding of the claim,—in other words, as a part of the annual labor. The majority of the court held that it was competent for the laws of a state or the local regulations of a district to increase the amount of annual work required to hold a mining claim by the federal law and upheld the validity of the regulation.

10 Wight v. Tabor, 2 L. D. 738, 742; S. C., on review, 2 L. D. 743.

11 In re Alfred H. Hale, 7 Copp's L. O. 115.

12 Sisson v. Sommers, 24 Nev. 379, 388, 55 Pac. 829; Sanders v. Noble, 22 Mont. 110, 117, 55 Pac. 1037, 19 Morr. Min. Rep. 650; Purdum v. Laddin, 23 Mont. 387, 389, 59 Pac. 153; Beals v. Cone, 27 Colo. 473, 499, 83 Am. St. Rep. 92, 62 Pac. 948, 20 Morr. Min. Rep. 591; McMillan v. Ferrum M. Co., 32 Colo. 38, 105 Am. St. Rep. 64, 74 Pac. 461; S. C., in error, dismissed, 197 U. S. 343; Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963. And see Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28 L. ed. 1113, 15 Morr. Min. Rep. 472; and dissenting opinion in Northmore v. Simmons, 97 Fed. 386, 392, 38 C. C. A. 211, 20 Morr. Min. Rep. 128.

13 97 Fed. 386, 38 C. C. A. 211, 20 Morr. Min. Rep. 128.

(9) *Requiring affidavit of sinking discovery shaft or its equivalent to be attached to and recorded with the notice of location.—*

Oregon.[14]

(10) *Fixing time within which location shall be completed after discovery.—*

Arizona,[15]
Colorado,[16]
Idaho,[17]
Montana,[18]
Nevada,[19]
New Mexico,[20]
North Dakota,[21]
Oregon,[22]
South Dakota,[23]
Utah,[24]

[14] Laws 1898, p. 16; as amended, Laws 1901, p. 141, §§ 2, 3; B. & C. Codes, § 3976; Lord's Or. Laws, §§ 5129, 5130. Held valid and mandatory. Wright v. Lyons, 45 Or. 167, 77 Pac. 81.

[15] Rev. Stats. 1901, § 3234; as amended, Laws 1909, p. 119.

[16] Placers: Mills' Annot. Stats., § 3136; Rev. Stats. 1908, § 4205. Lodes: Mills' Annot. Stats., § 3155; Rev. Stats. 1908, § 4200.

[17] Lodes: Laws 1895, p. 26 et seq., §§ 2–4; Civ. Code 1901, §§ 2557–2559; Rev. Codes 1907, §§ 3207–3209. Placers: Laws 1897, p. 12; Civ. Code 1901, § 2563; Rev. Codes 1907, § 3222.

[18] Pol. Code 1895, §§ 3611, 3612; as amended, Laws 1901, pp. 140, 141; Rev. Codes 1907, § 2284. Held reasonable and not in conflict with the federal laws. Purdum v. Laddin, 23 Mont. 387, 389, 59 Pac. 153.

[19] Comp. Laws 1900, §§ 209, 210; as amended, Stats. 1907, p. 420; Rev. Laws 1912, §§ 2423, 2424. Placers: Comp. Laws 1900, § 221; Rev. Laws 1912, § 2435. Millsites: Rev. Laws 1912, § 2438. Tunnel claims: Rev. Laws 1912, § 2442.

[20] Comp. Laws 1884, § 1566; Comp. Laws 1897, §§ 2286, 2298.

[21] Rev. Pol. Code 1895, § 1428; Id. 1899, §§ 1428, 1433; Id. 1905, §§ 1802, 1807.

[22] Laws 1898, p. 17, §§ 2, 3; as amended, Laws 1901, p. 140; Lord's Or. Laws, §§ 5128, 5129.

[23] Comp. Laws Dak. 1887, §§ 1999, 2004; adopted in South Dakota—Laws 1890, ch. cv, § 1; Grantham's Annot. Stats. S. D. (1899), § 2663; Rev. Pol. Code 1903, § 2539.

[24] Laws 1899, p. 26, § 4; Comp. Laws 1907, § 1498; as amended, Laws 1909, p. 79.

Washington,[25] Wyoming.[26]

(11) *Providing for the manner of relocating abandoned claims.—*

Arizona,[27] North Dakota,[33]
Colorado,[28] Oregon,[34]
Idaho,[29] South Dakota,[35]
Montana,[30] Washington,[36]
Nevada,[31] Wyoming.[37]
New Mexico,[32]

(12) *Amount of annual work.—*

Arizona,[38] California,[40]
Arkansas,[39] Nevada,[41]

25 Laws 1899, p. 69, § 1; Rem. & Bal. Annot. Codes, § 7358. Placers: Laws 1899, p. 72, § 10; as amended, Laws 1901, p. 292; Rem. & Bal. Annot. Codes, § 7367.

26 Lodes: Rev. Stats. Wyo. 1899, § 2550; Comp. Stats. 1910, § 3471. Placers: Rev. Stats. 1899, § 2553; Comp. Stats. 1910, § 3474.

27 Rev. Stats. 1901, § 3241; as amended, Laws 1909, p. 201; Matko v. Daley, 10 Ariz. 175, 85 Pac. 721; affirmed in Clason v. Matko, 223 U. S. 646, 32 Sup. Ct. Rep. 392, 56 L. ed. 588.

28 Mills' Annot. Stats., § 3162; Rev. Stats. 1908, § 4211; as amended, Laws 1911, p. 515.

29 Laws 1895, p. 28, § 7; Civ. Code 1901, § 2560; Rev. Codes 1907, § 3212.

30 Pol. Code 1895, § 3615; Rev. Codes 1907, §§ 2286, 2287.

31 Comp. Laws 1900, § 214; Rev. Laws 1912, § 2428.

32 Comp. Laws 1897, § 2300.

33 Rev. Pol. Code, § 1439; Id. 1899, § 1439; Id. 1905, § 1813.

34 Laws 1898, p. 17, § 4; Lord's Or. Laws, § 5131.

35 Comp. Laws Dak. 1887, § 2010; adopted by South Dakota—Laws 1890, ch. cv, § 1; Grantham's Annot. Stats. S. D. (1899), § 2669; Rev. Pol. Code 1903, § 2545.

36 Laws 1899, p. 71, § 8; Rem. & Bal. Annot. Codes, § 7365.

37 Rev. Stats. Wyo. 1899, § 2552; Comp. Stats. 1910, § 3473.

38 Re-enacts the federal law—Rev. Stats. 1901, § 3239.

39 Provides that miners of county may regulate the amount. Acts 1899, p. 113, § 6.

40 Civ. Code, § 1426 l.

41 One hundred dollars annually; fixing value of day's labor at four dollars for eight hours. Comp. Laws 1900, § 216; Rev. Laws 1912, § 2430.

New Mexico,[41a] Washington,[44]
North Dakota,[42] Wyoming.[45]
South Dakota,[43]

No state has a right to decrease the amount of labor which the congressional law requires to be done annually on a mining claim.[46] The law clearly implies that the states and territories, or the district organizations, in the absence of state or territorial legislation, may increase the amount of such labor.[47]

In the case of Northmore v. Simmons (*supra*), a majority of the court held a local regulation of a mining district to be valid which required the sinking of a shaft to a depth of ten feet "within ninety days of location," and provided that "otherwise the claim shall be subject to relocation." This regulation plainly made the sinking of this shaft a part of the annual work, and not a part of the location. The decision was placed upon the ground that the mining district had power to increase the amount of annual

[41a] Laws 1909, p. 191.

[42] Same as the federal law. Rev. Pol. Code, § 1438; Id. 1899, § 1438; Id. 1905, § 1812.

[43] Same as the federal law. Comp. Laws Dak., § 2009; adopted by South Dakota—Laws 1890, ch. cv, § 1; Grantham's Annot. Stats. S. D. (1899), § 2668; Rev. Pol. Code 1903, § 2544.

[44] Same as federal law. Ballinger's Annot. Codes & Stats., § 3154; Rem. & Bal. Annot. Codes, § 7354. Placers: Laws 1899, p. 72, § 10, subd. 3; as amended, Laws 1901, p. 282. See Laws 1899, p. 73, § 14; Rem. & Bal. Annot. Codes, § 7368.

[45] Placers: One hundred dollars per annum on claims consisting of one hundred and sixty acres; on claims of less than one hundred and sixty acres, sixty-two and one-half cents per acre. Rev. Stats. Wyo. 1899, §§ 2554, 2560; as amended, Laws 1901, p. 105; Comp. Stats. 1910, §§ 3475–3478.

[46] Penn v. Oldhauber, 24 Mont. 287, 290, 61 Pac. 649; Sweet v. Webber, 7 Colo. 443, 450, 4 Pac. 752.

[47] Rev. Stats., § 2324; Northmore v. Simmons, 97 Fed. 386, 387, 38 C. C. A. 211, 20 Morr. Min. Rep. 128; Sisson v. Sommers, 24 Nev. 379, 388, 55 Pac. 829.

work required by the federal laws, and to shorten the time within which a portion of it is to be done. There is an able dissenting opinion by Judge Ross, who takes the position that congress having expressly provided that the period within which the annual work is required to be done,—"shall commence on the first day of January succeeding the date of location,"—a state or mining district has no power to shorten this time. And this, it seems to us, is the true ground. While a state or mining district may increase the amount of labor required to hold the claim, it can only do so when it does not thereby impair an estate granted by congressional laws. When a locator has perfected his location, he is granted under the acts of congress the right to exclusive possession of his claim until the end of the year succeeding that in which the location is made without any further act on his part.[48] Such a local rule as the one in question is an attempt to declare that right forfeited unless certain further acts are done by the locator within ninety days, and is therefore an effort to impair a right or an estate granted by congress in the public lands. In this view we are upheld by the decision of the supreme court of the state of California in the case of Original Co. of the W. & K. v. W. M. Co.[49]

The statutory declaration, as in Nevada,[50] that a day's work of eight hours is of the value of four dollars, and must be so computed in estimating the amount of annual labor performed on a mining claim, is of questionable propriety. Mr. Morrison is of the

[48] Belk v. Meagher, 104 U. S. 279, 285, 26 L. ed. 735, 1 Morr. Min. Rep. 510.

[49] 60 Cal. 631.

[50] Rev. Laws 1912, § 2428.

opinion that such provisions "amount to absolutely nothing." [51]

The supreme court of Montana, in the case of Penn v. Oldhauber,[52] held a local custom of similar purport to be in conflict with section twenty-three hundred and twenty-four of the Revised Statutes, and consequently invalid.

(13) *Posting notice that annual or development work is in progress.—*

Utah.[53]

(14) *Authorizing the recording of affidavits of performance of annual labor.—*

Arizona,[54]
Arkansas,[55]
California,[56]
Colorado,[57]
Idaho,[58]
Montana,[59]
Nevada,[60]
New Mexico,[61]
Utah,[62]
Washington,[63]
Wyoming.[64]

[51] Morr. Min. Rights, 8th ed., p. 67; Id., 10th ed., p. 86; 14th ed., p. 122.

[52] 24 Mont. 287, 61 Pac. 649.

[53] Laws 1899, p. 26, § 5; Comp. Laws 1907, § 1499.

[54] Rev. Stats. 1901, §§ 3240, 3241; as amended, Laws 1907, p. 27.

[55] Acts 1901, p. 330, § 2; Digest of Stats. 1904, § 5364.

[56] Civ. Code, § 1426m.

[57] Mills' Annot. Stats., § 3161; Laws 1889, p. 261; Rev. Stats. 1908, § 4209.

[58] Laws 1895, p. 27, § 6; Laws 1899, p. 634; Civ. Code 1901, § 2565; Rev. Codes 1907, § 3211.

[59] Pol. Code 1895, § 3614. This section is omitted from the Revised Codes of 1907, but has never been repealed.

[60] Comp. Laws 1900, § 217; Rev. Laws 1912, § 2431.

[61] Comp. Laws 1897, § 2315.

[62] Laws 1899, p. 27, § 6; Comp. Laws 1907, § 1500.

[63] Laws 1899, p. 70, § 6; Rem. & Bal. Annot. Codes, §§ 7363, 7364. Placers: Laws 1899, p. 72, § 10, subd. 4; as amended, Laws 1901, p. 292; Rem. & Bal. Annot. Codes, § 7368.

[64] Placers: Rev. Stats. Wyo. 1899, § 2559; as amended, Laws 1901, p. 105, § 3; Comp. Stats. 1910, § 3479.

(15) *Prescribing manner of organizing mining districts.—*

Wyoming.[65]

(16) *Authorizing survey of claim to be made by deputy mineral surveyor, and when recorded to become a part of the location certificate and become prima facie evidence as to all facts therein contained.—*

California,[66] Nevada.[68]
Montana,[67]

(17) *Manner of locating tunnel claims and length allowed on discovered lodes.—*

California,[69] Nevada.[71]
Colorado,[70]

(18) *Manner of locating millsites, and area allowed therefor.—*

California,[72] Nevada.[73]

While it is manifest that the states and territories may legislate within a reasonable limit upon the foregoing subjects, we do not intend that it should be inferred that all of the legislation hereinbefore noted is absolutely in harmony with the letter and spirit of the national law. It is not our purpose at the present time to deal with individual state and territorial legislation

[65] Rev. Stats. Wyo. 1899, §§ 2533, 2534; Comp. Stats. 1910, §§ 3454, 3455.

[66] Civ. Code, § 1426i.

[67] Pol. Code 1895, § 3616. This section is omitted from the Revised Codes of 1907, but has never been repealed.

[68] Comp. Laws 1900, § 215; Rev. Laws 1912, § 2429.

[69] Civ. Code, §§ 1426e–1426g.

[70] Mills' Annot. Stats., § 3140; Rev. Stats. 1908, § 4207.

[71] Comp. Laws 1900, §§ 226, 229; Rev. Laws 1912, §§ 2440–2443.

[72] Civ. Code, §§ 1426j, 1426k.

[73] Laws 1897, p. 103, §§ 15–18; Comp. Laws 1900, §§ 222–225; Rev. Laws 1912, §§ 2436–2439.

analytically. When we come to consider the requirements of a valid location, the conditions required to perfect and perpetuate it, we shall note under each appropriate head the nature and force of such legislation. We are now presenting generally the subjects upon which, to some extent, states and territories are permitted to legislate.

§ 251. Subjects upon which states have enacted laws the validity of which is open to question.—It is extremely difficult to draw the line between what is proper supplemental state legislation and what is not. But there are some subjects upon which there has been state and territorial legislation, which legislation is either clearly obnoxious to the federal law or open to criticism as being ineffectual, by reason of its being a mere reiteration of the provisions of the Revised Statutes. We note the following instances which illustrate this:—

(1) *Laws giving a locator the right to all lodes which have their top, or apex, within the location, and defining the extralateral right.*—

Colorado,[74]
Nevada,[75]
North Dakota,[76]
South Dakota,[77]
Washington,[78]
Wyoming.[79]

[74] Mills' Annot. Stats., § 3156; Rev. Stats. 1908, § 4201.

[75] Comp. Laws 1900, § 211; Rev. Laws 1912, § 2425.

[76] Rev. Pol. Code 1895, § 1434; Id. 1899, § 1434; Id. 1905, § 1808.

[77] Comp. Laws Dak. 1887, § 2005; adopted by South Dakota—Laws 1890, ch. cv, § 1; Grantham's Annot. Stats. S. D. (1899), § 2664; Rev. Pol. Code 1903, § 2540.

[78] Hill's Annot. Stats. (Wash.), § 2212; Ballinger's Annot. Codes & Stats., § 3153; Rem. & Bal. Annot. Codes, § 7353.

[79] Laws 1888, p. 89, § 20; Rev. Stats. Wyo. 1899, § 2551; Comp. Stats. 1910, § 3472.

(2) *Prohibiting the proprietor of a mining claim from pursuing his vein on its strike beyond vertical planes drawn through surface boundaries.*—

Colorado,[80] North Dakota,[82]
Nevada,[81] South Dakota.[83]

These two classes of legislation clearly trench upon the power of congress. These subjects can only be regulated by the federal law, as they attempt to define and limit the character of the estate granted by the government.[84] We do not understand that any of these provisions conflict with the federal law. But their re-enactment by the states gives them no force. If in harmony with the federal law, they are unnecessary; if obnoxious to it, they are void.

(3) *Verification of location certificates by oath.*— Idaho.[85]

Montana [85a] at one time had a statute similar to that of Idaho, which has since been repealed. This statute was several times before the courts. In Wenner v. McNulty, the supreme court of Montana expressed its doubt of the right of the then territory to impose the additional burden upon the locator of verifying the notice of location by oath, and stated that this rule

[80] Mills' Annot. Stats., § 3157; Rev. Stats. 1908, § 4202.

[81] Comp. Laws 1900, § 212; Rev. Laws 1912, § 2426.

[82] Rev. Pol. Code 1895, § 1435; Id. 1899, § 1435; Id. 1905, § 1809.

[83] Comp. Laws Dak. 1887, § 2006; adopted by South Dakota—Laws 1890, ch. cv. § 1; Grantham's Annot. Stats. S. D. (1899), § 2665; Rev. Pol. Code 1903, § 2541.

[84] *Ante*, § 249.

[85] Rev. Stats., § 3104; as amended, Laws 1895, p. 29, § 13; Civ. Code 1901, § 2564; Rev. Codes 1907, § 3216.

[85a] Pol. Code, 1895, § 3612, as amended, Laws of 1901, p. 141; repealed, Laws 1907, p. 23.

trenched very closely upon the federal law.[86] The law had been previously enforced in a case in which its validity was apparently not questioned.[87] But in O'Donnell v. Glenn,[88] the court squarely upheld the law. In a still later case, Judge De Witt, speaking for the court, conceived that there were doubts about the validity of the rule, but declined to overrule O'Donnell v. Glenn and sustained the doctrine of that case.[89] This ruling was followed in later cases decided by that court.[90] It was raised in the federal courts, but was not passed upon.[91]

The Idaho statute was held to be valid by the supreme court of that state in Van Buren v. McKinley.[92]

(4) *Providing methods for forfeiting estate of delinquent co-owner.*—

Arizona,[93] Nevada,[95]
California,[94] Oregon.[96]

The validity of this class of statutes is generally upheld. In fact, the trend of modern decisions largely favors them as supplying appropriate methods of giv-

86 7 Mont. 30, 37, 14 Pac. 643.

87 McBurney v. Berry, 5 Mont. 300, 5 Pac. 867.

88 8 Mont. 248, 252, 19 Pac. 302.

89 Metcalf v. Prescott, 10 Mont. 283, 293, 25 Pac. 1037, 1 Morr. Min. Rep. 137.

90 McCowan v. Maclay, 16 Mont. 235, 40 Pac. 602; Berg v. Koegel, 16 Mont. 266, 40 Pac. 605; Mares v. Dillon, 30 Mont. 117, 75 Pac. 963; Hickey v. Anaconda Copper M. Co., 33 Mont. 46, 81 Pac. 806; Washoe Copper Co. v. Junila, 43 Mont. 178, 115 Pac. 917.

91 Preston v. Hunter, 67 Fed. 996, 999, 15 C. C. A. 148.

92 8 Idaho, 93, 66 Pac. 936, 938, 21 Morr. Min. Rep. 690. See, also, Dunlap v. Pattison, 4 Idaho, 473, 95 Am. St. Rep. 140, 42 Pac. 504.

93 Laws 1891, p. 140; Rev. Stats. 1901, §§ 3245–3249.

94 Civ. Code, § 1426o.

95 Laws 1897, p. 103, § 11; Comp. Laws Nev. 1900, § 218; Rev. Laws 1912, § 2432.

96 Laws 1903, p. 327; Lord's Or. Laws, §§ 5142–5150.

ing effect to the federal law. This subject is fully discussed in a later portion of the work.[97]

(5) *Specifying the character of deposits which may be located under the placer laws.*—

Montana,[98] New Mexico.[98a]

While all the substances named in the Montana and New Mexico acts fall within the definition of the term "mineral," as we understand it,[99] making legislation of this character unnecessary, yet these states have no right by their legislatures to construe federal laws. A provision like the foregoing would be eminently proper in a congressional law, and if enlarged and adopted by congress, it would have the effect of removing the ambiguities and uncertainties now existing. But we cannot understand how it is within the power of a state to dictate to the national government what substances it shall dispose of under its mineral laws.

§ 252. **Drainage, easements, and rights of way for mining purposes.**—By section twenty-three hundred and thirty-eight of the Revised Statutes, it is enacted, that—

> As a condition of sale, in the absence of necessary legislation by congress, the local legislation of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development, and those conditions shall be fully expressed in the patent.

[97] *Post*, § 646.

[98] Gold or other deposit of minerals, including building-stone, limestone, marble, clay, sand, and other mineral substances having a commercial value. Pol. Code 1895, § 3610; Rev. Codes 1907, § 2283.

[98a] Laws 1909, p. 190.

[99] § 98.

Arizona,[100] Colorado,[1] and Wyoming[2] have enacted laws providing for and regulating drainage of mines. Alaska is under the legislative supervision of congress, which has enacted laws prescribing the method of obtaining easements and rights of way for mining purposes,[3] and in the following states we find local legislation prescribing methods of obtaining easements and rights of way for mining purposes, and providing for condemnation proceedings:—

Arizona,[4]
California,[5]
Colorado,[6]
Idaho,[7]
Montana,[8]
Nevada,[9]
New Mexico,[10]
North Dakota,[11]
South Dakota,[12]

100 Rev. Stats. 1887, p. 412, §§ 2352–2357; Id. 1901, §§ 3252–3257.

1 Mills' Annot. Stats., §§ 3172–3180; Rev. Stats. 1908, §§ 4226–4234.

2 Rev. Stats. Wyo. 1899, § 2535.

3 Carter's Annot. Alaska Code, part v. ch. 22, § 204, subd. 5, and §§ 205–225; 31 U. S. Stats. at Large, pp. 522–527.

4 Laws 1881, p. 167; Rev. Stats. 1887, p. 314; Id. 1901, p. 654, § 2445, subd. 5.

5 Code Civ. Proc., as amended, 1895, § 1238, subd. 5.

6 Mills' Annot. Stats., § 3158; Rev. Stats. 1908, § 4216. Held constitutional as to condemnation for tunnels. Tanner v. Treasury T. M. & R. Co., 35 Colo. 593, 83 Pac. 864, 4 L. R. A., N. S., 106.

7 Acts 1877, 1881; Rev. Stats. 1887, §§ 3130–3142; Civ. Code 1901, §§ 2572–2574; Rev. Codes, 1907, §§ 3223–3235. Held constitutional. Baillie v. Larson, 138 Fed. 177. See, also, Headrick v. Larson, 152 Fed. 93, 81 C. C. A. 317. As to mining tunnels: Civ. Code 1901, §§ 2575–2578; Rev. Codes 1907, §§ 3224, 5210.

8 Pol. Code, 1895, §§ 3630–3640; Code Civ. Proc., § 2211; Laws 1899, p. 125, subds. 4, 5; Laws 1907, ch. 4; Rev. Codes 1907, § 7331. And see Glass v. Basin M. & C. Co., 22 Mont. 151, 55 Pac. 1047.

9 Stats. 1887, pp. 102, 103, § 1; Comp. Laws 1900, § 281; Rev. Laws 1912, §§ 2456–2462, 5606–5624.

10 Comp. Laws 1897, §§ 2328–2336.

11 Comp. Laws Dak. 1887, §§ 2016–2028; Rev. Codes N. D., 1899, § 5956, subds. 4, 5; Id. 1905, § 7575.

12 Comp. Laws Dak. 1887, §§ 2016–2028; Grantham's Annot. Stats. S. D. (1899), §§ 2674–2686; Rev. Pol. Code 1903, §§ 2550–2562.

Utah,[13] Wyoming.[15]
Washington,[14]

This class of legislation, in the states at least, is not, strictly speaking, supplemental to the federal law. It is more in the nature of independent legislation, the validity and operative force of which is to be determined from a consideration of the limitation upon legislative action prescribed by the organic laws of the respective states.[16]

In the case of People ex rel. Aspen M. & S. Co. v. District Court, considered by the supreme court of Colorado,[17] it was urged that section twenty-three hundred and thirty-eight of the Revised Statutes imposed upon mineral lands acquired under the mining laws conditions which could not be ignored by the states; that they amounted practically to a burden charged upon the land and a limitation of the estate conveyed. Therefore, that these provisions were above and beyond state legislation upon the subject of eminent domain; that the state could not by its constitution abridge or curtail the privileges sanctioned by the law of congress; and that the doctrine of public "utility" in no way controlled this class of easements.

The contention, however, was not sustained. The supreme court of Colorado was of the opinion that, so

[13] Laws 1896, p. 316; as amended, Laws 1901, p. 19, 1907, p. 143; Comp. Laws 1907, § 3588. Held constitutional. Highland Boy G. M. Co. v. Strickley, 28 Utah, 215, 107 Am. St. Rep. 711, 78 Pac. 296; affirmed, 200 U. S. 527, 26 Sup. Ct. Rep. 301, 50 L. ed. 581, 4 Ann. Cas. 1174.

[14] Laws 1897, p. 95; Ballinger's Annot. Codes & Stats., § 4282; Laws 1899, p. 261; Rem. & Bal. Codes 1909, §§ 7344–7346.

[15] Laws 1907, p. 58; Comp. Stats. 1910, § 3874.

[16] Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, 4 Ann. Cas. 1171; Strickley v. Highland Boy G. M. Co., 200 U. S. 527, 26 Sup. Ct. Rep. 301, 50 L. ed. 581, 4 Ann. Cas. 1174.

[17] 11 Colo. 147, 17 Pac. 298.

far as the territories were concerned, congress might authorize the organization of a local government, with authority to enact laws, or it might legislate directly for the government of the territory. But upon the admission of a territory into the Union as a sovereign state, the right of local self-government passes to the state.[18] The power of legislation thereafter resides in the people of the state, and is absolute and uncontrolled save as to the enumerated powers granted to the national government by the federal constitution and the restraints upon state legislation imposed by that instrument. Other limitations upon the powers of the legislative department of a state are to be found in the state constitution. One of the powers of state sovereignty which may be exercised in the regulation and control of private property is termed the right of eminent domain. The exercise of this power within the states by the federal government extends only to appropriations by the United States for sites for post-offices, courthouses, forts, arsenals, lighthouses, custom-houses, and other public uses.

> The foregoing principles [said the supreme court of Colorado], declaratory of the sovereign powers pertaining to the federal and state governments respectively, do not sustain the broad proposition of counsel that congress may ignore state constitutions and authorize local legislatures, regardless of state constitutions, to pass laws providing rules for the working of mines and involving easements upon mineral lands. It is the solemn duty of the courts of a state to enforce the state constitution as the paramount law, whenever an act of the state legislature is found to be clearly in conflict therewith. Assuming that the state constitution is a valid instrument, the authority of congress to authorize the state leg-

[18] See, also, Woodruff v. North Bloomfield G. M. Co., 18 Fed. 774, 775, 9 Saw. 441.

islature to pass laws upon any subject in conflict therewith cannot be admitted. But congress has not assumed to exercise such a power. The rules and easements intended to be authorized by the fifth section of the congressional act of July 26, 1866,[19] were evidently such as should be enacted in accordance with the fundamental law of the state or territory. Considered with reference to the territories, the section is unobjectionable in any view of the question, since, as we have seen, the power of congress to govern them is absolute. . . . . As applicable to state governments, the provision may be regarded as authorizing them to supplement the act of congress with necessary and proper rules and requirements, to be observed by citizens who have availed or might avail themselves of the privilege given to explore, occupy, and mine the mineral lands of the public domain with a view to acquiring title thereto. In so far as the provisions of the act may be regarded as conferring power upon the state legislature, to regulate the manner of using and operating mining claims, with a view to the protection of the rights of the several claimants, and to render available their respective locations, by imposing restraints on the mode of operating and using them, including necessary easements over the same, it would seem from the authorities cited that the states already possessed this power. Being comparatively a new question, however, at the date of the passage of the congressional act, this and the other permissive clauses were properly and wisely inserted. The opinion of Mr. Justice Field, in Jennison v. Kirk (98 U. S. 453–460, 4 Morr. Min. Rep. 504), upon other portions of this act, shows that the intention of congress by the insertion of provisions of this character was not to grant easements upon mining claims, but to sanction such as might be regularly granted by the local authorities, and in order that they might be perpetuated as property rights after the title had passed from the government. This precaution prevents any

[19] Now embodied in § 2338, Rev. Stats., 5 Fed. Stats. Ann. 52.

controversy in the future as to the power of either territory or state to impose easements on these lands while they belong to the United States.

From these principles and considerations, we arrive at the conclusion, that, unless a state statute imposing an easement upon mining claims is in accord with the state constitution, it cannot be enforced by our courts.[20]

The case under consideration arose out of an attempt to condemn a right of way for a tramway across the lands of another, to enable the Aspen Mining and Smelting Company to transport ores from its mines to the sampling works in the town of Aspen, under a statute which provided that all mining claims now located, or which may be hereafter located, shall be subject to the right of way for any tramway, whether now in use or which may hereafter be laid across any such location, to be condemned as in case of land taken for public highways when the consent of the owner cannot be obtained.[21]

The constitution of the state limited the power of the legislative department to the taking of private property for public use, and for the following *private* uses: "For private ways of necessity and for reservoirs, drains, flumes, or ditches for agricultural, mining, milling, domestic, or sanitary purposes." [22]

The court held that as tramways were not within the sanction of the constitution, the act of the legislature in question was void.

The rule announced in this case was approved and followed by Judge Hallet, sitting as United States cir-

[20] People ex rel. Aspen M. & S. Co. v. District Court, 11 Colo. 147, 17 Pac. 298.

[21] Gen. Stats. Colo. 1887, § 2407; Mills' Annot. Stats., § 3158; Rev. Stats. 1908, § 4216.

[22] Const., art. ii, §§ 14, 15.

cuit judge in the district of Colorado, in the case of Cone v. The Roxanna G. M. & T. Co.[23]

In the case of Calhoun G. M. Co. v. Ajax G. M. Co.,[24] it was held that since section twenty-three hundred and thirty-eight of the Revised Statutes provides only for easements for the development of mines, no rights thereunder could be acquired under a statute of Colorado giving a right of way for tunnels located for the purpose of discovery.

From a consideration of these cases, the doctrine of which is in harmony with the views announced by Judge Cooley, the most eminent of all writers on constitutional law,[25] it cannot be doubted that the validity of the laws of the several states purporting to provide for securing easements and rights of way over the lands of others, for purposes connected with the industry of mining, must be determined regardless of the federal laws, and in the light of the respective state constitutions. The exercise by the state of its sovereign right of eminent domain cannot be interfered with by the United States.[26]

§ 253. Provisions of state constitutions on the subject of eminent domain.—As preliminary to a discussion of the general features of state legislation on this subject, we think it not inappropriate to present an epitome of the constitutional provisions of the several states where laws of this class have been enacted, so far as such provisions are germane.

[23] 2 Legal Adv. 350, 352.

[24] 27 Colo. 1, 26, 83 Am. St. Rep. 17, 59 Pac. 607, 50 L. R. A. 209, 20 Morr. Min. Rep. 192; on appeal, 182 U. S. 499, 509, 21 Sup. Ct. Rep. 885, 45 L. ed. 1200, 21 Morr. Min. Rep. 381.

[25] Cooley's Const. Limit., 6th ed., 645.

[26] Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206.

Arizona.—

Private property shall not be taken for private use except for private ways of necessity and for drains, flumes or ditches on or across the lands of others for mining, agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question and determined as such without regard to any legislative assertion that the use is public.[27]

California.-

Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained or paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law.[28]

The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals.[29]

27 Const. Ariz., art. ii, § 17.
28 Const. Cal., art. i, § 14.
29 Id., art. xii, § 8.

The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law.[30]

Colorado.—

That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches on or across the land of others, for agricultural, mining, milling, domestic, or sanitary purposes.[31]

That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.[32]

Idaho.—

The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes, or pipes, to convey water to the place of use, for any useful, beneficial, or necessary purpose, or for drainage; or for the drainage of mines or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete

[30] Id., art. xiv, § 1.

[31] Const. Colo., art. ii, § 14.

[32] Const. Colo., art. ii, § 15. An act authorizing condemnation for tunnel purposes held constitutional. Tanner v. Treasury T. M. & R. Co., 35 Colo. 593, 83 Pac. 464, 4 L. R. A., N. S., 106.

development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor.[33]

Montana.—

Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into the court for, the owner.[34]

The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited.[35]

Under this clause the supreme court of Montana held the use of water for the purpose of irrigating a par-

[33] Const. Idaho, art. i, § 14. Idaho statute granting tunnel rights on condemnation held constitutional. Baillie v. Larson, 138 Fed. 177; Rev. Stats. 1887, §§ 3130–3142; as amended in 1899, Sess. Laws, p. 350; and certain other statutes referred to in Baillie v. Larson, *supra*. A tunnel right condemned under the legislation referred to cannot be used by the general public or other mine owners tributary to the tunnel bore. Headrick v. Larson, 152 Fed. 93, 81 C. C. A. 317.

[34] Const. Mont., art. iii, § 14.

[35] Const. Mont., art. iii, § 15.

ticular tract of agricultural land, or working a particular mine, to be a public use.[36]

Nevada.—

. . . . Nor shall private property be taken for public use without just compensation having been first taken or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made.[37]

New Mexico.—

Private property shall not be taken or damaged for public use without just compensation.[37a]

North Dakota.—

Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived.[38]

South Dakota.—

Private property shall not be taken for public use, or damaged, without just compensation, as determined by a jury, which shall be paid as soon as it can be ascertained, and before possession is taken. No benefit which may accrue to the owner as a result of an improvement made by any private corporation shall be considered in fixing the

[36] Ellinghouse v. Taylor, 19 Mont. 462, 464, 48 Pac. 757; Smith v. Denniff, 24 Mont. 20, 22, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 737. And see Butte, A. & P. Ry. Co. v. Montana U. Ry. Co., 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 298; Glass v. Basin M. & C. Co., 22 Mont. 151, 55 Pac. 1047.

[37] Const. Nev., art. i, § 8.

[37a] Sec. 22, Const. New Mex.

[38] Const. N. D., art. i, § 14.

compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.[39]

Oklahoma.—

No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining or sanitary purposes, in such manner as may be prescribed by law.[40]

Utah.—

Private property shall not be taken or damaged for a public use without just compensation.[41]

Washington.—

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court by the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.[42]

[39] Const. S. D., art. vi, § 13.

[40] Const. Okl., art. ii, § 23.

[41] Const. Utah, art. i, § 22.

[42] Const. Wash., art. i, § 16. See, also, art. xii, § 10.

Wyoming.—

> Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes, or ditches on or across the lands of others, for agricultural, mining, milling, domestic, or sanitary purposes, nor in any case without due compensation.[43]
>
> Private property shall not be taken or damaged for public or private use without just compensation.[44]

It will thus be seen that private property may be subjected to burdens for certain specified purposes that may generally be classified as private (if we mean by that term a use in which the public does not directly participate, and where the public benefit, if any, is indirect) in Colorado,[45] Idaho,[46] Montana,[47] Utah,[48] Washington,[49] Wyoming, and Arizona. In these states, it would seem that, within the limitations prescribed by the respective constitutions, the local legislatures may act, although some of the uses are not strictly public, as the term "public use" has been generally understood in a legal sense. The legislatures in the remaining states—i. e., California, Nevada,

[43] Const. Wyo., art. i, § 32.

[44] Id., art. i, § 33.

[45] Tanner v. Treasury T. M. & R. Co., 35 Colo. 593, 83 Pac. 464, 4 L. R. A., N. S., 106.

[46] Baillie v. Larson, 138 Fed. 177.

[47] Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757; Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 737; Glass v. Basin M. & C. Co., 22 Mont. 151, 55 Pac. 1047.

[48] Nash v. Clark, 27 Utah, 158, 101 Am. St. Rep. 593, 1 Ann. Cas. 300, 75 Pac. 371, 1 L. R. A., N. S., 208; S. C., 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, 4 Ann. Cas. 1171; Highland Boy M. Co. v. Strickley, 28 Utah, 215, 107 Am. St. Rep. 711, 3 Ann Cas. 1110, 78 Pac. 296, 1 L. R. A., N. S., 976; S. C., 200 U. S. 527, 26 Sup. Ct. Rep. 301, 50 L. ed. 586, 4 Ann. Cas. 1174.

[49] State v. Superior Court of Spokane County, 59 Wash. 621, 140 Am. St. Rep. 893, 110 Pac. 429.

New Mexico, North Dakota and South Dakota—and in the other states for purposes not within the specified limitations, must necessarily be confined to such uses as are essentially public in their nature. The use must be public in some sense. Otherwise the property is taken without due process of law.[50] But what is a public use depends largely upon the facts and circumstances surrounding the particular subject matter of the use.

§ 254. **Mining as a "public use."**—An exhaustive discussion of the law of eminent domain is hardly within the scope of this treatise, but it is necessary to deal with it to some extent.

The organic law of a state may not properly provide for the condemnation of private property for private use.

In that regard the more recent decisions, both state and federal, in discussing the test for determining whether a particular use is private or public, recognize the inadequacy of use by the general public as a universal test,[51] and adopt the view that the true criterion as to whether or not the taking of private property is for a public use rests in the consideration whether such use will foster and encourage the great natural advantages, resources, industrial opportunities and energies of the commonwealth,[52] and

[50] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 159, 17 Sup. Ct. Rep. 56, 41 L. ed. 369; Missouri Pacific Ry. v. Nebraska, 164 U. S. 403, 417, 17 Sup. Ct. Rep. 131, 41 L. ed. 489.

[51] Nash v. Clark, 27 Utah, 158, 101 Am. St. Rep. 593, 75 Pac. 371, 1 L. R. A., N. S., 208, 1 Ann. Cas. 300; Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426; Strickley v. Highland Boy Min. Co., 200 U. S. 527, 26 Sup. Ct. Rep. 301, 50 L. ed. 586, 4 Ann. Cas. 1174; Baillie v. Larson, 138 Fed. 177.

[52] Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426; Nash v. Clark, 27 Utah, 158, 101 Am. St. Rep. 593,

will contribute to the general growth and prosperity of the state,[53] a determination of which question is influenced in the different sections of our country by taking into account matters touching the differences of soil and climate,[54] the paramount industry of the state in its relation to the general welfare,[55] and peculiar local conditions and necessities.[56] With these matters the people of a state and the members of its legislature are more familiar than a stranger to the state can be. Consequently, constitutional declarations, acts of legislatures, and decisions of the courts of a state as to what is and what is not a public use within the state, while not necessarily conclusive, are entitled to great respect in the federal courts.[57]

A decision of the highest state court construing its constitution and laws on the subject of public use

75 Pac. 371, 1 L. R. A., N. S., 208, 1 Ann. Cas. 300; Kipp v. Davis-Daly Copper Co., 41 Mont. 509, 110 Pac. 237, 21 Ann. Cas. 1372; Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376.

[53] Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, 4 Ann. Cas. 1171; Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376; Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426.

[54] Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, 4 Ann. Cas. 1171. See, also, Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. Rep. 289, 51 L. ed. 499.

[55] Great Falls Mfg. Co. v. Fernald, 47 N. H. 444; Dayton M. Co. v. Seawell, 11 Nev. 394; Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376; Kipp v. Davis-Daly Copper Co., 41 Mont. 509, 110 Pac. 237, 21 Ann. Cas. 1372; Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426; Tanner v. Treasury T. M. & R. Co., 35 Colo. 593, 83 Pac. 464, 4 L. R. A., N. S., 106.

[56] Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426.

[57] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 159, 160, 17 Sup. Ct. Rep. 56, 41 L. ed. 369; Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, 4 Ann. Cas. 1171; Strickley v. Highland Boy M. Co., 200 U. S. 527, 26 Sup. Ct. Rep. 301, 50 L. ed. 586, 4 Ann. Cas. 1174; Hairston v. Danville & Western Ry., 208 U. S. 598, 28 Sup. Ct. Rep. 331, 52 L. ed. 637, 13 Ann. Cas. 1008.

would have to present a flagrant case of arbitrary exercise of power before the federal courts would interfere under the fourteenth amendment to the constitution.[58]

The text-writers are not altogether in accord as to what is meant by a public use.

Mr. Mills thus states his conclusions upon the subject of condemnation for private use:—

> The use to which property is condemned must be public. As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require a man to part with one inch of his estate.[59]

Judge Cooley says:—

> It is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another, without reference to some use to which it is to be applied for public benefit.[60]

Only a few of the state constitutions in terms prohibit the taking of private property for private use. All the courts, however, agree that this cannot be done.[61]

As was said by the supreme court of New Jersey,—

> There is no prohibition in the constitution of this state, or in any of the state constitutions that I know of, against taking private property for private use. But the power is nowhere granted to the legislature. The constitution vests in the senate and general assembly the legislative or law-making power. They

[58] Hairston v. Danville & Western Ry., 208 U. S. 598, 607, 28 Sup. Ct. Rep. 331, 52 L. ed. 637, 13 Ann. Cas. 1008.

[59] Mills on Eminent Domain, § 22.

[60] Cooley's Const. Limit., 6th ed., 651.

[61] Lewis on Eminent Domain, § 157; 3d ed., § 250.

> may make laws, the rules prescribed to govern our civil conduct. They are not sovereign in all things; the executive and judicial power is not vested in them. Taking the property of one man and giving it to another is not making a law or rule of action; it is not legislation, it is simply robbery.[62]

While this may be true, the rule announced is based upon a taking for a purely private purpose, unaccompanied by any supposed indirect public benefit.

Mr. Lewis, in his work on the law of "Eminent Domain," gives us the following definition:—

> Eminent domain is the right or power of a sovereign state to appropriate private property to particular uses for the purpose of promoting the general welfare.[63]

He further says:—

> Apart from constitutional considerations, it is not essential, in order to constitute an act of eminent domain, that the use for which the property is taken should be of a public nature; that is, a use in which the public participates, directly or indirectly, as in the case of highways, railways, public service plants and the like. It is sufficient that the use of the particular property for the purpose proposed is necessary to enable individual proprietors to utilize and develop the natural resources of their land, as by reclaiming wet or arid tracts, improving a water-power or working a mine.[64]

He also points out that some of the courts hold the term "public use" to be equivalent to "public welfare"; and this we think the rule in most of the states within which the federal mining laws are operative.

It has been established by a series of cases that an ulterior public advantage may justify a comparatively

[62] Coster v. Tide Water Co., 18 N. J. Eq. 54, 63.

[63] Lewis' Eminent Domain, 3d ed., § 1.

[64] Id.

insignificant taking of private property for what in its immediate purpose is a private use.[65]

The question as to whether a given use is or is not public is a judicial one. The legislature cannot so determine that the use is public as to make the determination conclusive upon the courts; but ordinarily the presumption is in favor of the public character of a use declared to be public by the legislature; and unless it is seen at first blush that it is not possible for the use to be public, the courts cannot interfere.[66]

§ 255. Rights of way for pipe-lines for the conveyance of oil and natural gas.—In the application of these principles to the class of state legislation under consideration, we find that the decisions of the courts are not altogether uniform. The power of eminent domain has been exercised for pipe-lines for the conveyance of oil and natural gas.[67]

The theory in such cases seems to be, that pipe-lines for such purposes are public highways, and their owners common carriers engaged in the transportation of oil or gas.

[65] Noble State Bank v. Haskin, 219 U. S. 104, 110, 31 Sup. Ct. Rep. 186, 55 L. ed. 112, Ann. Cas. 1912A, 487.

[66] Mills on Eminent Domain, § 10; Lewis on Eminent Domain, 3d ed., § 251; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 159, 160, 17 Sup. Ct. Rep. 56, 41 L. ed. 369; Highland Boy Gold Min. Co. v. Strickley, 28 Utah, 215, 107 Am. St. Rep. 711, 78 Pac. 296, 1 L. R. A., N. S., 976, 3 Ann. Cas. 1110; affirmed, 200 U. S. 527, 26 Sup. Ct. Rep. 301, 50 L. ed. 586, 4 Ann. Cas. 1174. The rule is different in Arizona, Colorado and Washington, whose constitutions provide that the question is to be determined without regard to any legislative assertion. Const. Ariz., art. ii, sec. 17; Const. Colo., art. ii, § 15; Const. Wash., art. i, § 16.

[67] Randolph on Eminent Domain, § 47; West Virginia Trans. Co. v. Volcanic C. Co., 5 W. Va. 382; Johnston v. Gas Co., 5 Cent. Rep. 564, 7 Atl. 167; Carothers v. Philadelphia Co., 118 Pa. 468, 12 Atl. 314; City of La Harpe v. Elm T. Gas, Light, Fuel & Power Co., 69 Kan. 97, 76 Pac. 448; Calor Oil & Gas Co. v. Franzell et al., Kentucky Heating Co. v. Calor Oil & Gas Co., 33 Ky. Law Rep. 98, 109 S. W. 328.

But, independently of this view, these uses are just as much public in their nature as supplying water to municipalities. Fuel and light are just as essential commodities as water, and their general distribution to the public for domestic, manufacturing, or industrial purposes is of unquestioned "public utility."

The legislatures of Arizona,[68] California,[69] Oklahoma,[70] and Utah [71] have declared "oil pipe-lines" to be a public use.

§ 256. Lateral and other railroads for transportation of mine products.—The mining interests in certain localities have been deemed sufficiently important to justify statutes enabling a mine owner to condemn rights of way from his mine to the nearest available thoroughfare, by means of what are termed "lateral railroads." But the laws authorizing the construction and maintenance of such railroads over the lands of another provide that all persons who may have occasion to do so may utilize them, thus making the use at least *quasi* public.[72]

A railroad company organized under a law making it a common carrier of passengers and freight may, of course, condemn land for its roadbed. And the fact that the road terminates at a mine, and is used for

[68] Laws 1899, p. 62; Rev. Stats. 1901, § 2445, subd. 8; Civ. Code, § 2445, subd. 5.

[69] Code Civ. Proc., § 1238; Public Utilities Act of Dec. 23, 1911, art. i, § 166; Stats. of Extra Session 1911, p. 22.

[70] Comp. Laws 1909 (Snyder), § 3328.

[71] Rev. Stats. 1898, § 3588; as amended, Laws 1901, p. 19; Comp. Laws 1907, § 3588.

[72] Randolph on Eminent Domain, § 47; Hays v. Risher, 32 Pa. 169, 176; De Camp v. Hibernia R. R. Co., 47 N. J. L. 43, 47; New Cent. C. Co. v. George's Creek C. Co., 37 Md. 537, 559; Phillips v. Watson, 63 Iowa, 28, 18 N. W. 659; Brown v. Corey, 43 Pa. 495, 503.

transporting the mined product, does not alter the public character of the use.[73]

But, in respect to the transportation of mine products, it has been held that a mine owner cannot condemn land for a railroad to be used exclusively for the product of his own mine.[74] Such use is a mere private one, to which the law of eminent domain is inapplicable.[75]

This was the rule announced as to tramways by the supreme court of Colorado, heretofore discussed;[76] also by the supreme court of Pennsylvania,[77] and the supreme court of West Virginia.[78]

§ 257. Generation of electric power as a public use. The constantly increasing importance of electric power in the various branches of industrial development of

[73] Lewis on Eminent Domain, 3d ed., § 264; Contra Costa R. R. v. Moss, 23 Cal. 323; Colorado E. Ry. Co. v. Union Pac. Ry. Co., 41 Fed. 293; Kipp v. Daly-Davis Copper Co., 41 Mont. 509, 110 Pac. 237, 21 Ann. Cas. 1372; Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27.

[74] Randolph on Eminent Domain, § 47; Stewart's Appeal, 56 Pa. 413; McCandless' Appeal, 70 Pa. 210; Sholl v. German C. Co., 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199; Alfred Phosphate Co. v. Duck River Phosphate Co., 120 Tenn. 260, 113 S. W. 410, 22 L. R. A., N. S., 701. For the application of the same principle invoked in the denial of the right of condemnation of a right of way for a railroad for the transportation of timber, see Cozard v. Kanawha Hardwood Co., 139 N. C. 283, 111 Am. St. Rep. 729, 51 S. E. 932, 1 L. R. A., N. S., 969; Apex Trans. Co. v. Garbade, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882, 62 L. R. A. 513.

[75] People v. Pittsburg R. R., 53 Cal. 694. In Greasy Creek Mineral Co. v. Ely Jellico Coal Co., 132 Ky. 692, 116 S. W. 1189, the supreme court of Kentucky sustained a statute granting the right of condemnation to any person engaged in mining for a railroad track, but principally on the ground that by the statute such road was made a common carrier.

[76] People ex rel. Aspen M. Co. v. District Court, 11 Colo. 147, 17 Pac. 298.

[77] Edgewood R. R.'s Appeal, 79 Pa. 257.

[78] Valley City S. Co. v. Brown, 7 W. Va. 191.

our time, including mining, has been the cause of bringing the question whether its generation and distribution is a public use frequently before the courts in recent years.

The decisions are practically unanimous on the proposition that it is a public use, when applied to public and private lighting and heating,[79] or as a motive power for railroad cars and trains;[80] but where the power of eminent domain has been sought to be invoked in favor of electric power plants for commercial purposes merely, or for *quasi* public, combined with commercial purposes, there is considerable divergence of judicial opinion, although it has been broadly stated "that the generation of electrical power for distribution and sale to the general public on equal terms is a public use, and property so used is devoted to a public use."[81] And in Rockingham Light & Power Co. v. Hobbs,[82] which was an action to condemn a right of way for an electric power line to operate a railway and for mechanical, commercial and business purposes, the supreme court of New Hampshire, in sus-

[79] State v. Allen, 178 Mo. 555, 77 S. W. 868; In re Niagara L. & O. Power Co., 111 App. Div. 686, 97 N. Y. Supp. 853; State v. Superior Court, 42 Wash. 666, 85 Pac. 666, 5 L. R. A., N. S., 672, 7 Ann. Cas. 748; Rockingham County L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; Lamborn v. Bell, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241; Tuolumne Water Co. v. Frederick, 13 Cal. App. 498, 110 Pac. 135.

[80] State v. Centralia-Chehalis Electric Ry., 42 Wash. 632, 85 Pac. 344, 7 L. R. A., N. S., 198; State v. Superior Court, 42 Wash. 660, 85 Pac. 666, 5 L. R. A., N. S., 672, 7 Ann. Cas. 748; Rockingham County L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A., N. S., 638, 7 Ann. Cas. 1182; Tuolumne Water Co. v. Frederick, 13 Cal. App. 498, 110 Pac. 135.

[81] Minnesota Canal & P. Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A., N. S., 638, 7 Ann. Cas. 1182.

[82] 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581.

taining the right of eminent domain, in favor of the power company, uses what seems to be most pertinent language:—

> Like water, electricity exists in nature in some form or state, and becomes useful as an agency of man's industry only when collected and controlled. It requires large capital to collect, store and distribute it for general use. The cost depends largely upon the location of a power plant. A water-power or a location upon tide water reduces the cost materially. It may happen that the business cannot be inaugurated without the aid of the power of eminent domain for the acquisition of necessary lands, or rights in land. All these considerations tend to show that the use of land for collecting, storing and distributing electricity, for the purposes of supplying power and heat to all who may desire it, is a public use, similar in character to the use of land for collecting, storing and distributing water for public needs—a use that is so manifestly public "that it has been seldom questioned and never denied."

In California, under section 1238 of the Code of Civil Procedure (subdivisions 12 and 13), which provides as follows:—

> Subject to the provisions of this title, the right of eminent domain may be exercised on behalf of the following uses: . . . .
>
> 12. Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes and outlets natural or otherwise for supplying, storing and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages or towns; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations, together with lands, buildings and all

other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

13. Electric power lines, electric heat lines, and electric light, heat and power lines.

the condemnation of a right of way for an electric power line to be used for the purpose of selling electric energy and power to the public generally was upheld in the case of Tuolumne Water Co. v. Frederick,[83] upon the ground, as stated by the first appellate district court:

> At the present day the use of electric power not only for lighting streets and private houses, but also for the purpose of moving railroad cars, street-cars, machinery for manufacturing purposes, and for use in mines and smelters has become so general that it is almost a necessity for modern civilization. The courts would not be aiding the great enterprises of the west by adopting a narrow and restricted view of the meaning of the term "public use," as used by the legislature and in our constitution.

In the case of Walker v. Shasta Power Co.,[84] the circuit court of appeals for the ninth circuit, having under consideration the same provisions of the code of California as were involved in the case of Tuolumne Water Co. v. Frederick, *supra*, decided that the supplying of the necessary public needs of the county of Shasta and other parts of California with electric power was a public use which justified the taking of a right of way for a ditch to convey water for the generation of such power, although the company has the power to, and might incidentally, serve a private purpose.

[83] 13 Cal. App. 498, 110 Pac. 135.
[84] 160 Fed. 856, 87 C. C. A. 660.

The case of Northern Light & Power Co. v. Stacher,[85] also decided by the California appellate district court, upheld condemnation proceedings directed against riparian water rights for power purposes.

Under the somewhat exceptional provisions of the constitution of the state of Colorado touching the exercise of the right of eminent domain for "reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes,"[86] the supreme court of that state, in the case of Lamborn v. Bell,[87] decided in favor of condemnation proceedings of the right of way for a ditch to convey water to furnish the necessary power for the defendant's private electric light plant.

On the other hand, the courts of Washington,[88] Maine,[89] Missouri,[90] Vermont,[91] and Virginia,[92] while to a large extent begging the question of the nature of the use, have declined to sanction the use of the right of eminent domain in favor of electric power plants for *quasi* public and commercial purposes combined, as well as for commercial purposes alone, principally because of the absence of statutory enactments making it obligatory, in express terms, upon power

[85] 13 Cal. App. 404, 109 Pac. 896.

[86] Const., art. 2, § 14.

[87] 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241.

[88] State v. White River Power Co., 39 Wash. 648, 82 Pac. 150, 2 L. R. A., N. S., 842, 4 Ann. Cas. 987; State v. Superior Court, 42 Wash. 660, 85 Pac. 666, 5 L. R. A., N. S., 672, 7 Ann. Cas. 748.

[89] Brown v. Gerald, 100 Me. 351, 109 Am. St. Rep. 526, 61 Atl. 785, 70 L. R. A. 472.

[90] Southwest Missouri Light Co. v. Scheurich, 174 Mo. 235, 73 S. W. 496.

[91] Avery v. Vermont Electric Co., 75 Vt. 235, 98 Am. St. Rep. 818, 54 Atl. 179, 59 L. R. A. 817.

[92] Fallsburgh Power Mfg. Co. v. Alexander, 101 Va. 98, 99 Am. St. Rep. 855, 43 S. E. 194, 61 L. R. A. 129.

plants established for commercial purposes, to serve the public generally, upon equal terms and conditions. Only the supreme court of Maine in the case of Brown v. Gerald,[93] while resting its decision, adverse to the power company, partly upon the ground just stated, goes further than any of the other tribunals, and practically denies the public use of the generation of electric power in any event, holding that there is not that absolute necessity which has always been held to be an essential factor in the many variant definitions of that almost indefinable term, "public use,"[94] in reference to the generation and distribution of electric current, since, as the court states, "Every man may have, if he wishes a mechanical power of his own, either steam, or water, or electric."

This extreme attitude is, however, not resorted to in any of the other adjudications on the subject; on the contrary, all of them practically admit that under proper statutory control, insuring the right to the use to the general public, the nature of the generation of electric power as a "public use" would probably have to be conceded. For, observes the supreme court of Virginia in Fallsburgh Power & Mfg. Co. v. Alexander,[95] while denying the exercise of the right of condemnation to the plaintiff, a commercial power plant, upon the ground that there was nothing in the charter of the company making it obligatory upon the company to serve the general public.

We do not mean to say, however, that under no condition can the right of eminent domain be con-

[93] 100 Me. 351, 109 Am. St. Rep. 526, 61 Atl. 785, 70 L. R. A. 472.

[94] Nash v. Clark, 27 Utah, 158, 101 Am. St. Rep. 593, 75 Pac. 371, 1 L. R. A., N. S., 208, 1 Ann. Cas. 300; Baillie v. Larson, 138 Fed. 177. See, also, Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426.

[95] 101 Va. 98, 99 Am. St. Rep. 855, 43 S. E. 194, 61 L. R. A. 129.

ferred by the legislature in furtherance of the establishment of plants for the generation of electric power or other power, light, or heat, where public necessity requires it, and the public use or benefit is apparent and safely guarded.

In conclusion, we believe we are correct in saying that all the adjudicated cases, with the possible exception of the case of Brown v. Gerald, *supra*, justify the statement that whenever the legislatures in those states, where the power of eminent domain has been denied to electric power companies, shall in express terms declare the generation and transmission of electric power to be a public use or grant the aid of condemnation in aid of it, the courts of those states will not hesitate to uphold such enactments.

And there can be no doubt that in the states of Utah, Nevada, Arizona, Colorado, Idaho and Montana, where mining is regarded as a public use, whenever the right of the exercise of eminent domain shall be invoked in favor of the generation and transmission of electric power in aid of mining operations in the courts of these states, it will unquestionably receive judicial sanction and approval.

§ 258. **The rule in Nevada, Arizona, Montana, Utah, Colorado, Idaho, and Georgia.**—In these states certain private enterprises, such as mining and irrigation, which on account of physical and industrial conditions are of the first importance to the people of the state, are regarded as public utilities, and it is held that the power of eminent domain may be invoked in their aid. The decisions announced by the courts in each of these states will be separately considered.

The state of Nevada enacted a law which provided that—

> The production and reduction of ores are of vital necessity to the people of this state; are pursuits in which all are interested, and from which all derive a benefit; so the mining, milling, smelting, or other reduction of ores are hereby declared to be for the public use, and the right of eminent domain may be exercised therefor.[96]

We have already noted the provisions of the Nevada constitution on this subject.

An action was brought under this statute to condemn a strip of land to enable the Dayton mining company to transport over it the wood, lumber, timbers, and other materials required by it in the conduct of its business of mining. The district court declined to act upon the application on the ground that the statute in question was unconstitutional and void.

A writ of mandate was applied for, to compel the district court to act, upon which application the supreme court of the state admitted that private property could not be taken for private use; that the declaration by the legislature was not conclusive upon the courts, and that the sole question to be determined was whether the use was a public one. Upon this the court, speaking through Chief Justice Hawley, said:—

> The reasons in favor of sustaining the act under consideration are certainly as strong as any that have been given in support of the mill-dam or flowage acts, as well as some of the other objects heretofore mentioned. Mining is the greatest of the industrial pursuits in this state. All other interests are subservient to it. Our mountains are almost barren of timber, and our valley lands could never be made profitable for agricultural purposes, except for the fact of a home market having been created by the mining developments in different sections of

[96] Stats. 1875, § 111; Comp. Laws 1900, §§ 283–300; amended, Laws 1907, pp. 140, 279, 289; Rev. Laws 1912, § 5606.

the state. The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills. The mines are fixed by the laws of nature, and are often found in places almost inaccessible. For the purpose of successfully conducting and carrying on the business of "mining, milling, smelting, or other reduction of ores," it is necessary to erect hoisting-works, to build mills, to construct smelting furnaces, to secure ample grounds for dumping waste rock and earth; and a road to and from the mine is always indispensable. The sites necessary for these purposes are oftentimes confined to certain fixed localities. Now, it so happens, or at least is liable to happen, that individuals, by securing a title to the barren lands adjacent to the mines, mills, or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation, which capital is always willing to give without litigation, to greatly embarrass, if not entirely defeat, the business of mining in such localities. In my opinion, the mineral wealth of this state ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining. Nature has denied to this state many of the advantages which other states possess, but, by way of compensation to her citizens, has placed at their doors the richest and most extensive silver deposits ever yet discovered. The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals.[97]

A like doctrine was affirmed by the same court in a later case, where a mine owner sought to condemn the

[97] Dayton M. Co. v. Seawell, 11 Nev. 394, 408.

land of another for the purpose of sinking a shaft thereon.[98]

The rule thus established was adhered to by the circuit court of appeals for the ninth circuit, holding that a mining company may, under the Nevada statute, condemn for use in reaching its mine an old and partially ruined tunnel in a neighboring claim which is not used by the owners of that claim, there being nothing in the record to show any present intention on the part of such owners to use it for mining purposes.[99]

The decision in the case of Dayton M. Co. v. Seawell, *supra*, presents the question of "public use," as applied to the class of state legislation under consideration, in the most favorable light for the mining industry. In its diction it is a classic; in its logic it is persuasive, considering the local conditions existing in that state.

§ 259. **Arizona.**—The supreme court of Arizona, by a parallel line of reasoning, reached the same conclusions as to the validity of the laws of that territory authorizing the condemnation of land for the purpose of a canal or ditch for irrigating purposes. Said that court:—

> May a state or territory, in view of its natural advantages and resources and necessities, legislate in such a way, exercising the power of eminent domain, that these advantages and resources may receive the fullest development for the general welfare, the laws being general in their operation? This territory is vast in extent, and rich in undeveloped natural resources. Mountains and deserts are not an inviting prospect when viewed by a stranger in transit. But

[98] Overman S. M. Co. v. Corcoran, 15 Nev. 147.

[99] Byrnes v. Douglass, 83 Fed. 45, 27 C. C. A. 399, 19 Morr. Min. Rep. 96.

the mountains abound in the precious metals, gold and silver, "the jewels of sovereignty"; and the deserts may be made to "bloom and blossom as the rose." The one great want is water. With this resource of nature made available, the mountains and the deserts may be made to yield fabulous wealth, and Arizona become the home of a vast, prosperous, and happy people. But with water in this territory "cribbed, cornered, and confined," it will continue and remain the mysterious land of arid desert plains, and barren hillsides, and bleak mountain peaks. The legislature of the territory, seeing what was apparent to all, adopted at an early day a policy—"a general and important public policy." That policy was to protect against private ownership and monopoly the one thing indispensable to the growth, development, and prosperity of the territory,—the element that would serve to uncover the gold and silver hidden in the hills and mountains, and transform the desert into a garden. . . . . The wisdom of this policy, under the physical conditions existing in the territory, must be apparent to everyone.[100]

Since this decision was rendered Arizona has been admitted into the Union and has adopted a constitution, the provisions of which on the subject of eminent domain are found in a preceding section.[1] There can be no doubt but what the principles above announced will in the future as in the past be of controlling force in that state.

§ 259a. **Montana.**—The section of the constitution of Montana [2] declaring certain uses of water to be public has been heretofore quoted.[3] The legislature enacted a law authorizing a proceeding to condemn a right of way

[100] Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376, 382.

[1] *Ante*, § 253.

[2] Art. iii, § 15.

[3] *Ante*, § 253.

over the lands of another for ditches used for irrigating purposes. Under this act a proceeding was commenced by an adjacent land owner to condemn a right of way for his irrigating ditch across the lands of another. The latter contended that the statute was unconstitutional, as authorizing the taking of private property, for private uses, and that the constitutional provision restricted the public use of water to the sale, rental, distribution, and *kindred* beneficial uses. The court refused to sustain this contention, saying:—

> We cannot agree with this construction of section fifteen, article three, of the constitution of Montana. The phrase "other beneficial use" clearly included in the term "public use" the use of water for the purpose of irrigating a particular tract of agricultural land or working a particular mine, as well as the use of water for irrigating a number of tracts of land or working a number of mines owned by different persons. In California, whose constitutional provision on the subject of the use of water, it is insisted by appellant, is substantially the same as that of Montana, a much narrower interpretation of the term "public use" has been adhered to than we can agree with. In Lorenz v. Jacob [4] the supreme court of California held that "The right of eminent domain is restricted to the taking of private property for public use. It cannot be exercised in favor of the owners of mining claims, to enable them to obtain water for their own use in working such claims, though the intention may also be to supply water to others for mining and irrigating purposes."
>
> . . . .
>
> The constitutional provision of California, however, is not the same as that of Montana on the subject of the use of water. The former does not contain the phrase "other beneficial use." But even if this phrase were not included in the Montana provision, we should not feel disposed to follow the

[4] 63 Cal. 73.

California construction. It impresses us as narrow and retrogressive. Under this language in the constitution of each state,—namely, "the appropriation of water for distribution,"—we think the courts of either state would be justified in declaring the use of water for one or two tracts of land or mines a "public use." . . . .

The public policy of the territory and the state of Montana has always been to encourage in every way the development of the minerals contained in its mountains, and the necessity for adding to its tilled acreage is manifest. This state is an arid country, and water is essential to the proper tillage of its scattered agricultural valleys. With all this in view, it was expressly declared in our state's constitution that the use of water by private individuals for the purpose of irrigating their lands should be a public use. The statute of 1891 regulating the manner in which rights of way for irrigating ditches should be acquired was enacted under the constitution in order to carry out the intention of its framers and the people who adopted it.[5]

A similar doctrine had previously been announced with reference to a lateral railroad having its terminus at a mine.[6]

In Kipp v. Davis-Daly Copper Co.[7] the doctrine of the latter case was extended to sustain the right of a private mining company to the use of the public streets of the city of Butte to build thereon a railroad by permission of and in conformity with the conditions of an ordinance of the city council for the purpose of carrying freight to and from its mine situated within the city limits. The decision, however, suggests that it is not to be taken as authority for the proposition that a

[5] Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757.

[6] Butte A. & P. Ry. Co. v. Montana Union Ry. Co., 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 298.

[7] 41 Mont. 509, 110 Pac. 237, 21 Ann. Cas. 1372.

natural person or corporation, other than a railroad company, under the existing laws of the state, would have the right to condemn a right of way for a railroad, but places the law of the case upon the grounds that under the constitution of the state of Montana [8] all railroads shall be public carriers—the same position as that taken by the supreme court of Kentucky in Greasy Creek Mineral Co. v. Ely Jellico Coal Co.[9]—and that the construction of a railroad of the character involved in the case did not impose a greater or additional servitude upon land abutting on the street, and, therefore, was not a taking or damaging of private property.

§ 259b. **Utah.**—This state follows the lead of Montana, Nevada and Arizona. The courts of Utah define a "public use" to be such as "will promote the public interest and which use tends to develop the great natural resources of the commonwealth."

In the case of Nash v. Clark,[10] this doctrine was applied in upholding the right of eminent domain in favor of condemnation proceedings to enlarge a ditch and obtain a right of way for irrigating a single farm, the court expressing its views in the following language:—

> The natural physical conditions of this state are such that in the great majority of cases the only possible way the farmer can supply his land with water is by conveying it by means of ditches across his neighbor's lands which intervene between his own and the source from which he obtains his supply. The question before us not only involves the right of the farmer to invoke the law of eminent domain, when necessary to convey water to his farm,

[8] Const., art. xv, §§ 5, 7.

[9] 132 Ky. 692, 116 S. W. 1189.

[10] 27 Utah, 158, 101 Am. St. Rep. 593, 75 Pac. 371, 1 L. R. A., N. S., 208, 1 Ann. Cas. 300.

but that of the miner, manufacturer, and persons engaged in other industrial pursuits to build canals, flumes, and lay pipe-lines over adjoining and intervening lands, when necessary for the purpose of conveying water necessary for the successful prosecution of their respective enterprises. . . . . In view of the physical and climatic conditions in this state, which shows the marvelous results accomplished by irrigation, to hold that the use of water for irrigation is not in any sense a public use, and thereby place it within the power of a few individuals to place insurmountable barriers in the way of the future welfare of the state would be giving to the term "public use" altogether too strict and narrow an interpretation, and one we do not think is contemplated by the constitution.

The court, in taking this position, appears to have been guided to a large extent by the principles laid down in the cases of Dayton Mining Co. v. Seawell,[11] and Oury v. Goodwin,[12] just discussed, and points out the similarity between the conditions existing in the state of Utah and the states of Nevada and Arizona.

The supreme court of the United States in affirming this decision,[13] speaking through Mr. Justice Peckham, say (with special reference to the weight which local conditions should have in determining what is and what is not a "public use"):—

Where the use is asserted to be public, and the right of an individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can be fairly done,

[11] 11 Nev. 394.

[12] 3 Ariz. 255, 26 Pac. 376.

[13] Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, 4 Ann. Cas. 1171.

strongly inclined to hold with the state courts, when they uphold a state statute providing for condemnation. . . . . They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the state, which in all probability would flow from a denial of its validity. These are matters which might properly be held to have a material bearing upon the question whether the individual use proposed might not in fact be a public use. It is not alone the fact that the land is arid and that it will bear crops if irrigated, or that the water is necessary for the purpose of working a mine that is material; other facts might exist which are also material, such as the particular manner in which the irrigation is carried on or proposed, or how the mining is to be done in a particular place where the water is needed for that purpose. The general situation and amount of the arid land, or of the mines themselves, might also be material, and what proportion of the water each owner should be entitled to; also the extent of the population living in the surrounding country, and whether each owner of land or mines could be, in fact, furnished with the necessary water in any other way than by condemnation in his own behalf, and not be a company, for his use and that of others.

Following in the wake of Nash v. Clark, and adopting and reaffirming its reasoning and conclusions, the supreme court of the same state, in Highland Boy Gold Min. Co. v. Strickley,[14] declared a law of Utah authorizing the exercise of the right of eminent domain in behalf of "roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines,"[14a] constitutional, and approved of con-

[14] 28 Utah, 215, 107 Am. St. Rep. 711, 78 Pac. 296, 1 L. R. A., N. S., 976, 3 Ann. Cas. 1110.

[14a] Comp. Laws 1907, § 3588.

demnation proceedings for the purpose of a tramway to transport ores from the plaintiff's mine to Bingham, and materials and supplies thence back to such mine. The decision of the state court received the sanction of the supreme court of the United States,[15] and it is to be noted that, while the judgment affirming Nash against Clark[16] was by a divided court, the decision in the Strickley case is apparently unanimous, and that the principles laid down in the former case have become firmly fixed as rules of interpretation of state legislation on matters concerning purely local conditions which furnish peculiarly cogent grounds for the enactment of laws regulating the right of eminent domain, particularly in the western states, in favor of what, under ordinary conditions, might elsewhere be considered purely private uses.[17]

§ 259c. Colorado.—We have heretofore discussed the cases of People ex rel. Aspen M. & S. Co. v. District Court[18] and Calhoun G. M. Co. v. Ajax G. M. Co.,[19] in the first of which cases it was held that a right of way for a tramway to be used by a single mining company could not be condemned, for the reason that the constitution of the state of Colorado, being the con-

[15] Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527, 26 Sup. Ct. Rep. 301, 50 L. ed. 586, 4 Ann. Cas. 1174.

[16] Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, 4 Ann. Cas. 1171.

[17] Baillie v. Larson, 138 Fed. 177; Offield v. New York, N. H. & H. R. Co., 203 U. S. 372, 27 Sup. Ct. Rep. 72, 51 L. ed. 231; Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. Rep. 289, 51 L. ed. 499; Hairston v. Danville etc. Ry. Co., 208 U. S. 598, 606, 607, 28 Sup. Ct. Rep. 331, 52 L. ed. 637, 13 Ann. Cas. 1008.

[18] 11 Colo. 147, 17 Pac. 298.

[19] 27 Colo. 1, 83 Am. St. Rep. 17, 59 Pac. 607, 50 L. R. A. 209, 20 Morr. Min. Rep. 192; affirmed 182 U. S. 499, 21 Sup. Ct. Rep. 885, 45 L. ed. 1200, 21 Morr. Min. Rep. 381.

trolling grant of legislative power in regard to the right of eminent domain, notwithstanding the provisions of section 2338, Revised Statutes, did not in terms authorize the exercise of the right of eminent domain for such purpose, and the second of which decided that an act of the legislature of the same state authorizing condemnation proceedings for a right for a mining tunnel for purposes of discovery was void, because section 2338 of Revised Statutes only provided for easements for the development of mines. Since these decisions the supreme court of Colorado has been called upon to pass upon the legality of condemnation proceedings inaugurated under an act of the legislature of Colorado granting the right of eminent domain to any corporation formed for the purpose of constructing a road, ditch, reservoir, pipe-line, bridge, ferry, tunnel, etc.[20] The court upheld the proceedings, declared that a tunnel constructed for the purpose of draining mines and transporting waste and ores from mines served a "public use," and adopted the definition of the latter term as laid down by the supreme court of Utah in Nash v. Clark,[21] and approved by the supreme court of the United States in Clark v. Nash.[22] The development of "the mineral resources of the state" are declared to be of "prime importance," and the business of mining is held to be a public use.[23] In this connection it is proper to observe that the decision of this case is not in conflict with the earlier case of Calhoun G. M.

[20] 3 Mills' Annot. Stats. (Rev. Supp.), § 616; Laws 1891, p. 98, § 3; Rev. Stats. 1908, p. 699, § 2460.

[21] 27 Utah, 158, 101 Am. St. Rep. 593, 75 Pac. 371, 1 L. R. A., N. S., 208, 1 Ann. Cas. 300.

[22] 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, 4 Ann. Cas. 1171.

[23] Tanner v. Treasury T. M. & R. Co., 35 Colo. 593, 83 Pac. 464, 4 L. R. A., N. S., 106.

Co. v. Ajax G. M. Co., *supra*, because the tunnel in the later case was to be constructed to aid the development of mines, and not for the purposes of discovery, as in the earlier case, and the right thus sought is directly within the purview and intent of section 2338, Revised Statutes.

§ 259d. **Idaho.**—The constitution of the state of Idaho [24] declares that the necessary use of land for the drainage or working of mining tunnels and otherwise is a "public use," and subject to the regulation and control of the state, and subdivision 4 of section 5210 of the Code of Civil Procedure of that state [25] provides for condemnation proceedings for tunnels and other means of working mines. In the case of Baillie v. Larson [26] the defendants based their right to run a tunnel through the mining ground of plaintiffs upon the provisions of section 2323, Revised Statutes,[27] and upon the constitution and laws of the state of Idaho just referred to. The circuit court of the United States for the ninth district, to which the cause had been removed from the state courts for determination, in sustaining the defendant's contention, decided, first, that the enactment of section 5210, providing for mining easements under which the tunnel rights claimed by the defendant might be granted, was a valid exercise of the legislative power granted to the states and territories by section 2338, Revised Statutes,[28] and, second,

[24] § 14, art. 1.

[25] Rev. Codes 1907, § 5210.

[26] 138 Fed. 177. See, also, Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426, wherein the supreme court of the state of Idaho adopts the definition of "public use" laid down in Nash v. Clark, 27 Utah, 158, 101 Am. St. Rep. 953, 25 Pac. 371, 1 L. R. A., N. S., 208, 1 Ann. Cas. 300.

[27] 17 Stats. at Large, 92; U. S. Comp. Stats. 1901, p. 1426.

[28] 14 Stats. at Large, 252; U. S. Comp. Stats. 1901, p. 1436.

that the purpose for which these tunnel rights were asserted was for a public use within the intent and meaning of these laws. That this conclusion of the court was largely influenced by the reasoning of Clark v. Nash [29] is apparent from the following language of Beatty, District Judge, who rendered the opinion of the court:—

> If the right claimed in that case [referring to the right of condemnation of water rights for the purpose of irrigating a single farm, upheld in Nash v. Clark] can be held a public use, and the statutes upon which it is based can be sustained as constitutional, no good reason can be assigned why the claim involved in this case, and the Idaho laws upon which it rests, should not also be so held and sustained. True, in that case, the "absolute necessity" of the easement to enable the party to "make any use whatever of his land" had its influence with the court. So the absolute necessity of this tunnel may be urged here. The defendants might, at great expense and inconvenience, go a long distance around through the vacant ground, if it could be found, but the same might be said of the ditch claimant. When necessity is made the basis, the degree thereof becomes an element. What the degree must be, to justify the right, can be resolved, perhaps, only by a comparison of the necessity of one with the injury to the other party. Again, to make a public use depend upon the many interested is neither a safe nor just rule. It should rather be upon some principle. The same conditions or necessities applying to the many or to an individual should be followed by like rights to each. Such seems to be the tendency of the later rulings, and only upon such principle can they be sustained. The conclusion must be, and is, that the laws of this state grant the defendants the right they claim.

[29] 198 U. S. 370, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, 4 Ann. Cas. 1171.

In this connection it is pertinent to call attention to the subsequent case of Headrick v. Larson,[30] which was a suit in equity to compel the joint use by plaintiffs with the defendants of the tunnel, the condemnation of which had been upheld in the case just discussed upon the ground that such condemnation had been for a public use, for which reason, it was claimed, the plaintiffs had a right, as a member of the public, to be let into such joint use, the doctrine of Clark v. Nash[31] being urged as authority for the proposition. The circuit court of appeals for the ninth circuit decided against such a contention, and pointed out that the doctrine of the Utah case might have applied had the plaintiffs sought to widen the tunnel to lay thereon their own tracks, but that there was neither statutory nor other authority nor reason for letting the plaintiffs into the possession and use of a tunnel constructed by the defendants at their own expense, for their own purposes and not more than sufficient for such purposes, particularly as there was no showing that the plaintiffs could not proceed to obtain a right of way for a tunnel of their own by the exercise of the right of eminent domain in their own behalf.

§ 260. **Georgia.**—The supreme court of Georgia upheld an act of the state legislature creating a private corporation and empowering it to condemn lands for the purpose of enabling it to work its mines for gold or other valuable minerals by the hydraulic process, thus stating its reasons:—

> Gold and silver is the constitutional currency of the country, and to facilitate the production of gold from the mines in which it is imbedded, for the

[30] 152 Fed. 93, 81 C. C. A. 317.

[31] 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, 4 Ann. Cas. 1171.

use of the public, is for the public good, though done through the medium of a corporation or individual enterprise. The increased production of gold from the mines of Lumpkin county by the means as provided for in the defendant's charter must necessarily be for the public good, inasmuch as it will increase for the use of the public a safe, sound constitutional circulating medium, which is of vital importance to the permanent welfare and prosperity of the people of the state of Georgia, as well as of the people of the United States.[32]

We cannot perceive upon what principle, particularly in states like Georgia, the industry of mining should be considered of "public utility" any more than the cultivation of the soil and the raising of cotton, sugar-cane, cereals, or any other product so essential to the use of mankind. While the reasoning of the court may be somewhat strained, the decision contains the germ of the modern doctrine applied in most of the western states, that whatever tends to promote the public welfare constitutes a public use.

§ 261. The rule in Pennsylvania, West Virginia, California, Oregon and Tennessee.—In these states a private enterprise such as mining is not regarded as a public utility in the sense of authorizing the exercise of the power of eminent domain in its behalf. The decisions of the respective courts on this subject will be considered in order.

An act of the legislature of Pennsylvania [33] provided for a right of way across or under rivers or other streams of this commonwealth, for the better and more convenient mining of anthracite coal. The supreme court of that state held the act to be unconstitutional

[32] Hand G. M. Co. v. Parker, 59 Ga. 419, 424.

[33] Purd. Dig., § 1967.

and void, as conferring authority to take private property for private use.[34]

In the case of Edgewood R. R. Co.'s Appeal,[35] the same court refused to permit a condemnation of land for a railroad which was a mere appurtenant to a mine, thus stating its views:—

> The commonwealth transfers to its citizens her power of eminent domain only when some existing public need is to be supplied or some present public advantage is to be gained. She does not confer it with a view to contingent results, which may or may not be produced, and may or may not justify the grant, as a projected speculation may prove successful or disastrous.

§ 262. West Virginia.—In West Virginia an act was passed providing that any person owning land having timber upon it, or containing coal, ore, or other minerals, who desires to obtain a subterranean or surface right of way by railroad or otherwise, under, through, or over land belonging to another, for the purpose of mining for such minerals, or conveying such timber or minerals to market, or for the purpose of draining any coal or mineral lands under, through, or over lands belonging to another, might institute proceedings for the condemnation of such lands for such purposes.[36]

Under this act, the Valley City Salt Company, owning some thirty acres of coal land, sought to condemn a subterranean right of way through the land of another, for the purpose of extracting and transporting its coal. The supreme court of West Virginia held that the intended use was strictly private in its nature, and that

[34] Waddell's Appeal, 84 Pa. 90.
[35] 79 Pa. 257, 269.
[36] Code W. Va., ch. xliii, §§ 44, 45.

the right of eminent domain could not be exercised for any such purpose.[37]

§ 263. **California.**—The supreme court of California has, in several instances, had under consideration a statute of that state which provides that the right of eminent domain may be exercised in behalf of certain enumerated *public* uses, including "tunnels, ditches, flumes, pipes, and dumping-places for working mines; also, outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from the mines." [38]

In the case of the Consolidated Channel Co. v. C. P. R. R. Co.[39] the attempt was made by the plaintiff, as the owner of a gold mine, to condemn a right of way for the purpose of constructing a ditch and flume to carry off the tailings from the mine.

> It is clear [said the court] that the object sought is the appropriation of the private property of the defendants to the private use of plaintiff. The proposed flume is to be constructed solely for the purpose of advantageously and profitably washing and mining plaintiff's mining ground. It is not even pretended that any person other than the plaintiff will derive any benefit whatever from the structure when completed. No public use can possibly be subserved by it. It is a private enterprise, to be conducted solely for the personal profit of the plaintiff, and in which the community at large have no concern. It is clear that this case does not come within the meaning of that clause of the constitution which permits the taking of private property for a public use. . . . . It would be difficult to suppose a case more completely within the exception stated, and in which the absence of all possible public interest in

[37] Valley City Salt Co. v. Brown, 7 W. Va. 191.

[38] Code Civ. Proc., § 1238, subd. 5.

[39] 51 Cal. 269.

the purposes for which the land is sought to be condemned is more clear and palpable, than in the case at bar.

In Lorenz v. Jacob,[40] the same court held that the right of eminent domain could not be exercised in favor of the owners of mining claims, to enable them to obtain water for their own use in working such claims, though the intention may also be to supply water to others for mining and irrigating purposes.

In the case of Amador Queen M. Co. v. Dewitt,[41] the plaintiff undertook to condemn the right of way through defendant's ground, for the purpose of a tunnel to enable plaintiff to extract ore from its mine and transport it to its mill, defendant's land intervening between plaintiff's mine and its mill. The federal statute was invoked, as in the Colorado case of People ex rel. Aspen M. & S. Co. v. District Court (*supra*). But the court held that the language of the Revised Statutes of the United States contained no reservation of such right in favor of plaintiff,[42] that the mine of defendant was his private property, the use for which it was sought to be condemned was a private use, and the proceeding could not be maintained. In Sutter County v. Nicols[43] a judgment of the trial court awarding a permanent injunction against a hydraulic miner who, in carrying on his operations, dumped the debris and tailings into the Feather and Bear rivers, causing them to overflow on the lands of the plaintiff, was sustained by the supreme court. The defendant sought to maintain the right to operate his mine in the manner complained of by virtue of a permit from the

[40] 63 Cal. 73.

[41] 73 Cal. 482, 15 Pac. 74.

[42] Cited approvingly in Cone v. Roxana G. M. Co., U. S. C. C., Dist. of Colo., 2 Leg. Adv. 350.

[43] 152 Cal. 688, 93 Pac. 872, 15 L. R. A., N. S., 616, 14 Ann. Cas. 900.

California debris commission, granted him by authority of the act of congress of March 1, 1893,[44] authorizing him to carry on his mining operations in the manner directed and specified by the order granting such permit, and claiming that such order was in the nature of a judicial adjudication of his right to mine in the manner provided for in such permit, irrespective of the rights of other parties, and that they were concluded from interfering with him as long as he carried on his operations in conformity with such order and the requirements and specifications fixed therein by the commission. The supreme court, through Justice Shaw, demolished this contention by pointing out that "the business of mining for the benefit of the mine owner is as much a private affair as that of the farm or the factory, and the right of eminent domain cannot be invoked in aid of it" (citing the several cases referred to in this paragraph), and that for that reason, in so far as it was claimed that the permit of the California debris commission authorized the carrying on of hydraulic mining to the detriment of third parties, as was found to be the fact in this case, it was in the nature of an unlawful attempt to exercise the right of eminent domain for a purely private use.

§ 263a. **Oregon.**—The legislature of Oregon enacted a law [45] authorizing any corporation organized for the purpose of transporting timber, lumber, or cordwood to condemn rights of way for railroads, skid roads, tramways, chutes, and flumes which "shall be deemed to be for the public benefit, ... and shall afford to all persons equal facilities in the use thereof for the pur-

[44] 27 Stats. at Large, 507, ch. 183; 3 U. S. Comp. Stats. 1901, p. 3553; (Supp.) Rev. Stats., vol. 2, p. 97.

[45] Laws 1895, p. 5; Lord's Or. Laws, § 6857.

poses to which they are adapted, upon payment or tender of reasonable compensation for such use." The Apex Transportation Company sought, under this act, to condemn a right of way over the land of the defendant for a skid road. But the supreme court of Oregon held that the use for which condemnation was sought was private, and, consequently, that the act was unconstitutional.[46]

§ 263b. **Tennessee.**—In the case of Alfred Phosphate Co. v. Duck River Phosphate Co.[47] the supreme court of the state of Tennessee declared a statute of that state [48] which granted to mining and manufacturing companies the power to condemn rights of way for a railroad unconstitutional. The contention arose over the legality of condemnation proceedings sought to be maintained by the plaintiff to obtain a right of way over a part of the defendant's private railroad line to enable it to transport its mine product to the nearest point on a main line railroad. The proceedings were declared to be in aid of a private and not a public use, and the court, in disposing of the point, said:—

> The right of way sought to be condemned in the present case is necessarily for the exclusive use of the Alfred Phosphate Company. This company is not a common carrier, and is in no sense a public service corporation. The line of railroad would extend from the mines of petitioner to the junction of the N. C. & St. L. Railway, and the only tonnage that would pass over this road would be the private traffic of the petitioner. It is argued, however, that such a railroad would provide an outlet for the products of other phosphate companies situated in that vicin-

[46] Apex Trans. Co. v. Garbade, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882, 62 L. R. A. 513.

[47] 120 Tenn. 260, 113 S. W. 410, 22 L. R. A., N. S., 701.

[48] § 11, ch. 142, Acts 1875, p. 247.

ity. But the fact that such a railroad might benefit a limited class would not clothe it about with the character of a public use.

§ 264. Conclusions.[49]—While in states surrounded by such physical and industrial conditions as exist in Nevada, Colorado, Idaho, Utah and Arizona, and probably Montana, judicial discretion may, with some show of reason, be exercised in favor of the rule that mining in the hands of individuals is a "public use," yet such a rule in some of the states, probably in most of them, would be against the logic of the law and the weight of authority, as expressed in the opinions of the courts in those states.[50]

We may appropriately close this discussion by quoting from the opinions of two distinguished courts as to what constitutes a public use:—

> No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words "public use," as found in the different state constitutions regulating the right of eminent domain. The reasoning is in many of the cases as unsatisfactory as the results have been uncertain. The beaten path of precedent, to which courts when in doubt seek refuge, here furnishes no safe guide to lead us through the long lane of uncertainty to the open highway of public justice and of right. The authorities are so diverse and conflicting that, no matter which road the court may take, it will be sustained, and opposed, by about an equal number of the decided cases. In this dilemma, the meaning must, in every case, be determined by the

[49] In the state of New York mining is a "public utility," for the reason that the ownership of the precious metals is in the state by virtue of its sovereignty, and the fundamental theory is analogous to the doctrine of the civil law. See *ante*, §§ 11, 19.

[50] Clark v. Nash, 198 U. S. 361, 367, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, 4 Ann. Cas. 1171.

common sense of each individual judge who has the power of deciding it.[51]

What, then, constitutes a public use, as distinguished from a private use? The most extended research will not likely result in the discovery of any rule or set of rules or principles of certain and unusual application by which this question can be determined in all cases. Eminent jurists and distinguished writers upon public law do not express concurrent or uniform views upon this subject. It is a question, from its very nature, of great practical, perhaps of insuperable, difficulty, to determine the degree of necessity or the extent of public use which justifies the exercise of this extraordinary power upon the part of a state, by which the citizen, without his will, is deprived of his property.[52]

It is manifest, however, that there is a marked tendency, evolutionary in its nature, to break away from the old rigid rules on the subject of "public use" and to enlarge the definition of the term, so as to make it synonymous with "public welfare." This tendency is no doubt influenced to some extent by the growth and spread of sociological ideas which seek to influence the construction of constitutions and statutes in the interest of the group instead of the individual, and to authorize the condemnation of private property for any use which stimulates or encourages the development of the natural resources of the country. As to what uses will accomplish this purpose, each state must determine for itself. As there exists marked differences in environment and economic conditions, it is hardly likely that uniform decisions in all the states will ever be reached. But the test of "public welfare," instead of the old doctrine of "public use," is being gradually extended, with the promise of its becoming the prevailing doctrine in most jurisdictions.

[51] Dayton G. & S. M. Co. v. Seawell, 11 Nev. 394, 400.

[52] Valley City Salt Co. v. Brown, 7 W. Va. 191, 195.

CHAPTER II.

LOCAL DISTRICT REGULATIONS.

§ 268. **Introductory.**—In the beginning the miners made the laws governing the mining industry, unhampered by congressional or state legislation. In their district assemblages they adopted regulations which covered most of the exigencies of the situation, and frequently much more. They amended, altered and repealed their rules at will, as changed conditions suggested the necessity, propriety or convenience. Some of these regulations were wise, and others were not so wise. That these early prospectors were pioneers of extreme western civilization in America, and assisted in laying the foundation of great states, is undoubted. For this they deserve, and have received, full meed of praise. But that they originated a system which is deserving of perpetuation for all time is open to serious question. We doubt whether there is any reason at the present time for permitting local district regulations of any character. If congress will not remodel the national mining laws in such a way as to prohibit legislation by local assemblages, the several states and territories should so cover the ground as to render mining districts as law-making factors not only un-

necessary—for that they usually are—but impossible. In a previous chapter,[1] we have traced the origin and noted the general character of district rules and miners' customs during the period when they constituted the American common law of mines. The change in governmental policy wrought by the act of July 26, 1866, and the subsequent legislation crystallizing into the existing system, have circumscribed the limits within which such rules and customs may have controlling force, and they now constitute but a small part in the scheme of mining jurisprudence. When we further consider that in most, if not all, of the precious metal bearing states the legislatures have enacted mining codes of more or less comprehensive nature, leaving but little to be regulated by district rules, we are forced to recognize the fact that the tendency is toward the absolute elimination of miners' regulations and customs as elements controlling mining rights. Nevertheless, in some states legislation is meager, and the subjects with which district organizations may deal are limited only by the laws of congress. In all of the states some vestige of power still resides in these local mining communities. Local rules may still be adopted, if they do not contravene congressional or state legislation.[2]

It therefore becomes necessary to deal with them to a limited extent, to consider the field in which they may legitimately be made operative, the manner of

[1] Tit. II, ch. iii, §§ 40–46.

[2] Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. Rep. 560, 28 L. ed 1113, 15 Morr. Min. Rep. 472; Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. Rep. 301, 27 L. ed. 990; Rosenthal v. Ives, 2 Idaho, 244 (265), 12 Pac. 904, 15 Morr. Min. Rep. 324; Dutch Flat W. Co. v. Mooney, 12 Cal. 534; Flaherty v. Gwinn, 1 Dak. 509; Wolfley v. Lebanon M. Co., 4 Colo. 112; In re Monk, 16 Utah, 100, 50 Pac. 810; Penn v. Oldhauber, 24 Mont. 287, 61 Pac. 649.

their adoption, the manner of proving their existence, and the rules of construction to be applied to them.

§ 269. Manner of organizing districts.—With the exception of the state of Wyoming,[3] no attempt has ever been made to prescribe the manner of creating mining districts. They generally come into existence without much formality. Any new discovery attracts prospectors. Usually the advance-guard is limited in number; but however few, they are sufficient to organize full-fledged districts, and equip them with "rules and regulations" on short notice. The geographical limits are defined, a recorder is elected, and the district is ready for business. When the first or any subsequent set of rules requires amendment, modification or abrogation, the miners convene at some appointed place, usually upon notice posted, and thus the legislative machinery is set in motion. As we shall see later, the courts do not closely scrutinize methods by which these rules are adopted. This was the primitive way, and for a time served a useful purpose, simply because the necessities of the case demanded and justified it.

Judge W. H. Beatty gives some very excellent reasons for the total abolition of the system:—

> In districts [said that distinguished jurist] 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

[3] Laws 1888, p. 83; Rev. Stats. 1899, §§ 2533, 2534; Comp. Stats. 1910, §§ 3454, 3455.

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.[4]

§ 270. Permissive scope of local regulations.—As to the subjects concerning which district organizations may prescribe rules, or which in any way may be controlled by local customs in the absence of state legislation, Judge W. H. Beatty, then chief justice of the supreme court of Nevada, now chief justice of the supreme court of California, in his testimony given before the public land commission,[5] gave it as his opinion that under the existing laws of congress the miners *may*, in the absence of state legislation,—

First—Restrict themselves to smaller claims than the maximum allowed by acts of congress;

Second—Require claims to be more thoroughly marked than would be absolutely necessary to satisfy the terms of the statutes;

[4] Report of Public Land Commission, § 398.

[5] Id., § 397.

Third—Require more work than the statutes require;

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

This is in consonance with section twenty-three hundred and twenty-four of the Revised Statutes.

As to the first three points, said the judge, it may be safely assumed that no such regulations will be adopted in any district hereafter organized. As to the fourth, under existing legislation, local rules are worse than useless. The monuments on the ground do well and completely what the notice and record do only imperfectly and in part.

But the facts remain that miners may make rules, and that they do organize districts, perhaps as a matter of precedent and habit, and with vague notions as to the legitimate scope within which they may act. Much of the adjudicated law upon this subject is now obsolete, and a critical review of the decisions applicable to the primitive conditions is neither necessary nor justifiable. A few illustrations as to what local districts might *not* do may not be out of place.

It was always exacted that a local rule should be reasonable.[6]

A local mining custom or regulation adopted after the location of a claim could not be given in evidence to limit the extent of a claim previously located.[7]

But where changes were made in local rules with reference to amount of work to be done to perpetuate rights, or providing methods by which such work was condoned, prior locators were called upon to comply

[6] King v. Edwards, 1 Mont. 235; Flaherty v. Gwinn, 1 Dak. 509; Penn v. Oldhauber, 24 Mont. 287, 61 Pac. 649.

[7] Table Mountain T. Co. v. Stranahan, 31 Cal. 387; Roach v. Gray, 16 Cal. 383.

with the new regulations as a condition to the continuance of their rights.[8]

A local custom fixing twenty days' work as equivalent to the amount required for annual assessment work was held void.[9]

Rights held and sanctioned by general laws could not be divested by mere local rules and neighborhood customs.[10] Nor could rules and customs authorize acts amounting to a public nuisance.[11]

Prior to 1860, in California and Nevada, a written instrument was not required to transfer a mining claim, and during that period evidence of local customs permitting such transfer by parol, accompanied by delivery of possession, was admissible.[12] But since that date conveyances in writing are necessary throughout the mining regions.[13]

Perfected mining locations are now considered as property in the highest sense of the term, and the rules applicable to other real estate govern their transfer. An agreement not in writing to convey an unpatented

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

[9] Penn v. Oldhauber, 24 Mont. 287, 61 Pac. 649.

[10] Waring v. Crow, 11 Cal. 367, 372; Dutch Flat W. Co. v. Mooney, 12 Cal. 534.

[11] Woodruff v. North Bloomfield M. Co., 9 Saw. 441, 18 Fed. 753.

[12] Jackson v. Feather River W. Co., 14 Cal. 19; Table Mountain T. Co. v. Stranahan, 20 Cal. 199; Gatewood v. McLaughlin, 23 Cal. 178; Patterson v. Keystone M. Co., 23 Cal. 575, 30 Cal. 360; Antoine Co. v. Ridge Co., 23 Cal. 219, 222; Hardenbergh v. Bacon, 33 Cal. 356, 381; Goller v. Fett, 30 Cal. 481; Felger v. Coward, 35 Cal. 652; Gore v. McBrayer, 18 Cal. 582; King v. Randlett, 33 Cal. 318; Kinney v. Con. Virginia M. Co., 4 Saw. 382, 452, Fed. Cas. No. 7827; Union S. M. Co. v. Taylor, 100 U. S. 37, 25 L. ed. 541, 5 Morr. Min. Rep. 323; Lockhardt v. Rollins, 2 Idaho, 503, 540, 21 Pac. 413, 16 Morr. Min. Rep. 16.

[13] Garthe v. Hart, 73 Cal. 541, 15 Pac. 93, 15 Morr. Min. Rep. 492; Moore v. Hamerstag, 109 Cal. 122, 41 Pac. 805, 18 Morr. Min. Rep. 256; Hopkins v. Noyes, 4 Mont. 550, 2 Pac. 280, 15 Morr. Min. Rep. 287.

mining claim cannot be enforced.[14] One exception to this rule prevails, to wit: "grub-stake" contracts need not be in writing,[15] unless specifically required by the state laws. Neither a transfer nor its recordation is now subject to regulation by local customs.

Where a state has passed laws on any given subject within the privilege granted by the federal laws, to that extent, at least, the districts are powerless.[16] Where a state, by its general law, has only partially exercised its privilege of supplemental legislation, district regulations may, in turn, supplement such legislation within the field not covered by state laws, if within the sanction of the federal laws.

§ 271. Acquiescence and observance, not mere adoption, the test.—As heretofore observed, it is not necessary that any rules or regulations should be adopted. Compliance with the federal law and state legislation, if any, is sufficient.[17] But when adopted, and acquiesced in, if not in conflict with federal or state legislation, they have the force of positive law,[18] and substantial compliance with them is essential to a perfect mining title.[19]

[14] Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943, 19 Morr. Min. Rep. 556.

[15] See *post*, § 858.

[16] In re Monk, 16 Utah, 100, 50 Pac. 810.

[17] Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312.

[18] Mallett v. Uncle Sam M. Co., 1 Nev. 200, 90 Am. Dec. 484; Gropper v. King, 4 Mont. 367, 1 Pac. 755; Rush v. French, 1 Ariz. 99, 25 Pac. 816; Gird v. California Oil Co., 60 Fed. 531, 535, 18 Morr. Min. Rep. 45; McCormick v. Varnes, 2 Utah, 355.

[19] Gleeson v. Martin White M. Co., 13 Nev. 443; Becker v. Pugh, 17 Colo. 243, 29 Pac. 173; King v. Edwards, 1 Mont. 235; Sullivan v. Hense, 2 Colo. 424; Donahue v. Meister, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096.

As a rule, courts will not inquire into the regularity of the modes by which miners adopt their local rules, unless fraud or some other like cause be shown. It is enough that they agree upon their laws, and that they are recognized as the rules.[20]

Local regulations do not acquire operative force by mere adoption, but from customary obedience and acquiescence of the miners following the enactment;[21] and they become void whenever they fall into disuse or are generally disregarded.[22]

A custom to be binding ought to be so well known, understood, and recognized in the district that locators should have no reasonable ground for doubt as to what is required.[23]

§ 272. Regulations, how proved—Their existence a question of fact for the jury; their construction a question of law for the court.—Judicial notice cannot be taken of the rules, usages, and customs of a mining district, and they should be proved at the trial, like any other fact, by the best evidence that can be obtained respecting them.[24] If one desires to attack the validity of another's location upon the ground that local rules and regulations were not complied with by the locators, he must show what such rules and regulations

[20] Gore v. McBrayer, 18 Cal. 583, 589.

[21] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 307, 1 Fed. 522, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 106, 11 Fed. 666, 4 Morr. Min. Rep. 411; Harvey v. Ryan, 42 Cal. 626.

[22] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 307, 1 Fed. 522, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 106, 11 Fed. 666, 4 Morr. Min. Rep. 411.

[23] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 106, 111, 11 Fed. 666, 4 Morr. Min. Rep. 411.

[24] Sullivan v. Hense, 2 Colo. 424; Meydenbauer v. Stevens, 78 Fed. 787, 18 Morr. Min. Rep. 578.

were.[25] The record books of the district into which written rules are transcribed are, of course, the best evidence as to such rules, and if lost or destroyed. secondary evidence is admissible.[26] But this record will not prove itself. It must be produced by the proper officer, and its authenticity as such established.[27]

Where copies of district rules are sought to be introduced in evidence, it is necessary that it should appear that they come from the proper repository, and that such custodian was empowered to give certified copies, and that such were copies of the laws prevailing and in force in the district.[28]

All of the written rules making up the body of the local law constitute one entire instrument; and it is necessary to a fair understanding of any one part that the whole should be inspected.[29]

Parol evidence of a mining custom cannot be given when there are written rules or regulations of the mining district in force on the same subject.[30] But if the proof renders it doubtful as to whether or not the written rules are in force, both the written laws and parol evidence of the mining customs may be offered in evidence.[31]

The existence of a custom relating to a subject not covered by the written laws, such as posting a notice

25 Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633; Dutch Flat Water Co. v. Mooney, 12 Cal. 534. See Glacier etc. M. Co. v. Willis, 127 U. S. 482, 8 Sup. Ct. Rep. 1214, 32 L. ed. 172, 17 Morr. Min. Rep. 127; Hughes v. Ochsner, 26 L. D. 540.

26 Sullivan v. Hense, 2 Colo. 425; Campbell v. Rankin, 99 U. S. 261, 25 L. ed. 435, 12 Morr. Min. Rep. 257.

27 Roberts v. Wilson, 1 Utah, 292.

28 Harvey v. Ryan, 42 Cal. 626; Roberts v. Wilson, 1 Utah, 292.

29 English v. Johnson, 17 Cal. 108, 119, 76 Am. Dec. 574; Roberts v. Wilson, 1 Utah, 292.

30 Ralston v. Plowman, 1 Idaho, 595.

31 Colman v. Clements, 23 Cal. 245.

on a claim, as an act indicating appropriation, may, of course, be shown.[32]

Rules and regulations once proved to have been adopted and acquiesced in, a presumption arises that they continue in force until something appears showing that they have been repealed or have fallen into disuse, and another practice has been generally adopted and acquiesced in.[33]

The mere violation of a rule by a few persons only would not abrogate it, if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused.[34] Such fact may be proved by a series of circumstances and conditions in the district.[35]

The existence of mining customs may be proved, however recent the date or short the duration of their establishment. The common-law doctrine as to customs in such cases does not govern.[36]

Whether a given rule or custom is in force at any given time is a question of fact to be determined by the jury.[37] But the court must construe the rule;[38] and it

[32] Harvey v. Ryan, 42 Cal. 626.

[33] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 308, 1 Fed. 522, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 107, 11 Fed. 666, 4 Morr. Min. Rep. 411; Riborado v. Quang Pang Co., 2 Idaho, 131, 144, 6 Pac. 125.

[34] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 308, 1 Fed. 522, 9 Morr. Min. Rep. 529.

[35] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 112, 11 Fed. 666, 4 Morr. Min. Rep. 411; Flaherty v. Gwinn, 1 Dak. 509, 12 Morr. Min. Rep. 605.

[36] Smith v. North American M. Co., 1 Nev. 357, 359.

[37] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 307, 1 Fed. 522, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 112, 11 Fed. 666, 4 Morr. Min. Rep. 411; King v. Edwards, 1 Mont. 235; Poujade v. Ryan, 21 Nev. 449, 33 Pac. 659; Golden Fleece v. Cable Cons. M. Co., 12 Nev. 312; Sullivan v. Hense, 2 Colo. 424; Harvey v. Ryan, 42 Cal. 626.

[38] Fairbanks v. Woodhouse, 6 Cal. 435; Ralston v. Plowman, 1 Idaho, 595.

shall be so construed as to harmonize with the entire body of the mining law,[39] including all other rules in force in the district.[40]

There is no distinction between the effect of a "custom" or usage, the proof of which must rest in parol, and a "regulation," which may be adopted at a miners' meeting, and embodied in a written local law.[41]

Some of the courts have held that a discoverer has a reasonable time to perfect his location after discovery, in the absence of a state statute or local rule fixing the time.[42] In such cases, it is said, the court may consider evidence of a general custom upon this subject prevalent in different sections of the mining regions as to what constitutes a reasonable time, following the principle announced in early days as to what was a reasonable extent of ground embraced in a mining location, in the absence of any local rule fixing it.[43]

§ 273. Regulations concerning records of mining claims.—The mining laws of congress do not require any notice or certificate of location to be recorded, although the provisions of the federal statute are framed upon the implication that recordation will be required by either local rule or state legislation.[43a] In the absence of some state or territorial law, or local rule or custom, providing for such record, it is unneces-

39 Leet v. John Dare M. Co., 6 Nev. 218.

40 English v. Johnson, 17 Cal. 108, 119, 76 Am. Dec. 574; Roberts v. Wilson, 1 Utah, 292.

41 Harvey v. Ryan, 42 Cal. 626, 628; North Noonday M. Co. v. Orient M. Co. 6 Saw. 299, 307, 1 Fed. 522, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 106, 11 Fed. 666, 4 Morr. Min. Rep. 411; Doe v. Waterloo M. Co., 70 Fed. 455, 459, 17 C. C. A. 190, 18 Morr. Min. Rep. 265; Flaherty v. Gwinn, 1 Dak. 509, 12 Morr. Min. Rep. 605.

42 Doe v. Waterloo M. Co., 70 Fed. 455, 17 C. C. A. 190, 18 Morr. Min. Rep. 265; Gleeson v. Martin White M. Co., 13 Nev. 443; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312, 329.

43 Table Mountain T. Co. v. Stranahan, 20 Cal. 199.

43a Zerres v. Vanina, 134 Fed. 610, 617.

sary,[44] and proof of recording, without some regulation or custom requiring it, is irrelevant and inadmissible.[45]

If a notice is required, by either state law or local rules, to be recorded, it must contain all the requisites prescribed by section twenty-three hundred and twenty-four of the Revised Statutes.[46]

[44] Haws v. Victoria Copper Co., 160 U. S. 303, 16 Sup. Ct. Rep. 282, 40 L. ed. 436; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 311, 1 Fed. 522, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 111, 114, 11 Fed. 666, 4 Morr. Min. Rep. 411; Southern Cross M. Co. v. Europa M. Co., 15 Nev. 383; Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 16 Morr. Min. Rep. 26; Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401, 15 Morr. Min. Rep. 602; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182; Souter v. Maguire, 78 Cal. 543, 21 Pac. 183; Freezer v. Sweeney, 8 Mont. 508, 21 Pac. 20, 17 Morr. Min. Rep. 179; Carter v. Bacigalupi, 83 Cal. 187, 23 Pac. 261; Fuller v. Harris, 29 Fed. 814; Allen v. Dunlap, 24 Or. 229, 33 Pac. 675; Gird v. California Oil Co., 60 Fed. 531, 18 Morr. Min. Rep. 45; Moore v. Hamerstag, 109 Cal. 122, 41 Pac. 805, 18 Morr. Min. Rep. 256; Meydenbauer v. Stevens, 78 Fed. 787, 792, 18 Morr. Min. Rep. 578; Smith v. Newell, 86 Fed. 56; Perigo v. Erwin, 85 Fed. 904, 19 Morr. Min. Rep. 269; Magruder v. Oregon & California R. R. Co., 28 L. D. 174; Kern County v. Lee, 129 Cal. 361, 61 Pac. 1124; Conway v. Hart, 129 Cal. 480, 62 Pac. 44, 21 Morr. Min. Rep. 20; Dwinnell v. Dyer, 145 Cal. 12, 78 Pac. 247, 7 L. R. A., N. S., 763; Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931; Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223; Daggett v. Yreka M. & M. Co., 149 Cal. 357, 86 Pac. 968; Ford v. Campbell, 29 Nev. 578, 92 Pac. 206; Peters v. Tonopah M. Co., 120 Fed. 587, 589; Walton v. Wild Goose M. & T. Co., 123 Fed. 209, 60 C. C. A. 155, 22 Morr. Min. Rep. 688; Zerres v. Vanina, 134 Fed. 610, 617; S. C., in error, 150 Fed. 564, 80 C. C. A. 366; Sturtevant v. Voger, 167 Fed. 448, 93 C. C. A. 84; McCleary v. Braddus, 14 Cal. App. 60, 111 Pac. 125; Saxton v. Perry, 47 Colo. 263, 107 Pac. 281; Indiana Nevada M. Co. v. Gold Hills M. & M. Co. (Nev.), 126 Pac. 965, 967.

[45] Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312.

[46] Hammer v. Garfield M. & M. Co., 130 U. S. 291, 9 Sup. Ct. Rep. 548, 32 L. ed. 964, 16 Morr. Min. Rep. 125; Gleeson v. Martin White M. Co., 13 Nev. 443; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 312, 1 Fed. 522, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 112, 11 Fed. 666, 4 Morr. Min. Rep. 411; Poujade v. Ryan, 21 Nev. 449, 33 Pac. 659; Meydenbauer v. Stevens, 78 Fed. 787, 792, 18 Morr. Min. Rep. 578; Smith v. Newell, 86 Fed. 56; Conway v. Hart, 129 Cal. 480, 62 Pac. 44, 21 Morr. Min. Rep. 20.

In some states district recorders have been required to turn over their records to the county recorder. Such legislation is valid.[47]

The popular understanding of the requirements of the mining law is, that notices of location should be recorded somewhere. This led to an almost universal custom, in states where there were no laws or regulations on the subject, of recording all such notices in the county recorder's office of the several counties. Where provisions for recording are found only in local rules, the county recorder may not be required to so record. If he does, his act is not that of a county recorder elected by the people, but as a person selected by the miners to do an act not provided for by the recording laws of the state.[48] The county recorder's books, showing records of such claims in any considerable number, are competent evidence, as tending to establish such custom and its general observance.[49] But such custom, to be binding, ought to be so well known, understood, and recognized in the district, that locators should have no reasonable ground for doubt as to what was required as to the place of record.[50] When such a custom has been generally followed and acquiesced in, it gives the record validity and entitles it, or certified copies of it, to be introduced in evidence; but in most states a failure to record would not work a forfeiture of the claim, or make it subject to relocation, unless the custom or rule so pro-

[47] In re Monk, 16 Utah, 100, 50 Pac. 810.

[48] San Bernardino County v. Davidson, 112 Cal. 503, 44 Pac. 659. See the later case of County of Kern v. Lee, 129 Cal. 361, 61 Pac. 1124.

[49] Pralus v. Pacific G. & S. M. Co., 35 Cal. 30.

[50] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 111, 11 Fed. 666, 4 Morr. Min. Rep. 411.

vided. There is, however, some dissent from this rule, as will be noted later.[51]

Where such custom has become recognized and generally observed, the records of the county recorder, besides tending to establish a regulation sanctioning the recording of mining claims, also furnish evidence of a persuasive character, tending to show in many instances that local written regulations at one time formally adopted, and never formally repealed, have fallen into disuse. Instances of this character are found in several of the mining counties of California, and undoubtedly elsewhere. Prior to the passage of the act of May 10, 1872, written regulations adopted at a miners' meeting limited the width of lode claims to one hundred feet on each side of the lode, and provided for recording with a district recorder. After the passage of this act, it seems that, almost uniformly, location notices were recorded with the county recorder; and from such records it appeared that the new locations invariably claimed the statutory limit of three hundred feet on each side of the center of the vein. There can be no doubt that these records should be considered as competent evidence tending to establish the fact that the local rules had become obsolete, and were no longer of controlling force. A discussion of the method of proving local rules and customs concerning the location and recording of claims will be found in a preceding section.[52]

§ 274. Penalty for noncompliance with district rules.—While it has been frequently said that a forfeiture may be worked for failure to comply with

[51] See *post*, § 274.

[52] *Ante*, § 272. See, also, McCann v. McMillan, 129 Cal. 350, 62 Pac. 31, 21 Morr. Min. Rep. 6.

local rules,[53] the supreme court of California at an early date announced the doctrine that—

> The failure to comply with any one of the mining rules and regulations of the camp is not a forfeiture of title. It would be enough to hold the forfeiture as a result of the noncompliance with such of them as make a noncompliance a cause of forfeiture.[54]

This doctrine was acquiesced in, in a later case, decided by the same court,[55] and reaffirmed at a still later date by the same tribunal, in the following terms:—

> The objection taken to this instruction is, that it directs the jury to find for the defendants, if they find from the evidence that the plaintiff had failed to comply with certain regulations, without accompanying the same with a further charge as to whether these rules and regulations declared a forfeiture as the result of such noncompliance. The failure of a party to comply with a mining rule or regulation cannot work a forfeiture, unless the rule itself so provides. There may be rules and regulations which do not provide that a failure to comply with their provisions shall work a forfeiture. If so, a failure will not work a forfeiture; hence, in charging the jury upon a question of forfeiture, the charge should be narrowed to such rules as expressly provide that a noncompliance with their provisions shall be cause of forfeiture.[56]

This is now the settled rule in California.[57]

[53] Mallett v. Uncle Sam M. Co., 1 Nev. 203, 90 Am. Dec. 484; Oreamuno v. Uncle Sam M. Co., 1 Nev. 179; St. John v. Kidd, 26 Cal. 264; Depuy v. Williams, 26 Cal. 310; Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153.

[54] McGarrity v. Byington, 12 Cal. 427.

[55] English v. Johnson, 17 Cal. 108, 117, 76 Am. Dec. 574.

[56] Bell v. Bed Rock H. & M. Co., 36 Cal. 214.

[57] Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036, 21 Morr. Min. Rep. 470.

The rule announced by the California court was accepted by the supreme court of Arizona,[58] and by the late Judge Sawyer, circuit judge of the ninth circuit.[59]

In Nevada the early decisions seem to be opposed to this rule.[59a] And at one time the supreme court of that state expressed the view unequivocally that failure to comply with the laws and rules worked a forfeiture, whether the laws and rules so provide or not.[59b] At a more recent date, however, that court, as well as the federal court in that district, adopted a rule in harmony with that of California and Arizona.[59c]

The supreme court of Montana, however, while conceding that the decisions in California generally deserve great weight upon the subject of mining, expresses the opinion that upon this particular point they are far from satisfactory, and declines to follow them.[60]

Oregon follows the earlier Nevada rule, although it has a statute on the subject which obviates the necessity of relying on the rule.[61] The supreme court of the United States notes this conflict between the state de-

[58] Johnson v. McLaughlin, 1 Ariz. 493, 4 Pac. 130, 132; Rush v. French, 1 Ariz. 99, 25 Pac. 816.

[59] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 117, 11 Fed. 666, 4 Morr Min. Rep. 411. See, also, Flaherty v. Gwinn, 1 Dak. 509, 511, 12 Morr. Min. Rep. 605.

[59a] Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188, 90 Am. Dec. 484; Oreamuno v. Uncle Sam M. Co., 1 Nev. 215.

[59b] Sisson v. Sommers, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829.

[59c] Ford v. Campbell, 29 Nev. 578, 92 Pac. 206, 208; Gibson v. Hjul, 32 Nev. 360, 108 Pac. 759, 762; Zerres v. Vanina, 134 Fed. 610, 617; Wailes v. Davies, 158 Fed. 667, 668; Sturtevant v. Vogel, 167 Fed. 448, 451, 93 C. C. A. 84; Indiana Nevada M. Co. v. Gold Hills M. & M. Co. (Nev.), 126 Pac. 965, 967.

[60] King v. Edwards, 1 Mont. 235, 241. See Purdum v. Laddin, 23 Mont. 387, 59 Pac. 153.

[61] Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A., N. S., 791.

cisions, but found it unnecessary in the case before it to determine which rule was the correct one.[61a]

The existing mining laws, however, relieve to a large extent the embarrassments which might flow from a conflict of opinion on this subject, particularly with reference to the performance of annual labor and the result of noncompliance with the terms of the law. As to other matters within the scope of local regulation which may be considered of minor importance, we think the California rule, as was said by the supreme court of Arizona, "is a safe and conservative rule of decision, tending to the permanency and security of mining titles."[62]

Forfeitures have always been deemed in law odious, and the courts have universally insisted upon their being clearly established before enforcing them.[63]

We shall have occasion to again consider this subject in another portion of this treatise, in connection with the perpetuation of estates acquired by location.[63a]

[61a] Yosemite M. Co. v. Emerson, 208 U. S. 25, 30, 28 Sup. Ct. Rep. 196, 52 L. ed. 374.

[62] Johnson v. McLaughlin, 1 Ariz. 493, 4 Pac. 130, 133. To the same effect, see Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036, 21 Morr. Min. Rep. 470; S. C., in error, *sub nom.* Yosemite M. Co. v. Emerson, 208 U. S. 25, 30, 28 Sup. Ct. Rep. 196, 52 L. ed. 374, in which the court quotes the text as above, but found it unnecessary to decide the question.

[63] See *post*, § 645; Hammer v. Garfield M. & M. Co., 130 U. S. 291, 9 Sup. Ct. Rep. 548, 32 L. ed. 964, 16 Morr. Min. Rep. 125; Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439, Fed. Cas. No. 9886, 9 Morr. Min. Rep. 616; Belcher Cons. M. Co. v. Deferari, 62 Cal. 160; Quigley v. Gillett, 101 Cal. 462, 35 Pac. 1040, 18 Morr. Min. Rep. 68; Johnson v. Young, 18 Colo. 625, 34 Pac. 173; Book v. Justice M. Co., 58 Fed. 106, 17 Morr. Min. Rep. 617; Strasburger v. Beecher, 49 Fed. 209; Providence G. M. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 19 Morr. Min. Rep. 625; Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036, 21 Morr. Min. Rep. 470.

[63a] See *post*, §§ 624, 645.

§ 275. **Local rules and regulations before the land department.**—In proceedings to obtain patents under the mining laws, it devolves upon the land department, in the absence of adverse claims, and suits brought to determine them, to decide what rules and regulations are in force in a given district, and its decision upon the subject is final.[64]

As a rule, the land department has followed closely the doctrines announced by the courts in the mining regions, in applying and construing local customs and regulations. In suits upon adverse claims, where most of the questions arise, the local courts determine the facts and apply the law, and their judgment is a guide to the land department in the issuance of patents. We do not encounter in the decisions of this department on this subject much that is instructive at the present time, as applied to existing conditions.

[64] Parley's Park M. Co. v. Kerr, 130 U. S. 256, 262, 9 Sup. Ct. Rep. 511, 32 L. ed. 906, 17 Morr. Min. Rep. 201.

TITLE V.

OF THE ACQUISITION OF TITLE TO PUBLIC MINERAL LANDS BY LOCATION, AND PRIVILEGES INCIDENT THERETO.

CHAPTER I.

INTRODUCTORY—DEFINITIONS.

ARTICLE I. INTRODUCTORY.

§ 280. **Introductory.**—In the preceding chapters of this treatise we have endeavored to determine what lands are subject to appropriation under the mining laws, to outline the general nature of the legal system which sanctions such appropriation, and to designate the persons who may or may not under this system acquire, hold, and enjoy rights upon the mineral lands of the public domain. We are now to consider the manner in which such rights may be acquired, and the acts necessary to be done and performed as a condition precedent to such acquisition.

§ 281. **Division of the subject.**—Some of the requirements of the law are general in their nature, and apply with equal force to all classes of mineral deposits. Others, by reason of the nature of the thing to be appropriated, or on account of a difference in governmental policy respecting it, are essentially of special application to individual groups. The embarrassments surrounding the arrangement of the subject for the purpose of philosophical, or even methodical, treatment are not to be underestimated. The body

of the mining law is complex and incongruous, illogically arranged, and inharmoniously blended. Perhaps the mere form in which the subject is presented is of minor importance, and may be left to the discretion of the author without furnishing justification for serious criticism. At the same time, some orderly method should be adopted by which the practitioner or student may find the state of the law from the author's standpoint, on any given branch, without reading the work from preface to appendix. A comprehensive index may lessen the evil flowing from a want of systematic arrangement, but this cannot wholly supply the necessity for grouping individual classes, and treating them separately, when their nature will permit. We think the object will be fairly accomplished by the division and distribution of the subject into the following heads:—

(1) Lode claims, or the appropriation of deposits "in place";

(2) The appropriation of claims usually called "placers," and other forms of deposit not "in place";

(3) Tunnel claims;

(4) Coal lands;

(5) Salines;

(6) Millsites;

(7) Easements.

§ 282. **Difficulties of accurate definition.**—Before entering upon the formal discussion of the mode of acquiring mining rights upon the public domain, there are certain words and phrases of such frequent occurrence in the mining laws that some attempt at defining them is advisable. In analyzing these various laws and their judicial interpretation by the courts, we encounter numerous terms, few, if any, of which are

susceptible of exact definition. By "exact definition" we mean one that contains every attribute which belongs to the thing defined, and excludes all others. Definitions are most often too narrow, but not infrequently too broad.[1] While they are more or less essential, to avoid repetition and the necessity for frequent descriptive explanation of the sense in which such words and phrases are used and of the ideas they are intended to convey, it is not to be expected that absolute exactitude will be obtained. The circumstances surrounding the employment of the terms and the conditions to which they are to be applied are so variable that differentiation will be frequently found necessary. Judge Hawley, one of the most experienced and distinguished judges in the mining states, said, while there was no conflict in the decisions, yet the result is, that some definitions have been given in some of the states that are not deemed applicable to the conditions and surroundings of mining districts in other states, or other districts in the same state.[2]

The old maxim, that definitions are always dangerous because it is always difficult to prevent their being or becoming inaccurate, finds ample justification when the attempt is made to define the words and phrases of a more or less technical character in the mining statutes. As Judge Field observed in the Eureka case,[3] it is difficult to give any definition of some of the

[1] Andrews Bros. v. Youngstown Coke Co., 86 Fed. 585, 588, 30 C. C. A. 293.

[2] Book v. Justice M. Co., 58 Fed. 106, 17 Morr. Min. Rep. 617. For a case discussing difficulty of definition, see Grand Central M. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648, and comment of United States supreme court dismissing the appeal, 213 U. S. 72, 29 Sup. Ct. Rep. 413, 53 L. ed. 702.

[3] Eureka Cons. M. Co. v. Richmond M. Co., 4 Saw. 302, 311, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578.

terms as used and understood in the acts of congress which will not be subject to criticism. Many of these terms, said Judge Phillips, are not susceptible of arbitrary definition; nor are they capable of being defined by one set phrase so unvarying as to apply to every case, regardless of the differing conditions of locality and mineral deposit.[4] Even if such a result could be reached, "important questions of law are not to be determined by a slavish adherence to the letter of arbitrary definition."[5]

We are admonished not to "yield our minds to the rigor of verbal definitions," but to "emancipate ourselves from such bondage and look at the purpose of the law."[6]

It is our purpose to present such definitions of the terms found in the mining statutes as have been formulated by lexicographers and writers upon geological subjects, together with those approved by the various tribunals charged with the administration and judicial construction of these laws. It is possible that with this aggregation no individual case may arise which will suffer for lack of a suitable definition.

[4] Cheesman v. Shreeve, 40 Fed. 792, 17 Morr. Min. Rep. 260.

[5] Duggan v. Davey, 4 Dak. 110, 140, 26 N. W. 887, 891, 17 Morr. Min. Rep. 59.

[6] State ex rel. Van Riper v. Parsons, 40 N. J. L. 123; Klauber v. Higgins, 117 Cal. 451, 49 Pac. 466, 468.

Article II. "Lode," "Vein," "Ledge."

§ 286. English and Scotch definitions.—We are indebted to Mr. Archibald Brown for the following:—

A mineral lode, or vein, is a flattened mass of metallic or earthy matter, differing materially in its nature from the rocks or strata in which it occurs. Its breadth varies from a few inches to several feet, and it extends in length to a considerable distance, but often with great irregularity of course. It is often perpendicular, or nearly so, in its position, and descends in most cases to an unknown depth. Sometimes the sides are parallel, and sometimes they recede from each other so as to form large accumulations, or, as they are called, bellies, of mineral matter; and occasionally they approach each other so as almost, if not wholly, to cause the vein to disappear. Veins also traverse each other, and smaller ones ramify or spring out from the larger.[7]

And to Mr. Ross Stewart for the following:—

"Vein," "seam," "lode," which appear to signify the same thing, viz.: a layer or stratum of material of a different nature from the stratification in which

[7] Bainbridge on Mines, 4th ed., p. 7. This definition is somewhat modified in the later (5th) edition, q. v., p. 6.

it occurs, are equivalent to the term "mine," when by it is understood an unopened mine.[8]

We do not find the term discussed in Collyer, Arundel, or Rogers. MacSwinney contents himself with definitions given by the lexicographers, without venturing to formulate one of his own.

§ 287. As defined by the lexicographers.—

Century Dictionary:—

LODE. A metalliferous deposit, having more or less of a vein-like character; that is, having a certain degree of regularity, and being confined within walls. *Lode*, as used by miners, is nearly synonymous with the term *vein*, as employed by geologists. The word would not be used for a flat or stratified mass.

VEIN. An occurrence of ore, usually disseminated through a gangue, or veinstone, and having a more or less regular development in length, width, and depth. A vein and a lode are, in common usage, essentially the same thing, the former being rather the scientific, the latter the miners', name for it.

LEDGE. In mining, *ledge* is a common name in the Cordilleran region for the lode, or for any outcrop supposed to be that of a mineral deposit or vein. It is frequently used to designate a quartz vein.

Webster's Dictionary:—

LODE. A metallic vein; any regular vein or course, whether metallic or not.

LEDGE. A lode; a limited mass of rock, bearing valuable mineral.

VEIN. A narrow mass of rock intersecting other rocks, and filling inclined or vertical fissures not corresponding with the stratification; a lode; a dike; —often limited, in the language of miners, to a

[8] Stewart on Mines, p. 3.

mineral vein or lode; that is, to a vein which contains useful minerals or ores.

A fissure, cleft, or cavity, as in the earth or other substance.

Standard Dictionary:—

Lode. A somewhat continuous unstratified metal-bearing vein.

Vein. The filling of a fissure or fault in a rock, particularly if deposited by aqueous solutions. When metalliferous, it is called by miners a *lode*. . . . . A bed or shoot of ore parallel with the bedding.

Ledge. A metal-bearing rock-stratum; a quartz vein.

Richardson's Dictionary:—

Veins. Lineal streaks in mineral.

Encyclopedia Britannica:—

Veins. Fissures or cracks in the rocks which are filled with materials of quite a different nature from the rocks in which the fissures occur.

§ 288. As defined by the geologists.—

Von Cotta:—

Veins are aggregations of mineral matter in fissures of rocks. *Lodes* are therefore aggregations of mineral matter containing ores in fissures.[9]

Dana:—

Veins are the fillings of fissures, or of open spaces made in any way, exclusive of those called *dikes*, which are due to intrusions of melted rock.[10] Where ores occur along a vein, it is, in miners' language, a *lode*.[11]

[9] Von Cotta's Treatise on Ore Deposits (1859), Prime's translation (1870), p. 26, referred to in the Eureka case, 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578.

[10] Dana's Manual of Geology, 4th ed. (1895), p. 327.

[11] Id., p. 331.

Geike:—

Into the fissures opened in the earth's crust there have been introduced various simple minerals and ores, which, solidifying there, have taken the form of mineral veins.

A true mineral vein consists of one or more minerals filling up a fissure, which may be vertical, but is usually more or less inclined, and may vary in width from less than an inch up to one hundred and fifty feet or more.[12]

Le Conte:—

All rocks, but especially metamorphic rocks, in mountain regions are seamed and scarred in every direction, as if broken and again mended, as if wounded and again healed. All such seams and scars are often called by the general name of *veins.* True veins are accumulations, mostly in fissures, of certain mineral matters, usually in a purer and more sparry form than they exist in the rocks.[13]

Lindgren:—

A fissure vein may be regarded as a mineral mass, tabular in form as a whole, though frequently irregular in detail, occupying or accompanying a fracture or set of fractures in the inclosing rock; this mineral mass has been formed later than the country rock and the fracture, either through the filling of open spaces along the latter, or through chemical alterations of the adjoining rock.[14]

§ 289. **Elements to be considered in the judicial application of definitions—Rules of interpretation.**— Dr. Raymond, one of the expert witnesses whose evi-

12 Geike's Geology (1886), p. 275.

13 Le Conte's Elements of Geology (1895), p. 234.

14 Metasomatic Processes in Fissure Veins,—Trans. Am. Inst. M. E., vol. xxx, pp. 578, 580. Mr. F. L. Ransome, in his monograph on the economic geology of the Silverton Quadrangle, Bulletin No. 182 of the United States Geological Survey, reviews some of these definitions and explains what he understands by the term "vein" and the sense in which it is used by him in his monograph.

dence is quoted and referred to in the Eureka case, thus states his views:—

> The miners made the definition first. As used by miners, before being defined by any authority, the term "lode" simply meant that formation by which the miner could be led or guided. It is an alteration of the verb "lead," and whatever the miner could follow, expecting to find ore, was his lode. Some formation within which he could find ore, and out of which he could not expect to find ore, was his lode.[15]

At the time the act of July 26, 1866, was passed. the first congressional enactment wherein the words "lode" and "vein" were used, the center of activity in the mining industry was found in the auriferous quartz belt of California, and the Comstock lode, in Nevada. Up to that time there is but little doubt that the experience of the western miner in lode mining was, with rare exceptions, confined to a class of deposits that would readily fall within the narrowest definition of a "lode"; that is, "a fissure in the earth's crust filled with mineral matter; an aggregation of mineral matter containing ore in a fissure."

Dr. Raymond is of the opinion that the term was used by the miner in a more enlarged sense, because "cinnabar" was included in the category of minerals specified in the statute, and "cinnabar" occurs not in fissure veins, but as "impregnations and masses of ore distributed through zones of rock."[16]

[15] Eureka case, 4 Saw. 302, 311, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578.

[16] Monograph in Eureka-Richmond case,—Trans. Am. Inst. M. E., vol. vi, 382. See, also, Dr. Raymond's testimony, quoted by the court in the Eureka case, 4 Saw. 302, 311, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578.

This same illustration is employed by the supreme court of Utah as indicating that it was not the intention of the framers of the acts of congress that purely scientific definitions should be applied in giving them effect.[17]

When it is considered that up to the year 1866 the quicksilver product of the Pacific slope (and it was not known to occur elsewhere in the United States) was confined to three mines, two of which were then claimed under Mexican grants,—the New Almaden, in Santa Clara county, California, and the New Idria (Panoche Grande), in Fresno county, California,—and that active search for cinnabar deposits was not inaugurated until 1874,[18] popular knowledge on the subject of the mode of occurrence was not particularly extended.[19] It is not likely, therefore, that the inclusion of cinnabar with gold and silver in the act was based upon any very clear conception of its mode of occurence. However, as we understand the matter now, the typical cinnabar deposits are in fact fissured, fractured, and mineralized zones, formed in a way somewhat similar to the more complex of the gold, silver, copper, and lead-bearing lodes. They were probably regarded as lodes by the miner. There may be differences of opinion among scientists regarding the proper place for these deposits in a system of classifica-

[17] Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029, 1033, 19 Morr. Min. Rep. 485.

[18] Becker's Geology of the Quicksilver Deposits of the Pacific Slope, pp. 10, 11.

[19] The ignorance of many of the early miners of California on geological subjects is thus quaintly suggested by Mr. J. Ross Browne ("Mineral Resources of the West," 1867): "Many believed that there must be some volcanic source from which the gold had been thrown up and scattered over the hills; and they thought that if they could only find that place, that they would have nothing to do but to shovel up the precious metal and load their mules with it."

tion; but that is a matter of little moment here. They have become "lodes" in the eye of the law. Be that as it may, the miner first applied the terms "lode" and "vein," and they had with him a definite meaning. Whether it accorded with scientific theories and abstractions is, at this late day at least, of no serious moment.

Speaking of the essential differences between the miner and the scientist on the subject of definitions, Dr. Foster, in his contribution to the "Quarterly Journal of the Geological Society," on the Great Flat lode in Cornwall, quoted by Dr. Raymond in his monograph on the Eureka-Richmond case,[20] presents some suggestions on the subject of the definition of these terms which are worthy of repetition here:—

> The terms "lode," or "mineral vein," commonly regarded as synonymous, are usually taken to mean the mineral contents of a fissure. I have endeavored to show that the Great Flat lode is in the main a band of altered rock. Much of the veinstone extracted from some of the largest Cornish mines, such as Dolcoath, Cook's Kitchen, Tincroft, Carn Brea, and Phoenix, for instance, closely resembles the contents of the Great Flat lode, and was probably formed in a similar manner; indeed, I question very much whether at least half the tin ore of the country is not obtained from tabular masses of stanniferous altered granite. If, then, many of the important lodes of such classic ground as Cornwall do not satisfy the common definition, one of two things ought to be done; either the miner should give up the term "lode" for these repositories, or else the meaning attached to the word by geologists should be extended. I need hardly say that the first alternative is not likely to be adopted; nor do I think it is one to be recommended—for I believe that one and the same fissure traversing killas and granite

[20] Trans. Am. Inst. M. E., vol. vi, pp. 371, 381.

> may produce two kinds of lodes. . . . . I should propose, therefore, that the term "lode," or "mineral vein," should include not only the contents of fissures, but also such tabular masses of metalliferous rock as those I have been describing. . . . . If, however, this course should be thought on the whole undesirable, the geologist and miner must agree to differ in their language, and some of the *lodes* of the latter will have to be designated as tabular stockworks by men of science.

We do not conceive that from a judicial standpoint it is a matter of vital importance that the miner and the scientist should harmonize their differences on the subject of mere definition. The danger lies in accepting the definitions of either as broadly comprehensive or rigidly restrictive, and attempting to apply them to conditions not within the reasonable contemplation of the law, or in attempting to deprive a locator of the benefit of his discovery, if the thing discovered cannot be forced into the mold of arbitrary definition, either popular or scientific.

If in the construction of the terms used in the mining laws there is one evil to be avoided as great as the servile adherence to arbitrary definition, it is the blind application of a rule announced in one case, where local conditions may justify it, to other cases, where a similar application of the rule, by reason of modified or totally different conditions, would produce absurd results.

> Many definitions of veins have been given, varying according to the facts under consideration. The term is not susceptible of arbitrary definition applicable to every case. It must be controlled, in a measure at least, by conditions of locality and deposit.[21]

[21] Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 953, 20 Morr. Min. Rep. 591.

As was said by Judge Hawley, sitting as circuit judge in the case of Book v. Justice M. Co.,—

> Various courts have at different times given a definition of what constitutes a vein, or lode, within the meaning of the act of congress; but the definitions that have been given, as a general rule, apply to the peculiar character and formation of the ore deposits, or vein matter, and of the country rock, in the particular district where the claims are located.[22]

And in a later case,—

> The mining laws of the United States were drafted for the purpose of protecting the *bona fide* locators of mining ground and at the same time to make necessary provision as to rights of agriculturists and claimants of townsite lands. The object of each section and of the whole policy of the entire statute should not be overlooked. The particular character of each case necessarily determines the rights of the respective parties, and must be kept constantly in view, in order to enable the court to arrive at a correct conclusion. What is said in one character of cases may or may not be applicable in the other. Whatever variance, if any, may be found in the views expressed in the different decisions touching these questions arises from the difference in the facts and a difference in the character of the cases and the advanced knowledge which experience in the trial of the different kinds of cases brings to the court. . . . . The definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district.[23]

As was said by Judge Field, speaking of the act of July 26, 1866,—

> The mining acts "were not drawn by geologists or for geologists. They were not framed in the interest

[22] 58 Fed. 106, 121, 17 Morr. Min. Rep. 617.

[23] Migeon v. Montana Cent. Ry., 77 Fed. 249, 254, 23 C. C. A. 156, 18 Morr. Min. Rep. 446.

of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose." [24]

§ 290. The terms "lode," "vein," "ledge," legal equivalents.—The act of July 26, 1866, used the term "vein, or lode." The act of May 10, 1872, added the word "ledge," and all these terms occur in the Revised Statutes.

Of the three terms, the word "lode" is the more comprehensive. A lode may, and often does, contain more than one vein.[25]

Instances have been known of a broad zone, generally recognized as a lode, itself having well-defined boundaries, but being traversed by mineralized fissure veins, each possessing such individuality as to be the subject of location.[26]

A lode may or may not be a fissure vein, but a fissure vein is, in contemplation of law, a lode.

"Ledge" is more of a local term, at one time in common use in California and some parts of Nevada. It is mentioned in the act of May 10, 1872, and is incorporated into the Revised Statutes, but it is practically unrecognized in many mining localities.

[24] Eureka case, 4 Saw. 302, 311, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578. See, also, Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029, 1033, 19 Morr. Min. Rep. 485; Henderson v. Fulton, 35 L. D. 652; Harry Lode Claim, 41 L. D. 403.

[25] United States v. Iron S. M. Co., 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32 L. ed. 571.

[26] Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439, Fed. Cas. No. 9886, 9 Morr. Min. Rep. 616. See, also, Doe v. Waterloo M. Co., 54 Fed. 935.

Generally speaking, the terms are used interchangeably.[27]

As observed by Dr. Raymond, "lode" is an alteration of the verb "lead." In many localities the word "lead" is used as synonymous with "lode." "Lead" is also applied in California to certain subterranean auriferous gravel deposits, which, however, can be acquired only under the placer laws,[28] according to the rules established by the land department.[29]

The terms "lode" and "vein" are always associated in the existing mining statutes, and are invariably separated by the disjunctive. For all practical purposes, they may be considered as legal equivalents.[30] Unless the authority cited itself makes the distinction heretofore suggested, the definitions hereafter given apply equally to both words.

§ 290a. **Definition and illustrations formulated by Mr. Ross E. Browne.**—A proper conception of the difficulties encountered in framing comprehensive definitions of the terms used in the mining laws requires more or less familiarity and experience with those "brute beasts of the intellectual domain," the *facts* as they are encountered in the operation and exploitation of mines. A practical knowledge of what we may term structural geology, derived from actual contact in-

[27] Iron S. M. Co. v. Cheesman, 8 Fed. 297, 301, 2 McCrary, 191, 9 Morr. Min. Rep. 552; Cheesman v. Shreeve, 40 Fed. 787, 792, 17 Morr. Min. Rep. 260; Morr. Min. Rights, 8th ed., p. 113; Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029, 1032, 19 Morr. Min. Rep. 485.

[28] Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401, 15 Morr. Min. Rep. 602.

[29] Copp's Min. Dec. 78. *Post*, § 427.

[30] Under the Wisconsin statute, which is referred to in § 20, *ante*, the words "crevice" or 'range" are used. "Crevice" is held to be synonymous with "lode" or "vein." St. Anthony M. & M. Co. v. Shaffra, 138 Wis. 507, 120 N. W. 238.

volved in the investigation and working of mines, is quite as essential as a familiarity with the law, in order to enable one to present any satisfactory illustration of the nature of the things to which the law is to be applied. Lawyers specializing on the legal phases of mining law necessarily absorb some general information from the mining engineers with whom they are brought in contact. But as a rule this familiarity with structural conditions is to a large degree superficial. The mining engineer and expert with a broad experience, not only in the field of mining operations, but in mining litigation, occupies a unique position, not only as the mentor of counsel, but as an important aid to the court in the ascertainment of the facts to which the law is to be applied. Among the engineers there is no one better qualified to speak from a practical standpoint upon the subject under consideration than Mr. Ross E. Browne, who has had a wide experience in mining and has been connected with some of the most important mining litigation of the west. At the author's request, he has formulated certain definitions and illustrations which we here present.

Originally the word "vein" was narrow in its significance, defining a single clearly marked seam or fissure-filling in the country rock. The word "lode" was a broader term, applied not only to ore-bearing veins in a narrow sense, but to various more complicated forms of ore-deposits as well.

Under the influence of the mining acts of congress, it has gradually become more and more customary to use the two terms synonymously, and to give to the word "vein" the broad definition that would formerly have been regarded as more properly applicable to the word "lode." Still the custom is not rigid, and the miner, as a rule, continues to make certain distinctions in the use of the terms. For example, when his deposit contains separate parallel seams,

or sheets, of ore, and he regards the whole as a unit, he may call it either a "lode" or a "vein," but the separate sheets he designates as distinct veins within the limits of his lode. He calls the entire mass vein-matter, and his conception is, that the word "vein" refers either to the entire mass or to narrow streaks within the mass, while the word "lode" always refers to the entire mass.

In a very general way a lode may be described as a mass of mineralized rock in place, the word "mineral" referring only to commercially valuable constituents. The form is usually more or less tabular or sheet-like, but occasionally too irregular to fit such description.

Referring to ores of the more valuable metals, such as gold, silver, quicksilver, copper, lead, etc., the lodes in which they are found are generally formed by fissuring of the country rock and subsequent introduction of mineralizing solutions depositing ore-bearing material in the fissures and occasionally mineralizing portions of the wall-rocks by processes of metamorphism and impregnation, occasionally filling pre-existing cavities, such as occur in limestone.

The lode as it commonly occurs may then be defined as the ore-bearing filling of a single fissure or of a system of interconnected fissures and pre-existing cavities in the country rock, together with occasional mineralized masses of the wall-rocks.[31]

[31] AUTHOR'S NOTE.—The acts of congress are so construed as to include in the category of lodes, veins, and ledges certain deposits which would not fall under the above definition. As, for example, certain tilted beds or sedimentary strata containing ores as original constituents, and not formed by subsequent fissuring and mineralization. The geologist would call these beds, and not lodes, but we understand that the intent of the law is not to make distinctions based upon the genetic principle. It is doubtless true that a very small percentage of the ore deposits of the precious metals occur as tilted beds in place, unassociated with subsequent fissuring and mineralization; but when such are found, they are undoubtedly subject to location as veins or lodes within the meaning of the statutes.

The lode material consists not only of the valuable ores, but also of the associate gangue minerals deposited by the same solutions.

There are frequently encountered fragmentary or detached masses of unaltered country rock, wholly or substantially surrounded by lode material,—so-called "horses,"—which are regarded as belonging to the lode.

The lateral boundaries are formed either by the walls of the fissures or by the more irregular limits of mineralization.[32]

The following diagrams will illustrate in vertical cross-section the common occurrences.

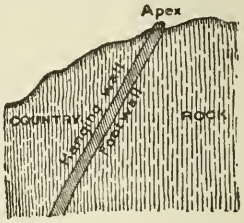

FIGURE 4.

Figure 4 represents a simple fissure vein or lode with plane foot-wall and hanging-wall boundaries.

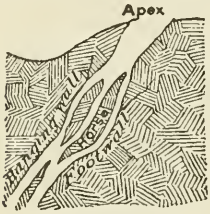

FIGURE 5.

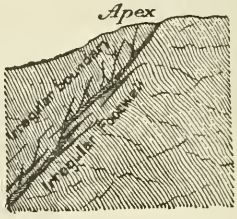

FIGURE 6.

Figure 5 represents a complex fissure-vein or lode, still having comparatively simple boundaries. The foot and hanging walls are more or less broken by insignificant spurs or offshoots.

Figure 6 is a complex lode with jagged or complex fissure-wall boundaries.

32 AUTHOR'S NOTE.—The vein must have boundaries, but it is not necessary that they be seen. Their existence may be determined by assay and analysis. Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 953, 20 Morr. Min. Rep. 591 (citing Cheesman v. Shreeve, 40 Fed. 787, 17 Morr. Min. Rep. 260; Hyman v. Wheeler, 29 Fed. 347, 15 Morr. Min. Rep. 519; Iron S. M. Co. v. Cheesman, 116 U. S. 529, 6 Sup. Ct. Rep. 481, 29 L. ed. 712).

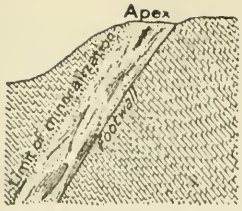

FIGURE 7.

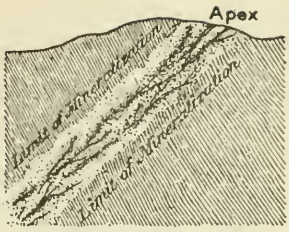

FIGURE 8.

Figure 7 is a complex lode, consisting of fissure-fillings and mineralized wall-rock. The foot-boundary is a simple fissure-wall, the hanging boundary is the somewhat indefinite limit of mineralization.[33]

Figure 8 is a complex lode with both boundaries formed only by the irregular limits of mineralization.

Figure 9 is the Eureka - Richmond belt of fissured and partly mineralized limestone, adjudged to be a lode. The boundaries practically confining the mineralization are the surfaces of contact with the underlying quartzite and overlying shale.[34]

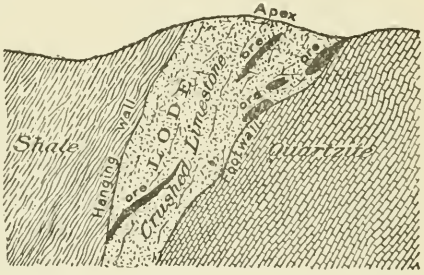

FIGURE 9.

There are other forms that need not be enumerated here. Suffice it to say, that the mineralization of rock in place is an essential element in the definition; the nature of the material, the form of the deposit, the character of the boundaries are widely variant.

[33] A vein or lode of the character illustrated was involved in a series of cases arising out of controversies between the Bunker Hill & Sullivan M. & C. Co. and the Empire State-Idaho and Last Chance Companies, and is described in 134 Fed. 268, 272.

[34] A somewhat similar deposit or ore-bearing zone bounded by quartzite on both walls was involved in United States M. Co. v. Lawson, 134 Fed. 769, 67 C. C. A. 587; S. C., in *certiorari*, 207 U. S. 1, 28 Sup.

§ 291. Classification of cases in which the terms "lode" and "vein" are to be construed.—Judge Hawley, speaking for the circuit court of appeals in the case of Migeon v. Montana Cent. Ry.,[35] says:—

> There are four classes of cases where the courts have been called upon to determine what constitutes a lode or vein, within the intent and meaning of different sections of the Revised Statutes:—
>
> (1) Between miners who have located claims on the same lode, under the provisions of section twenty-three hundred and twenty;
>
> (2) Between placer and lode claimants, under the provisions of section twenty-three hundred and thirty-three;
>
> (3) Between mineral claimants and parties holding townsite patents to the same ground;
>
> (4) Between mineral and agricultural claimants to the same land.

To these we may add another:—

(5) Controversies between a lode miner, who has penetrated into and underneath lands adjoining in the development of what he has located under the law applicable to lode claims, and the adjoining or neighboring surface proprietor, whose claim to the underlying mineral deposits rests solely upon presumptions flowing from surface ownership.

In interpreting these terms the nature of the controversy is an undoubted element to be considered. In some classes of cases a more liberal rule is followed than would be justified in others. It is useless, in our judgment, to search for a judicial definition which would be absolutely applicable under every conceivable state of facts and in all classes of controversies.

Ct. Rep. 15, 52 L. ed. 65. See, also, Grand Central M. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648.

[35] 77 Fed. 249, 254, 23 C. C. A. 156, 18 Morr. Min. Rep. 446; Fox v. Myers, 29 Nev. 169, 86 Pac. 793.

§ 292. Judicial definitions and their application—The Eureka case.—It may be safely asserted that as to the terms "lode" and "vein," when applied to geological conditions existing in most mining localities, there is no essential difference between their definition as given by the scientist and that applied by the practical miner. But it is when we encounter certain classes of deposits, and meet with new and unique conditions, the existence of which was neither known nor contemplated when the "miners made the definitions," nor when congress enacted the mining laws, that the courts have been forced to admit that "what constitutes a lode, or vein, of mineral matter has been no easy thing to define." [36]

The first reported case in which a judicial definition of any of these terms was attempted is the case of the Eureka M. Co. v. Richmond M. Co.,[37] one of the most famous of the mining cases ever considered by the courts. It was tried before three of the most eminent mining judges,—Field, Sawyer, and Hillyer,—who had the benefit of the testimony of some of the most distinguished scientists of the period.

It was a case involving rights accruing under the act of 1866, and the following is the definition formulated:—

> 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

[36] Iron S. M. Co. v. Cheesman, 116 U. S. 529, 6 Sup. Ct. Rep. 481, 29 L. ed. 712.

[37] 4 Saw. 302, Fed. Cas. No. 4548, 9 Morr. Min. Rep. 578; Judge Field, in Iron S. M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436.

same source, impressed with the same forms, and appearing to have been created by the same processes.

The zone to which this definition was applied was of dolomitic limestone, a sedimentary deposit, broken, crushed, and fissured, resting on a foot-wall of quartzite, and having a hanging-wall of clay shale.[38]

The width of the zone varied from a few inches to four hundred and fifty feet. Its mean width was about two hundred and fifty feet. The hanging-wall had a dip of eighty to eighty-five degrees, while the foot-wall had an average inclination of forty-five degrees. Throughout this body of limestone, vugs, chambers, and large caverns were encountered, in the bottoms of which ore—lead carbonates, carrying gold and silver—was invariably found. Overlying the hanging-wall was another zone of limestone, which differed from that lying on the quartzite, being plainly stratified, and contained neither ores nor caverns.

No one connected with the case contended that this mineral-bearing zone was the filling of a fissure.[39]

While we are not concerned with the genesis of these ore deposits, it is a matter of common knowledge that the inclosing rock (limestone) being soluble and fissured, the caves, vugs, and chambers resulted from the chemical action of percolating waters, creating the larger spaces for the subsequent deposit of the ores.

[38] A cross-section of this lode is shown in figure 9, *ante*, § 290a, forming one of Mr. Browne's illustrations. Similar structural conditions were involved in Lawson v. United States M. Co., 134 Fed. 769, 67 C. C. A. 587, Lawson v. United States M. Co., 207 U. S. 1, 28 Sup. Ct. Rep. 15, 52 L. ed. 65, and in Grand Central M. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648, and in each case the definition in the Eureka case was followed.

[39] See monographs of W. S. Keyes and R. W. Raymond, Trans. Am. Inst. M. E., vol. vi, pp. 344, 393.

Professor Le Conte, in his "Elements of Geology,"[40] gives a cross-section, exhibiting a homely illustration of the result of the erosive action of the water in rocks of this character, and cites the Mammoth Cave, in Kentucky, Wier's Cave, in Virginia, and Nicojack Cave, in Tennessee, as examples. The Eureka ore-chambers were all presumed to be interconnected by fissures, but the irregularity of distribution was such as to make the continuous tracing of persistent fissure-veins impracticable. Our apology for introducing these elements into the discussion is found in the admonition of the courts, referred to in a preceding section, that in applying a definition we must look to the facts, circumstances, and conditions of structural geology which justified its creation before we can intelligently determine whether it should be applied to other cases.

We do not complain that the law was incorrectly applied in the Eureka case. But there is hardly a mining case of any considerable importance involving the broad lode question in which one side or the other does not attempt to apply the zone theory announced in this case to conditions materially different from those encountered on Ruby Hill.

The Eureka case stands as a judicial classic; but its force as a precedent ought to be limited to cases where the conditions are parallel, or at least analogous.

The passage of the act of May 10, 1872, introduced new terms, and created new complications, which must be considered when dealing with the present state of the law.

§ 293. **The Leadville cases.**[41]—We shall have occasion to analyze the group of cases arising out of the

[40] 3d ed., p. 76.

[41] For a full presentation and discussion of these cases, see Dr. Raymond's "Law of the Apex."

unique geological conditions existing at and in the vicinity of Leadville, Colorado, when we discuss the subject of "apex" in the succeeding article, presenting a cross-section which gives a fair illustration of the mode in which these so-called "veins" occur. As we shall there fully explain our understanding of these local conditions to which definitions have been applied, we confine ourselves presently to quotations from these various cases, most of which refer to and apply the Eureka case:—

> In general it may be said that a lode or vein,
>
> is a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain.[42]
>
> In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode.[43]
>
> Such boundaries constitute a fissure; and if in such fissure ore is found, although at considerable intervals, and in small quantities, it is called a lode, or vein. . . . .

[42] Judge Hallett, in Iron S. M. Co. v. Cheesman, 8 Fed. 299, 301, 2 McCrary, 191, 9 Morr. Min. Rep. 552, quoted by Justice Miller in Stevens & Leiter v. Williams, 1 McCrary, 480, 488, Fed. Cas. No. 13,413, 1 Morr. Min. Rep. 566; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, 575, 22 Morr. Min. Rep. 276.

[43] Quoted in Cheesman v. Shreeve, 40 Fed. 787, 795, 17 Morr. Min. Rep. 260.

A continuous body of mineral or mineral-bearing rock extending through loose, disjointed rocks, is a lode as fully and certainly as that which is found in more regular formation.[44]

The thinness or thickness of the matter in particular places does not affect its being a vein or lode. Nor does the fact that it is occasionally found in the general course of the vein or shoot, in pockets deeper down in the earth, or higher up, affect its character as a vein, lode or ledge.[45]

By veins, or lodes, are meant lines or aggregations of metal embedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock. Yet a lode may, and often does, contain more than one vein.[46]

With ore in mass and position in the body of the mountain, no other fact is required to prove the existence of a lode or the dimensions of the ore. As far as it prevails, the ore is a lode; and it is not at all necessary to decide any question of fissures, contacts, selvages, slicken-sides, or other marks of distinction, in order to establish its character.[47]

It has sometimes been contended that the lode must have a certain position in the earth; that is to

[44] Judge Hallett, as quoted and approved in Iron S. M. Co. v. Cheesman, 116 U. S. 529, 6 Sup. Ct. Rep. 481, 29 L. ed. 712; United States v. Iron S. M. Co., 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32 L. ed. 571; Grand Central M. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648. As to definition given in this case, see comment by the United States supreme court dismissing the appeal, 213 U. S. 72, 29 Sup. Ct. Rep. 413, 53 L. ed. 702. See, also, Hyman v. Wheeler, 29 Fed. 347, 353, 15 Morr. Min. Rep. 519; Illinois S. M. Co. v. Raff, 7 N. M. 336, 34 Pac. 544; Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 20 Morr. Min. Rep. 591; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572, 575, 22 Morr. Min. Rep. 276.

[45] Justice Miller, in Stevens v. Williams (second trial), Fed. Cas. No. 13,413, 1 McCrary, 480, 1 Morr. Min. Rep. 573.

[46] United States v. Iron S. M. Co., 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32 L. ed. 571.

[47] Hyman v. Wheeler, 29 Fed. 347, 353, 15 Morr. Min. Rep. 519; Cheesman v. Shreeve, 40 Fed. 795, 17 Morr. Min. Rep. 260.

say, it must be more or less vertical, before this rule which is given in the act of congress can be applied; but we have heretofore held, and we are still of the opinion, that it applies to all lodes which have an inclination below the plane of the horizon, whatever it may be.[48]

In Stevens v. Williams [49] is found the following by Judge Hallett:—

> As to the word "vein," or "lode," it seems to me that these words may embrace any description of deposit which is so situated in the general mass of the country, whether it is described in any one way or another; that is to say, whether, in the language of the geologist, we say it is a bed, or a segregated vein, or gash vein, or true fissure vein, or merely a deposit. . . . . Whenever a miner finds a valuable mineral deposit in the body of the earth (in place) he calls that a lode, whatever its form may be, and however it may be situated, and whatever its extent in the body of the earth.

The same judge, in another case, held that an impregnation to the extent to which it may be traced as a body of ore is as fully within the broad terms of the act of congress as any other form of deposit.[50]

While the supreme court of the United States, in the cases of Iron S. M. Co. v. Cheesman,[51] United States v. Iron S. M. Co.,[52] and Reynolds v. Iron S. M. Co.,[53] had accepted the definition of a lode, or vein, announced by

[48] Leadville M. Co. v. Fitzgerald, Fed. Cas. No. 8158, 4 Morr. Min. Rep. 380.

[49] 1 Morr. Min. Rep. 566, Fed. Cas. No. 13,414, 1 McCrary, 480.

[50] Hyman v. Wheeler, 29 Fed. 347, 353, 15 Morr. Min. Rep. 519. See, also, Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 20 Morr. Min. Rep. 591.

[51] 116 U. S. 529, 6 Sup. Ct. Rep. 481, 29 L. ed. 712.

[52] 128 U. S. 673, 9 Sup. Ct. Rep. 195, 32 L. ed. 571.

[53] 116 U. S. 687, 6 Sup. Ct. Rep. 601, 29 L. ed. 774, 15 Morr. Min. Rep. 591.

Judge Hallett, thus determining that the blanket deposits of Leadville were in law embraced within the definition of the terms "lode" and "vein," their position was vigorously assailed in the later case of Iron S. M. Co. v. Mike & Starr G. & S. M. Co.[54]

This case was twice argued, a reargument having been ordered, and the attention of counsel directed to the question, among others, as to what constituted a vein, or lode, within the meaning of sections twenty-three hundred and twenty and twenty-three hundred and thirty-three of the Revised Statutes. The action was brought by the plaintiff in error as the owner of the William Moyer placer to eject the defendant. The defense was "known lode" existing at the time of the application for the placer patent, called the Goodell lode. The verdict was for the lode claimant. Plaintiff appealed. The judgment was affirmed by the supreme court of the United States, in an opinion from which we quote:—

> There was an earnest inquiry . . . . as to whether, in view of the disclosures made in this, as in prior cases, of the existence of a body of mineral underlying a large area of country in the Leadville mining district, whose general horizontal direction, together with the sedimentary character of the superior rock, indicated something more of the nature of a deposit, like a coal-bed, than of the vertical and descending fissure vein in which silver and gold are ordinarily found, it did not become necessary to hold that the only provisions of the statute under which title to any portion of this body of mineral or the ground in which it is situated can be acquired are those with respect to placer claims. . . . .
>
> Our conclusions are that the title to portions of this horizontal vein or deposit—"blanket vein," as

[54] 143 U. S. 394, 12 Sup. Ct. Rep. 543, 36 L. ed. 201, 17 Morr. Min. Rep. 436.

it is generally called—may be acquired under the sections concerning veins, lodes, etc. The fact that so many patents have been obtained under these sections, and that so many applications for patent are still pending, is a strong reason against a new and contrary ruling. That which has been accepted as law, and acted upon by that mining community for such a length of time, should not be adjudged wholly a mistake and put entirely aside because of difficulties in the application of some minor provisions to the peculiarities of this vein or deposit.

Judges Field, Harlan, and Brown dissented, but not as to the legal conclusions. They were of the opinion that the evidence was insufficient to establish the existence of a "known lode."

The embarrassing results flowing from this decision will be demonstrated when we discuss the question of apex and extralateral rights.[55]

§ 294. Other definitions given by state and federal courts.—The supreme court of Montana has given the following definition:—

> In construing this language, regard must be had to what in truth a lode, or lead, is, and when so tested the problem seems easy of solution and free from doubt. A lead, or lode, is not an imaginary line without dimensions; it is not a thing without shape or form. But before it can legally and rightfully be denominated a lead, or lode, it must have length, and width, and depth; it must be capable of measurement; it must occupy defined space, and be capable

[55] The supreme court of Wisconsin, in construing its local statute referred to in § 20, *ante*, regulating mining in private lands, after holding that the word "crevice" used in the statutes was synonymous with "vein" or "lode," had a similar difficulty in applying the term to the conditions existing in the lead and zinc regions of Wisconsin. But as these deposits had for many years been so classified, the courts declined to change the classifications. St. Anthony M. & M. Co. v. Shaffra, 138 Wis. 507, 120 N. W. 238.

of identification. Before a quartz claim can be legally located, a lead, or lode, containing gold or silver must be discovered; and before such discovery can be called a discovery, at least one well-defined wall,[56] or side, to the lode must be found. What, then, is a quartz lode? It is a fissure, or seam, in the country rock, filled with quartz matter, bearing gold or silver. This fissure may be wide or narrow; it varies in width from one inch, or even less, to one hundred feet, or much more. The sides of a lead are represented and defined by the walls of the country rock, and these walls must be discovered, and the lead identified thereby, before it can be located and held as a lead.[57]

Judge Hawley, sitting as circuit judge in the ninth circuit, after reviewing most of the adjudicated law upon the subject, thus expressed his views:—

> This statute was intended to be liberal and broad enough to apply to any kind of a lode, or vein, of quartz or other rock bearing mineral, in whatever kind, character, or formation the mineral might be found. It should be so construed as to protect locators of mining claims who have discovered rock in place, bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located.[58]
>
> It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts the veins, lodes, and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities the mineral is found

[56] At the time this case was decided a law existed in Montana making it a prerequisite to a valid location that the workings should disclose at least one wall,—a limitation on the definition of a vein which we think repugnant to the spirit and intent of the federal law and not within the province of state legislation.

[57] Foote v. National M. Co., 2 Mont. 403.

[58] Quoted in Wyoming Cons. M. Co. v. Champion M. Co., 63 Fed. 540, 544, 18 Morr. Min. Rep. 113.

in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place, bearing mineral, is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein, or lode, is liable to have barren spots and narrow places, as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place containing mineral, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim.[59] . . . .

And in a later case, speaking for the circuit court of appeals,—

> When a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low.[60]

In Hyman v. Wheeler,[61] Judge Hallett, after referring to the decisions in some of the Leadville cases, adds the following:—

[59] Book v. Justice M. Co., 58 Fed. 106, 120, 17 Morr. Min. Rep. 617. Commented on and reaffirmed in Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. 540, 544, 18 Morr. Min. Rep. 113; quoted approvingly in Shoshone M. Co. v. Rutter, 87 Fed. 801, 807, 31 C. C. A. 223, 19 Morr. Min. Rep. 356.

[60] Migeon v. Mont. Cent. Ry., 77 Fed. 249, 255, 23 C. C. A. 156, 18 Morr. Min. Rep. 446.

[61] 29 Fed. 347, 353, 15 Morr. Min. Rep. 519.

> An impregnation to the extent to which it may be traced as a body of ore is as fully within the broad terms of the act of congress as any other form of deposit.

The supreme court of Colorado, speaking through Justice Gabbert, contributes the following comprehensive statement:—

> Many definitions of veins have been given, varying according to the facts under consideration. The term is not susceptible of an arbitrary definition applicable to every case. It must be controlled, in a measure at least, by the conditions of locality and deposit. The distinguishing feature between a vein and the formation inclosing it may be visible. It must have boundaries, but it is not necessary that they be seen. Their existence may be determined by assay and analysis. The controlling characteristic of a vein is a continuous body of mineral-bearing rock in place in the general mass of the surrounding formation. If it possess these requisites, and carry mineral in appreciable quantities, it is a mineral-bearing vein within the meaning of the law, even though its boundaries may not have been ascertained.[62]

The supreme court of Utah also furnishes valuable and interesting discussions of the subject.[63]

Some of the courts accept the liberal interpretation suggested by Dr. Raymond in the Eureka case—that a "lode is whatever a miner could follow and find ore."[64]

[62] Beals v. Cone, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, 952, 20 Morr. Min. Rep. 591 (citing Cheesman v. Shreeve, 40 Fed. 787, 17 Morr. Min. Rep. 260; Hyman v. Wheeler, 29 Fed. 347, 15 Morr. Min. Rep. 519; Iron S. M. Co. v. Cheesman, 116 U. S. 529, 6 Sup. Ct. Rep. 481, 29 L. ed. 712).

[63] Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029, 19 Morr. Min. Rep. 485; Grand Central M. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648; S. C., in United States supreme court, 213 U. S. 72, 29 Sup. Ct. Rep. 413, 53 L. ed. 702.

[64] Harrington v. Chambers, 3 Utah, 94, 1 Pac. 362, 375; Burke v. McDonald, 2 Idaho, 310 (339), 13 Pac. 351; Shreve v. Copper Bell M.

Others lean toward the narrow definition—that it is a seam or fissure in the earth's crust, filled with quartz or other rock in place, carrying gold, silver, etc.[65]

In Webb v. American Asphaltum M. Co.[66] the circuit court of appeals said:—

> A vein or lode is mineral-bearing rock or earthy matter in place in a fissure in rock, so that its boundaries are sharply defined by rock walls in place.

The definition was given in connection with the distinction between lodes and placers and for illustrative purposes. It is too narrow a definition, and if universally applied excludes many vein and lode deposits in place not in fissure, e. g., veins of impregnation and replacement, including those large commercially valuable deposits of copper sulphides formed usually as the result of secondary enrichment.

The land department has supplied a comprehensive definition, or rather adopted one from some of the leading cases:—

> By the term "vein" or "lode" . . . . it is not to be understood as having had in mind merely a typical fissure or contact vein, but rather any fairly well-defined zone of mineral-bearing rock in place.[67]

Sand rock or sedimentary sandstone in the general mass of the mountain bearing gold is rock in place bearing mineral, and constitutes a vein or lode within the purview of the statute, which can be located and

Co., 11 Mont. 309, 28 Pac. 315; Brownfield v. Bier, 15 Mont. 403, 39 Pac. 461.

[65] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 309, 1 Fed. 522, 9 Morr. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 107, 11 Fed. 666, 4 Morr. Min. Rep. 411; Foote v. National M. Co., 2 Mont. 402; Stinchfield v. Gillis, 96 Cal. 33, 30 Pac. 839, 17 Morr. Min. Rep. 497.

[66] 157 Fed. 203, 204, 84 C. C. A. 561.

[67] East Tintic Cons. M. Co., 40 L. D. 271.

entered only under the laws applicable to lode deposits.[68]

In a case arising in Nevada, at Treasure Hill, where the formation is limestone, and the conditions were parallel to those existing in the Eureka case, the supreme court of that state held that the term "lode" might be applied to ore deposits in a succession of chambers connected by a seam, varying in width, and more or less barren, and with walls of different character.[69]

All cases seem to agree that neither the size[70] nor the richness of the ore[71] is an element of the definition.[72]

As to whether a given deposit is a vein, or lode, is a question of fact.[73]

[68] In re Palmer, 38 L. D. 294.

[69] Phillpotts v. Blasdel, 8 Nev. 62.

[70] Stinchfield v. Gillis, 96 Cal. 33, 30 Pac. 839, 841, 17 Morr. Min. Rep. 497; Stevens v. Williams, Fed. Cas. No. 13,413, 1 McCrary, 480, 1 Morr. Min. Rep. 566; Jupiter M. Co, v. Bodie Cons. M. Co., 7 Saw. 96, 107, 11 Fed. 666, 675, 4 Morr. Min. Rep. 411; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 309, 1 Fed. 522, 530, 9 Morr. Min. Rep. 529; Meydenbauer v. Stevens, 78 Fed. 787, 791, 18 Morr. Min. Rep. 678.

[71] Stinchfield v. Gillis, 96 Cal. 33, 30 Pac. 839, 841, 17 Morr. Min. Rep. 497; Book v. Justice M. Co., 58 Fed. 106, 17 Morr. Min. Rep. 617; Migeon v. Mont. Cent. Ry., 77 Fed. 249, 23 C. C. A. 156, 18 Morr. Min. Rep. 446; Shoshone M. Co. v. Rutter, 87 Fed. 801, 807, 31 C. C. A. 223, 19 Morr. Min. Rep. 356.

[72] Golden Terra M. Co. v. Mahler, 4 Morr. Min. Rep. 390, 4 Pac. C. L. J. 405; Armstrong v. Lower, 6 Colo. 393; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 108, 11 Fed. 666, 675, 4 Morr. Min. Rep. 411; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 309, 1 Fed. 522, 530, 9 Morr. Min. Rep. 529.

[73] Bluebird M. Co. v. Largey, 49 Fed. 289, 290; Bullion B. & C. M. Co. v. Eureka Hill M. Co., 5 Utah, 3, 11 Pac. 515, 519; Illinois S. M. Co. v. Raff, 7 N. M. 336, 34 Pac. 544.

ARTICLE III. "ROCK IN PLACE."

§ 298. Classification of lands containing valuable deposits.—The laws of the United States prescribing the terms upon which its lands containing valuable deposits, other than coal, shall be sold, used or occupied, have divided such lands into two distinct classes:—

(1) Those which contain veins, or lodes, of quartz or of other rock in place;[74]

(2) Those containing placers and other forms of deposit other than those found "in place."[75]

To determine the proper manner of appropriating public lands containing such valuable deposits, it is necessary to first ascertain whether they are found in veins, or lodes, of rock in place, or not. If of rock in place, a method is to be pursued differing from that applicable to other deposits, and the nature and extent of rights conferred by the appropriation of one class differ in some respects from those conferred by the other. It becomes necessary to arrive at an understanding of what is meant by "rock in place."

§ 299. Use of term "in place" in the mining laws. A vein, or lode, is necessarily "in place." The con-

[74] Rev. Stats., § 2320; Comp. Stats. 1901, p. 1424; 5 Fed. Stats. Ann. 8.

[75] Rev. Stats., § 2329. Justice Miller, in Stevens v. Williams, Fed. Cas. No. 13,413, 1 McCrary, 480, 1 Morr. Min. Rep. 566, 572; Gen. Circ. Inst. (July 15, 1873), Copp's Min. Dec. 316, 318; Henderson v. Fulton, 35 L. D. 652; In re McDonald, 40 L. D. 7; Harry Lode Min. Claim, 41 L. D. 403.

dition of being "in place" is one of its essential attributes. The term "quartz or other rock in place," as used in section twenty-three hundred and twenty of the Revised Statutes, refers to its constituent elements, or the "filling" of veins and lodes. Experience has shown that mineral substances in veins, or lodes, are not always found in quartz. Sometimes the vein material is composed mainly of the same character of rock as the inclosing walls—the occurrence of mineral being in the form of impregnations, penetrating the country rock, or the mineral may be but a replacement of the original rocks. So the statute recognizing that while the material of most veins consists of quartz, yet, as this is not universally true, the alternative, "or other rock in place," was introduced. As quartz in a vein is rock in place, the statute would have been equally as comprehensive if instead of saying "veins, or lodes, of quartz or other rock in place," it had simply said "veins, or lodes, of rock in place."

The term "rock in place," occurs in all of the mining legislation of congress. There is nothing cabalistic in its use. It is simply the *in situ* of the geologist, and as explained by the commissioner of the general land office in the mining circulars issued by him, the term has always received the most liberal construction of which the language would admit. Every class of claims that either according to scientific accuracy or popular usage can be classed and applied for as a vein or lode may be patented under the law, as a vein or lode of rock in place.[76]

In this class the commissioner included all lands wherein the mineral matter is contained in veins or ledges occupying the original *habitat*, or location, of the metal or mineral, whether in true or false veins,

[76] Commissioner Drummond (July 20, 1871), Copp's Min. Dec. 46.

in zones, in pockets, or in the several other forms in which minerals are found in the *original rock*.[77]

Petroleum is said to be "in place" when it occupies the undisturbed position in the earth between the inclosing rocks where it was placed by natural processes; and so with subterranean salt water; but they are not "rock in place."[78]

Ordinarily, there should be but little difficulty in determining whether a given deposit is a vein or lode of rock in place or not. But circumstances have arisen which have provoked discussion as to what is meant by the term "in place," and it has frequently occupied the attention of the courts.

§ 300. The blanket deposits of Leadville.—The blanket deposits at and in the vicinity of Leadville, Colorado, have given rise to most of the controverted questions on the subject of "lodes," "veins," "in place," "top," and "apex"; and the burden of solving many of these difficulties in the first instance fell to the lot of Judge Hallett. His decisions have furnished the text for other courts, in other jurisdictions, where analogous conditions have been to a limited extent encountered.

The conditions which created the necessity for a rule of interpretation to be applied to the term "in place" are thus stated by the distinguished judge:—

> Until the discovery of mineral deposits near Leadville no controversy had arisen in Colorado as to whether a lode, or vein, is in place within the meaning of the act of congress.
>
> The mines opened in Clear Creek, Gilpin, Boulder, and other counties descend into the earth

[77] Copp's Min. Dec. 316, 319, 1 Copp's L. O. 11.

[78] Williamson v. Jones, 39 W. Va. 231, 257, 19 S. E. 436, 441, 25 L. R. A. 222.

so directly that no question could arise whether they were inclosed in the general mass of the country; whatever the character of the vein, and whatever its width, it was sure to be within the general mass of the mountain; but the Leadville deposits were found to be of a different character. In some of them at least, the ore was found on the surface or covered only by the superficial mass of slide, débris, detritus, or movable stuff which is distinguishable from the general mass of the mountain, while others were found beneath an overlying mass of fixed and immovable rock which could be called a wall as well as that which was found below them. It then became necessary to consider very carefully the meaning of the words "in place" in the act of congress, in order to determine whether these deposits were of the character described in that act.[79]

As the character of these deposits is frequently involved in the discussion of numerous phases of the mining law, we think it advisable to give a short account of the nature of their occurrence. Much has been written upon them, and the scientists are by no means harmonious as to the theory of their origin. On the question of structural geology, however, there is but little room for controversy. The records of geological history exposed in the mine workings are read by all alike; and there is a general consensus of opinion as to what is there found. Professor Emmons thus states the result of his investigations:—

By far the most important of the ores of Leadville and vicinity, both in quantity and quality, occur in the blue-gray dolomitic limestone, known as blue or ore-bearing limestone, and at or near its contact with the overlying sheet of white porphyry. They thus constitute a sort of contact sheet whose

[79] Leadville M. Co. v. Fitzgerald, 4 Morr. Min. Rep. 381, Fed. Cas. No. 8158.

upper surface, being formed by the base of the porphyry sheet, is comparatively regular and well defined, while the lower surface is ill-defined and irregular, there being a gradual transition from ore into unaltered limestone, the former extending to varying depths from the surface, and even occupying at times the entire thickness of the blue limestone. This may be regarded as the typical form of the Leadville deposits; there are, however, variations from it, and also in the character of the inclosing rock, which do not necessarily involve any difference in origin or mode of formation. As variations in form, the ore sometimes occurs in irregularly shaped bodies, or in transverse sheets, not always directly connected with the upper or contact surface of the ore-bearing bed or rock. It also occurs at or near the contact of sheets of gray or other porphyries with the blue limestone, and less frequently in sedimentary beds, both calcareous and silicious, and in porphyry bodies, sometimes on or near contact surfaces, sometimes along joint or fault planes. . . . .

The material of which they were composed was not a deposit in a pre-existing cavity in the rock, but the solutions, which carried them, gradually dissolved out the original rock material and left the ore or vein material in its place. . . . .

The mineral solutions or ore currents concentrated along natural water channels, and followed by preference the bedding planes at a certain geological horizon; but they also penetrated the adjoining rocks through cross-joints and cleavage planes.[80]

A glance at the geological atlas accompanying this monograph shows that in many portions of this mineral belt these deposits lie in a position approaching the horizontal, sometimes forming a basin, at others alternating in anticlinal and synclinal folds, shown in

[80] Geology and Mining Industry of Leadville, pp. 375, 378.

an emphasized form in figure 22 appearing in a subsequent section.[81]

In places erosion has carried off the overlying porphyry, leaving the vein material lying between the bedding of limestone and superficial deposit of slide and detritus. The continuity of the vein material is frequently interrupted by faults and intrusive dikes as well as by a broken or "jumbled-up" condition of the country rock. This is substantially the character of deposits with which the courts are confronted in the application of the mining laws.

§ 301. Judicial interpretation of the term "rock in place."—In some of Judge Hallett's decisions he speaks of the *lode* being "in place." Notably in the case of Stevens v. Williams,[82] where that distinguished jurist uses the following language:—

> As to the meaning of these words "in place," they seem to indicate the body of the country which has not been affected by the action of the elements; which may remain in its original state and condition as distinguished from the superficial mass which may lie above it. . . . . And when the act speaks of veins or lodes *in place*, it means such as lie in fixed position in the general mass of country rock or in the general mass of the mountain. . . . . Now, whenever we find a vein, or lode, in this general mass of country rock we may be permitted to say that it is *in place*, as distinguished from the superficial deposit; and that is true, whatever the character of the deposit may be—that is to say, as to whether it belongs to one class of veins or another; it is *in place* if it is held in the embrace, is inclosed by the general mass—of the country.
>
> . . . . . .
>
> It is not material as to the character of the vein matter whether it is loose and disintegrated or

[81] *Post*, § 312.

[82] Fed. Cas. No. 13,414, 1 Morr. Min. Rep. 557, 558.

whether it is solid material. In these lodes the earth that is found in them, the earthy matter which may be washed or treated with water or steam, is often the most valuable part.

It was never understood here or elsewhere, so far as I know, that such earthy matter was not embraced in the location because it was of that character. It is the surrounding mass of country rock; it is that which incloses the lode, rather than the material of which it is composed, which gives it its character. So that, even if it be true, as counsel have stated in the course of their arguments, that this is mere sand, is a loose and friable material, which cannot be called rock, in the strict definition of the word—if that be true, it does not affect the character of the lode. If it were all of that character, it would still be a vein or lode *in place* if the wall on each side, the part which holds the lode, is fixed and immovable.

And in Stevens v. Gill[83] he says:—

The act of congress speaks of veins or lodes *in place*, by which, according to our interpretation, it is required that the vein, or lode, shall be in the general mass of the mountain. It may not be on the surface or covered only by movable parts, called slide, or débris. But if it is in the general mass of the mountain, although the inclosing rocks may have sustained fracture and dislocation in the general movement of the country, it is in place.[84]

The judge does not give the exact language of the statute, which is "veins, or lodes, *of* quartz or other rock in place."

Dr. Raymond, in his "Law of the Apex," calls attention to the misquotation. But it seems to us that,

[83] Fed. Cas. No. 13,398, 1 Morr. Min. Rep. 576, 580.

[84] See, also, Leadville M. Co. v. Fitzgerald, Fed. Cas. No. 8158, 4 Morr. Min. Rep. 381; Stevens & Leiter v. Murphey, 4 Morr. Min. Rep. 380.

taken in connection with Judge Hallett's other rulings, his intent is manifest.[85]

In the second trial of the Stevens & Leiter case, Justice Miller charged the jury as follows:—

> By "rock in place" I do not mean merely hard rock, merely quartz rock, but any combination of rock, broken up, mixed with mineral and other things, is rock in place, within the meaning of the statute.
>
> I give that instruction [that the mineral must be of quartz or other rock], but with the distinct understanding that all this substance between the porphyry and limestone that has been explained to you which contains mineral—I mean which contains ore—is *rock in place.*[86]

And in Iron S. M. Co. v. Cheesman, Judge Hallett says:—

> Excluding the wash, slide, or débris, on the surface of the mountain, all things in the mass of the mountain are *in place.*

This was quoted and approved by the supreme court of the United States.[87]

The decisions of Judge Hallett and Justice Miller were quoted with approval in a case decided by the supreme court of Nevada, the facts of which and conclusions drawn from them are thus stated in the opinion of the court:—

> A certain formation which the defendant claimed to be the ledge had been traced on its inclination

[85] See, also, Judge Hallett's definitions of "vein" and "lode," *ante,* § 293.

[86] Stevens & Leiter v. Williams, Fed. Cas. No. 13,413, 1 McCrary, 480, 1 Morr. Min. Rep. 566, 569, 571.

[87] Iron S. M. Co. v. Cheesman, 116 U. S. 529, 537, 6 Sup. Ct. Rep. 481, 29 L. ed. 712. See, also, Jones v. Prospect Mt. T. Co., 21 Nev. 339, 31 Pac. 642, 646.

outside the plaintiff's boundaries, and a large amount of work there done upon it. If this was the ledge, as the defendant claimed, it tended to show that its apex was outside those boundaries. According to the witnesses, it consisted of broken limestone, boulders, low-grade ore, gravel, and sand, which appeared to have been subjected to the action of water. This was found at a depth of several hundred feet, and where there seems to have been no question that it was within the original and unbroken mass of the mountain. So far as was shown, the rock on either side was fixed, solid, and immovable. Mineral matter so situated, no matter where it was originally formed or deposited, is in place within the meaning of the law. The manner in which mineral was deposited in the places where it is found is at best but little more than a matter of mere speculation, and to attempt to draw a distinction based upon the mode, or manner, or time of its deposit would be utterly impracticable and useless. The question was long ago settled by the courts.[88]

A mere superficial deposit, although originally in place, the overlying rock having been eroded and replaced by débris, or wash, is not in place.[89]

Auriferous cement gravel beds found in the channels of ancient rivers, lying upon bedrock and covered with thick deposits of other gravel, the whole frequently capped with a lava of great thickness, would seem to be "in place" within the definitions heretofore given. But the land department,[90] as well as the courts,[91] treats them as deposits of rock not "in

[88] Jones v. Prospect Mt. T. Co., 21 Nev. 339, 351, 31 Pac. 642, 645.

[89] Tabor v. Dexter, Fed. Cas. No. 13,723, 9 Morr. Min. Rep. 614. See Judge Delaney's charge to jury in Meydenbauer v. Stevens (Alaska), 78 Fed. 787, 790, 18 Morr. Min. Rep. 578.

[90] Copp's Min. Dec. 78.

[91] Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401, 403, 15 Morr. Min. Rep. 602.

place," and requires them to be located under the laws applicable to placers.

A later ruling of the land department, however, seems to be somewhat inconsistent with these decisions. A sand rock or sedimentary sandstone formation in the general mass of the mountain bearing gold is held to be rock in place bearing mineral and constitutes a vein or lode within the provisions of the statute which can be located and entered only under the law applicable to lode deposits.[92]

The difference between this class of deposits and the auriferous gravels of the ancient river-beds would seem to be one of degree and not of kind. Both are of sedimentary origin; both are in the mass of the mountain, and both carry mineral. It is not probable, however, that this inconsistency will change the previous rule classifying the deep-seated gravels in the category of placers.

Article IV. "Top," or "Apex."

[92] In re Palmer, 38 L. D. 294.

§ 305. The "top," or "apex," of a vein as a controlling factor in lode locations.—The importance of a correct definition of the terms "top," or "apex," or at least a proper application of their definitions to the varying geological conditions encountered in the administration of the mining laws, cannot be overestimated. The top, or apex, of the vein which is the subject of appropriation, is the prime factor in determining the extent of the rights acquired by a lode location. This is apparent when we consider the following requirements of the law:—

(1) No lode location is valid unless it includes, to some extent at least, within vertical planes drawn through the surface boundaries, the top, or apex, of a discovered vein, at least as against a subsequent locator properly inclosing such apex within his surface boundaries.[93]

(2) The right to pursue the vein on its strike ceases at the point where the apex of the vein passes beyond the surface boundaries or vertical planes drawn through them;

(3) The right to pursue the vein on its downward course out of and beyond a vertical plane drawn through the side-line, into and underneath the lands adjoining, when this right exists to any degree, can only be exercised to the extent that the top, or apex, of the located vein is found within the surface boundaries of the location, or within vertical planes drawn through them.[94]

[93] It is possible that under some circumstances a location overlying the dip of a vein may be valid to the extent of whatever may be found within the vertical bounding planes. The statement in the text should be read in the light of the discussion found in a subsequent section (*post*, § 364).

[94] The grant is as to lodes having their apex in the ground patented. The fact that a part of the apex might be in the ground granted would

It is not our purpose to here discuss these elements or presently note possible exceptions to the rule. These will be fully considered under appropriate heads in other portions of this treatise. We enumerate them simply to demonstrate the necessity of an accurate understanding of what is meant by the terms "top," or "apex," and the care with which principles announced in one case are to be applied to another.

In the light of the rules announced in the previous articles, if a given mineral deposit is in place, it is a lode. The law assumes that the lode has a top, or apex, and provides for the acquisition of title by location upon this apex. A lode without an apex is not contemplated and no provision is made for locating it. It cannot be located under the placer laws, because these laws apply only to deposits *not* in place; and before it can be legally located as a lode, the apex, or top, must be found. If a location is made on the side or on the dip, whoever discovers and properly locates the apex will be entitled to enjoy the full rights accorded to regular valid lode locations, and the rights of those who have located on the side edge, or dip, must yield.[94a]

The most serious difficulty in defining the apex has arisen in connection with certain flat, or "blanket," deposits, which have been judicially determined to be lodes within the meaning of the statutes. It is often quite impracticable to fix upon any exposure of such a deposit which properly constitutes the apex. It is

not give any right to that part of the apex which is not therein, although the apex might be cut by both end-lines of the granted premises. Waterloo M. Co. v. Doe, 82 Fed. 45, 55, 27 C. C. A. 50, 19 Morr. Min. Rep. 1.

[94a] Stewart Min. Co. v. Ontario Min. Co. (Idaho), 132 Pac. 787, 792–794.

true that after a lode patent is issued, the existence of an apex within the patented ground will be conclusively presumed,[95] but not necessarily the apex of the vein in dispute. Nor will it be conclusively presumed that any particular exposure of the vein is that apex.[96] It must still remain a question of proof. As to the presumptions flowing from a lode patent and what presumptions are *prima facie* and what are conclusive, the subject will be found fully discussed in a later portion of this treatise.[97]

§ 306. The terms "top," or "apex," not found in the miner's vocabulary—Definitions of the lexicographers.—Prior to the passage of the act of July 26, 1866, the terms "vein" and "lode" formed a part of the miner's vocabulary. They were incorporated into local rules, and their signification was fairly understood throughout the mining regions. The first congressional law on the subject of mining on the public domain was but a crystallization of these rules;[98] and it was no more than natural that when the courts came to construe the terms which had thus found their way into legislative enactments, they should be interpreted according to the understanding of those who first made the definitions and applied them. In addition to this, the terms "vein" and "lode" had a recognized scientific meaning which did not differ from the

95 Iron S. M. Co. v. Campbell, 17 Colo. 267, 29 Pac. 513, 514.

96 Grand Central M. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648, 667.

97 *Post*, §§ 780, 866.

98 Jennison v. Kirk, 98 U. S. 453, 459, 25 L. ed. 240, 4 Morr. Min. Rep. 504; Broder v. Natoma W. Co., 101 U. S. 274, 276, 25 L. ed. 790, 5 Morr. Min. Rep. 33; Chambers v. Harrington, 111 U. S. 350, 352, 4 Sup. Ct. Rep. 428, 28 L. ed. 452; N. P. R. R. v. Sanders, 166 U. S. 620, 634, 17 Sup. Ct. Rep. 671, 41 L. ed. 1139. See *ante*, § 56.

popular one, except as applied to novel and peculiar conditions.

But neither "top" nor "apex" found a place in the miner's glossary at any period in the history of the mining industry, either in the mining regions of the west or elsewhere; nor had they ever been recognized or applied by scientists for the purpose of designating any part of a vein, lode, or mineral deposit of any kind. Neither miner nor geologist is entitled to the credit for their appearance in the public statutes; nor are they to be held responsible for the perplexities and embarrassments surrounding their proper interpretation. Thus left without custom, precedent, or scientific definition to guide them, the courts were forced to take the statute by its "four corners" and evolve a definition which would, measurably at least, effectuate the object and end of the law. The rule that words employed in a statutory enactment are to be given their ordinary meaning unless a contrary intention appear was not necessarily violated. The courts simply were forced to the conclusion that the ordinary acceptation of the terms was not what congress intended.

Webster defines an apex to be "the top, point, or summit of anything."

Compilers of dictionaries which have made their appearance since the act under consideration was passed have not been particularly lucid in their definitions. For instance:—

Standard Dictionary:—

(1) The pointed or angular end, or highest point, as of a pyramid, spire, or mountain; extreme point; tip; top.

(2) The vertex of a plane or solid angle.

(3) The highest point of a stratum; as a coal seam.

Century Dictionary:—

(1) The tip, point, or summit of anything. In *geometry*, the angular point of a cone or conic section. The angular point of a triangle opposite the base.

(2) In *geology*, the top of an anticlinal fold of strata. This term, as used in United States Revised Statutes, has been the occasion of much litigation. It is supposed to mean something nearly equivalent to outcrop; but precisely in what it differs from outcrop has not been, neither does it seem capable of being, distinctly made out.

Evidently the courts even now can receive but little assistance from the lexicographers.

§ 307. Definitions given in response to circulars issued by the public land commission.—Under an act of congress passed March 3, 1879, a public land commission was appointed for the purpose of codifying the then existing laws relating to the survey and disposition of the public domain, and to make such recommendations as it might deem wise in relation to the best methods of disposing of the public lands. This commission consisted of J. A. Williamson, commissioner of the general land office; Clarence King, director of the geological survey; A. T. Britton, Thomas Donaldson, and J. W. Powell. For the purpose of informing themselves generally on conditions existing in the west, the commissioners issued a circular containing a series of questions, to which answers were received. These circulars were sent to mining engineers, surveyors, lawyers, judges, and practical miners. Under the head of "Lode Claims," the fourth question was:—

What do you understand to be the top, or apex, of a vein or lode?

We select from the list of answers quoted by Dr. Raymond in his "Law of the Apex":—

The highest point at which the ore or rock is found "in place" or between the walls of the vein, and not a "blow out" or part of the ledge broken down outside the walls.

The croppings, or the exposed surface of the vein, or lode.

The highest point at which it approaches or reaches the natural surface of the ground.

The highest point of its outcrop in rock in place.

That point at which the vein enters or emerges from rock in place.

The top, or apex, is generally understood to be that part of the lode that is first discovered. A vertical lode has its apex at the surface.

Where the mineral-bearing crevice-matter is first met, either on the surface, or, as in blind lodes, underground; but wherever it is met, there begins the apex.

The croppings, or highest point of the ledge appearing above or discovered beneath the surface.

The highest point of the center of the ledge.

The outcrop in the highest geological level, whether this is accidentally higher or lower than some outcrop caused by denudation, or slip.

Where it comes through or to the surface of the rock in which it is incased, though it may be covered, and sometimes is, with twenty or thirty feet of loose earth.

That portion of the lode along its course which outcrops to the surface, or, if "blind," which comes nearest to the surface.

Croppings.

The line such vein would make in its intersection with the surface, calculated from its true dip at each point.

The uppermost part of the ledge between the two walls, although these may be missing.

In case the vein outcrops at the surface, I would call any portion of such outcrop the top, or apex. If the vein does not reach the surface, then the highest point to which the vein, or lode, can be traced is the apex—not necessarily the nearest point to the surface, but the absolute highest point.

The summit, comb, crest, or highest point on the ridge of a vein, or lode.

The upper edge; that part which is first reached or passed, in developing a mine.

The outcrop, or, in case of a blind ledge, that line of the vein, or lode, which approaches the surface the nearest.

That portion of the vein that is visible in the country rock when the loose dirt or earth has been removed. Some veins stand up above the country rock like a wall. The top of such veins would be the highest part of such wall above the ground or bedrock.

Its highest point at any given place.

The outcrop.

The point at surface where the ore is met with; either superficially seen in the croppings, or just beneath the surface.

Either the outcrop or crevice between walls at the top of bedrock.

The vein at the surface.

Outcrops generally.

The width of the vein, or lode, on the surface; but the United States mining law means the top, or apex, to be the width of the claim, six hundred by fifteen hundred feet.

The outcropping of the vein.

Where it has been projected through the country rock by an acting subterranean agency or force.

Judge Beatty, then chief justice of Nevada, gave the clearest and most comprehensive of all the definitions. It is as follows:—

The top, or apex, of any part of a vein is found by following the line of its dip up to the highest point at which vein-matter exists in the fissure. According to this definition, the top, or apex, of a vein is the highest part of the vein along its entire course. If the vein is supposed to be divided into sections by vertical planes at right angles to its strike, the top, or apex, of each section is the highest part of the vein between the planes that bound that section. . . . .

Of course, there are irregular mineral deposits departing widely in their characteristics from the typical or ideal vein which seems to have been in the mind of the framer of the act of 1872. To such deposits the foregoing definitions will not apply; and, in my opinion, great difficulty will be experienced in any attempt to apply the existing law to them.[99]

§ 308. **Definition by Dr. Raymond.**—Dr. Raymond, in his "Law of the Apex," with reference to these terms and their use in the act of May 10, 1872, says:—

I have reason to believe that they were used instead of the word "outcrop," in order to cover "blind lodes," which do not crop out. The conception of an apex, which is properly a point, was probably taken from the appearance of a blind lode in a cross-section, where the walls appear as lines and the upper edge as a point. The term may also have been intended to cover the imaginary case of an ore deposit which terminates upwards in a point. We may, however, dismiss from consideration the case of a simple point, and safely assume that the apex is the same as a top, and is either a line or a surface.

The definition crystallized by him and found in his "Glossary of Mining and Metallurgical Terms,"[100] is "the end or edge of a vein nearest the surface."

[99] Report of Public Land Commission, p. 399; Dr. Raymond on Law of the Apex, p. 28.

[100] Trans. Am. Inst. M. E., vol. ix, p. 102.

We think this definition should be qualified to some extent. Our views will be found in the next section.

§ 309. The ideal lode and its apex.—For the purpose of elementary consideration of the subject, we present in figure 10, a vertical cross-section, showing two veins, or lodes, of the simplest type, two steeply inclined fissures filled with ore-bearing material, the one outcropping on the surface, the other terminating on its upward course before reaching the surface.

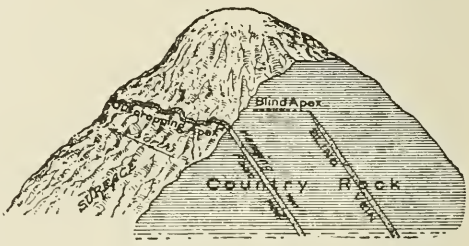

FIGURE 10.

These are doubtless the veins which the miner had in mind when he furnished the descriptions which served as guides in the enactment of the law. There appears no room for doubt concerning the meaning of the word "apex" as used in the statutes, when applied to these veins. It referred to the upper terminal edge of the sheet-like vein, whether reaching the surface or not.

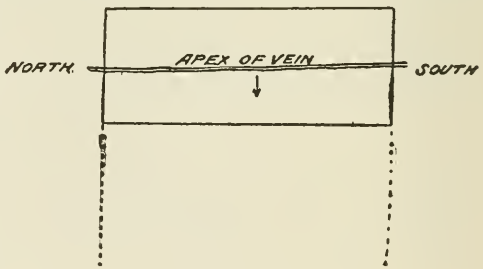

FIGURE 11.

An ideal location covering one such apex is represented in figure 11, and the rights flowing from it are unquestioned.

How should this apex be defined? It is evidently a surface, bounded by the walls of the vein. It has

both length and breadth, and cannot be described as a point or a line.

The apex of the ideal vein within the location is a surface bounded by the walls of the vein and the end-lines of the location. This surface is, of course, irregular. It may be higher at one place within the boundaries than it is in another; but mere elevation of the upper edge of the vein at different points within the location is of no moment. If the top of the mountain were ground down to a horizontal plane, the vein as exposed would be a plane surface; but, nevertheless, it would be an apex. The fact that the exposed edge of the vein is ragged, or that the surface of the outcrop is higher in one place above a given datum plane than it is in another, makes no difference in the principle.

If this upper edge does not outcrop so as to be visibly traceable on the surface, but is "blind," covered with detritus or a capping of country rock, it is still a surface bounded by the walls of the vein and vertical planes drawn downward through the end-lines. The plane of contact of the upper edge of the vein with the detritus or capping, intersected by the walls of the vein, would be the apex surface. We cannot conceive that an apex of a lode, within the meaning of the act of congress, can be anything but a surface, although we are aware that the supreme court of the United States has said that an apex is often a *line* of great length.[1] But it undoubtedly meant a surface, because in another portion of the same case it speaks of the "apex in its full width." Mathematically speaking, there is no width to a line. As was

[1] Larkin v. Upton, 144 U. S. 19, 23, 12 Sup. Ct. Rep. 614, 36 L. ed. 330, 17 Morr. Min. Rep. 465.

said by the supreme court of Montana, a lead, or lode, is not an imaginary line without dimensions; it is not a thing without shape or form. But before it can legally and rightfully be denominated a lead, or lode, it must have length, and width, and depth; it must be capable of measurement; it must occupy defined space, and be capable of identification.[2] Of course, in speaking of the edge of the vein nearest to the surface, we mean the surface along the course of the vein, the upper edge, and not the lower edge, or side edge. As absolute horizontality does not exist in nature, every vein, lode, or deposit, whatever its form, has either an upper and lower edge, or a top and a bottom, as well as sides. It may be difficult to find them, or to determine their relative position, but they exist, in the nature of things.

To further illustrate, recurring again to figure 10: Suppose that, instead of the mountain being in its normal condition, the south face of a hill was abraded, cut down vertically, as you would cut a cheese, as shown in cross-section on the figure, leaving the edge of the vein from the original outcrop to the bottom of the figure between the hanging and foot wall planes, there indicated, exposed to the observer as we see it in the figure. In other respects, the vein preserves its position in the mountain as described. Will it be seriously contended that the exposure of the edge thus described constitutes an apex, because it appears at the surface on the perpendicular face of the hill? It has been so claimed. In the case of Duggan v. Davey, decided by the supreme court of Dakota, a case soon to be considered by us, it was stated by Professor Dickerman, a distinguished expert, in response to an

[2] Foote v. National M. Co., 2 Mont. 403.

inquiry as to what would be the apex of a vein cropping out at an angle of one degree from the vertical on a perpendicular hillside, and cropping out also at a right angle with that along the level summit of the hill (which is the case assumed by us with reference to figure 10), that in his opinion the whole line of the exposure from the bottom upward to the original outcrop and clear over the hill, as far as it extended, would be the apex of the vein. In other words, one part of the apex surface can be perpendicular, or at right angles to the other.[3] Of course, the court declined to follow him.

Mr. Ross E. Browne furnishes the following definition and illustration:—

The vein is limited in extent. It terminates horizontally, upward, and ultimately downward. Let figure 12 represent in isometric projection, the plane

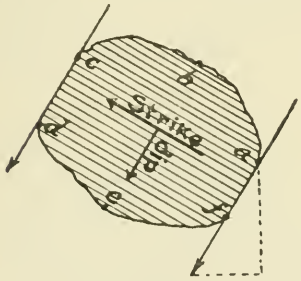

FIGURE 12.

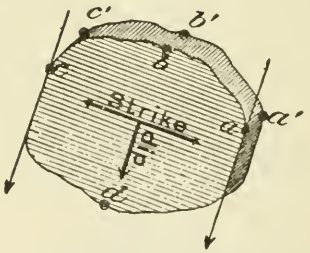

FIGURE 13.

of an ideal narrow vein, comparable with a sheet of paper. The line *a-b-c-d-e-f* represents the terminal edge, with tangent dip-lines at *a* and *c*. Then *a-b-c* is the top edge or apex, *a-f* and *c-d* are the side edges, and *d-e-f* is the bottom edge. From any point of the apex *a-b-c* the vein may be followed

[3] Duggan v. Davey, 4 Dak. 110, 140, 26 N. W. 887, 895, 17 Morr. Min. Rep. 59. See, also, Stewart Min. Co. v. Ontario Min. Co., 132 Pac. 787, 794.

downward in the direction of its true dip. From the bottom edge *d-e-f* the vein does not extend further downward. Hence the definition which follows: "The apex is all that portion of the terminal edge of the vein from which the vein has extension downward in the direction of its dip." But a vein is not generally so thin as a sheet of paper; it has a material and widely varying thickness, and its apex is a surface rather than an edge. The above definition may then apply more strictly to the lateral boundaries or walls of the vein, and the apex of the vein itself may be described as the surface included between the apices of its lateral boundaries—*a-b-c-c'-b'-a'*, on figure 13.

The apex may outcrop or it may be blind,—that is, not reach up to the surface.

The above definition, which accords with our views, involves the elements of terminal edge, and downward course therefrom.

According to it, the horizontal sheet *a* on figure 14 and the anticlinal fold *b* have no apices, while the synclinal fold *c* has two apices.

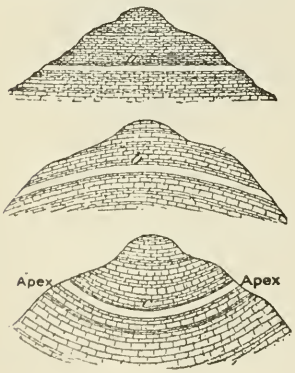

FIGURE 14.

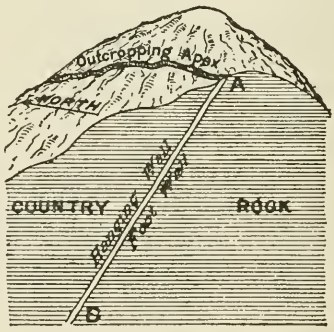

FIGURE 15.

It has sometimes happened, especially with veins of slight inclination from the horizontal, that in the process of erosion, the side edge, representing a dip-

line, has been exposed so as to constitute an outcrop. For example, assume that the vertical cross-section cut shown on figure 15 is the result of natural erosion, then the exposure *a-b* would be such an outcrop. It is quite apparent that such outcrops do not constitute apices.

Where the deposit is embraced within well-defined boundaries such as occur in true fissure veins or in ore-bearing zones within limits which are susceptible of definition, the mineral character being once established, it may not be difficult to fix the position of the top or apex. But where the deposits are situated within homogeneous rock such as those formed by impregnation, replacement or are the results of secondary enrichment, the difficulties surrounding the determination of what and where is the apex are multiplied. We shall have occasion to recur to this class of deposits when dealing with the subject of broad lodes.[4]

§ 310. Illustration of a departure from the ideal lode—The case of Duggan v. Davey.—One of the most interesting and instructive of all the adjudicated cases involving the interpretation of the terms "top," or "apex," is Duggan v. Davey,[5] decided by the supreme court of Dakota. The decision follows, in the main, the opinion given by the trial court. It is a lucid and masterly presentation of the law, and, as presented, affords us an opportunity to illustrate and explain by diagrams the position of the vein in the earth, its exposure on both top and side, the contention of the respective parties as to what constituted the apex, and

[4] *Post*, § 583.

[5] 4 Dak. 110, 26 N. W. 887, 17 Morr. Min. Rep. 59.

the conclusions of the court deduced from the facts. It is one of the few cases which affords a full opportunity of explaining by simple methods the true definition of the term "top," or "apex," as well as the "strike" and "dip," and their relationship one to the other. Entertaining these views as to the importance of the case, we are justified in presenting it fully.

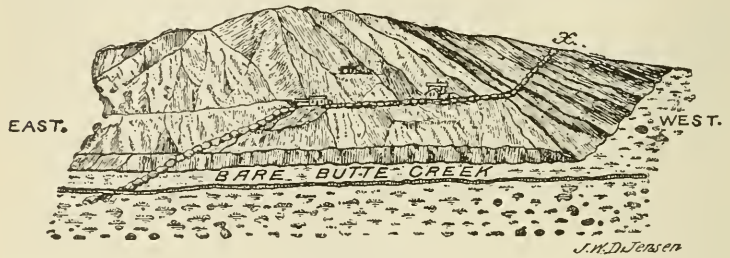

FIGURE 16.

Figure 16 is a perspective, showing an edge or outcrop of the vein exposed along the western face of Custer Hill, traversing it in a northerly and southerly direction, and an edge or outcrop traversing the northern slope in an easterly and westerly direction. We take the following description from the opinion of the trial court:—

The western slope of the hill presents a lateral face from south to north, along the line of the outcrop, of thirteen hundred feet. At its northern extremity it turns to the east, and its northern slope presents a lateral face from west to east of upward of three thousand feet. Along its base and following it in this turn in the direction indicated is a small stream called Bare Butte creek. These slopes are quite steep, and extend from base to summit about twelve hundred to thirteen hundred feet. The whole country is hilly and broken, and the hill is only one of a series of similar

elevations, with which it is more or less directly connected.

Beginning at or near the southern extremity of the western slope of Custer Hill, at a point (marked *x* on figure 16) halfway up the slope, there is found an outcropping layer or stratum of reddish quartzite, or metamorphic sandstone, of several feet in thickness, overlaid by a body or stratum of limestone or dolomitic shale, of a thickness not definitely ascertained. From this point the croppings may be readily traced in several places by high reef-like ledges, jutting out boldly from the face of the hill along the western face to its northern extremity.

The general bearing of this line of croppings may be stated as N. 11° W., the distance twelve hundred and forty-three feet, and the angle of inclination upward from south to north, approximately, three degrees.

At the northern extremity of the hill this line of outcrop of quartzite, with its overlying limestone or dolomite, turns and extends along the northern slope with a downward inclination, thus gradually nearing the base of the hill until, at a distance of something over twenty-five hundred feet, it disappears beneath the bed of the creek.

The course of the outcrop along the northern slope of the hill is for a distance of nineteen hundred and fifty feet, N. 70° 30′ E., and the angle of declination eight degrees, from west to east.

The "vein" consists of the underlying quartzite, impregnated with iron and silver in various forms, the width of the so-called vein material not being uniform. The richer ore deposits are usually found along the contact with the overlying limestone.

The entire line of outcrop on both slopes of Custer Hill appears to have been appropriated by different

locations, but the controversies in the case under consideration arose out of claims located on the northern slope. We present in figure 17 a diagram showing the

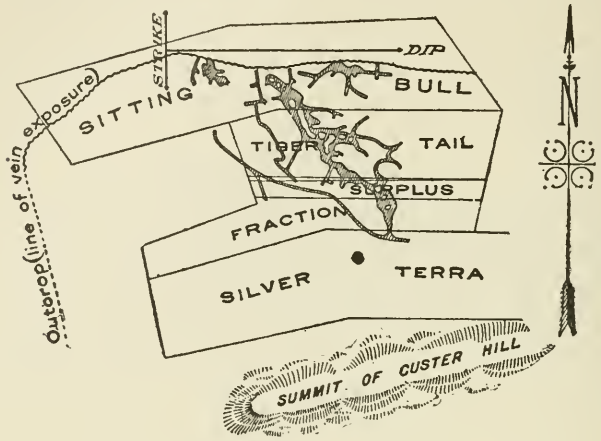

FIGURE 17.

surface boundaries of the claims, the "vein exposure," and the underground workings, in horizontal projection. From this figure it will appear that the Sitting Bull, belonging to the defendants, covers about thirteen hundred and eighty feet of the outcrop on the northern slope of the hill. Its end-lines are parallel, and if this outcrop or vein exposure is the "top," or "apex," of the vein, the location approximates the ideal shown in figure 11.[6]

The plaintiffs owned the Silver Terra, some distance south and up the hill from the Sitting Bull. It does not appear upon what vein the Silver Terra location was based. It was not material for the purposes of the case that it should be shown. Both parties had lode patents for their respective claims. The Sitting Bull had, in following the vein southerly into the hill with its underground works, penetrated underneath

[6] *Ante*, § 309.

the surface of the Silver Terra, whereupon the owners of that claim brought an action in equity to enjoin the owners of the Sitting Bull from trespassing within the boundaries of the Silver Terra.

The Sitting Bull justified its presence underneath the Silver Terra surface by asserting ownership of the apex of the vein, and its right to follow it between its end-line planes to an indefinite depth.

The principal question involved was—

> *Is the top, or apex, of this vein, or lode, within the lines of the Sitting Bull location?*

The court below, in arriving at its conclusions, considered the relative angles of declination in determining which was the top, or apex, of the vein.

The strike and dip, so far as exposed in the underground workings, was testified to as follows: Witnesses for the Sitting Bull claimed the average strike to be N. 18 E. and the dip S. 72 E., seven and one-half to eight degrees. Witnesses for the Silver Terra claimed the strike N. 8½ W. and the dip N. 81½ E., seven degrees. The court found the strike to be north and south, and the dip east, at an angle of seven and one-half to eight degrees, as shown in figure 17. This dip-line shows that the outcrop in the Sitting Bull location is *substantially* on the side edge of the vein not forming an apex. To be sure, a small part of the outcrop at the westerly end of the location is apex, according to our definition, but this is not the controlling part involved in the case.

As to what constitutes the "top," or "apex," of a vein, the court expressed its view as follows:—

> The definition of the top, or apex, of a vein usually given is the end or edge of a vein nearest the surface; and to this definition the defendants insist

we must adhere with absolute, literal, and exclusive strictness, so that wherever, under any circumstances, an edge of a vein can be found at any surface, regardless of all other circumstances, that is to be considered as the top, or apex, of the vein. The extent to which this view was carried by the defendants—and I must confess its logical results were exhibited by Professor Dickerman, their engineer, who, replying to an inquiry as to what would be the apex of a vein cropping out at an angle of one degree from the vertical, on a perpendicular hillside, and cropping out also at a right angle with that along the level summit of the hill, stated that, in his opinion, the whole line of that outcrop, from the bottom clear over the hill, so far as it extended, would be the apex of the vein. Some other witnesses had similar opinions. The definition given is no doubt correct, under most circumstances, but, like many other definitions, is found to lack fullness and accuracy in special cases, and I do not think important questions of law are to be determined by a slavish adherence to this letter of an arbitrary definition.

It is indeed difficult to see how any serious question could have arisen as to the practical meaning of the terms "top," or "apex," but it seems, in fact, to have become somewhat clouded. . . . .

Justice Goddard, a jurist of experience in mining law, in his charge to the jury in the case of Iron S. M. Co. v. Louisville, defines "top," or "apex," as the highest or terminal point of a vein, where it approaches nearest the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein.

After quoting Judge Beatty's definition given to the public land commission, referred to in a preceding section, the court continues:—

I am aware that in several adjudged cases "top," or "apex," and "outcrop" have been treated as

synonymous, but never, so far as I am aware, with reference to a case presenting the same features as the present. The word "apex" ordinarily designates a point, and so considered the apex of a vein is the summit; the highest point in a vein is the ascent along the line of its dip, or downward course, and beyond which the vein extends no farther; so that it is the end, or, reversely, the beginning, of the vein. The word "top," while including "apex," may also include a succession of points,—that is, a line,—so that by the top of a vein would be meant the line connecting a succession of such highest points or apices, thus forming an edge.

Applying these definitions to the facts of the case under consideration, the court below held that the Sitting Bull location did not cover the top, or apex, of the vein. That the outcrop shown on the northern slope of Custer Hill was merely an exposure of the edge of the vein on the line of its dip, just as the exposure of the side edge of the ideal fissure veins represented in figures 10 and 15.[7]

Judgment passed for the plaintiff. The supreme court of Dakota adopting the views of the trial court, affirmed the judgment. It was not in terms decided that the outcrop on the west slope of the hill was the top, or apex, of the vein. It was not necessary to do so in order to defeat the extralateral right claimed by the Sitting Bull. But if the owner of a location covering the outcrop on the western slope should pursue his vein easterly with his underground works so as to intersect the workings of the Sitting Bull, showing identity and continuity, and establishing that the angles of declination disclosed in such workings were the same as in the case proved, the conclusion is irresistible that the western outcrop would be the true

[7] *Ante*, § 309.

apex of the vein, and this is in consonance with the rule applied to veins of steeper inclination.

The Idaho case of Gilpin v. Sierra Nevada Cons. M. Co.[8] shows a state of facts similar to that appearing in the South Dakota case, and is illustrated on figure 18.

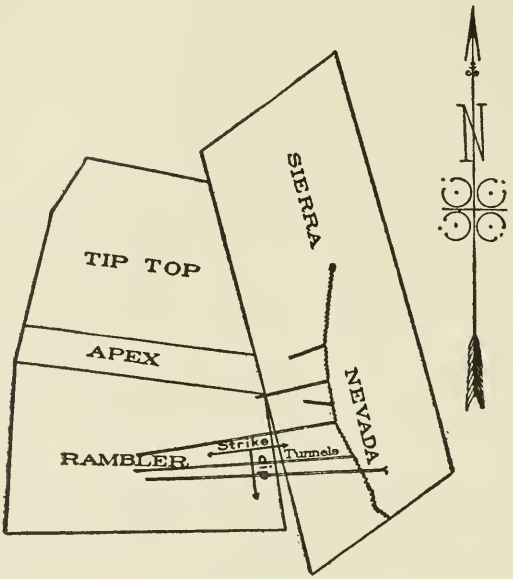

FIGURE 18.

The location of the defendant's claim, the Sierra Nevada, was upon the outcropping side edge of the vein following the dip, the line of exposure or outcrop being shown on figure 18 by the zigzag line within the Sierra Nevada claim. The defendant's works, following the vein on the strike by tunnels driven at right angles to the outcrop, extended underneath the surface of plaintiff's claims, the Apex and the Rambler.

An injunction was sought and denied by the lower court. The supreme court of Idaho reversed the order

[8] 2 Idaho, 362, 23 Pac. 547, 17 Morr. Min. Rep. 310.

and directed an injunction principally on the ground that the location of the Sierra Nevada did not cover the apex, and that the showing made did not justify or authorize its presence underneath the plaintiff's surface.[8a]

The case of Stewart Min. Co. v. Ontario Min. Co.,[8b] recently decided by the supreme court of Idaho, involved a very interesting situation illustrated by figure 18A.

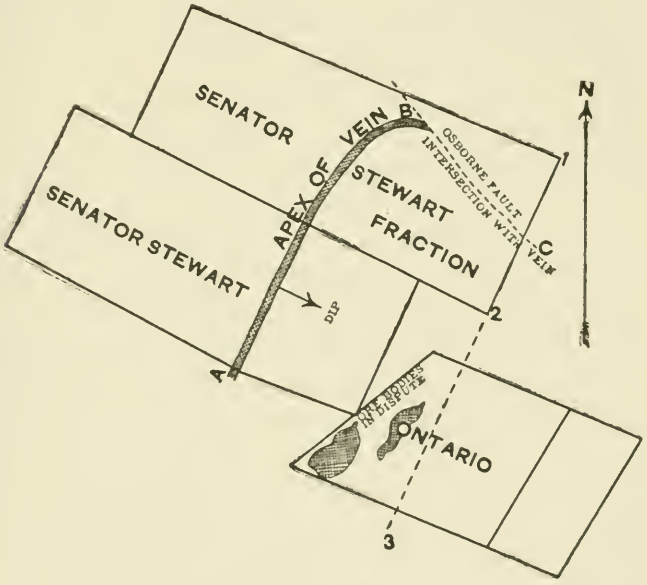

FIGURE 18A.

The vein in question, A B, crossed the southerly sideline of the Senator Stewart Fraction claim at about

[8a] For dissenting opinion, see Gilpin v. Sierra Nevada Cons. M .Co., 2 Idaho, 675, 23 Pac. 1014, 17 Morr. Min. Rep. 310.

[8b] (Idaho, July 7, 1913), 132 Pac. 787.

right angles,[9] and extended across this claim to within about one hundred feet of the north side-line where the vein was completely cut off and terminated on its onward course or strike by what is known as the "Osborne fault," B C. This fault, which was of great extent, had the effect of deflecting the strike of the vein from its normal direction for a short distance in the vicinity of the fault. The fault dipped southwesterly and undercut the vein, so that if the country rock to the north of the fault were eroded away it would have left the end edge of the vein, where it intersected the fault, standing out like an overhanging cliff. The owner of the Senator Stewart Fraction claimed that the apex of the vein in the Senator Stewart Fraction claim was along the line A B as indicated on the diagram, and that when the vein reached and was cut off by the fault, the apex of the vein turned at more than a right angle from its former course and continued along the end edge intersection of the vein with the fault B C. It was further contended that because the alleged apex A B C crossed through one side line and passed out through an end-line of the Senator Stewart Fraction claim, that therefore the claim was entitled to an extralateral right on this vein measured between a vertical plane (1, 2, 3 on diagram) passed through the easterly end-line and a plane parallel to the first plane passed through the point where the apex crossed the southerly side-line of the claim. This extralateral sweep would have included the ore bodies in dispute situated vertically

[9] The evidence presented at the trial indicated that the true apex of the vein A B was probably considerably farther west than represented on the diagram, but for the purposes of this discussion it will be assumed to have the position indicated.

beneath the surface of the Ontario lode claim controlled by the defendant.

The court held that the end edge of the vein along the Osborne fault could not be treated as an apex of the vein and ore bodies in question, for an overhanging end edge of a vein cut off as the evidence showed this to have been could not in any sense be called the top or apex of the vein. The court said that the apex of a vein "must be the top or terminal edge of the vein on the surface or the nearest point to the surface," and that to constitute an apex the vein at that point must have "a dip as well as strike or course." This, it would seem, is the determining factor, and no portion of B C, the end edge of the vein in the Senator Stewart Fraction claim abutting against the undercutting fault, could satisfy this requirement.

The vein in question was a secondary vein, the position of the primary or discovery vein not having been established by the evidence. The court, however, assumed for the purposes of this opinion that the presumption flowing from the Senator Stewart Fraction patent might be taken as sufficient, in the absence of evidence to the contrary, to establish that the end-lines on the ground were the true end-lines for all purposes. In view of the holding that the end edge of the vein along the fault did not constitute an apex, the question as to what were the true end-lines of the claim became immaterial for the purposes of this particular litigation.

Figure 18B, which is an isometric projection of this segment of the vein, will further illustrate the situation presented by this case.

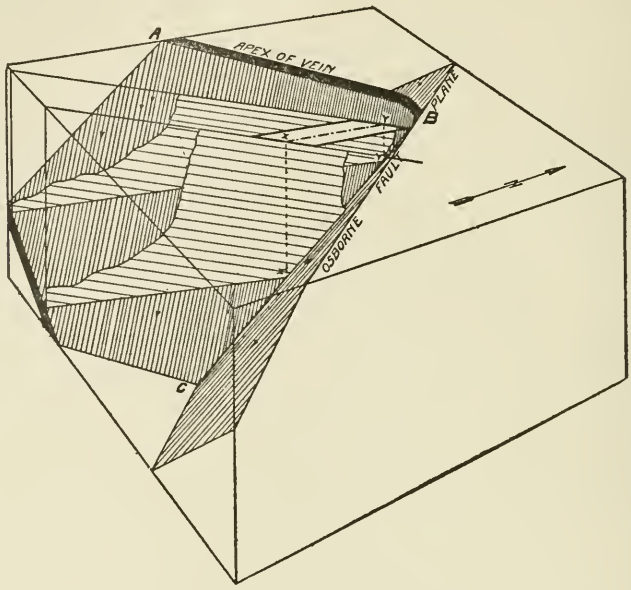

FIGURE 18B.

The contention of the plaintiff in this case is idealized by location X Y as indicated on the figure. From no portion of the end edge of the vein covered by this location is there any dip, and hence there is no apex contained therein on which to predicate an extralateral right.

In the above cases the failure of the locator of the outcrop or the locator of the edge of the vein along a fault to maintain an extralateral right was due to the fact that the portion of the vein located was the side edge and not the apex of the vein. The principle may be illustrated by reference to figure 19, representing a

conical hill cut through by an inclined vein, having a northerly and southerly strike and an easterly dip. The top of the hill is removed to expose the plane of the vein. The line *a-b-c-d* is all outcrop, but only the upper portion *d-a-b* is "apex" subject to lode location.

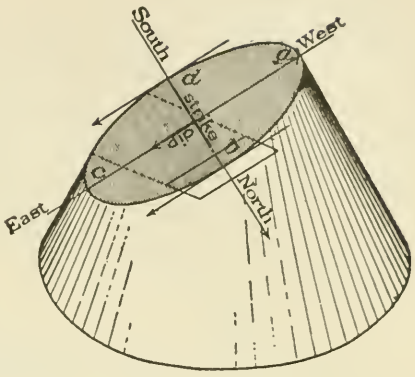

FIGURE 19.

The Sitting Bull location is indicated at *b*. Its endlines were so placed that the vertical planes passed through them intersected the vein on a downward course; still the extralateral right was denied because the location was not upon the apex. Figure 19, showing the approximate location, is to be considered in the light of our observation previously made, that, accurately speaking, the location covered a small part of what we deem to be apex, but the court disregarded this in its findings.

§ 311. **The Leadville cases.**—As in almost all other phases of the mining law, the flat deposits of Leadville have produced their full quota of adjudicated law on the subject of "tops" and "apices." As these deposits are legally held to be veins, or lodes, of rock in place, subject to mineral location, the law contemplated that they should have apices. We have heretofore given an outline of the formation in which these deposits occur, and the manner of their occurrence.[10]

[10] *Ante*, § 300.

But in connection with the quotation of some of the definitions of the words "top," or "apex," as applied by the Colorado courts, we think it instructive to present, in cross-section, illustrations showing the physical conditions surrounding some of the litigated cases, where these definitions have been announced and applied. A much better understanding of the views of the court in a given case is reached by the aid of diagrams.

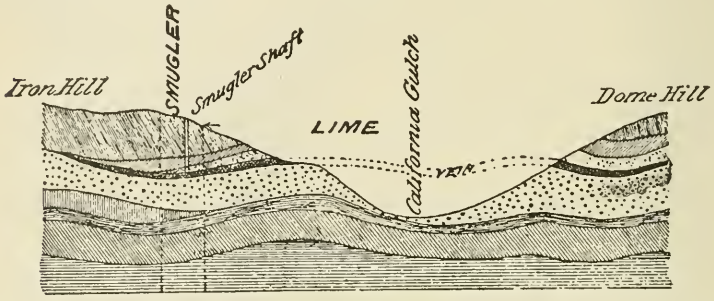

FIGURE 20A.

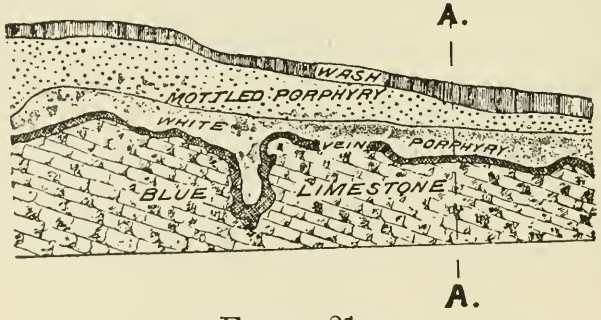

FIGURE 21B.

Iron Silver Mining Co. v. Cheesman.[11]—

Figures 20A and 21B are longitudinal sections on the line of the strike of the vein north and south, the latter section being along the joint Lime-Smuggler side-line, along plane B B of figure 20B.

[11] 8 Fed. 297, 2 McCrary, 191, 9 Morr. Min. Rep. 552; 116 U. S. 529, 6 Sup. Ct. Rep. 481, 29 L. ed. 712.

Figures 21A and 20B are cross-sections on the line of the dip, east and west, through the Lime incline, although in figure 20B the incline is not drawn.

Figures 20A and 21A are reduced, with slight modifications, from the atlas sheets of Mr. Emmons accompanying his monograph on "The Geology and Mining Industry of Leadville."[12]

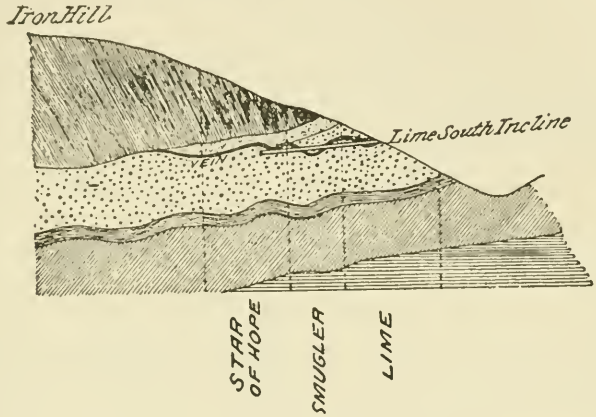

FIGURE 21A.

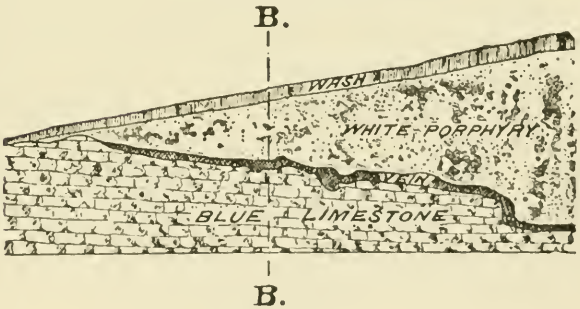

FIGURE 20B.

Figures 20B and 21B are practically reproductions of the sections prepared by Mr. C. M. Rolker, accompanying his "Notes on Leadville Ore Deposits," read before the American Institute of Mining Engineers.[13]

[12] Monograph XII of the U. S. Geological Survey.

[13] Trans. Am. Inst. M. E., vol. xiv, p. 283.

An inspection of figure 20A indicates that the only vein exposure is on the slope of the hill facing California Gulch; this exposure, and the one appearing on the opposite side in Dome Hill, having resulted from natural erosion. Bearing in mind the description of the character of the vein and its inclosing rocks, given in a preceding section, the facts involved in the case were substantially as follows:—

The Iron Silver Mining Company owned by patent the Lime claim. Adjoining it on the east was the Smuggler, owned by the defendants. Prior to location, the defendants sunk a vertical shaft (see figure 20A) to the depth of forty feet, and at the bottom found a large body of mineral. After the discovery of the mineral in the Smuggler claim the owners of the Lime ran inclines (see figure 21A) from the Lime claim into and upon the Smuggler claim, and connected them with the Smuggler workings. Thereupon the Iron S. M. Co. commenced their action against defendants to eject them from the body of mineral they had discovered and developed within the Smuggler location, claiming that it was the lode or vein of mineral which had its apex within the Lime claim. This the Smuggler owners disputed, claiming that there was no vein or lode within the Lime ground; that whatever mineral was there was not in place, but had been removed to that point from some other locality.

The case was tried three times by jury.[14]

[14] The first resulted in a verdict for the defendant. Plaintiff demanded a second trial as a matter of right, a practice at that time permissible under the laws of Colorado. The second trial resulted in a disagreement; the third in a verdict and judgment for defendant, which was affirmed by the supreme court of the United States. Iron S. M. Co. v. Cheesman, 116 U. S. 529, 6 Sup. Ct. Rep. 481, 29 L. ed. 712.

We have already noted the charge of Judge Hallett in this case, as to what constitutes a lode, or vein, which was the principal contention between the parties. Upon the subject of "apex," we quote the following from Judge Hallett's charge to the jury:—

> A good deal has been said by the witnesses as to whether there is a top, or apex, of the vein. That depends very much as to whether there is any vein, or lode, there. If you find that there is a vein, or lode, to my mind the evidence is clear enough that the top of it is in the Lime location; and if there is none there, of course that which does not exist, does not exist in any part—it does not exist by its top nor by its bottom, nor anywhere between the two points.[15]

The jury found that there was no vein, or lode, which was the customary finding in all cases where the Iron Silver Mining Company attempted to assert extralateral rights. This was the unwritten law of Leadville. While the deposits were veins, or lodes, within the definitions given by the courts, they were not such, as a matter of fact, when the question was left to a jury of the neighborhood, if their verdict would uphold the right to pass on the dip of the vein through and beyond vertical planes, drawn through the side-lines.[16]

We cite the charge of Judge Hallett for the purpose of illustrating his views on the subject of "top," or "apex." This charge, as a whole, was approved by the supreme court of the United States.[17]

[15] Iron S. M. Co. v. Cheesman, 8 Fed. 297, 302, 2 McCrary, 191, 9 Morr. Min. Rep. 552.

[16] For an interesting discussion of this, see Dr. Raymond's "Law of the Apex."

[17] Iron S. M. Co. v. Cheesman, 116 U. S. 529, 535, 6 Sup. Ct. Rep. 481, 29 L. ed. 712.

Stevens & Leiter v. Williams.[18]—

This case involved a controversy between the Iron and Grandview claims, situated upon Iron Hill, where the occurrence of the vein and vein exposure were similar to those found in the Lime-Smuggler case. The question of apex in the Iron-Grandview case received full consideration in two trials, at the first of which Judge Hallett presided, and at the second Justice Miller. Although the case was never passed upon by the supreme court of the United States, the charges to the two juries given by the presiding judges are considered to be a full exposition of the law on the subject. We are justified in quoting them fully. Judge Hallett's charge is as follows:—

> We have now to consider the question which was so much discussed by counsel as to the location with reference to the top and apex of a vein; and upon that point it is clear, from an examination of the act, that it was framed upon the hypothesis that all lodes and veins occupy a position more or less vertical in the earth,—that is, that they stand upon their edge in the body of the mountain,—and these words "top" and "apex" refer to the part which comes nearest to the surface. The words used are "top," or "apex," as if the writer was somewhat doubtful as to which word would best describe or best convey the idea which he had in his mind. It was with reference to that part of the lode which comes nearest to the surface that this description was used; probably the words were not before known in mining industry; at least, they are not met with elsewhere, so far as I am informed. Perhaps, they were not the best that could have been used to describe the manner in which the lode should be taken and located. But whether that be true or not, they

[18] First trial, 1 Morr. Min. Rep. 557, Fed. Cas. No. 13,414; second trial, 1 Morr. Min. Rep. 566, Fed. Cas. No. 13,413, 1 McCrary, 480.

are in the act of congress, and there seems to be little doubt as to their meaning; they are not at all ambiguous. In some instances, they may perhaps refer to the *floe* of the lode; that is, a part of the lode which has been detached from the body of mineral in the crevice and flowed down on the surface. In others, where there is no such outcrop, they may mean that part which stands in the solid rock, although below a considerable body of the superficial mass, which I have attempted to describe to you. We are all agreed, however, the courts and counsel, everyone, that that is the meaning of the words; that they are to be taken in some such sense as that, as being the part of the lode which comes nearest the surface; and the act requires that the location shall be along the line of this top, or apex. Supposing the lode to have a somewhat vertical position in the earth, with this line of outcrop, or of appearance on the surface, or nearest to the surface, it shall be taken up and occupied by the claimant as his location; and he must find where this top, or apex, is and make his location with reference to that.[19]

On the second trial, Justice Miller charged the jury, as follows:—

I think that you will agree with me, as all counsel agree, and all the witnesses agree substantially, conceding that there is a vein, that the top, or the apex, of a vein, within the meaning of the act of congress, is the highest point of that vein where it approaches nearest to the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein. The word "outcrop" has been used in connection with it, and in the true definition of the word "outcrop," as it concerns a vein, is probably an essential part of the definition of its apex, or top; but that does not mean the strict use of the word "outcrop." That would not, perhaps, imply the presentation of the mineral to the naked

[19] Stevens & Leiter v. Williams, 1 Morr. Min. Rep. 557, 561, Fed. Cas. No. 13,414.

eye on the surface of the earth; but it means that it comes so near to the surface of the earth that it is found easily by digging for it, or it is the point at which the vein is nearest to the surface of the earth; it means the nearest point at which it is found toward the surface of the earth. And where it ceases to continue in the direction of the surface, is the top, or apex, of that vein. It is said in this case that the point claimed to be the top, or apex, is not such, because at the points where plaintiff shows or attempts to prove an interruption of that vein in its ascent toward the surface, and what he calls the beginning of it, the defendant says that it is only a wave or roll in the general shoot of the metal, and that from that point it turns over and pursues its course downward as a part of the same vein in a westerly or southwesterly direction. It is proper, I should say to you, if the defendant's hypothesis be true, if that point which the plaintiff calls the *highest point, the apex*, is merely a swell in the mineral matter, and that it turns over and goes on down in a declination to the west, that it is not a true apex within the statute. It does not mean merely the highest point in a continuous succession of rolls or waves in the elevation and depression of the mineral nearly horizontal.[20]

Iron Silver Mining Company v. Murphy.[21]

This involved a controversy between the Iron and Loella claims. Judge Hallett charged the jury as follows:—

The top, or apex, is the end, or edge, or terminal point of the lode nearest to the surface of the earth. It is not required that it shall be on or near or within any given distance of the surface. If found at any depth, and the locator can define on the surface the

[20] Stevens & Leiter v. Williams, 1 Morr. Min. Rep. 566, 574, Fed. Cas. No. 13,413, 1 McCrary, 480. See, also, Stewart Min. Co. v. Ontario Min. Co., 132 Pac. 787, 792.

[21] 1 Morr. Min. Rep. 548, 3 Fed. 368, 373, 2 McCrary, 121.

area which will inclose it, the lode may be held by such location.

§ 312. Hypothetical illustrations, based upon the mode of occurrence of the Leadville and similar deposits.—It is not our purpose in this article to deal with the subject of extralateral rights or treat of the apex, as affecting those rights. We reserve this important element of the mining law for individual treatment in a later portion of this work.[22] We are now interested in determining what is or is not a "top," or "apex." In the course of investigation, however, reference to the extralateral right is incidentally involved, to the end that the conclusions reached may be rationally explained and applied to cases within reasonable probabilities.

We have heretofore considered two classes of deposits: those whose position in the earth approximates the perpendicular, and those approaching the horizontal. The geological conditions at Leadville suggest additional complications, by reason of the fact that the veins do not always occupy the same plane, but are frequently found in alternating anticlinal and synclinal folds, which are best expressed by the use of the term "undulating."

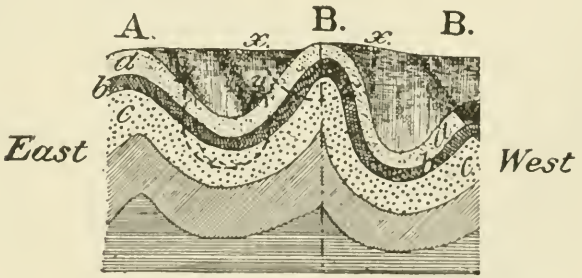

FIGURE 22.

[22] *Post*, § 564 et seq.

For purposes of illustration, we present in figure 22 a cross-section. In the figure the stratum *d d* represents the overlying white porphyry; *b b*, the vein material; *c c*, the underlying blue limestone. The lines A *x* and B B represent the crests of the ridges formed by the anticlinal folds.

If the overlying porphyry on the crests of the anticlinal folds were removed, leaving the vein material there exposed, and assuming that in this uncovered position the deposit would still fall within the definition of a vein or lode,[23] neither A *x* nor B B would be apices. They are tops, or crests, of the folds, but not apices of the deposit. The exposed surface would be part of the top of the deposit, contradistinguished from the bottom lying on the limestone.

With the vein in position, as shown on figure 22, it might be said that its highest part, or the part approaching nearest to the surface (assuming that there was no surface exposure elsewhere), would be along the crest of the fold. But this would not be the top, or apex, of the *vein*. It would be the top, or apex, of a fold in the vein. If this line were the apex of the vein, a location with side-lines along the crest would give the locator the right to follow the vein in both directions, east and west, "up hill and down dale," indefinitely, so far as the vein preserved its continuity and identity.

The only exposures of the vein in position as shown in figure 22 that can possibly answer to the definitions given by the courts are those indicated by the abrupt terminations at the east and west. As to which of these two exposures would be considered the true apex

[23] Judge Hallett inclines to the view that such a deposit would not be *in place*. Stevens v. Gill, 1 Morr. Min. Rep. 576, 580, Fed. Cas. No. 13,398. *Ante*, § 301.

is a difficult question, and might have to be determined mathematically, by ascertaining which occupied the higher elevation above a given datum plane.

Eliminating from consideration the inquiry as to which of the two exposures is the higher above a given datum plane, a location on the east or west would cover an apex; and if it covers an apex, the right of extralateral pursuit would inure to the locator, to the extent that the identity and continuity of the vein could be established up and down the undulations or folds.

If we can assume that the crest of the anticlinal fold has been eroded, as represented by the dotted line *x x*, we would have then two distinct veins, with their attributes of apices, strike, and dip. But suppose the erosion occurred in the synclinal fold, as illustrated by the dotted line *y y*, leaving two exposures,—would these be apices? They would not be, according to the rule announced in the case of Gilpin v. Sierra Nevada Consolidated, heretofore referred to, unless, as suggested by Judge J. H. Beatty in that case, the course upward proved, on subsequent development, to be caused by a mere local fold or dislocation.[24]

It is hardly profitable to pursue this discussion further. Enough has been said to show the absurdity of the law, when applied to geological conditions which were not in contemplation of the lawmakers when the laws were enacted. But it is nevertheless the law, if these deposits are "veins, or lodes, of rock in place," and the courts hold that they are.[25]

[24] *Ante*, § 310.

[25] The views of the land department as to what constitutes a blanket vein and how side-lines are to be constructed when it is desired to locate on top of such deposit may be gleaned from the secretary's opinion in the case of the Homestake Mining Company, 29 L. D. 689. See, also,

Geologists have always insisted that this character of deposits should be separately classified. There is no reason why the lawmakers should not so classify them, or else abandon the entire element of lateral pursuit, and limit the locator to vertical planes drawn through surface boundaries. In considering the difficulties surrounding the application of the law to conditions similar to those existing at Leadville, we recall the almost prophetic language of Judge W. H. Beatty, then chief justice of Nevada:—

> We are willing to admit that cases may arise to which it will be difficult to apply the law; but this only proves that such cases escaped the foresight of congress, or, that although they foresaw the possibility of such cases occurring, they considered that possibility so remote as not to afford a reason for departing from the simplicity of the plan they chose to adopt.[26]

§ 312a. Theoretical apex where the true apex is within prior patented agricultural claims, the vein passing on its downward course into public land.— Where the true apex of a vein lies within a prior placer or agricultural patent, thus possibly[27] inhibit-

Jack Pot Lode Mining Claim, 34 L. D. 470; Belligerent and Other Lodes, 35 L. D. 22.

[26] Gleeson v. Martin White M. Co., 13 Nev. 442, 459.

[27] We say *possibly*, having in mind the doctrine established by the supreme court of the United States in the case of Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370, to the effect that a junior location may be laid upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extra-lateral rights not in conflict with any rights of the senior location. This doctrine has been held by the land department to apply to prior patented lode mining claims (Hidee G. M. Co., 30 L. D. 420, cited by the circuit court of appeals, ninth circuit, in Bunker Hill & Sullivan M. & C. Co. v. Empire State etc. Co., 109 Fed. 538, 542, 48 C. C. A. 665, 21 Morr. Min.

ing a location covering such apex, and the vein on its downward course passes out of and beyond a vertical plane, drawn through the agricultural or placer boundary, into unappropriated public domain, how may that portion of the vein lying outside of and beyond such boundary be appropriated? Is it impossible to acquire it under the mining laws by reason of the fact that the true apex is within patented lands? Will the courts theorize an apex on the line of intersection of the vein on its dip with the vertical plane of the agricultural or placer patented boundary? If it may be located, could such a location confer any extralateral right?

These are questions that cannot under the present state of the law be answered categorically; nor is there enough precedent or authority to enable us to even discuss them other than tentatively.[28] Some of them involve a consideration of extralateral right problems, a subject which must in the main be reserved for future discussion in another part of the work. We must rest content for the time being with a presentation of the views of the only tribunal which has thus far ventured to any extent upon this delicate and somewhat dangerous ground. This venture, as we shall

Rep. 317), and to be also applicable in cases of patented agricultural claims (Alice Lode Mining Claim, 30 L. D. 481). To the same effect is McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823. The supreme court of Montana, however, expresses grave doubts as to the soundness of these views. State v. District Court, 25 Mont. 504, 517, 65 Pac. 1020, 1025.

[28] The expedient devised by the supreme court of Montana in fixing the extralateral right planes of the conveyed part of a lode claim containing a part of the apex under the facts shown in Montana Ore Purchasing Co. v. Boston & M. Cons. C. & I. Co., 27 Mont. 536, 71 Pac. 1005, establishing a *conventional* apex along the plane of the side-line intersecting the vein on its downward course, may possibly be used as an analogue in the solution of the question. This expedient is discussed *post*, § 618.

see, was simply upon the border-line of the subject, and was, we deferentially suggest, not altogether essential to a proper adjustment of the controversies arising in the case under consideration. We refer to the case of Woods v. Holden,[29] the facts of which may be illustrated by reference to figure 23, a plan exhibiting the boundaries of the conflicting lode and placer claim, and figure 24, a vertical cross-section drawn through the line *A-B* on figure 23, showing the apex in the placer at *X* and passing out of the vertical placer boundary, at *Y* on figure 24.

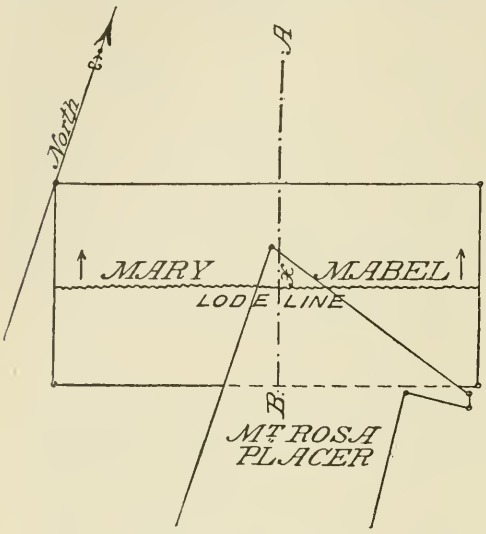

FIGURE 23.

We quote so much of the secretary's opinion as suggests his views upon the subject under discussion:—

> The undisputed evidence shows that the Mary Mabel vein dips to the north, that only the apex and a small portion of the vein upon its dip is located within the placer, and that

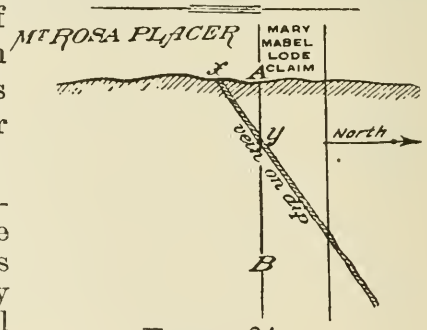

FIGURE 24.

[29] 26 L. D. 198; S. C., on review, 27 L. D. 375.

in dipping to the north the vein passes into that portion of the Mary Mabel location lying between the northerly side-line thereof and the placer. Along its course from west to east the vein has an actual existence within the Mary Mabel from one end-line to the other, so that the location of that claim does not involve or present a violation of the statutory requirement that a lode mining claim shall be located "along the vein." The vein, after dipping out of the Mt. Rosa placer, is either lawfully included in the Mary Mabel claim, or a valid location thereof cannot be made. This latter part of this alternative proposition cannot be recognized, because it has no support in any statute and is inconsistent with the express provision of section 2319, Rev. Stats., which declares:—

"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."

There is no claim that the existence of this lode was known at the time of the Mt. Rosa placer entry or patent, and therefore the portion thereof within the placer passed to the placer claimants under the provisions of section 2333, which reads:—

. . . . "but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

It has been indisputably settled, and is admitted by protestants, that a placer claimant cannot follow a vein or lode beyond the surface boundaries of his claim extended vertically downward. The portion of this vein lying outside of the placer is "in lands belonging to the United States," and under section 2319 is "free and open to exploration and purchase." While the actual apex of the vein is within the placer, the United States has dealt with and disposed of the placer claim as nonlode ground, and for all

purposes of disposition by the United States under future exploration and discovery any vein or lode in adjacent ground stops at the point of its intersection with the boundary of the placer. Within the placer it is not subject to exploration or purchase, except according to the will of the private owner. For the purpose of discovery and purchase under the mining laws, the legal apex of a vein like the Mary Mabel, dipping out of ground disposed of under the placer or nonmineral laws, is that portion of the vein within the public lands which would constitute its actual apex if the vein had no actual existence in the ground so disposed of. Under this view the apex of the vein extends throughout the entire length of the Mary Mabel claim, if that be necessary to the valid entry thereof. Protestant's contention that the Mary Mabel vein or lode is segregated and divided into two noncontiguous parts by the Mt. Rosa placer, and that the location and entry of the easterly part is thereby rendered invalid, cannot be sustained.[30]

If we are to accept the assertion contained in the foregoing extract from the opinion, that "For the purpose of discovery and purchase under the mining laws, the legal apex of a vein like the Mary Mabel, dipping out of ground disposed of under the placer or nonmineral laws, is that portion of the vein within the public lands which would constitute its actual apex if the vein had no actual existence in the ground so disposed of," as a correct exposition of the law, we have to deal with a new element in the solution of extralateral right problems. There may be no question but that the locator of the vein, having made an under-

[30] This decision of the secretary was rendered prior to the promulgation of the opinion by the supreme court of the United States in Del Monte M. & M. Co. v. Last Chance M. Co., 171 U. S. 55, 18 Sup. Ct. Rep. 895, 43 L. ed. 72, 19 Morr. Min. Rep. 370. The application of the doctrine there announced to the case of the Mabel lode would have rendered the opinion of the secretary on this subject unnecessary.

ground discovery outside of the placer boundary, might acquire by location fifteen hundred feet in length and at least three hundred feet in width, and be entitled to everything within his vertical planes drawn through his surface boundaries, there being no apex proprietor with extralateral privileges to challenge his rights. But whether or not such locator could himself predicate an extralateral right upon this so-called "legal apex," is a question we cannot see our way clear to answer without further light from an inspired source. We shall have occasion to recur to this again when dealing with the manner of making lode locations, and also in connection with the extralateral right problems.

§ 313. The existence and situs of the "top," or "apex," a question of fact.—When we consider that most, if not all, of the definitions of "top," or "apex," found in this article are contained in charges to juries, it is hardly necessary to cite authorities to show that the existence and *situs* of the "top," or "apex," are questions of fact. What constitutes an apex is a question of law to be determined by the court; but whether a given portion of a lode, or vein, is its "top," or "apex," and what is its course through the ground of contending parties, is a question for the jury.[31]

This accounts for the presence in the literature of the law of so many able and logical statements as to what constitutes a "top," or "apex," and the absence of recorded cases establishing the existence of any such tops, or apices, within the Leadville belt. It would seem that among the muniments of a lode locator's

31 Illinois S. M. Co. v. Raff, 7 N. M. 336, 34 Pac. 544, 545; Bluebird M. Co. v. Largey, 49 Fed. 289, 290. See, also, cases cited in § 311, *ante*.

title in this section of the country is the unwritten law of the neighborhood, that no extralateral rights should be permitted.

ARTICLE V. "STRIKE," "DIP," OR "DOWNWARD COURSE."

§ 317. Terms "strike" and "dip" not found in the Revised Statutes—Popular use of the terms.—The act of July 26, 1866, granted the right to follow the located vein, "with its dips, angles, and variations, to any depth." The Revised Statutes, in defining the extralateral right, use the terms "entire depth" and "course downward," as a substitute for the terms "dips, angles, and variations." The term "dip" is the one in common use. "Dip" and "depth" are of the same origin, and, colloquially speaking, "dip" and "course downward" are synonymous. In a popular sense, "dip" is the "downward course," the direction, or inclination, toward the "depth."[32]

"Strike" does not appear in any of the mining laws. It is a term used to designate the longitudinal or horizontal course of the vein.

§ 318. "Strike" and "dip" as judicially defined.—Judge W. H. Beatty, in his testimony before the public land commission, thus defined these terms:—

> The strike, or course, of a vein is determined by a horizontal line drawn between its extremities at that depth at which it attains its greatest longitudinal

[32] Duggan v. Davey, 4 Dak. 110, 141, 26 N. W. 887, 901, 17 Morr. Min. Rep. 59. See, also, Stewart Min. Co. v. Ontario Min. Co. (Idaho), 132 Pac. 787, 792.

extent. The dip of a vein, its "course downward" (Rev. Stats., § 2322; Comp. Stats. 1901, p. 1425; 5 Fed. Stats. Ann. 13), is at right angles to its strike; or, in other words, if a vein is cut by a vertical plane at right angles to its course, the line of section will be the line of its dip. . . . .

The strike, or course, of a vein can never be exactly determined until it has been explored to its greatest extent; but a comparatively slight development near the surface will generally show its course with sufficient accuracy for the purposes of a location. The dip, having an exact mathematical relation to the course of the vein is, of course, undetermined until the strike is determined; but, practically, the line of dip is closely approximated by taking the steepest (the nearest a vertical) line by which a vein can be followed downward.[33]

The miner in locating his claim, although he is called upon to locate it "along the vein," has but little opportunity to explore the ground and determine prior to location what is its course, or strike. He is compelled to exercise his best judgment from surface indications and such primitive development as the limited time allowed him to perfect his location will permit. A vein does not always outcrop to any considerable distance, so as to present to the miner's observation its longitudinal direction. His location usually precedes any extended exploration, and, in most cases, is made without accurate knowledge of the course or direction of the vein.[34]

Mathematically speaking, the true course (strike) of a vein (underground) is never demonstrated until after extensive investigation and the expenditure of time and money. In a case decided by Judge Hawley, sit-

[33] Report of Public Land Commission, p. 399.

[34] Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196, 204, 6 Sup. Ct. Rep. 1177, 30 L. ed. 98, 15 Morr. Min. Rep. 641.

ting as circuit judge in the ninth circuit,[35] one of the veins in controversy had been located for forty years, and at different times during that period the mine was in active operation. At the trial the course of this vein was a disputed and closely contested question, although there were extensive underground workings.

In addition to this, the lower levels of a mine frequently show a different direction from that which guided the miner in making his location, and are at variance with conditions shown in openings nearest to the surface. This was the case in the famous Flagstaff mine in Utah,[36] where the croppings showed that the direction, or course, of the apex of the vein at or near the surface, was nearly east and west. By following a level beneath the surface, the strike of the vein ran in a northwesterly direction, so that if, by a process of natural abrasion, the mountain had been ground down, the course of the apex would have been northwest instead of west.

Upon this state of facts the supreme court of the United States thus expressed its views:—

> We do not mean to say that a vein must necessarily crop out upon the surface in order that locations may be properly laid upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position of the vein, and locations may be properly made on the surface above it, so as to secure a right to the vein beneath. . . . . Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike, or the line of a level run through it; but this can rarely be ascertained until considerable work

[35] Cons. Wyoming G. M. Co. v. Champion M. Co., 63 Fed. 540, 548, 18 Morr. Min. Rep. 113.

[36] Flagstaff S. M. Co. v. Tarbet, 98 U. S. 463, 469, 25 L. ed. 253, 9 Morr. Min. Rep. 607.

has been done, and after claims and locations have become fixed. The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined.[37]

An interesting and important case involving this question is that of the Carson City Gold and Silver Mining Company v. North Star Mining Company, tried before Judge James H. Beatty, United States district judge of Idaho, sitting as circuit judge. Figure 25 represents the properties in controversy and the un-

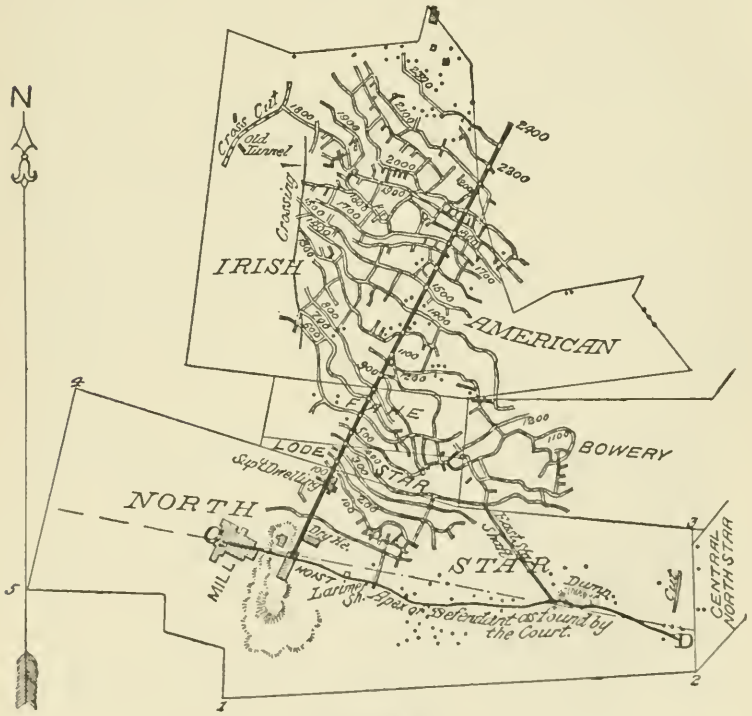

FIGURE 25.

[37] Rule followed by circuit court of appeals, ninth circuit, Last Chance M. Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 579, 589, 66

derground workings of the North Star mine in horizontal projection.

The line C D traversing the center of the North Star surface was the line connecting the collar of the main working shaft, the mouth of the Larimer incline, the East Star shaft, all sunk on the vein, and a shallow vertical shaft at D. The course of the vein to the west was interrupted at the point C by the occurrence of a "crossing," or a zone of fractured country rock, into which the vein, as far as developed, was not shown to have penetrated. The vein was located in 1851, and had been worked by the North Star Company and its predecessors, with casual interruptions, ever since. The plaintiff in the case, owning the Irish-American ground, contended that the true course of the vein was southeasterly from the point C and across the side line *1–2*, presenting a case, according to its contention, wherein the North Star Company was denied any extralateral right. The course of many of the deeper levels appeared to sustain its contention as to the longitudinal direction of the vein. The court, however, declined to accept the underground workings as determining the true course of the apex, announcing its views as follows:—

> The workings of a mine made in mining operations, and not in support of litigation, are generally important as evidence of any facts which may be legitimately inferred from them. The three incline working shafts were started upon this North Star central line, and are all shown to follow the ledge on their descent. It is reasonable to presume that they were started upon or near the apex of the ledge. . . . . As ledges may in their depths change their course, and as the surface course, or the course of the apex, is to govern the miner's rights, the

C. C. A. 299; *certiorari* denied, 200 U. S. 617, 26 Sup. Ct. Rep. 754, 50 L. ed. 622.

workings nearest the surface are better guides to the course of the apex than those far below.[38]

The "course" of the vein, for the purpose of guiding the miners in making their location, is therefore not the "technical true strike of the engineer, the line which would be cut by a horizontal plane. Such a requirement would be in many cases impracticable."[39]

The true method of determination is found in the rule laid down by the supreme court of the United States in the Flagstaff case, and followed by Judge Beatty in the North Star case, that the workings nearest the surface are better guides to the course of the apex than those far below.

The "strike" once determined, the ascertainment of the direction of the "dip" follows as a mathematical deduction. The true average dip of a vein is always at right angles to the strike.[40]

Mr. Phillips in his treatise on Ore Deposits thus explained this:—

> Where a bed has been tilted from a horizontal position, its maximum inclination toward the horizon is called its *dip*, and the amount of this dip may be stated in degrees, or by saying that it falls so many feet or inches in a given distance. The line at right angles to the dip of a bed which is consequently a horizontal line is called its *strike*, and is described by its line of compass-bearing, either true or magnetic.[41]

§ 319. **Downward course.**—Confusion often arises in using popular terms which, through loose custom, have gradually acquired many shades of meaning.

[38] Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597, 601.

[39] Duggan v. Davey, 4 Dak. 110, 143, 26 N. W. 887, 17 Morr. Min. Rep. 59.

[40] Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662 (696), 23 Pac. 547, 1014, 17 Morr. Min. Rep. 310.

[41] Phillips' "Ore Deposits," p. 12.

We believe the words "strike" and "dip," in so far as they concern us here, are the surveyor's terms, and should be used in the sense in which he applies them,—i. e., as mathematical terms applied to an inclined plane to accurately describe its position. The terms are doubtless so understood by the intelligent miner.

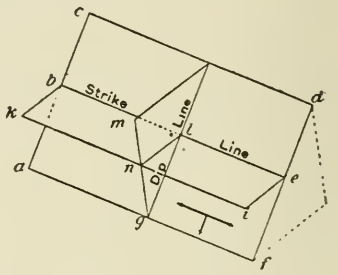

FIGURE 26.

Let *a-c-d-f* on figure 26 be an inclined plane; *b-k-i-e*, a horizontal plane intersecting the inclined plane in line *b-e; h-m-g*, a vertical plane at right angles to the inclined plane. Then *b-e* is the "strike-line" and *h-g* the "dip-line" of the inclined plane. The angle *n-l-g* is the dip-angle, measuring the *greatest* declination of the plane below the horizon. It is easily shown mathematically that the strike and dip-lines form a rectangular intersection.

The "strike" is defined by the bearing of the strike-line, the "dip" by the angle of declination and the bearing of the dip-line; for example, strike "N. 10° W.," dip "45° to S. 80° W."

The walls of veins are never true planes. They are always more or less irregularly curved, constituting "warped" surfaces. The strike and dip of the wall at any point are the strike and dip of an imaginary plane drawn tangent to the wall at the given point. In many veins the strike and dip vary widely, both longitudinally and in depth.

The word "course" is applicable to any line in the vein,—to an apex-line, a strike-line, a dip-line, or any inclined line between strike and dip. The wall of a vein has extent, length, course, in any direction along its surface. Some miners may mean by "course of

the vein'' the course of the apex, others the strike of the vein. It is an expression that calls for qualification to fix its meaning definitely.

The "course of the vein'' appearing on the surface is plainly the course of its apex, which is generally inclined and undulating and departs more or less materially from the "strike.'' The miner is required to locate his claim "along the vein,'' which plainly means along the outcrop or course of the apex. It would be impracticable for him to locate it along the strike, as it usually takes years of underground work to determine the strike through the length of his claim. It is often difficult even to locate properly along the apex, especially where the walls are obscured by surface disintegration or are covered with a capping or a large accumulation of detritus.

It sometimes happens where the dip of the vein is at a small angle from the horizontal, and the surface of the ground is steeply inclined, that the course of the apex departs widely from the strike of the vein developed in the underground working, as illustrated on figure 27. Some veins are curved and warped to an unusual extent, with greatly varying strike and dip, as illustrated on figure 28. The smaller the dip the greater the variations in strike. These facts

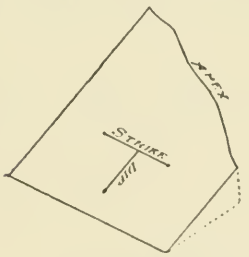

FIGURE 27.

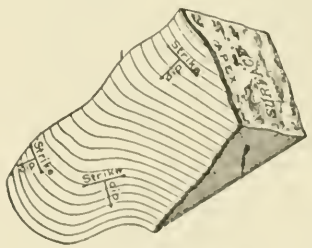

FIGURE 28.

often lead to disputes concerning identity of the vari-

ous parts explored,[42] but with the identity once established, the departure of the apex from the strike-line and the variations in strike and dip do not affect the rights attaching to a proper location along the line of the apex.

"Downward course" is a popular term, and might be applied to the dip-course or any course between the strike and dip. "The downward course" might have been construed to mean strictly the dip-line course, but for certain exigencies arising out of the requirements in placing the end-lines of a location, as will be explained later on.

Under the miner's rules and customs which controlled rights on the vein prior to the enactment of any federal mining laws, as well as under the act of July 26, 1866, planes constructed at right angles to the general course of the vein at the surface and applied at the extreme points on the vein covered by the location carved out the underground segment of the vein which the locator was privileged to enjoy. As was said by Justice Field in the Eureka case,—

> Lines drawn vertically down through the ledge or lode at right angles with a line representing the general course of the ends of claimant's location, will carve out, so to speak, a section of the ledge or lode within which he is permitted to work and out of which he cannot pass.[43]

[42] The subject of identity, or vein-tracing, on both strike and dip will be fully dealt with when considering the subject of extralateral rights. *Post*, § 615.

[43] Fed. Cas. No. 4548, 4 Saw. 302, 323, 9 Morr. Min. Rep. 578—followed in Argonaut M. Co. v. Kennedy M. Co., 131 Cal. 15, 82 Am. St. Rep. 317, 320, 63 Pac. 148, 150, 21 Morr. Min. Rep. 163. The Argonaut-Kennedy case was taken to the supreme court of the United States, but decided on other grounds (estoppel).

The act of July 26, 1866, in providing for what is now called the extralateral right, authorized a patent "granting such mine, together with the right to follow such vein with the *dips*, *spurs*, *angles*, and *variations*." As this act was construed to imply extralateral planes at right angles to the course of the vein within the location, the word "dips" found in this statute may be taken to mean the true dip of the vein, bearing a mathematical relationship (right angle) to the strike of the vein, as illustrated on figure 26.

The act of May 10, 1872, however, gave controlling force to surface lines, through which it was contemplated extralateral bounding-planes were to be drawn. As we have heretofore observed, none of the words, "dips, spurs, angles, variations," used in the former act were retained in the later legislation. The words "downward course" were substituted, as, under the new system, end-lines were not required to cross the apex of the lode at any particular angle.[44]

The rectangular, or true dip, theory was therefore not applicable.

The term "downward course," a more flexible term, may therefore have been advisedly used in the new law to apply to a course from a higher to a lower level in the plane of the vein following downward along the intersecting vertical end-line plane, which only in extremely rare instances would be coincident with the true dip-line.

[44] *Post*, § 365.

To illustrate: On figure 29 the line A-E is a true dip-line,—i. e., at right angles to the strike. The line

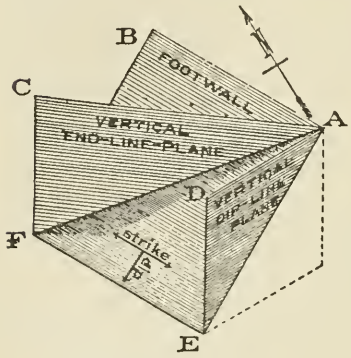

FIGURE 29.

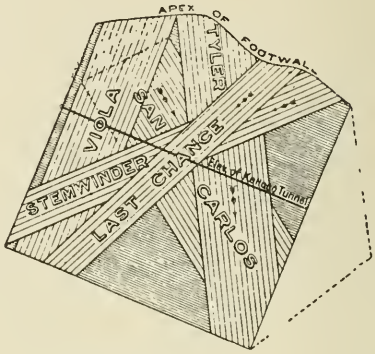

FIGURE 30.

A-F is the intersection of the plane of the vein with the vertical end-line plane, which obviously at the surface crosses the lode at an angle less than a right angle. The course along the intersecting plane from A to F is essentially downward, just as much so as that from A to E.

We do not desire at this juncture to anticipate the discussion of the larger problems involved in the grant of the extralateral right, but there is an apt illustration of the application of the term "downward course" to a series of claims on the same vein, known as the Bunker Hill lode in the Coeur d'Alenes, Idaho.

Figure 30 represents, in isometric projection, the Bunker Hill vein upon which were the locations thereon named.

The Viola does not depart far from the true dip-line, but the San Carlos is nearer to the strike-line than to the dip-line.[45] The Stemwinder follows a line between the strike and dip.

[45] From the facts found by the court, the side-line common to the Viola and San Carlos bisected a broad apex—the Viola covering the

In extended litigation over these properties extralateral rights have been awarded to the respective owners (subject to certain priorities not necessary to enumerate here) between the vertical end-line planes of the respective locations, as delineated on figure 30 —not necessarily to the full extent as there shown, but sufficiently to establish the negative doctrine that the right to follow the vein on its "downward course" conferred by the statute does not mean that such course must be on a true dip-line.[46]

The supreme court of Idaho,[46a] in discussing these terms, has used the following language:

> In this statute (section 2322, Revised Statutes) the words "downward course" and "course downward" are used interchangeably, and it was undoubtedly intended by the use of the words to signify the course of the vein from the surface toward the center of the earth. Sometimes it may happen that the "downward course" of a vein will be perpendicular and the vein will form a vertical plane, but, as a rule, there is a deflection in the downward course of these mineral veins from the perpendicular, and we call this their dip; but still the course of the dip is always "downward," and, when the plane of the vein reaches the horizontal, then we have a blanket vein or lode, and on such a vein a locator has no extralateral right.

foot-wall, and the San Carlos the hanging-wall. For diagram showing these claims, see 114 Fed. 418, 52 C. C. A. 219, 22 Morr. Min. Rep. 104.

[46] The extralateral rights of the respective claims shown on figure 30 were discussed, and to some extent at least adjudicated in the cases appearing in the reports as indicated. Tyler and Last Chance, 157 U. S. 683, 695, 15 Sup. Ct. Rep. 733, 39 L. ed. 859, 18 Morr. Min. Rep. 205, 61 Fed. 557, 564, 4 C. C. A. 329, 71 Fed. 848, 850, 18 Morr. Min. Rep. 303, 54 Fed. 284, 9 C. C. A. 613, 79 Fed. 277, 279, 24 C. C. A. 578; Viola and San Carlos, 114 Fed. 417, 419, 52 C. C. A. 219, 22 Morr. Min. Rep. 104; Stemwinder, 109 Fed. 538, 542, 48 C. C. A. 665, 21 Morr. Min. Rep. 317.

[46a] Stewart Min. Co. v. Ontario Min. Co. (Idaho), 132 Pac. 787, 792.

The court also said:

> So far as we are aware, the authorities are quite uniform in holding that the extralateral right awarded by the statute (section 2322) must in all cases be pursued more upon the dip than the strike of the vein—more upon the downward than upon the onward course of the vein. To pursue a vein in the direction of its strike at an angle of less than 45 degrees to the course thereof would clearly not be following the vein on its "downward course," as authorized by the statute.

We know of no legal principle to support this latter deduction, that an extralateral right cannot be exercised where the angle the extralateral planes form with the line of strike of the vein is less than forty-five degrees. The adoption of an arbitrary angle beyond which such rights may not be exercised is hardly within the province of the courts.

In a subsequent section [46b] we have pointed out that the locator may place his end-lines at an angle so long as they cross the apex of the vein.

Many of the questions here under discussion will necessarily reappear when we come to deal with the manner of making surface locations, the functions performed by end-lines, extralateral rights, and other subjects which are intimately associated with that of definitions. Our present investigation is limited to the subject of definitions.

Further elaboration here is unnecessary, and may be deferred until we reach the domain of practical application.

[46b] *Post*, § 365.