DIGEST

OF THE

LAW OF MINES AND MINERALS

AND

OF ALL CONTROVERSIES INCIDENT TO THE SUBJECT-MATTER OF

MINING,

COMPRISING THE CASES IN THE ENGLISH AND AMERICAN REPORTS, FROM THE YEAR BOOKS TO THE PRESENT TIME (1878).

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INTRODUCTION.

THE application of the rules of law is always more or less controlled by the peculiarities of the subject-matter. No more striking illustration of this can occur than is found in the case of mines. Upon his first examination into a mining question, the counselor finds that the general rulings upon land law, such rulings being based upon mere surface conflict, can not reach all the complications of underground interference. In mining, the entire cubical contents of the land are involved, and not merely its superficies.

Further, the title to a large proportion of the mines of the United States is based upon the principle of appropriation, which is almost a novelty to the common law, and upon which little can be gathered from the text-books. These considerations have induced the compilation of the following digest.

In its arrangement each syllabus has a separate heading, and the general plan is based upon the idea that a digest, as a work of reference, should contain every possible aid to the speedy finding of the proposition sought.

The index is so arranged as to contain under each title a reference to those syllabi which might have been collated under that title, but which, owing to their relation to other headings, have necessarily been distributed under such other headings.

In conclusion, I only desire further to acknowledge the debt of gratitude I owe to Harry I. Thornton, Esq., of San Francisco, for his genial supervision of my labors and his courtesy during my stay in that city. If any credit attaches to the plan of the work, it is his desert more than mine. To my partners, G. G. White, Esq., and James P. DeMattos, Esq., I am also under obligations for their assistance.

R. S. MORRISON.

GEORGETOWN, COLORADO,
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CASES CITED.

LAWS OF MINES AND MINERALS.

DIGEST

OF THE

LAW OF MINES AND MINERALS.

ABANDONMENT.

1. **Question of Fact.** Abandonment is a question of fact for the jury. *Weill* v. *Lucerne M. Co.*, 11 Nev. 200.

2. **Question of Fact—Lease.** Abandonment (of a lease) is a question of intention, and is to be left to the jury. *Karns* v. *Tanner*, 66 Pa. St. 297.

3. **Law and Fact.** Abandonment is a mixed question of law and fact. If, in this case the plaintiff intended to give up his claim, and, in pursuance of that intention, quit paying assessments, it was an abandonment in fact. *Doak* v. *Brubaker*, 1 Nev. 217.

4. **Intention—Law and Fact.** Abandonment is a mixed question of law and fact. If, in fact, a person intend to give up his claim and quit paying assessments in pursuance of that intention, it is an abandonment in fact. *Oreamvono* v. *Uncle Sam G. & S. M. Co.*, 1 Nev. 215.

5. **Intention.** Abandonment is a question of intention. *Weill* v. *Lucerne M. Co.*, 11 Nev. 200.

6. **Intention—District Rules.** Abandonment, in its common law sense, is purely a question of intention. An abandonment takes place when the ground is left by the locator, without any intention of returning or making any future use of it, independent of any mining rule or regulation. *St. John* v. *Kidd*, 26 Cal. 263.

7. **Non-compliance with District Rules.** If the local mining laws provide that on a failure to work and notice a claim as required by the mining laws, the claim shall be considered as abandoned; a failure to comply with such laws is an abandonment of the claim, and it is open to location as vacant ground. *Strange* v. *Ryan*, 46 Cal. 33.

8. **Statements Going to Intention.** The statements of a party alleged to have abandonded are evidence in his favor as disproving an intention to abandon. *Noble* v. *Sylvester*, 42 Vt. 146.

9. **Intent to Return.** As to support the plea of abandonment it must appear from the evidence that there was a leaving of the claim, without any intention of returning or making any further use of it, so it is competent for the opposite party to prove, in rebuttal, any acts explanatory of the leaving which tend to show that it was not accompanied with an intention not to return. *Bell* v. *Bed Rock Co.*, 36 Cal. 214.

10. **No Intention to Return.** An abandonment can only take place where the occupant leaves the land free to the appropriation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself, and regardless and indifferent as to what may become of it in the future. *Richardson* v. *McNulty*, 24 Cal. 339; B. & W. L. C. 206.

11. **Leaving Tools in Mine.** Leaving tools upon the ground considered as evidence against abandonment. *Harkness* v. *Burton*, 39 Iowa, 101; see f. 22.

12. **Meaning — Intention — Lapse of Time.** Abandonment is a word which has acquired a technical meaning, and there can be no reason why it should receive a different signification when applied to a mining claim than that which it has received in the books. *Mallett* v. *Uncle Sam M. Co.*, 1 Nev. 194.

In determining the question of abandon-

ment the intention is the first and paramount object of inquiry. Id.

Time is not an essential element of abandonment: the moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete. But lapse of time may be a strong circumstance in connection with other circumstances to prove the intention to abandon. Id.

Bare lapse of time short of the statute of limitations, unconnected with other circumstances, is no proof of abandonment. Id.

13. As Affected by Custom—Time—Limitations—Intention. Where the court, in an action to recover a mining claim, instructed the jury that "where an abandonment is sought to be established by the act of the party, the intention alone governs, and if such party leave a mine with the intention not to return, his abandonment is as complete, if it exist for a minute or a second, as though it continued for years. But if he left with the intention of returning, he might do so at any time within five years (the period of the statute of limitations); *provided*, there was no rule or custom of miners of such a notorious character as to raise a presumption of an intention to abandon:" *Held*, that the question of abandonment was fairly left to the jury. *Waring* v. *Crow*, 11 Cal. 366.

14. Lapse of Time—Ditch. The law will not presume an abandonment of property in a dam and ditch for mining purposes from lapse of time. *Partridge* v. *McKinney*, 10 Cal. 181.

15. Time—Relation. An abandonment of property determines the right of the party thereto from the date of the act, and the property is to him as though he had never owned or occupied it. *Davis* v. *Butler*, 6 Cal. 510.

16. Statute of Limitations—California. In an action for a mining claim, when the defendant asked for an instruction to the jury "that if the plaintiff had abandoned the claim, and did not intend to return and work it before the commencement of the suit," and the court gave the instruction "subject to the seventeenth section of the statute of limitations:" *Held* that the qualification to the instruction was an error. *Davis* v. *Butler*, 6 Cal. 510.

Abandonment may arise from a single act or a series of acts, and a party having once abandoned his claim, will not be permitted to come in within the time allowed for commencing civil actions to re-assert his rights or resume his claim to the prejudice of those who may have in the meantime appropriated it. Id.

17. Work—District Rules. The failure to perform the amount of work on a mining claim required by the local mining laws or regulations established and in force in the district where the claim is located, amounts to an abandonment of the claim, and thereupon it may be occupied and appropriated by another. *Depuy* v. *Williams*, 26 Cal. 309.

18. Quitting Work. Not to work a mining claim may be a circumstance of some weight, tending to show abandonment; and this abandonment of a claim, resting for validity only upon possession, may be sufficient to defeat the title (*obiter*). *McGarrity* v. *Byington*, 12 Cal. 431.

19. Non-user. The inference of abandonment of a right from *non-user* is not applicable to the case of mines. *Seaman* v. *Vawdrey*, 16 Vesey, 390.

20. Evidence—Bringing Action. In an action to recover possession of a mining claim, where the defense is an abandonment of the claim by the plaintiff, the judgment-roll in an action brought by the plaintiff against third parties to recover possession of the same ground, and in which plaintiff recovered judgment, is admissible in evidence to rebut the presumption of abandonment. *Richardson* v. *McNulty*, 24 Cal. 339; B. & W. L. C. 206.

21. Element of Estoppel. Evidence of matter in the nature of estoppel as the acquiescence by silence in a sale of the premises by another, is not admissible in support of the allegation of abandonment. Estoppel is no element of abandonment. *Marquart* v. *Bradford*, 43 Cal. 526.

22. Offer to Purchase. When, on the trial of the title to a mining claim, defendant proved that plaintiffs or their grantors had, about two years before suit brought, removed their mining tools, and had ever since ceased to work or occupy the claim, evidence of an offer by defendants or an agent of defendants to purchase plaintiffs' interest, and plaintiffs' refusal to sell, is evidence tending to disprove abandonment. *Bell* v. *Bed Rock Co.*, 33 Cal. 214.

23. After Action Brought. When the defendant in an action to quiet title to a mining claim alleged, in a supplemental answer, an abandonment by plaintiff of his mining claim since suit commenced, but failed to set up any subsequently acquired rights in the defendant: *Held*, that such matters, if true, would not avail as a defense, and that the failure of the court to make a special finding of the fact thereon was immaterial. *Pralus* v. *Pacific G. & S. M. Co.*, 35 Cal. 30.

24. Burden of Proof. A party who insists upon a forfeiture or abandonment, and relies thereon to build up a right in himself to the thing, franchise or easement forfeited or abandoned, is, upon first principles, bound to establish the fact or facts upon which his asserted claim or right depends. *Doak* v. *Brubaker*, 1 Nev. 217.

25. Of Ditch. The fact that water was appropriated for a particular purpose, and that the purpose has been fully accomplished, and that, when accomplished, the appropriators dispersed and allowed a long time to elapse without using the ditch, and then sold it for a nominal sum, may be received in evidence as tending to show abandonment. *Davis* v. *Gale*, 32 Cal. 26.

26. Water—Real Estate. A water right, although real estate, may be abandoned. *Barkley* v. *Tieleke*, 2 Mont. 59.

27. When there is a Legal Title. The doctrine of abandonment only applies where there has been a mere naked possession without title. Where there is a title, to preserve it there need be no continuance of possession, and the abandonment of possession cannot affect the rights held by virtue of the title. *Ferris* v. *Coover*, 10 Cal. 589.

28. Water and Tailings. If miners engaged in washing their mining claims with water, abandon the water and tailings which pass from their mining grounds, any other persons have a right to take and appropriate the same to their own use. *Dougherty* v. *Creary*, 30 Cal. 290.

29. Tailings. If a miner allow his tailings to mingle with those of other miners, this would not of itself give a stranger a right to the mixed mass; but it may be a circumstance to prove an intention of abandonment. *Jones* v. *Jackson*, 9 Cal. 237.

30. Slag. Where slag from smelting-works is thrown out, and rejected as of no value, and is then appropriated by others, the party who made the slag cannot reclaim it. *McGoon* v. *Ankeny*, 15 Ill. 559.

31. Collusion. Where, upon a question of abandonment, the plaintiffs offered to show that defendants went into possession of the mining ground by collusion with one of the plaintiffs: *Held*, that the evidence upon such naked offer was well excluded; *aliter*, if offered with evidence showing the agreement of such plaintiff with his fellows to hold the claim for them, or on their account. *Depuy* v. *Williams*, 26 Cal. 309.

32. Gift. If the possession of the occupant be continued in another, by the expression of a wish or desire of the occupant to another that he succeed to the possession, and he thereupon takes possession, a gift is the result; there is no vacancy in the possession, and consequently no abandonment. *Richardson* v. *McNulty*, 24 Cal. 339; B. & W. L. C. 206.

A mere wish or desire of the occupant, when he leaves the possession, that another may next occupy, without being communicated to that other person, and assented to by him, and accompanied by a transfer of possession, does not amount to a gift. Id.

33. Abandonment and Reclaim, Verdict of Jury. In reference to a question of this character (abandonment with reclaim after defendants had found ore), the finding of a jury of the vicinage familiar with mining usages ought to be regarded as entitled to peculiar weight. From dissenting opinion of Dillon, J., in *Anderson* v. *Simpson*, 21 Iowa, 405.

34. No Revival after Right Lost. One who has abandoned his prior right to the use of water cannot, by afterward making a sale of the same, revive his prior right in favor of his grantees, even if the sale is made in good faith. *Davis* v. *Gale*, 32 Cal. 26.

35. Operation of Void Conveyance. The attempt to convey a water right by an imperfect deed operates as an abandonment of the title obtained by the appropriation thereof. *Barkley* v. *Tieleke*, 2 Mont. 59.

36. Pleading. Evidence of the abandonment of a mining claim by a party suing to recover the same is admissible, without a special plea thereof, under a denial of title in the plaintiff pleaded by the defendant. *Bell* v. *Bed Rock Co.*, 36 Cal. 214.

37. Ejectment. Abandonment of his mining claim by plaintiff will defeat his recovery in ejectment. *Atkins* v. *Hendree*, 1 Idaho, 108.

38. Parties Necessary. An abandonment by one party does not inure to the benefit of another without action on his part. *Pralus* v. *G. & S. M. Co.*, 35 Cal. 30.

ACCOUNT.

1. Complainant, Possession. Where a bill prays an account of ore dug on complainant's lands, a court of equity will decree it in a proper case, but the complainant must show that he is in possession. *Bracken* v. *Preston*, 1 Pinney, (Wis.) 585.

2. Plaintiff out of Possession. An account of the profits of coal mines cannot be decreed in favor of a party out of possession. He must bring his ejectment. *Sayer* v. *Pierce*, 1 Ves. Sr. 232.

3. Tenant in Common. Where the common property (salt works) is rented out by one tenant in common, he is accountable to his co-tenants for their share of the rents he has received. And where he occupies and uses the whole property himself, he is liable to his co-tenants for a reasonable rent for it in the condition it was in when he took possession. *Early* v. *Friend*, 16 Grat. (Va.) 21.

4. Tenants in Common—Title Involved. When a question of title is necessarily involved upon a bill for an accounting between tenants in common, it is competent for the court to decide it. *Wilhelm's Appeal*, 79 Pa. St. 141; *Grubb's Appeal*, 79 Pa. St. 141.

5. Practice, Partnership, Decree. Where, in a proceeding for the dissolution of a partnership, the court found that there was due the complainant a certain sum over and above the amount of his expenses in the business, and the court rendered judgment for that sum in his favor against "the said partnership:" *Held*, that the judgment was erroneous. *Levi* v. *Karrick*, 8 Iowa, 150; 13 Id. 344.

6. Limits of Investigation. A court may require the production of books in and of an account, but should not extend the order in such case beyond the necessities of the object in view; an order to ascertain the rental value of salt works does not justify an account of the entire operations of the concern in the manufacture of salt. *Stuart* v. *White*, 25 Grat. (Va.) 300; *Mitchell* v. *McCall*, Id.

7. Account without Injunction—Timber Cases Distinguished—Laches. An account may be had in the case of mines, although no injunction is granted; although the contrary may be the rule in cases of timber. *Parrott* v. *Palmer*, 3 Myl. & K. 632.

But the right to an account even in the case of mines may be lost by laches. Id.

And the plaintiff having allowed defendants for many years to open and operate mines without asserting title or taking any action against them, a court of equity will not decree an account prior to the filing of the bill. Id.

8. Jurisdiction, Oil Well. A bill for an account of oil produced must be filed in the county where the well is situate. *Thompson* v. *Noble*, 3 Pgh. 201.

9. Remainder-man. Tenant in tail in remainder is entitled to an account and payment of moneys realized by a tenant for life from stone quarried and not used for repairs, and minerals from newly opened mines. *Ferrand* v. *Wilson*, 4 Hare, 344.

10. With Partition, Pennsylvania. Under section 24, act of April 25, 1850, relative to partition, the courts of common pleas have equity jurisdiction to compel accounts between tenants of lands containing coal, iron ore or other mineral. *Coleman* v. *Coleman*, 19 Pa. St. 100; B. & W. L. C. 260.

11. Referee Bound by Special Contract between Partners. Where, in proceedings for the dissolution of a partnership, and for an account of the partnership transactions, the cause is referred by agreement of the parties to referees, the referees are bound by the agreement of partnership in stating an account between the partners, and they can exercise no discretion in charging the expenses of the partnership. *Levi* v. *Karrick*, 8 Iowa, 150; 13 Id. 344.

12. Net Profits Defined. Net profits, properly so-called, are to be ascertained by putting a value on all the assets of the company, of whatever nature, and deducting therefrom all liabilities, including among such liabilities the amount of the contributed capital, the surplus then remaining being net profits. *Binney* v. *Ince Hall C. & C. Co.*, 35 L. J. Ch. 363.

13. Fraud. The fraudulent procuring of an injunction is not a matter which can be considered upon an accounting between tenants in common. *Hall* v. *Fisher*, 20 Barb. (N. Y.) 443.

14. Covenant to Keep Accounts. To a bill for an account of stone taken from the plaintiff's quarry, under a promise to account, alleging assurances that accounts were kept, plea denying only the promise to account, but not that the account had been kept, overruled. *Jones* v. *Davis*, 16 Vesey, Jr. 262.

15. Expenses and Services. For case allowing expenses and considering the question of allowance for services to equitable creditor in charge of salt works, see *Ruffners* v. *Putney*, 12 Grat. 541.

16. Conversion of Ore; Tort. For case where conversion of ore by one of several tenants in common of a mine is *apparently* treated as a tort, and as such not subject to consideration in a bill praying for a general accounting. *Hall* v. *Fisher*, 20 Barb. 442; S. C. 9 Id. 148; 1 Barb. Ch. 53; 3 Id. 639.

ACT OF GOD.

1. Cutting Swollen Ditch. When, by means of an artificial ditch, the waters of a stream are conducted from the bed of the stream over the adjacent country, crossing other small natural water-courses, the beds of which are dammed up by the em-

bankment of the ditch, and by the fall of rain the waters of the streams become so swollen as to render it necessary to cut the embankment of the ditch to preserve it from injury, and the owners of the ditch cut the embankment at a point where there is no natural water-course, so that the waters are turned on to cultivated land, causing injury thereto, the injury thereby sustained is not the act of God, but results from negligence, and the owners of the ditch are liable therefor. *Turner* v. *Tuolumne Water Co.*, 25 Cal. 397.

2. Tools Sticking in Oil Well. Janes, the plaintiff in error, by indorsement in form on the back of the original contract, guaranteed that Burke, the contractor, should complete his contract to sink an oil well. Burke commenced boring, and the tools stuck in the well: *Held*, that although it was a contract requiring skill, yet the guarantor assumed the risk of accidents pertaining to the business, and was liable; being excusable only as to such inevitable occurrences as are called the act of God. *Janes* v. *Scott*, 59 Pa. St. 179.

ADMIRALTY.

1. Coal Barges. Coal barges are not "ships or vessels," and are not subject to admiralty jurisdiction. *Jones* v. *The Coal Barges*, 3 Wall. Jr. 53.

ADVERSE CLAIM.

1. Purpose of. The purpose of an adverse claim is to ascertain the party who has the right to the mining claim under the laws of the State and local rules and customs. *420 Mining Co.* v. *Bullion M. Co.*, 3 Saw. 634.

2. Practice. The object of the acts of Congress of July 26, 1866, July 9, 1870, and May 10, 1872, in relation to the patenting of mining claims, was not to confer any additional jurisdiction upon the State courts, but to require parties protesting against the issuance of a patent to try the right of possession, and have the controversy determined in the State courts, by the same rules, and governed by the same principles, and controlled by the same statutes that apply in other cases. *420 Mining Co.* v. *Bullion M. Co.*, 9 Nev. 240.

3. Adjudication Upon. And when, under such acts, an application for patent to a claim on a lode, followed by an adverse claim, and an adjudication upon such adverse claim, and the issuance of a patent to the successful party by proceedings regular in form and without fraud, it is a case where the doctrine of *res adjudicata* ought to be carried to its utmost limit. *420 Mining Co.* v. *Bullion M. Co.*, 3 Saw. 659.

4. Possession. A complaint (or bill in chancery) by claimants in possession of a mining claim may be sustained against adverse claimants out of possession. (So held in action brought in support of an "adverse claim" in the United States land-office.) *Houtz* v. *Gisborn*, 1 Utah, 173.

5. Retroactive Statutes. The rights of claimants of mining ground as to which application for United States patent has been made, cannot be determined by acts subsequent to the filing of the adverse claim. *Moxon* v. *Wilkinson*, 2 Mont. 421.

6. Priority Lost by Failure to Adverse. The holder of an elder location on a mining claim neglecting to adverse the application for patent made by the holder of a junior location waives his priority, and if he afterward apply for patent, his patent is subject and junior to the patent issued on the prior application. *Eureka Cons. M. Co.* v. *Richmond M. Co.*, 9 Cir. Ct., Field, Sawyer and Hillyer, JJ., Pamph., p. 18 (1877).

ADVERSE POSSESSION.

1. By Digging Ore. The defendant entered upon a tract of land, under a claim of title, and removed iron ore therefrom, from time to time, to supply an adjoining factory, but without any actual inclosure or residence thereupon: *Held*, that such entry and removal of ore constituted an actual possession, and defeated the constructive possession of the true owner. *West* v. *Lanier*, 9 Humph. (Tenn.) 762.

2. Presumption of Grant. The presumption of a grant of the use of water does not arise when the adverse use was hostile and without the acquiescence of the owner. *Union M. Co.* v. *Dangberg*, 2 Saw. 450.

3. Vests Title. Adverse possession for the time limited by the statutes of limitation not only bars the remedy, but extinguishes the right and vests title in the adverse holder. *420 Mining Co.* v. *Bullion Mining Co.*, 3 Saw. 634.

4. Forcible Ouster—"Adverse Claim"—Statute of Limitations. Where A. commenced suit in support of an adverse claim brought under the mining act of congress of 1872 (R. S. sec. 2326): *Held*, that the pendency of a former suit to recover possession of the mining claim in which he, A., was defendant, was no bar to prevent B., the plaintiff in the former suit and defendant in the latter, from claiming the benefit of the statute of limitations. *420 M. Co.* v. *Bullion M. Co.*, 9 Nev. 240.

Where B. had brought ejectment for a mining claim and afterward forcibly ousted A., the defendant, and continued to hold actual and exclusive possession: *Held*, in a subsequent suit by the party ousted that such possession could not be considered otherwise than adverse and such as could claim the benefit of the statute of limitations. Id.

5. Ouster—Tenants in Common. Open, notorious and uninterrupted possession of the whole by a tenant in common for twenty-one years, claiming the land as his own, and taking the profits (by coal mining) exclusively, is evidence from which a jury may infer ouster and adverse possession. *Susquehanna Co.* v. *Quick*, 61 Pa. St. 328.

6. Pedis Possessio—Possession Originally Obtained by Fraud. After the delivery of a deed procured by fraud, the land was sold to other parties, having, however, knowledge of the fraud, who dug ore in large quantities, and erected works of the value of $70,000, which they supplied from the land: *Held*, that the deed being obtained by fraud could not be the foundation for an adverse possession; and, *Held further*, that the working of the ore-beds could not be considered adverse possession* "beyond the spot where the ore was dug." *Livingston* v. *Peru Iron Co.*, 9 Wend. 513, S. C.; 2 Paige Ch. 390.

When ore has been, from time to time, taken generally from the lands of a large estate, without reference to any particular tract or the subdivisions of the land, the right of the disseisor so taking the ore cannot be carried beyond his mere *pedis possessio*. *Ege* v. *Medlar*, 82 Pa. St. 86.

7. Ore-bed, Limit of Possession. The working of an ore-bed along with the occupation of a dwelling-house at one end of a large tract of land, unaccompanied by paper title, does not give constructive possession of the whole tract. The possession is confined to the land actually occupied. *Aikin* v. *Buck*, 1 Wend. 467.

8. By Quarrying—Statute of Limitations. Where timber and quarry land was claimed by the owner of adjacent property, who leased the quarries for ten years, and continued afterward to procure stone and timber therefrom, or permitted others to do so, upon payment for the right, and during the time regularly paid the taxes upon the land, the claimant of the land was held to have maintained continued adverse possession. *Colvin* v. *McCune*, 39 Iowa, 502.

9. Of Parcel of Quarries Reserved. The user and possession by the grantee of part of the quarries reserved to the grantor, does not justify the presumption of possession of the whole so as to oust the landlord's title. *McDonnel* v. *McKinty*, 10 Irish L. R. 514.

10. Quarrying Stone. Quarrying stone from time to time during a period of twenty-five years on an uninclosed tract of fifty acres of wild land, with claim of title by deed during that time: *Held*, a complete adverse possession. *Jackson* v. *Olitz*, 8 Wend. 440.

11. By Working Sand Bank. A valuable sand bank being exclusively and notoriously used by the defendant, who sold the sand and used it, this being the use to which the true owner of the land would naturally apply it, meets all the requisites of a legal, adverse possession. *Ewing* v. *Burnet*, 11 Peters, 41.

12. Possession of Surface Owner after Severance—Taking Coal for Domestic Use. The adverse possession of the mine by the owners of the surface for the statutory period would give title, but it must be distinct from, and is unaided by, the occupancy of the surface. And the possession of the mine or minerals must be actual as distinguished from constructive, as well as exclusive, continued, peaceable and hostile. *Armstrong* v. *Caldwell*, 63 Pa. St. 284.

If the owner of a mine is not in actual possession, and any person digs pits or drives adits and carries on mining operations continuously for twenty-one years, adversely to the rights of any other, he may acquire title, and in such case he takes possession of the entire body of minerals in the land. Id.

13. Surface Possession not Adverse to Mine. The failure to exercise the right to dig minerals by the grantee thereof does not operate to bar the right against a surface occupant who has not taken the minerals himself. *Hodgkinson* v. *Fletcher*, 3 Doug. 31.

14. Not Adverse when by Consent—Tin Streamer—Abandonment. Payments made to a tin bounder in consideration of his refraining from using the water for streaming tin, so that it may not be spoiled for the use of a brick pit below, he still claiming the water and exercising his right to use it from time to time, do not operate to work an abandonment against him, nor to give the owner of the brick pit a right in the water. *Gaved* v. *Martyn*, 19 C. B. N. S. 732.

*The court seemed to doubt whether digging ore constituted adverse possession at all. In this case the vote stood three judges and seven senators in favor of the above syllabus against eight senators dissenting, among the latter Wm. H. Seward, who delivered a dissenting opinion.

15. Non-user. The rights of the mine-owner are not extinguished by non-user. To found an adverse possession that will work an extinguishment, there must be with the non-user some act of the owner of the surface, adverse and hostile to such rights, and which prevents the exercise thereof. *Marvin* v. *Brewster Iron Co.*, 55 N. Y. 538.

16. Overlapping Claims. Where two mining companies take up adjoining claims, and the one last taken up overlaps the other, and neither company is working that portion of the claim which overlaps the other, but both are working in different portions of their respective claims, the fact that the locators of the last claim located have been in possession of their claim for five years does not divest the owners of the first claim of the right to their claim to the extent of the original boundaries, and such a possession by the locators of the last claim located is not adverse to the possession of those who located the first claim. *Maine Boys T. Co.* v. *Boston T. Co.*, 37 Cal. 41.

17. Of Water. If one who has the prior right to the use of water permits another to acquire and hold for five years continuous adverse possession of the same, or any part thereof, he loses his right to the same or that part thereof which the adverse possessor enjoyed. *Davis* v. *Gale*, 32 Cal. 26.

18. Water Use, Order of Proof. In an action for wrongful diversion of water, where the answer sets up more than five years continuous adverse possession in the defendant, if the plaintiff before resting introduces evidence tending to show his possession during the five years, and the defendant then introduces evidence to sustain the answer, the plaintiff, in rebuttal, may introduce evidence to show that defendant's possession had not been continuous, or uninterrupted, or adverse, but he cannot claim as a right to introduce evidence to prove the same facts that were proved in his opening. *Yankee Jim's U. W. Co.* v. *Crary*, 25 Cal. 504.

19. Gift of Water. Upon a question of title between an upper and lower appropriator of water, the upper proprietor claimed adverse possession during the statutory period; and it appeared that he had allowed a portion of water to flow at certain times for the accommodation of miners below his ditch and above the plaintiff's ditch: *Held*, that if he allowed the water in the interest of such miners it was no concession of right to the plaintiff and did not interrupt his adverse possession. *Davis* v. *Gale*, 32 Cal. 26.

20. Pleading Use of Water. The party claiming a right to the use of water by five years adverse possession, must set up the same as a defense in his answer; and if he does not, he loses the right to introduce evidence in support of it, and to have the court instruct the jury in relation to it. *American Co.* v. *Bradford*, 27 Cal. 360.

21. Ditch Property Notice. The actual adverse possession of land (dam and ditch property) by another party at the time of the conveyance, will be notice to the purchaser, whose grantors only claim by a possession short of the period fixed by the statute of limitations. Id.

22. Trover. In trover for copper ore raised under the plaintiff's land: *Held*, that the presumption that the right to the minerals accompanied the fee-simple of the land, might be rebutted by the absence of enjoyment of the minerals by the plaintiff, and the user by persons not the owners of the soil. *Rowe* v. *Grenfel*, R. & M. 396.

AGENT.

1. Question of Fact—Stock. Whether a person is acting as the agent of a corporation, or of an individual shareholder in a certain transaction for the purchase of stock, is a question of fact for the jury. *Kelsey* v. *Northern Light Oil Co. of N. Y.*, 45 N. Y. 505.

2. Power Limited to Special Purpose. The agent employed by a miner in the management of his mines, and in his communications with the commissioners for setting out the metes and bounds and fixing the rents and duties in respect thereof, is not, therefore, the agent of the miner for the purpose of making a contract with the commissioners, not within the power which had been conferred upon them in that character. *Attorney-general* v. *Jackson*, 5 Hare, 355.

3. Parol Appointment—Land. An agency having land (a mine) for its subject, may be created by parol and proved in the same manner. *Hardenbergh* v. *Bacon*, 33 Cal. 356.

4. Fiduciary Relation—Full Disclosures—Concealing Mineral Value—Fraud—Sale Set Aside. Where a party accepts the position of an agent to take charge of the lands of his principal, collect the rents and royalties and pay taxes, a fiduciary relation is thereby created in regard to everything relating to such lands; and in treating with his principal for the property, the agent is bound to make the fullest disclosure of all matters connected therewith within his knowledge, which it is important for his

principal to know in order to treat understandingly. *Norris* v. *Taylor*, 49 Ill. 18.

And when an agent occupying such a relation to his principal purchases the property from his non-resident principal at a greatly inadequate price, by concealment of recent discoveries of large deposits of lead ore, and the raising of large amounts of mineral, the sale will be set aside. Id.

And when a party, with full knowledge of the nature of the transactions between such agent and his principal, purchases from the agent a portion of the property so purchased from the principal by such agent, the sale cannot be sustained, but must be set aside in favor of such principal, the original owner. Id.

5. Acting for Two Companies—Mutual Dealings. Where the same person is agent for two mines in the same vicinity, and it becomes necessary for one to deal with the other, he must be presumed to have the same power to act for both that would be possessed if there were a separate agent for each mine, and may dispose of property in the same way; and such a double authority would dispense with such formalities as could not be complied with where one man acts for both companies. *Adams M. Co.* v. *Senter*, 26 Mich. 73.

Where one of such companies authorizes its supplies to be used for the benefit of the other, a third person may rely on the authority of such joint agent in transferring any property belonging to either as sufficient to pass title, and no formal transfer from one company to the other would be necessary to protect a purchaser dealing with either. The agent will be treated as competent to bind both. Id.

Where an agent is empowered to use the supplies of one company for another, he may use them as well in exchange for articles necessary to be purchased as in specie; and where timber owned by one company was used to obtain powder for the other, which could only be done by settling also an outstanding powder account, it was held within his discretion. Id.

6. Acting Against Principal's Interest—Practice—California. In suit for services as agent, defendant in its answer alleged a violation of the contract by plaintiff, and further set up matter amounting to a tort on his part, as conspiracy to have the property of defendant sold, to be bought in by the agent, circulating reports that defendant was a bankrupt, its affairs a swindle, etc.: *Held*, that the latter part of the answer was properly stricken out. *Bates* v. *Sierra Nevada Co.*, 18 Cal. 171.

7. Acting for Third Party. An agent who cannot purchase for himself cannot act for another in making a purchase. *Cumberland Co.* v. *Sherman*, 30 Barb. 553.

8. Fraudulent Acceptance of Increased Price. The agent for the sale of a tract of oil land having ascertained that a sale could be effected for a much larger sum ($45,000) than that at which his principal held it ($16,000), without revealing this fact, procured his principal to make to him a deed of the premises instead of a power of attorney, so that he was able to make a conveyance in his own name for the larger sum, and then accounted to his grantor for the smaller sum, treating the conveyance to himself as an absolute sale: *Held*, that he must account to his principal for the difference; and this, although complainant had expressed himself satisfied after he had heard of the larger price received. *Bell* v. *Bell*, 3 W. Va. 183.

9. Buying Title Against his Principal. An agent representing his principal's interest in a mine, who is informed of a defect in his principal's title, is not permitted to acquire and hold for himself an outstanding title. His principal may either repudiate such sale as fraudulent, or treat the agent as a trustee, and claim the benefit of the purchase. *Hardenbergh* v. *Bacon*, 33 Cal. 356.

10. Steward Taking Lease. The steward of an estate taking a mining lease from his principal, his character as agent accompanying him as tenant, deprives him of the benefit of an objection that might be competent to another person, as to delay in bringing forward the demand. *Beaumont* v. *Boulbee*, 5 Ves. Jr. 485; 7 Id. 599; 11 Id. 358.

11. Purchase by Agent Inuring to Principal—A Co-purchaser not Affected. Where B. was the agent of H. to take care of the interests of H. in certain mining grounds in Nevada, and B. and W., being partners in their dealings in mining lands and stocks, purchased (or W. alone, having notice of said agency, and of the rights of H. therein, and with the consent of B., purchased) for their joint benefit said mining ground—thereby B. and W. became tenants in common of said ground, each holding an undivided half thereof; and the moiety that passed to B. became subject instantly to the trust in favor of H. *Hardenbergh* v. *Bacon*, 33 Cal. 356.

In making such purchase, W. being neither actually nor constructively the agent of H., the interest of W. in the property purchased cannot be controlled for the benefit of H. except through said notice to him of the said rights of H. therein, and then only to the extent of said rights. Id.

12. Foreman Taking Contract—Acting as Agent after Discharge—Notice. Where

a party who had acted as foreman of a mining company, and as such for a long time purchased provisions from the plaintiff, took a contract to run a tunnel to the vein of the company, at his own expense, of which contract the plaintiff had full notice: *Held*, that knowledge of such contract must imply knowledge that the relation of agent had ceased. *Van Dusen* v. *Star Q. M. Co.*, 36 Cal. 571.

And where such party abandoned work on the tunnel and began to operate the mine on his own account, it gave the plaintiff no right to assume that the agency had been re-established. Id.

18. Secret Arrangement with Vendor. In the purchase of land as agent for an association of subscribers contributing for an investment of oil lands and leases, such agent cannot lawfully obtain any advantage or make any profit for himself inconsistent with the interests of his principals. And if, by any secret arrangement with the vendors of the land, under pretense of commissions to be paid him by them, he obtained it for a less sum than was expected by the subscribers or represented by himself, he must account for the difference. *Collins* v. *Case*, 23 Wis. 231.

14. Making Secret Profit. Agents, partners or associates cannot make profit out of their principals, copartners or co-associates for whom they have undertaken to act. *Simons* v. *Vulcan Oil Co.*, 61 Pa. St. 202.

15. Purchase of Mine and Organization of Company for his own Use. An agent employed to set off and sell such portion of his principal's lands as he deems advisable, cannot purchase the property himself and take a conveyance for his own benefit. *Cumberland Coal Co.* v. *Sherman*, 30 Barb. 553.

And if such agent, after so purchasing, organize a company in which he becomes a director and principal stockholder and assigns his contract to the company, such company will be charged with notice. Id.

And the sale to the agent may be set aside, both as against the agent and his company. Id.

16. Clandestine Partnership. An agent cannot have a clandestine partnership with a party supplying timber to the mine of his principal, and will be decreed to account for and pay over the profits of such proceedings. *Massey* v. *Davies*, 2 Ves. Jr. 317.

17. Claiming Benefit of Contract made for Principal. Where a party has negotiated with a proposed lessor for a lease of a mine as the agent and for the benefit of another party, and upon a bill for specific performance filed by the principal against such agent and the proposed lessor, the agent asserts that the contract was for his own use and benefit, the intention of such agent in making the contract amounts to nothing, and the fact appearing that he had been employed to negotiate a lease for the benefit of the plaintiff, specific performance was decreed. *Taylor* v. *Salmon*, 4 My. & Cr. 134.

18. Evidence — Nature and Extent of Authority. S., assuming to be the mining superintendent of defendant, obtained money in its name. In an action to recover the loan, the plaintiff relied upon an alleged ratification of the acts of S.: *Held*, that upon the question of ratification the fact that S. was the agent of the company for some purpose, and the nature and extent of his agency (even though not extending to the act in question) was material and competent. *Union M. Co.* v. *Rocky Mt. Bank*, 2 Colorado, 248 and 565; 1 Id. 531.

19. Declarations of Agent after Agency Proved. Declarations of agent are not admissible to establish the agency, but the agency being otherwise shown, or testimony sufficient to warrant the jury in finding either an original agency, or subsequent ratification being produced, the declarations of the alleged agent made during and within the scope of his authority then become admissible to establish other facts in issue in the same case. *Union M. Co.* v. *Rocky Mt. Bank*, 2 Colorado, 248, 565; 1 Id. 531.

20. Statements not Proof of Agency. The statements of an assumed agent are not evidence of the fact of the agency, nor of the resumption of an agency which the party knew had once ceased. *Van Dusen* v. *Star Q. M. Co.*, 36 Cal. 571.

21. Mining Superintendent — Declarations. The acts of a mining superintendent of a flume, in constructing, repairing and superintending the same, are binding upon the principal, but such authority does not make his acts and declarations in respect to title admissible to affect his principal. *Herbert* v. *King*, 1 Mont. 475.

22. Agency as to Land not Owned. To constitute a valid agency, where property is its subject, it is not essential that the principal should hold the legal or equitable title, or more than a naked claim of title. It may be created for the acquisition of title, either legal or equitable, or for the protection of an asserted title. *Hardenbergh* v. *Bacon*, 33 Cal. 356.

23. Power to Sell Mining Claim. A verbal power is sufficient to authorize an agent to sign a bill of sale of a mining claim. *Patterson* v. *Keystone M. Co.*, 30 Cal. 360.

24. Second Contract after Failure in Original Negotiation—Fluctuation. Consent to sale, or authority to sell (given by a *cestui que trust* to his trustee) at a given rate at one time does not operate when the sale falls through, as a continuing power to make sale at a future time, especially where the property is mining land and fluctuating in value; and new authority is required after any considerable interval, even though the price obtained may be larger than that before provided for. *Palmer* v. *Williams et al.*, 24 Mich. 329.

25. Borrowing Money. The superintendent of a mine, with authority to take ore therefrom and crush it for the purpose of obtaining gold, cannot upon such authority borrow money in the name of his principal for use in carrying on the mine. *Union G. M. Co.* v. *Rocky M. Nat. Bank*, 1 Colorado, 532; 2 Id. 248 and 565.

26. Power to Borrow. The resident agent, appointed by the directors of a mining company to manage the mine, has not an implied authority from the shareholders of the company to borrow money upon their credit, in order to pay the arrears of wages due to the laborers in the mine, who have obtained warrants of distress upon the materials belonging to the mine, for the satisfaction of such arrears; nor in any case of necessity, however pressing. *Hawtayne* v. *Bourne*, 7 M. & W. 595.

27. Mining Superintendent. The authority of mining superintendents or general agents in charge of mines will be recognized without proof, as covering all the ordinary local business of the concern; and persons dealing with them have a right in the absence of notice to the contrary to assume that they have such power. *Adams M. Co.* v. *Senter*, 26 Mich. 73.

28. Representations Bind Owners. Owners are bound by the representations of an agent made in the sale of property (mining stock), although such agent goes beyond the written terms of sale and prospectus. If a sale of stock is made on his false representations it is void. *Crump* v. *A. S. M. Co.*, 7 Grat. (Va.) 352.

29. Foreman's Purchase—Company Liability. If a mining company has for a long time recognized the acts of its foreman in buying goods for it, and paid for them, it is liable for goods ordered by the agent for it from the same parties after the agency ceases, if they have no notice that the agency has ceased. This liability of the principal is the same to the assignee of the demand, even if the assignee had notice before the goods were sold that the agency had ceased. *Van Dusen* v. *Star Q. M. Co.*, 36 Cal. 571.

30. Contract to pay Price in Excess of Authority — Laches. On November 11, 1864, an agent of the Atlas Mining Company made an arrangement with Johnston, the plaintiff, to substitute said company as purchaser of certain mining lands at a guardian's sale, in place of another party, the highest bidder, at a price known to plaintiff to be in excess of the authority of such agent. On November 12, the agent wrote to the officers of the company informing them of the arrangement, and a delay having occurred until January 9, following, owing to a misunderstanding between plaintiff and said agent as to whether or not the deeds and abstracts of title were to be sent to the office of the company in Boston to be examined before ratification, such papers were on that day so sent, and the officers of the company, by letter from Boston, dated February 13, 1865, declined to ratify the purchase, of which refusal plaintiff was informed by said agent by letter dated March 6, 1865: *Held*, in an action of *assumpsit* for purchase money, that in the absence of any other evidence of ratification or estoppel the company were not liable. *Atlas M. Co.* v. *Johnston*, 23 Mich. 37.

31. Steward—Judicial Appointment—Negligence. The steward of a mine (in this case appointed by the court of chancery at the instance of a ward), employing colliers, is not responsible for injuries arising out of the negligence of his employees. *Stone* v. *Cartwright*, 6 Term R. 411.

32. Service Upon. Service upon a party returned as "business manager," is not equivalent to return of service upon the "managing agent" of a corporation. *Scorpion S. M. Co.* v. *Marsano*, 10 Nev. 370.

33. Superintendent — Relieving Contractor. A superintendent of a mining company has no right, by virtue of his position, to moderate the terms of a written contract, which a third party and his company had entered into concerning the furnishing of materials for sinking a shaft. *Lonkey* v. *Succor M. & M. Co.*, 10 Nev. 17.

34. Annual Hiring. A written contract by which a party is employed "to act as agent or salesman for stock," etc., of a coal company, to be paid $3000 "in equal quarterly payments," is a hiring for a year. *Kirk* v. *Hartman*, 63 Pa. St. 97.

35. Not Liable for Rent. An agent, in possession as agent of an interest in a mining ditch is not personally liable for the rent. *Stewart* v. *Perkins*, 3 Oreg. 508.

36. As Trespasser. A court of chancery cannot charge an agent who has committed a trespass in taking coal, although conscious of its being a wrong, with the

proceeds of such trespass as compensation, when his principal and not himself received such proceeds. *Powell* v. *Aiken*, 4 Kay & J. 343.

Compensation is not to be required of an agent of a mining company which has tortiously taken ore beyond its boundary, although it was his duty to prevent such acts. *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80.

37. Authority to Purchase Supplies—Prospectus Forbidding Debts. A joint-stock company was formed to work a mine, in which the defendant became a shareholder, and took part in its proceedings. The prospectus issued on the formation of the company stated that all supplies for the mine were to be purchased at cash prices, and no debt was to be incurred; and the script certificates also bore an indorsement to the same effect. The plaintiff supplied goods for the necessary working of the mine, on the order of a resident agent appointed by the directors to manage the mine, which was the customary course in such concerns: *Held*, that the defendant was liable to the plaintiff for the price of such goods, notwithstanding the statements in the prospectus and certificates, unless it were shown that the agent had, in fact, no authority from the defendant, and that the plaintiff had notice thereof. *Hawken* v. *Bourne*, 8 M. & W. 703; 10 L. J. Ex. 361.

38. Not Estopped by Report of Receipts not Acted On. Defendant, the agent of a mining association for the purchase of oil-land, being himself a subscriber, and retaining his interest in the property of the association as if his subscription were actually paid, he must account for the amount of it, as well as for other subscriptions actually paid; but he is not estopped from denying the actual receipt of subscriptions by the fact that in a report made to the subscribers he had stated that he had received the whole, none of the subscribers having advanced money or changed his position in consequence of such statement. *Collins* v. *Case*, 23 Wis. 231.

39. Sale to or through Agent. For a case of fact as to whether a sale of oil-land negotiated by letters in the form of an optional contract was a sale direct to B., or through him, as agent, to C., the final holder, see *Logan* v. *Dils*, 4 W. Va. 397.

40. Expenses to California Construed—Statute of Frauds. A. made a written proposal to a mining corporation which owned mines in the interior of California, to engage with them as superintendent for three years, at a certain salary and "expense of passage to the mines." The corporation voted to choose him as superintendent at the salary named, and "to pay his expenses out to California." They also voted certain rules as to his duties, and required him to give a bond, with sureties, for the faithful performance of his duties. He gave the required bond, received a copy of the rules, went to the mines, and before the expiration of three years was unjustly discharged: *Held*, that the record of the above votes constituted a sufficient memorandum in writing to bind the corporation and take the contract out of the statute of frauds. That the vote to pay A.'s expenses to California should be construed to mean to pay them to the mines. That his acceptance of the votes requiring a bond and establishing rules as to his duties as modifications of his proposal, might be inferred from his acts. *Tufts* v. *Plymouth G. M. Co.* 14 Allen, 407.

41. Services—Quantum Meruit. A mining agent under a contract to serve a company for a term of years, if wrongfully prevented from performing his contract by the defendants, may recover before the expiration of the service for the labor actually performed upon a *quantum meruit*. *Isaacs* v. *McAndrew*, 1 Mont. 437.

42. Bill Signed as "Agent." Adding the title of agent to the signature of the drawer of a bill is notice that the party does not mean to be personallv liable. *Conro* v. *Port Henry Iron Co.*, 12 Barb. 28.

In such case, when the principal is known, he alone is liable. Id.

43. Interest. Interest not allowed upon the compensation of a mine agent, except in the case of unreasonable and vexatious delay. *Isaacs* v. *McAndrew*, 1 Mont. 437.

44. Act of Agent—Negligence—Blasting Accident. Where the principal authorizes and directs it, the misconduct of his agent is his; and he is not discharged from liability to his servant, who is injured thereby, because he employed another servant as an instrument in carrying his purpose into effect. *Spelman* v. *Fisher Iron Co.*, 56 Barb. (N. Y.) 151.

45. Premiums Paid Allowed as Expenses. If one who by virtue of his employment as agent of a mine in California is entitled to charge for his expenses, has properly paid in legal-tender notes a premium for specie, to be used by him for such expenses, he may recover of his principal the full amount so paid by him in legal-tender notes. *Tufts* v. *Plymouth G. M. Co.*, 14 Allen, 407.

46. Of Corporation, Agency how Proved. In an action against a mining corporation on a contract made by a per-

son on its behalf, purporting to act as its agent, parol testimony is admissible to show that such person was authorized to act as its agent, unless the corporation is compelled by its charter to appoint its agents by deed or resolution. *Carey* v. *Philadelphia Petroleum Co.*, 33 Cal. 694.

47. Account. For general account decreed against tenant, who was also agent, with respect to fraud, concealment and breach of trust, see *Beaumont* v. *Boultbee*, 5 Ves. Jr. 485; 7 Id. 599; 11 Id. 358.

48. Office and Boarding-house of Mining Co.—Ratification of Contract. N., the president and managing agent of a corporation for ditch and mining purposes, and who was vested, by a resolution of the company, with discretionary power as to all matters pertaining to the prosecution of the projects of the company, and who had been in the habit of making such contracts as he deemed necessary for the good of the corporation, purchased of the plaintiff and one S., in the name and for the use of the corporation, a house, to be used as an office for the corporation, and a boarding-house for the laborers employed by the corporation, for $3000; $500 of which N. paid down, and to secure the balance he gave a mortgage, in the name of the corporation, on the premises. N. then, as agent, took possession of the premises, and subsequently several meetings of the trustees of the corporation were held in the house. Six weeks after the purchase, at a meeting of the trustees, a resolution approving the contract failed to pass. Subsequently the premises were destroyed by fire. Plaintiff, who had obtained S.'s interest in the debt, brought suit against the corporation to recover the amount, and for a foreclosure of the mortgage: *Held*, that N. had authority to bind the corporation, and if such authority were doubtful, the acts of the corporation amounted to a ratification of the contract. *Shaver* v. *Bear River W. & M. Co.*, 10 Cal. 396.

49. Hostler for Agent. The agent of a mining company has authority to employ laborers in the business of the company, but he cannot pledge the faith of the company to pay for taking care of a team used by the agent. *Consolidated Gregory Co.* v. *Raber*, 1 Colorado, 511.

But evidence that one of the directors stated that plaintiff should lose nothing by the company, and a like admission of another director to the same effect, will so far ratify the employment as to support a verdict. Id.

50. Purchases by Mine Captain. In an action against a shareholder, also the secretary of a mine, conducted on the cost-book principle, under which the mine agents made monthly or quarterly estimates of the money required to carry on the business, and raised the amount by calls on the shareholders, it being also the practice, when sufficient sums were not forthcoming, to obtain goods on credit, and the defendant having, as secretary, entered the order for the goods, the question was left to the jury, whether the captain had authority to pledge the credit of the shareholders for goods which were necessary. *Newton* v. *Daly*, 1 F. & F. 26.

51. Acts of Superintendent Ratified by Mining Partnership—Estoppel. Where a promissory note purporting to be executed for and on behalf of a mining partnership, and signed by the superintendent as such, was given in payment for property which the partnership was using, and such use was a beneficial one, and all the members knew soon after the execution of the note of its existence, and believed it to be a company note, and acquiesced in paying interest upon it, until long after the original debt would have been barred if the note were held invalid: *Held*, that the members of the partnership should be estopped from disputing its validity. *Jones* v. *Clark*, 42 Cal. 180; B. & W. L. C. 525.

52. Year's Service—Agent's Absence. A finding by a jury that a party under contract to superintend mines in Montana has served for one year, against the admitted fact that he left the territory before the expiration of the year, and remained in New York on his own affairs, is a finding against the evidence. *Isaacs* v. *McAndrew*, 1 Mont. 437.

53. Ratification. The question whether a mining company shall be inferred to have ratified an unauthorized act of its agent by delay in disavowing such act is a question for the jury. And where money had been borrowed by an agent without authority, the company notified on December 16, and fifteen days later the president undertook to present the claim to the board at a meeting to be held in February, but the corporation did not disavow the act until the following spring: *Held*, that a finding of ratification might be warranted. *Union G. M. Co.* v. *Rocky M. Nat. Bank*, 1 Colorado, 532; 2 Id. 248, 565.

54. Ratification, Benefit of Proceeds. In an action against a mining company to recover money borrowed by its agent without authority, the circumstance that the company retained the ore taken from the mine by the use of the money is not material to the question of ratification *Union G. M. Co.* v. *Rocky M. Nat. Bank*, 1 Colorado, 532; 2 Id. 248, 565.

55. Notice of Discharge, Agency of Corporation. Where a contract between a domestic mining corporation and its local agent provided for a determination of the contract upon six months' notice from either party: *Held*, that notice from the committee of a foreign agency was not notice under the contract. *Bates* v. *Sierra Nevada Co.*, 18 Cal. 171.

56. Demand Cannot Recognize Stranger's Rights. An agent taking possession of a colliery is not bound to deliver the property to the true owner in derogation of his principal's claims; and a refusal by such agent to deliver on demand is no evidence of a conversion against his principal. *Carey* v. *Bright*, 58 Pa. St. 70.

ALIENS.

1. Mine and Parties out of Jurisdiction. The court has no power to decree a lien, and ought not to pronounce a decree even in *in personam*, in a case where there is no privity between the plaintiff and the defendant in this country, and the subject-matter is mines, inmovable property, in a foreign country, out of the jurisdiction of the court. Bill therefore to declare a lien where an owner of mines in Prussia, after receipt of part of the consideration, from the intending purchaser a British subject, consummated the contract with third parties, a British company, allowing to them, and not to the estate of the deceased, credit for the amount paid by deceased, dismissed. *Norris* v. *Chambres*, 4 Law Times N. S. 345; 7 Jurist. N. S. 689; aff'g 9; 29 Beav. 246.

2. Foreign Miners' Tax, California. Where a foreign miner subject to a license tax was employed by one of a mining partnership to mine on the claim of the firm, but the firm was not connected with the hiring: *Held*, that the person employing him and not the firm, was liable for the tax. *Meyer* v. *Larkin*, 3 Cal. 403.

The collector having seized on the property of the firm for the tax, and sold the whole claim and dispossessed the plaintiff, one of the partners: *Held*, that the officer was a trespasser. Id.

The State has power to impose a license fee upon foreigners for the privilege of working gold mines. *People* v. *Naglee*, 1 Cal. 232.

The act prohibiting foreigners from working gold mines, except upon payment of a certain sum each month, is not repugnant to the constitution of the State, of the United States, or treaties of the United States. Id.

Review of the legislation of California imposing special taxes upon foreigners. The act of 1862, declared unconstitutional. *Lin Sing* v. *Washburn*, 20 Cal. 534.

The fact that the parties in possession of a gold mine are foreigners working without license, affords no apology for trespassers. The State alone can enforce the law prohibiting foreigners from working in the mines without a license. *Mitchell* v. *Hagood*, 6 Cal. 148.

3. Transfers to, not Prohibited—Act of 1866. The mining act of Congress of July 26, 1866, allows citizens of the United States to explore and occupy the mineral lands, but it "does not prohibit citizens who rightfully acquire this possessory title from selling and transferring the same to aliens." *Territory* v. *Lee*, 2 Mont. 124.

4. Claims not Forfeitable to a Territory. The act of the legislature of the Territory of Montana, attempting to declare forfeited to the Territory or to authorize proceedings to declare forfeited, mining claims held by aliens, is in violation of the organic act, and void. *Territory* v. *Lee*, 2 Mont. 124.

See "CHINESE" and "TAXATION."

ANNUAL LABOR.

See LABOR.

APPROPRIATION.

1. Recognition of Appropriation. The territorial statutes have recognized the validity and binding force of the rules, regulations and customs of the mining districts; and under this legislation, not only without interference by the National government but by 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. *Sparrow* v. *Strong*, 3 Wall. 97.

2. Use the Test of Right. Appropriation and use for a beneficial purpose are the tests of right to water in the mineral regions, while the place and character of its use are no such tests. *Davis* v. *Gale*, 32 Cal. 26.

3. Speculation, Useful Purpose. To render valid a claim to water by appropriation, the claim must be for some useful purpose, or in contemplation of a future appropriation for such purpose by the parties claiming it. A claim for speculation should be wholly disregarded. *Weaver* v. *Eureka Co.*, 15 Cal. 273.

4. Title Acquired. The right of a miner locating a claim comes from the mere appropriation of the claim in accordance with the mining customs of the vicinage. The title is in the government, and the right to mine is by its passive concession to

the appropriator. *Gore* v. *McBrayer*, 18 Cal. 583; B. & W. L. C. 191.

5. Effect of Contract prior to Appropriation. The estate of discoverers and locators of a mineral deposit on the public domain inures by their mere appropriation; but their relations to each other or respective interests in the estate so acquired may be controlled by a previous agreement or prospecting contract made between them. *Murley* v. *Ennis*, 2 Colorado, 304.

6. Drainage, no Appropriation. The diversion of the waters of a stream with the object of drainage simply, or without the intention of applying them to some useful purpose, does not constitute an appropriation. *McKinney* v. *Smith*, 21 Cal. 374.

7. Drainage Ditch, no Appropriation. Cutting a ditch for the purpose of draining a mining claim without using the water for any useful purpose does not constitute a prior appropriation against a younger ditch dug for the purpose of using the water to work a claim. *Maeris* v. *Bicknell*, 7 Cal. 261.

8. Incomplete Appropriation — Practice. Until a claimant is himself in a position to use the water, the right to the water does not exist in such a sense as to enable him to maintain an action against another, either to recover the water or damages for its diversion. *Nevada Co.* v. *Kidd*, 37 Cal. 284.

9. Priority, Ditch and Mining Claim. The case of conflict between a ditch and a mining claim is peculiar. The rule of prior appropriation cannot be strictly applied. The governing maxim is rather *sic utere tuo ut alienum non laedas.* And it may be doubted whether a ditch, although recognized as real estate, is to be regarded with the same favor by a court of equity. *Clark* v. *Willett*, 35 Cal. 534.

10. Mining Claim Subject to Prior Water Right. The miner who selects a claim on the public domain must take it as he finds it, subject even to the prior appropriation of water which would have flowed over his ground and would naturally have been used in working the same. *Irwin* v. *Phillips*, 5 Cal. 140; B. & W. L. C. 727.

11. Priority — Waste Water Enlarging Common Source. If two persons appropriate water from the same stream, one prior in point of time to the other, and a third person builds a flume in the stream so as to increase the flow of water, the prior appropriator is first entitled to the increased flow of water to the extent of his appropriation. *Davis* v. *Gale*, 32 Cal. 26.

12. Prior Appropriation for Irrigation. The construction of a reservoir across the bed of a ravine, for the purpose of collecting the water flowing down the same, to be used in irrigating a garden, or fruit trees, gives to the party constructing the same a vested right of property in the reservoir, and the right to have the water flow into the same, of which he cannot be divested by persons subsequently entering for mining purposes; and a court of equity will enjoin miners thus entering from injuring the reservoir or diverting the water therefrom. *Rupley* v. *Welch*, 23 Cal. 453.

13. Diligence in Constructing Ditch, Relation. Where one Rose, in 1858, constructed a ditch from the Carson river to Dayton, a distance of four and one-half miles; in 1859 and 1860, one Carpenter tapped the river below the head of the Dayton ditch; and in 1864 the Dayton ditch was finally enlarged to much greater capacity and so as to interfere with the supply to Carpenter's ditch; this enlargement of the Dayton ditch, however, having been contemplated since 1858, but the work not having been prosecuted with sufficient diligence between 1858 and the time when Carpenter's rights accrued: *Held*, that the Carpenter ditch had the appropriation prior to the enlarged ditch. (*Ophir S. M. Co.* v. *Carpenter*, 4 Nev. 534.) *Held further*, that the cleaning of the old ditch in 1859, with the enlargements in places, but not so as to increase the capacity of the ditch to any greater scale, no labor toward enlargement in 1860, but little except repairs in 1861 and 1862, and no definite effort to increase the capacity of the ditch with expenditures commensurate to the undertaking until 1863 and 1864, was not sufficient diligence to hold the ditch as enlarged against an undertaking which had been vigorously prosecuted shortly after the completion of the original ditch. Id.

Where the work of appropriation is not prosecuted with diligence, although finally completed, the appropriation is dated from the completion, and not from the original commencement of the enterprise. Id.

Priority of appropriation gives the better right to the use of running water, when the right itself springs from appropriation, and not as an incident of ownership of the soil; and where labor is required to complete the appropriation, a reasonable time is allowed for such labor; and if completed within such reasonable time, the appropriation is considered as relating back to the first act done by the locator. Id.

In considering the question of reasonable diligence upon enterprises requiring much labor and capital, the illness of the principal operator, or his want of pecuniary means, and such other accidents causing delay as are incident to the person and not to the enterprise, cannot be taken as an ex-

case to prolong the time which should be allowed. Id.

To constitute diligence does not require unusual efforts or expenditures, but only such constancy in the pursuit of the undertaking as is usual with those in like enterprises, who desire a speedy accomplishment of their designs; such assiduity as shows a *bona fide* intention to complete it within a reasonable time. Id.

Due diligence is a question for the jury, but the term is sufficiently well defined to justify a court in setting the verdict aside, when, upon an admitted state of facts, there appears an utter want of diligence. Id.

14. Diligence—Claim not followed up—Water. A party who intends to claim water, must appropriate the same with reasonable diligence, by some known means, and at a certain point; a declaration of such a claim, without any acts of possession, is insufficient. *Columbia M. Co.* v. *Holter*, 1 Mont. 296.

15. Diligence—Relation to First Work—Ditch. The appropriation of water by parties, who prosecute the work on their ditch with reasonable diligence, dates back to the commencement of the work. *Woolman* v. *Garringer*, 1 Mont. 535.

16. Burden of Proof. Plaintiff, claimant of fruit trees and garden crops, suing to enjoin mining, and for damages for crops and trees destroyed, not showing a prior appropriation of the ground: *Held*, rightfully nonsuited. *Ensminger* v. *McIntire*, 23 Cal. 593.

17. Hotel and Town Lots on Mining Ground. The acts giving the right to mine upon land appropriated for grazing and agricultural purposes, do not apply to the case of a town lot occupied for hotel purposes. Lands settled in good faith, and built up as mining towns, must be protected as incidental to the business of mining. *Fitzgerald* v. *Urton*, 5 Cal. 308.

The occupant of mineral land may rely upon his possession against a mere trespasser, unless he uses the land for grazing or agricultural purposes. Id.

In permitting persons to go upon public lands occupied by others for the purpose of mining, the Legislature has legalized what would otherwise have been a trespass, and the act cannot be extended, by implication, to a class of cases not specially provided for. Id.

18. Local Considerations. In the appropriation of water on the public domain, only such evidences of appropriation are required as the nature of the case and the face of the country will admit of. Surveys, notices, stakes and blazing of trees, followed by work and labor, without abandonment, will, in every case where the work is completed, give title to the water over subsequent claimants. *Kimball* v. *Gearhart*, 12 Cal. 28.*

The mere act of commencing a ditch with the intention of appropriating the water, does not, of itself, give exclusive right to the water of such stream. Id.

19. Of Timber. The right to the use of growing wood and timber upon the public mineral lands, as between the claims of miners on the one hand and agriculturists on the other, is governed by the rule of priority of appropriation. *Rogers* v. *Soggs*, 22 Cal. 444.

20. Water—Extent of Appropriation. The extent of the right acquired by an act of appropriation, or the extent to which subsequent acts of appropriation are subordinate to it, is a question of fact for the jury. *Nevada W. Co.* v. *Powell*, 34 Cal. 109.

21. Extent of the Right to Water. The rights of parties claimants of ditches obtained by prior appropriation, though not founded on legal title, are as perfect and absolute as if acquired by prescription or express grant from the riparian owner. *Butte T. Co.* v. *Morgan*, 19 Cal. 609.

22. Water, Mining and Milling Purposes. The appropriation of water for all purposes stands upon equal footing, and a later appropriation for mining purposes is not good against a prior appropriation by a mill. *McDonald* v. *Bear River Co.*, 13 Cal. 221.

23. Of Water, a Franchise. The right to appropriate water under the general presumed license of the government is a franchise. *Conger* v. *Weaver*, 6 Cal. 548.

24. Of Water—Relation—Constructive Possession. The appropriation of water cannot be constructive. It cannot rest in intention. Yet if prosecuted in good faith it relates back to the commencement of the improvements by which appropriation was made. *Kelly* v. *Natoma W. Co.*, 6 Cal. 105.

25. Water and Mining Ground alike subject—Priority. The right to appropriate mining ground and the right to appropriate water for mining purposes stand upon an equal footing, and when they conflict they must be decided by the fact of priority. *Irwin* v. *Phillips*, 5 Cal. 140; B. & W. L. C. 727; see Secs. 9 and 10.

26. Water, Change of Use. The prior appropriator of water for mining purposes

*This case contains a full set of instructions to jury upon the question of water appropriation.

at a certain point can extend his ditch and use the water to the extent of his appropriation, at any point for the same or a different purpose. *Woolman* v. *Garringer*, 1 Mont. 535.

27. Water in Lakes Appropriated by Tapping their Outlets. Where certain small lakes were drained by one stream the waters of which outlet had been appropriated, subsequent parties cannot appropriate the waters of the lakes as against them; nor does the great value of the lakes as reservoirs justify the erection of embankments which impede the flow into the outlet; had the location of such lakes as reservoirs worked only trivial injury it might have been *damnum absque injuria*, but otherwise where there was a serious diversion of the water. *Weaver* v. *Eureka Lake Co.*, 15 Cal. 271.

28. Relation. Where water is appropriated for mining purposes the right to the same dates from the commencement of the work. *Maeris* v. *Bicknell*, 7 Cal. 261.

29. Change of Ditch-head. A person entitled to divert a given quantity of water from a stream may take the same from any point on the stream, and may change the point of diversion at pleasure, if the rights of others be not injuriously affected by the change. *Butte Co.* v. *Morgan*, 19 Cal. 609.

The right of a party entitled to divert water to change his point of diversion does not depend upon the mode by which his right to the water was acquired. The source of the right may be looked to in determining its existence and extent, but not in determining the manner of its enjoyment. Id.

30. Surplus Water. If the first appropriator of water take only a part of the quantity flowing in a stream another may afterward appropriate the remainder. *Smith* v. *O'Hara*, 43 Cal. 371.

31. Special Case—Sale of Water by Mill Owner. A person who has built a mill on a stream and appropriated a part of its water to propel machinery, does not lose his prior right over one who has claimed the water below him for mining purposes, by a sale of his interest in the water of the stream to be used in a ditch above. *McDonald* v. *Askew*, 29 Cal. 200.

32. New Appropriation of Possessory Claim to Water dating from Void Deed. Where the owner of a ditch attempts to convey the same by a deed which is void, and places the grantee in possession who continues to use the ditch, it operates as an abandonment of his appropriation by the grantor and as a new appropriation by the grantee, dating from the change of possession. *Barkley* v. *Tieleke*, 2 Mont. 59.

33. Priority—Affecting Cases of Injury from Accident. There is no doubt that ditch owners would be responsible for wanton injury or gross negligence, but they are not liable for a mere accidental injury where no negligence is shown to a claim located subsequent to the construction of the ditch. *Tenney* v. *Miners' Ditch Co.*, 7 Cal. 335.

34. Mining Under Crops—California Statute. A person entering upon and possessing public land, under the Possessory Act of April 20, 1852, holds the land subject to the right of any person to enter upon it and work the mines of precious metals thereon. This right of the miner to enter upon lands thus held is subject to such regulations and restrictions as the Legislature may see fit to impose; and the act of April 25, 1855, compelling the miner to give bonds to the owner of crops growing on such lands before he can use the mineral lands on which crops are growing, is but a regulation of a right given by the act of April 20, 1852, and is not liable to any constitutional objection. *Rupley* v. *Welch*, 23 Cal. 453.

An owner of crops refusing to accept the bond provided for under said act, cannot treat the miner who enters as a trespasser; but if such miner refuse to pay for the crop destroyed, upon demand, he is liable therefor, and might be restrained from further working. Id.

35. No Preference to Miners. The theory that in the mineral districts of this State (California) the rights of miners and persons owning ditches constructed for mining purposes are paramount to all other rights and interests of a different character, regardless of the priority of their acquisition, cannot be sustained. *Wixon* v. *Bear River & A. W. & M. Co.*, 24 Cal. 367.

36. Prior Agricultural Claim. Where the title of the respective parties to public mineral lands is based on possession alone, the older possession, as between the two, gives the better right; and this although the use to which the older possessor appropriated the land was for agricultural purposes, while the younger possession was for mining purposes. *Gibson* v. *Puchta*, 33 Cal. 310.

36. Reclamation After Flowing into Natural Stream. The first appropriator of the water of a stream passing through the public lands in the State has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation. To this ex-

tent his rights go, and no further. In subordination to those rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle its waters with other waters, and divert an equal quantity as often as they choose. *Butte Canal Co.* v. *Vaughn*, 11 Cal. 143.

APPURTENANCES.

1. A Relative Term. The word appurtenances is a relative term; it will not enlarge an allegation of seizin of mines to an allegation of seizin of mines, with the right to enter the surface owned by another to get them; as used in such connection it relates to seizin and such things further and only, as are incident to seizin. *McMahon* v. *Breton*, 2 Allen (New Brunswick) 354.

2. Ore Banks. In his declaration in partition the plaintiff demanded "The Mount Hope Estate," setting out the particular tracts and not the ore hills, but averred that each tenant was entitled to one-eighth of the premises with the "appurtenances:" *Held*, that the right to ore in the mine hills passed under "appurtenances." *Grubb* v. *Grubb*, 74 Penn. Stat. 25.

3. Right to Mine in adjoining Land. F. seized in fee of a tract of land sold and conveyed a small part of it to B. in fee, and by the same instrument granted to B. an easement or right "from time to time and at all times hereafter to dig, take and carry away all iron ore to be found within the bounds" of the residue of the tract not conveyed, "provided the said B., his heirs and assigns, pay to the said F., his heirs and assigns, the sum of sixpence per ton for every ton taken from the premises:" *Held*, that such easement or right is not appurtenant to the part of the land conveyed, so that it would pass by a sheriff's sale of the latter. *Grubb* v. *Guilford*, 4 Watts. 223.

4. Easement. A thing corporeal cannot be appended to a thing corporeal. Coleman's App., 52 Penn. Stat. 252; B. & W. L. C. 275.

5. Miners' Houses, Lease. Miners' houses are ordinary and proper appurtenances of coal mines, and when they are on the premises and included in the lease they constitute part of the estate, and all the remedies between landlord and tenant attach to them. *Spencer* v. *Kunkle*, 2 Grant (Pa.) 406.

6. Ditch not Appurtenant to Ditch, but part of the Subject-matter when it is a Sole Feeder. "He who grants a ditch is supposed to grant not only the excavated channel, but also his rights to the water by which it is supplied and made valuable. And if this supply comes from a second ditch the conveyance of the ditch thus supplied, by general words, would carry the second ditch as part and parcel of the first;" not as an appurtenance. (Knowles, J., dissented.) *Donnell* v. *Humphreys*, 1 Mont. 518.

7. Ditches, Burden of Proof. Where a party alleges that ditches or water rights have passed as appurtenances to mining claims, the burden of proof is upon him to show that they are in fact appurtenances. *Quirk* v. *Falk*, 47 Cal. 453.

8. Ditches—Sheriff's Deed. A sheriff's deed for certain mining claims, "together with the water ditches and privileges, hereditaments and appurtenances thereto belonging, or in anywise appertaining," will not be construed to pass water or ditches used in operating the claims without affirmative proof that the water rights were appurtenances to the claims. *Quirk* v. *Falk*, 47 Cal. 453.

9. Flume not Part of Mining Claim—Taxation. A flume run by a mining company along the bank of a river for the purpose of working its claims in the bed of the river, auxiliary to and necessary for the working of such claims is not a part of the mining claim, and is not exempt from taxation under the statute of 1857, exempting mining claims. *Hart* v. *Plum*, 14 Cal. 148.

10. Trough for Washing Ore. A wooden trough, by which water is conveyed from a spring to a pool, at the distance of half a mile from the mine for the purpose of washing the ore, is an "erection used in conducting the business" of the mine. So held under penal statute allowing compensation for such structures destroyed by riot. *Barwell* v. *The Hundred of Winterstoke*, 14 Q. B. 704.

11. Oil. Oil is not an appurtenance to the oil well or lease. So held on assignment of leasehold interest. *Dresser* v. *West Va. T. Co.*, 8 W. Va. 553.

12. Surface Support. A grant of minerals and all privileges necessary for the convenient working, etc., of coal, and the rights "incident or usually appurtenant to working and using coal mines," does not affect the grantor's right to a surface support. *Coleman* v. *Chadwick*, 80 Pa. St. 81; *Chadwick* v. *Coleman*, Id.

ARBITRATION AND AWARD.

1. Covenant for, in Lease. The lease of a mine contained an agreement to refer disputes between the lessors and the three

lessees to arbitrators or their umpire, pursuant to the provisions of the Common Law Procedure Act, 1854. The lessees sank a shaft, and through the shaft drew minerals from an adjoining mine. The lessors filed a bill to restrain the lessees from so doing. Two of the three lessees applied for an order to stay proceedings in the suit, and that the matter might be referred to arbitration: *Held*, on the construction of the lease, that the arbitrators had power to determine disputes arising out of the subject-matter of the lease, though not within the terms of the agreement; 2. That the agreement to refer was obligatory upon the parties; 3. That the arbitrators had power to decide whether the claims of lessors were, or were not, made in good faith, and to award damages; 4. That neither the want of appeal nor the inability of the arbitrators to award an injunction formed any objection to a reference; 5. That it was no objection under the said act that two only of the three defendants concurred in the reference to arbitration; 6. And the decree of the vice-chancellor staying proceedings in the suit (L. R. 14 Eq. 572) was affirmed. *Willesford* v. *Watson*, L. R. 8 Ch. App. 473.

2. Arbitrator Consulting Attorney. Where a cause was referred at *nisi prius* to T., a mining agent, objection having been made to any legal arbitrator, and T. called in an attorney to sit with him, whereupon the defendants protested and withdrew from the reference, and an award was made *ex parte* in their absence: *Held*, that the award was bad. *Proctor* v. *Williamson*, 29 L. J. C. P. 157; 8 C. B. N. S. 386.

3. Colluding with Party. In action for damages to the surface from mining, an arbitrator was agreed upon to fix the value of the land, and defendant agreed to pay plaintiff such value and take the land. The arbitrator refused to hear evidence in mitigation of the value, and consulted, as charged, with the plaintiff, to increase the value: *Held*, that a bill would lie to set aside the award, and that to such bill the arbitrator was a proper party. *Lonsdale* v. *Littledale*, 2 Ves. Jr. 451.

4. Mining Arbitrator taking Lease. An officer who by custom sees to the duties paid to the proprietors of mines, and whose duty it is to set off claims and do justice and decide disputes between miner and miner, miner and adventurer and miner and lord, cannot take a lease of the mines and perform such judicial functions. *Arkwright* v. *Cantrell*, 7 Ad. & E. 565.

5. Fraud. Bill by members of a smelting company against members of a mining company, charging matters of fraud in connection with contract for annual supply of ore, entertained notwithstanding clause of arbitration in the contract. *Mitchell* v. *Harris*, 2 Ves. jr. 129; 4 Br. Ch. Ca. 311.

6. Mining Claim—Title. The decision of the right of possession to a mining claim involves a question of title so that it cannot be the subject of arbitration under the act which provides for the arbitration of all matters, "except a question of title to real property in fee or for life." *Spencer* v. *Winselman*, 42 Cal. 479.

7. Ouster of Jurisdiction. Arbitration clauses in mining leases are not binding on the parties so as to oust the jurisdiction of the court. *Mexborough* v. *Bower*, 7 Beav. 127.

8. Ousting Jurisdiction—Covenant to raise Coal. J. S. granted a lease of a coal mine to E. S. for a term of years at a rent or royalty of one-eighth of the value of the coal mine, and E. S. covenanted to raise at least 4,000 tons, and it was thereby agreed between the parties that if any difference or question should arise between them touching any covenant, matter or thing expressed in the deed, or the meaning thereof, it should be settled by two arbitrators, to be nominated within two months after the difference arose, with mutual covenants to obey and perform the award, and not to bring any action at law or in equity without first submitting all matters to arbitration: *Held*, that as the agreements and covenants to refer were absolute to oust the jurisdiction of the superior courts, they were void for that purpose, and could not be pleaded in bar to an action for not raising 4,000 tons of coal. *Horton* v. *Sayer*, 29 L. J. Ex. 28; 4 H. & N. 643.

ASSUMPSIT.

1. Waiver of Tort. The owners of coal mined by trespass may waive the tort and sue for its proceeds as money received for their use. *Hawesville* v. *Hawes*, 6 Bush (Ky.) 233.

When mineral has been obtained by a trespass upon the lands of another (*e. g.*, digging beyond dividing line) and converted into money, the trespass may be waived and an action of assumpsit brought for the proceeds. *Alderson* v. *Ennor*, 45 Ill. 128.

2. Waiver of Trespass — Royalties. Trespass in taking coal may be waived and assumpsit sustained for the value of the coal taken, where the defendants (lessors) have received the royalties on the coal. *Dundas* v. *Muhlenberg*, 35 Pa. 351.

3. Creditor cannot Waive Tort. An attaching creditor cannot treat a party supposed to have taken gold from defendant's mine by trespass, as a debtor of the defendant: the defendant alone could waive the tort. *Johnson* v. *Lamping*, 34 Cal. 293.

4. Title to Realty Disputed. Assumpsit for money had and received will not lie for the price of sand taken and sold from a sand bar to which both plaintiff and defendant claim title. *Baker* v. *Howell*, 6 S. & R. 476.

Indebitatus assumpsit will not lie in favor of a person claiming title against one who enters on land as a trespasser and takes out ore, to recover its value. *Irvine* v. *Hanlin*, 10 Id. 219.

5. Co-trespasser, a Witness. A co-trespasser not joined as a defendant is a competent witness for the plaintiff to establish the trespass in an action for money had and received in which the tort is waived. *Dundas* v. *Muhlenberg*, 35 Pa. 351.

6. Debts Assumed by Corporation. A corporation assuming the debts of its corporators, or some of them, previously incurred in mining its claims, is liable in assumpsit to the creditors of such corporators. *Paxton* v. *Bacon M. Co.*, 2 Nev. 257.

ATTORNEY AT LAW.

1. Evidence of Contract with Corporation. When an attorney proposes to do the legal business of a mining company for a certain period for a certain rate per month, the mere fact that his bills at that rate for several months had been allowed and paid, though sufficient to raise a presumption of the acceptance of his proposition, would not overbear direct evidence that the proposition was not submitted to or acted upon by the company, and consequently never accepted. *Hillyer* v. *Overman S. M. Co.*, 6 Nev. 51.

BANKRUPT.

1. Trader—Salt Works. The manufacture of salt from brine obtained on the premises and by purchase from neighboring springs, with sales of the produce, does not constitute the proprietor a trader, within the bankrupt act. *Ex parte Atkinson*, 1 M. D. & De Gex, 300.

2. Trader—Coal. One who buys a coal mine, works it and sells the coal, is not a trader within the bankrupt acts. *Port* v. *Turton*, 2 Wilson, 169.

3. Trade—Supply Store. Supplying tools and gunpowder to miners is not a trading or selling, but a mode of payment. *In re Cleland*, L. R. 2 Ch. App. 466.

The same as to a general supply store. *Ex parte Gallimore*, 2 Rose, 424.

4. Trader—Slate Quarry. The lessee of a slate quarry, working the produce of the same into slates for sale, is not a trader, within the meaning of the bankrupt acts. *In re Cleland*, L. R. 2 Ch. App. 466.

Nor does he become so by selling tools and gunpowder to his workmen, nor by any sale of a particular chattel. Id.

5. Trader—Iron Works. As to whether the purchase of cast-iron by the lessee of an iron mine, and the manufacture of such cast-iron into implements for use in smelting the iron ore, some of the implements not used for such purpose being sold, constitutes the lessee a trader under the bankrupt law, see *Ex parte Salkeld; In re O'Neil*, 3 Mont. D. & D. 125.

6. Trader—Phosphate Factory. The owner of a phosphate mine who digs the phosphates, makes them marketable, and sells them is not a trader within the meaning of the bankruptcy law. *Ex parte Schomberg*, L. R. 10 Ch. 172.

7. Trader—Lime Kiln. A farmer who digs lime-stone, converting it into lime for his farm, and selling the surplus beyond what he needs for manure, is not a trader under the bankrupt laws. *Ex parte Ridge*, 1 Ves. & B. 360.

8. Trader—Brickmaker. A party manufacturing brick out of the clay of his land, although purchasing coals and wood for the manufacture, and making the bricks for sale and profit, is not a trader within the meaning of the bankrupt laws. *Sutton* v. *Wheeley*, 7 East, 442.

9. Mixing Products. Whether the owner of a colliery borrowing a particular kind of coal to render his own marketable be a trader, depends on the intention, and is for the jury to determine. *Ex parte Gallimore*, 2 Rose, 424.

10. Iron Works—Purchasing Ores—Intention. A person bought iron ore, and mixed it with ore which he raised from lands rented by him, in the proportion of sixty-five per cent. of what he bought to thirty-five per cent. of what he raised, and then smelted the whole into pig-iron, which he sold: *Held*, that he was a trader within the meaning of the bankrupt act (12 and 13 Vict. s. 106), although he only so mixed the ore which was the produce of his lands with ores which he bought, in order to make the former a marketable commodity. *Turner* v. *Hardcastle*, 31 L. J. C. P. 193.

11. Stockholders—Irish Court. An order for a call was made by the court of bankruptcy, in Ireland, in a winding-up remitted to it by the court of chancery in Ireland: *Held*, that for the purpose of enforcing the call against contributories resident in England, the order must be made an order of the court of chancery in England, and that there was no jurisdiction to make it an order of the court of bankruptcy in England. *In re Hollyford Copper M. Co.*, L. R. 5, Ch. 93.

12. Corporation. The trustees of a mining corporation have no power to order the filing of a petition in bankruptcy; that power is vested in the stockholders. *In re Lady Bryan M. Co.*, 2 Abb. C. C. 527.

It requires "a majority of the corporators," that is, of the stockholders, to authorize a petition in bankruptcy. The action of the board of trustees is not sufficient; nor can a subsequent ratification of the action of the board by the stockholders satisfy the terms of the act. *In re Lady Bryan M. Co.*, 1 Sawyer, C. C. 350.

13. Quarry. A person selling stone from his own quarry is not a trader within the bankrupt law; whether or not he becomes so by purchasing stones from others, depends upon the quantity and the intention. *Ex parte Gardner*, 1 Rose B. Ca. 377 S. C.; 1 Vesey & B. 45.

14. Practice—Joint Stock Company Acts. A creditor of a limited company in course of being wound up voluntarily, may file his bill in this court to have his claim declared valid, and to restrain the voluntary liquidators from expending the assets of the company in paying other debts of the same degree. *Lowndes* v. *Garnett & Mosely G. M. Co.*, 2 Johns. & H. 282.

Plea to such a bill, that by the Joint-stock Companies Acts, 1856, 1857 and 1858, the cognizance of the matters in question belongs to the court of bankruptcy, overruled, with costs. Id.

15. Partnership—Void Provision. A provision in a deed of partnership, that in the event of the bankruptcy or insolvency of a partner, his share of a mining lease (formerly part of the partnership property) shall go over to his copartners, is void, as being in fraud of the bankrupt laws. *Whitmore* v. *Mason*, 2 Johns. & H. 204.

16. Reputed Ownership. L. took a lease of a mill and iron forge, and bought the fixed and movable implements, etc., but it was agreed that they should be delivered up at the end or other determination of the term at a valuation, if the lessors shall give fifteen months' notice of their desire to have them. L. afterward conveyed all his interest in the premises, implements, etc., to a creditor, in trust, if default should be made by L. in paying certain installments, to enter upon and sell the same, and satisfy himself out of the proceeds, reassigning the residue; and if the lessor should require a re-sale of the implements, etc., the proceeds of such re-sale were to go in discharge of the debt, if unsatisfied. L. made default, and subsequently became bankrupt, after which and during the term the creditor, who had not before interfered, entered upon the property: *Held*, on trespass brought by the assignees, that L. had at the time of his bankruptcy, the reputed ownership of the movable goods, but not of the fixtures. *Clark* v. *Crownshaw*, 3 B. & Ad. 804.

BARRIERS.

1. Owner must Protect himself. Where mines are contiguous, the one lying lower than, so as naturally to drain the upper mine, it is the duty of the owner of the lower mine to protect himself by barriers or otherwise, and the duty of leaving barriers is not incumbent upon the owner of the upper mine. *Smith* v. *Kenrick*, 7 C. B. 515.

2. Breaking Barriers—No Obligation to repair Trespass. A party committing a trespass upon another's land (passing his boundaries and breaking through defendants' coal barriers, so as to result in letting water into defendant's mine), is liable in an action of trespass; but he is not liable for omitting to re-enter the plaintiff's land and fill up the excavation. *Clegg* v. *Dearden*, 12 Q. B. 576.

But if he is under an obligation to take steps on his own land to prevent the continuance of the injury, plaintiff cannot recover upon a declaration relying upon the omission to enter upon defendant's land and prevent the flow of water. Id.

3. Barriers Removed—Mine Flooded—Cause of Action—Case. A declaration stated that plaintiffs and defendants were owners of adjacent mines; that defendants had trespassed on plaintiffs' mine and had carried away a quantity of coal; that water had risen in the defendants' mine, against which, but for the trespass of the plaintiffs, the coal would have been a sufficient barrier; that thereupon it became and was the duty of the defendants to prevent the water in their mine from flowing into the plaintiffs' mine; yet, the plaintiffs neglected their said duty, whereby the water flowed into the plaintiffs' mine and prevented them from working the same: *Held*, on general demurrer a good count in case. *Firmstone* v. *Wheeley*, 2 Dow. & L. 203.

4. Lower Mine, Dip—Flooding from River. The lower mine on the dip can only protect itself from the upper mine by leaving a barrier to prevent the water coming into such mine. *Crompton* v. *Lea*, L. R. 19 Eq. 115.

But a failure to leave a barrier does not justify the owner of the upper mine in so working his mine as to draw foreign water from a river into it and let it flow upon the lower mine. Id.

5. Working Through. Plaintiff was possessed of a colliery, and the defendant of a colliery adjoining upon a higher level

than that of plaintiff. A previous occupant of defendant's works, with whom defendant was in no wise connected, had worked through and into defendant's barrier of coal so as to leave them exposed to the accumulation of water, upon the removal of certain coal standing in the defendant's mine. Defendant removed this coal in his own mine, whereupon the water escaped into plaintiff's mine through the openings made by the wrongful act of the previous occupant of defendant's mine: *Held*, that defendant was not responsible for the injury resulting. *Smith* v. *Kenrick*, 7 C. B. 515.

6. Coal in Abandoned—Water Stops—Access. Letting down the roof of a coal mine so as to prevent access to barriers of coal left: *Held*, not a ground of complaint where the barriers were not left for the purpose of being worked, but to prevent water coming in from an adjoining mine. *Shafto* v. *Johnson*, 8 B. & S. 252.

7. Action for Removal of—Injury to Reversion. Case in the nature of waste will lie against the lessee of a mine for an injury to the reversion by the removal of a barrier or boundary between it and an adjoining mine, although the act complained of might also be the subject of an action for a breach of an express covenant. *Marker* v. *Kenrick*, 13 C. B. 187.

BILLS AND NOTES.

1. Payable out of Ore. An instrument by which a party promises to pay a certain sum at a stated time out of the net proceeds of ore to be raised and sold from a certain ore bed, is not a promissory note, it being payable upon a contingency. *Worden* v. *Dodge*, 4 Denio (N. Y.) 159 S. C.; Redfield & B. L. C. on Notes, 7.

2. Note for Stone not a Real Contract. Where a widow, under a will, occupied a part of the mansion-house of her deceased husband, and, being in possession, sold and delivered stone quarried from the farm: *Held*, that a note given for the stone is not a real contract, and a justice of the peace has jurisdiction. *Rhoads* v. *Patrick*, 27 Pa. St. 325.

3. Draft in Payment of Machinery—Personal Liability. An order to pay to the drawer's order, at three months after date, a sum of money "for value received in machinery supplied the adventurers in — mines," was directed to Mr. W. C., who wrote upon it: "accepted for the company, W. C. Purser:" *Held*, that this made W. C. personally liable as acceptor of the bill. *Ware* v. *Charles*, 5 El. & Bl. 978.

4. Official Signature—Personal Liability. "Eagle River, August 20, 1846. Sixty days after sight, please pay to the order of Charles Ellet, superintendent, three hundred dollars, value received, and charge same as advised. Abraham Movell. To John R. Livingstone, Jr., President Rosendale Mining Co., New York."

This bill was assigned to Moss, plaintiff, who received it on account of a debt due him by the company. Ellet and Movell were agents of the company.

It was also indorsed: "Accepted September 14, 1846. John R. Livingstone, Jr., President Rosendale Mining Company, 16 Wall St."

Held, action was properly brought thereon against J. R. Livingstone individually. The bill cannot be deemed the obligation of the company. It does not purport to have been drawn in their behalf, nor was it addressed to them, or accepted in their corporate name. *Moss* v. *Livingstone*, 4 N. Y. 208.

5. Official Signatures. A promissory note not mentioning any company anywhere upon the face of it, and signed "William Scott, President Blannerhassett Oil Co." "W. H. Hornor, Treasurer:" *Held*, to be the personal note of W. Scott and W. H. Hornor. *Scott* v. *Baker*, 3 W. Va. 285.

6. Addition of Office. A bill of exchange signed "Chas. F. Hale, Pres't," drawn on "L. A. Rosemiller, Treas.," as between the drawers and the holders, cannot be shown to be the contract of a mining company of which they were officers. *Rand* v. *Hale*, 3 W. Va. 495.

7. Signed by Trustee. A note in the form following: "Three months after date, the Ocean Mining Company promise to pay to W. G. Bright, or order, one thousand dollars, for value received, with interest," signed "James Harter, Trustee, S. N. Stranahan," is the note of the company and not of the persons subscribing; their intention to bind the company appearing on the face of the note. *Shaver* v. *Ocean M. Co.*, 20 Cal. 45.

8. Signature of Superintendent—Parol Evidence. In a suit against the superintendent of a mining company on due bills signed by him, but adding after his signature, "Sup't C. S. M. Co.:" *Held*, that he might show that the consideration for the bills passed to the company, that the credit was given to it, that he had authority to bind it, and acted solely as such agent, to the knowledge of the payees of the bills; and that the rejection of such proffered evidence was error. *Schaefer* v. *Bidwell*, 9 Nev. 209.

9. Intention—Official Signature—Liability. In an action against a person who signed a promissory note "Jas. Stuart, Gen.

Man. and Sup't St. L. & M. M. Co.," the defendant's personal liability will not be presumed, and he can introduce evidence showing that he made the note for the mining company, of which he was the agent, and that it was the intention of all the parties that the company should pay the note, and that he was not to be held liable thereon. *Gerber* v. *Stuart*, 1 Mont. 172.

10. Form of Acceptance, Purser. A bill of exchange, directed to the defendant thus: "To J. D., Purser West Downs Mining Company," was accepted by him in these terms: "J. D. accepted per proc. West Downs Mining Company." J. D. was a member of the company, but was not authorized to accept bills on their behalf: *Held*, that he was personally liable. *Nicholls* v. *Diamond*, 23 L. J. Ex. 1.

11. Partnership, Assigned Note. The plaintiff being interested in a joint stock company (unincorporated) known as the Oil Creek Petroleum Company, and the company needing money to pay debts accrued in the partnership business, the defendant and S., being also interested and principal managers of the company, applied to the plaintiff to raise money for that purpose at the bank upon the note of defendant, payable to and indorsed by S. This he did, and the note being unpaid at maturity, he paid and took a transfer thereof: *Held*, he could recover the amount thereof against the defendant. *Crater* v. *Bensminger*, 45 N. Y. 545.

12. Contribution, Partnership. A portion of the members of a mining partnership procuring money on their individual note from a third party for the purpose of the mine, are liable to each other for contribution. It is not a partnership transaction. *Sedgwick* v. *Daniell*, 2 H. & N. 319.

13. Note of Unincorporated Ditch Company. If an unincorporated ditch company duly authorizes its superintendent to give the company note for materials before then purchased by the company, all the members are bound by the note, whether they were such members when the materials were purchased or not. *McConnell* v. *Denver*, 35 Cal. 365.

14. Of Insolvent Corporation. The insolvency of a mining company does not of itself invalidate a note given for a *bona fide* debt. *Savage* v. *Ball*, 17 N. J. ch. 143.

15. Power of Corporation. A corporation (mining) may make a promissory note for a debt contracted in the course of its legitimate business, although not specially authorized by its charter to contract in that form. *Moss* v. *Oakley*, 2 Hill, 265; see *McCullough* v. *Moss*, 5 Den. 567.

16. Note of Corporation. Where a mining corporation makes a promissory note it must be made to appear affirmatively that it was made in the course of its legitimate business. *McCullough* v. *Moss*, 5 Denio, 566, reversing *Moss* v. *McCullough*, 5 Hill, 131; Id. 7 Barb. 279.

17. Director Represented by Proxy. A director of a mining partnership (joint-stock) represented at a meeting by a proxy, is not bound by the act of the directors at such meeting in accepting a bill of exchange drawn for advances to the mine. *Brown* v. *Byers*, 16 M. & W. 252.

18. Rescission—Fraud. If a defendant would resist the payment of a promissory note given for mining stock, on the ground that the seller made fraudulent representations as to the value of the mine, the answer should set up the defense, and aver either that the stock was valueless to either party, or that the defendant had offered to return it and rescind the contract. *Gifford* v. *Carroll*, 29 Cal. 589.

BLASTING.

1. Furnishing Miner with New and Dangerous Explosive. Where, in an action brought against a corporation by one of its laborers employed in blasting, for an injury occasioned by the premature discharge of a blast (while tamping) loaded with newly-invented powder (name not given, but described as liable to explode from percussion), which he was directed to use by the defendant's foreman or superintendent, the complaint alleged that the company furnished the powder for use in its ordinary and appropriate business; that its superintendent directed its use, by the plaintiff, in such business; that it had never been used as an explosive in blasting, and was, in fact, unfit and unsafe for such use; and that the plaintiff was ignorant of its dangerous properties: *Held*, on demurrer, that a right of action was unquestionably stated. *Spelman* v. *Fisher Iron Co.*, 56 Barb. (N. Y.) 151.

Held, also, that the risk of personal injury in blasting with the ordinary appliances used for that purpose the plaintiff assumed under his contract with the company to labor in that employment; but not those risks attendant upon the use of an unusual, untested and exceedingly dangerous article, which could not be tamped without inevitable explosion, the dangerous quality of which was unknown to him. Id.

That it was gross negligence in the company to furnish such an article for the laborer's use, without giving him information in that particular, whether the company was aware of its dangerous quality,

or furnished it for use without having taken any steps to obtain such knowledge. Id.

That the negligence and misconduct of the managing agent was that of the company; and that he having, in fact and in law, authorized and directed the act, it did not lie with the company to deny all liability to a servant, free from blame, who should suffer injury therefrom. Id.

2. Knowledge of Danger. When in a mine insufficient means are provided for avoiding the dangers of blasting, a party employed in the mine, with full personal knowledge of the danger and of the want of proper precautions being taken against it, who voluntarily continues in such employment, assumes the risk, and cannot recover against his employer in case of accident. *Kielley* v. *Belcher M. Co.*, 3 Sawyer, 437 and 500.

3. Corporate Liability—Negligence. A corporation is liable for damages caused to one of its employees by a premature blast, if the employee injured and the employee whose neglect was the occasion of the injury are not "fellow-servants," and persons engaged in distinct parts of the employer's business are not fellow-servants. *Kielley* v. *Belcher S. M.* Co., 3 Sawyer, 437; see S. C. 500.

4. Trespass—Case. The working of quarries and blasting of rocks, whereby large quantities of rocks and stones were thrown upon the dwelling-house and premises of the plaintiff, breaking the doors, windows, etc., is a case for an action of *trespass quare clausum fregit*, and not for an action on the case. *Scott* v. *Bay*, 3 Md. 431.

Such acts constitute a forcible breaking of the plaintiff's close, and the injuries resulting therefrom would be immediate and not consequential, and hence trespass and not case is the proper remedy. Id.

5. Cases, not Mining. For other cases for injuries from blasting or explosions not connected with mining, see *Hay* v. *Cohoes Co.*, 2 N. Y. 159; *Tremain* v. *Same*, Id. 163; *Furth* v. *Foster*, 7 Robt. (N. Y.) 484; *Cuff* v. *Newark R.R.*, 35 N. J. Law, 17 (nitroglycerine case).

BONDS.

1. Payable to Bearer. The bonds of a coal company, incorporated by the legislature of Pennsylvania, payable to bearer will pass by delivery, and the holder may sue in his own name. *Carr* v. *Le Fevre*, 27 Pa. St. 413.

BOUNDARIES.

1. Equity Jurisdiction. A court of chancery has no jurisdiction to quiet the title or settle the boundary of a coal mine claimed by two parties, the only question being as to where the true boundary line runs. *Fraley* v. *Peters*, 12 Bush (Ky.) 470.

2. Jurisdiction—Account. The court of chancery may entertain a bill to settle boundaries between coal mines, after a recovery in ejectment, but will not order an account in such case in favor of the party out of possession. *Sayer* v. *Pierce*, 1 Ves. Sr. 232.

3. Acquiescence. Lessees of mines present at a running of a boundary upon a reference made by lessors and the adjoining owner: *Held*, bound to the result of the reference by their presence and acquiescence. *Taylor* v. *Parry*, 1 Scott N. R. 576; 1 M. & G. 604.

4. Estoppel. Where two mining companies agree upon a boundary line between their claims, and subsequently other parties purchase the several interests of the two companies with a knowledge of the boundary line so fixed, both parties are concluded by it, and are estopped from denying the line. *McGee* v. *Stone*, 9 Cal. 600.

The fact that such line was fixed by mistake as to the true boundaries and corners makes no difference, as the subsequent purchasers bought with a view to this line. Id

5. Admission of Stockholder. A stockholder cannot by his conduct bind his company upon a question of the boundary of its land. *Western M. & M. Co.* v. *Peytona, C. C. Co.*, 8 W. Va. 406.

6. Admissions. Where an instruction was given in a case of dispute between adjoining mining companies as to their boundary that "when boundaries have been established, defining and denoting the size and limits of the claim upon the surface, and for a long period have been recognized as such, the extent of the claim will be confined to the extent as manifested by such surface boundaries;" and the state of the testimony was such that the instruction applied to or was apt to be understood by the jury to refer to a fixing or recognition of boundaries after the consummation of the original location, and consisting merely in the declarations of superintendents and other officers not authorized to fix boundaries: *Held*, error. *Overman S. M. Co.* v. *American M. Co.*, 7 Nev. 312.

7. Evidence. In an action to recover damages for a trespass upon the plaintiff's mining claims, where the defendants own adjoining claims lying west of the plaintiff's ground, and both parties agree as to the north line of the plaintiff's claims, and admit that their east and west lines are parallel, but disagree as to their location, and

W & Co. own claims adjoining and east of plaintiffs, and H. & Co. own claims adjoining and east of W. & Co., evidence of the location of the west line of H. & Co. is not pertinent, unless the east and west lines of W. & Co. are parallel and the east line of W. & Co. is coincident with the west line of H. & Co. *Stokes* v. *Monroe*, 36 Cal. 383.

8. Sett—Question of Fact. What is the true boundary line of a "sett," or piece of a mine let, and whether certain premises are parcel or no parcel of the ground demised, is a question of fact for the jury; but the judge is bound to tell the jury what is the proper construction of any documents necessary to be considered in the decision of that question. *Lyle* v. *Richards*, L. R. 1 H. L. 222; 35 L. J. Q. B. 214.

9. "Ten Paces North of Quarries." Where a boundary line is described as a line ten paces north of the face of certain quarries, and that face is jagged, and at one end much to the north of the general line of the face, the line contracted for must still be a straight line in every part, and distant at least ten paces from the face of the quarry at every point. *Huffman* v. *Hummer*, 18 N. J. Ch. 83.

10. Map. A lease professed to demise to the plaintiffs all mines and minerals "in, upon, or under, all or any part of the messuages, or tenements, fields, closes, or parcels of land described and set forth in the map thereunto annexed; and also, in, upon, or under, all or any part of that large tract of land called Mold Mountain, all which premises are situate, etc., and are bounded etc., and all which are particularly described, delineated and distinguished in the map or plan thereof annexed to these presents, and which by agreement of all the said several parties thereto was meant and intended to be taken as part of that indenture:" *Held*, the words of the demise were not to be controlled or restrained by the map, but might receive full effect, and be held to include a particular spot, the boundary of which could not be traced with strict accuracy upon the map, by reason of the smallness of the scale upon which it was drawn. *Taylor* v. *Parry*, 1 Scott, N. R. 576; S. C. 1 M. & G. 604.

BRICK-MAKING.

1. Contract Creating Partnership. R. and L. agreed that R. should furnish the ground for a brick-yard, the clay to make bricks thereon, the lumber to protect the bricks while making, and the wood to burn them, and that L. should manufacture and burn bricks in the yard, and be at all the expense of so doing; when manufactured, each was to have a fixed proportion of the bricks, subject to a certain sum that R. was to have for every 100,000 bricks sold; the bricks were to be sold by either of the parties, and proceeds divided according to the rights of the parties under the contract: *Held*, that R. and L. were partners, and jointly liable for a breach of contract of sale made by either of them. *Farmers' Ins. Co.* v. *Ross*, 29 Ohio St. 429.

2. Trade—Bankrupt Act. Brick-making carried on as a mode of enjoying the profits of real estate is not a trade, but to buy the earth as a chattel for the purpose of manufacture and sale would constitute the brick-maker a trader under the bankrupt act. *Heane* v. *Rogers*, 9 B. & C. 577.

BROKERS.

1. Usage. The order of a customer to buy stock, deliverable at any time, at buyer's option, in sixty days, does not authorize the broker to buy the stock himself at thirty days and deliver it to his customer at the end of sixty days, at an increased price and interest, besides the usual commission. A usage of brokers so to do is bad, and a settlement in ignorance of the broker's conduct is no ratification by the customer. *Day* v. *Holmes*, 103 Mass. 306.

2. Usage of Coal Trade. A coal company engaged defendants to sell its coal; defendants sold it through brokers; in settlement with the company, they charged commissions paid the brokers. In a suit by the company to recover such commissions, evidence was proper to show the usage of the Philadelphia coal trade, where the business was transacted to sell through the agency of brokers. *Carter* v. *Philadelphia Coal Co.*, 77 Pa. St. 286.

Such a usage of trade is presumed to be known to the contracting parties, and to enter into their contract. Id.

3. Board of Brokers—Proof of Usages. The court will not take judicial cognizance of the board of brokers, in mining stock transactions, unless they are rules or usages of trade and commerce which would be recognized without their adoption by any board; and the party who relies upon them must plead them. *Goldsmith* v. *Sawyer*, 46 Cal. 209.

4. Rules of Board of Brokers. When a contract is entered into with reference to the rules of the board of brokers, such rules become, in effect, special terms of the contract. *Goldsmith* v. *Sawyer*, 46 Cal. 209.

5. Custom—Mining Shares, Time of Delivery. Upon the sale, by one broker to another, of shares in a mine, they re-

spectively signed, bought and sold notes, the former of which was as follows: Bought F. F. 250.51-20ths shares in Wheal Charlotte, at £2 5s. per share, £562 10s. for payment, half in two months and half in four months. In an action for not accepting the shares: *Held*, that evidence was admissible of a custom among brokers in mining shares, that in contracts relating to the sale and purchase of such shares, no time for delivery being expressed, the delivery must be made at the time of payment, and cannot be insisted on before payment. *Field* v. *Lelean*, 6 H. & N. 617.

6. Acting for Both Parties. A person cannot act as broker for both contracting parties, in an exchange of a mine and another parcel of real estate. *Harris* v. *Burtnett*, 2 Daly (N. Y.) 189.

7. Confined to First Bill of Charges. Where a person at the request of another went to and saw the treasurer of a coal company for the purpose of negotiating the sale of a tract of coal land to the company, and conversed with the treasurer upon the subject, and was only engaged in such employment not exceeding one day, and the owner subsequently sold the land to the company, and the person who had seen the treasurer presented a bill for a specified sum for his compensation, but it was not paid: *Held*, that the amount of such bill thus presented is the extreme limit of any recovery he can have. It is the price he fixes on the value of his compensation and an admission that it is worth no more. *Daniels* v. *Wilber*, 60 Ill. 526.

See USAGE.

BULLION.

Tax on Exports. A stamp duty imposed by the legislature of California upon bills of lading for gold or silver transported from that State to any port or place out of the State, is a tax on exports, and the statute is unconstitutional and void. *Almy* v. *State of California*, 24 How. 169.

CASE.

1. Removing Barriers—Ultimate Injuries—Drowning Mine. An action lies for the ultimate drowning of a mine caused by removal of coal or coal barriers on the plaintiff's ground by the defendant from his adjoining colliery. *Firmstone* v. *Wheeley*, 2 Dow. & L. 203.

And the defendant, having done the wrong, is bound to provide against the consequences. Id.

2. Consequential Damage to Colliery. Damage resulting to a plaintiff's colliery resulting from operations in defendant's colliery (in this case operating through intervening coal works), must, in the nature of the thing, be a consequential damage, for which trespass on the case lies. *Haward* v. *Bankes*, 2 Burr. 1113.

3. Consequential Damage—Blasting. Diminution of rental value of property adjacent to a quarry, the prevention of the use of such adjoining premises on account of the blasting, jeopardy of life and damages resulting from water coming through a hole knocked in the roof by a rock blasted through, are all matters consequential and referable to the action of case. *Scott* v. *Bay*, 3 Md. 432.

4. Slandering Mine. Where by the impertinent and wrongful interference of another the owner is prevented from effecting a sale, he may maintain his action for the inconvenience suffered; if, however, the agreement for sale had been complete, so as to bind the intending purchaser, and the actual sale or transfer had been defeated by the misrepresentations of the interfering property, the owner's remedy would have been against the intending purchaser on his contract. *Paull* v. *Halferty*, 63 Pa. St. 46.

See TRESPASS.

CHAMPERTY.

1. Champertous Contract with Solicitor. The plaintiff agreed with a solicitor to give him a portion of the profits arising from the successful prosecution of a suit to establish his right to certain coal mines, upon being indemnified against the costs of the proceedings: *Held*, that the contract amounted to champerty and maintenance, but the plaintiff was not disqualified from suing, since his title was vested in him before he entered into the illegal contract. A decree was therefore made in his favor, but without costs. If, however, the solicitor had been the party suing by virtue of a title derived under such a contract, his bill would have been dismissed. *Hilton* v. *Woods*, L. R. 4 Eq. 432.

2. Purchase against Adverse Holding—Trustee. The purchase of land by a trustee for the benefit of a mining corporation, and bringing suit for the recovery of the land, the land being at the time of the purchase held adversely, does not amount to champerty or maintenance, although such trustee is also a stockholder in the company. *Roberts* v. *Cooper*, 20 How. (U. S.) 467.

CHINESE.

1. Burlingame Treaty. The Chinese, under the Burlingame treaty (16 U. S.

Stat. 739), have no greater privileges with relation to acquiring mining claims, or otherwise, than are accorded to other aliens of favored nations. *Territory* v. *Lee*, 2 Mont. 124.

2. Foreign Miners' Tax. The mere fact that a Chinaman is a resident of a mining district of the State, does not subject him to the foreign miners' tax. *Ex parte Ah Pong*, 19 Cal. 106.

See ALIENS.

CLAIM.

1. Common Law—California Precedents. The decisions of the Supreme Court of California, referred to as establishing a system of common law upon the questions peculiar to the occupation of the mineral lands upon the public domain. *Mallett* v. *Uncle Sam M. Co.*, 1 Nev. 194.

2. Claim Defined. A mining claim is a piece of land supposed to contain, in its soil or rock, gold or other precious metal. *McKeon* v. *Bisbee*, 9 Cal. 137.

3. Subject to Execution. A mining claim on the public domain is property, and may be taken and sold on execution. Id.

4. Must be Located. Land must be marked out and taken possession of before it can be called a mining claim. Id.

5. Real Estate. Mining claims in Utah (by statute) are real estate, and pass by deed. *Houtz* v. *Gisborn*, 1 Utah, 173.

6. Personal Property. A possessory right or "claim" on the United States mineral lands is personal property. *Stewart* v. *Chadwick*, 8 Iowa, 463.

A miner's claim, being a mere possessory right on public lands, is personalty, and may be sold and conveyed by the administrator. (So held in Iowa, with regard to a claim situate in Montana.) *Corbett* v. *Berryhill*, 29 Iowa, 157.

7. How Held. A mining claim on the public domain may be held either by actual occupancy, and the exercise and control over it by distinctly indicating the boundaries by monuments and marks, or by occupancy in accordance with the local mining customs. *Hess* v. *Winder*, 30 Cal. 349.

8. Value—Jurisdiction. The value of a mining claim in Nevada may be the subject of estimate in money, and the Supreme Court will take jurisdiction of a suit concerning such a claim, if of the requisite value, though the land where the claim exists has never been surveyed or brought into market, 1865. *Sparrow* v. *Strong*, 3 Wall. 97.

Such a claim may have existed as a right or title under the laws of Mexico prior to annexation, and if so, would be protected by treaty. The court cannot know judicially that it was not so acquired. Id.

9. Judicial Notice of Possessory Claims. The rule that courts will take judicial notice of the political and social condition of the country applied to the possessory mining claims and ditch claims in California. *Irwin* v. *Phillips*, 5 Cal. 140; B. & W. L. C. 727.

10. Estate of the Locator. Persons claiming and in the possession of mining claims upon the public lands of the United States, are as between themselves and all other persons except the United States, owners of the same, having a vested right of property founded on their possession, and appropriation of the land containing the mines. *Hughes* v. *Devlin*, 23 Cal. 501; B. & W. L. C. 311.

11. Freehold Estates—Abandonment. Claims to public mineral lands are recognized as titles, as legal estates of freehold, for all practical purposes, except in certain matters of abandonment not in general applicable to such estates. *Merritt* v. *Judd*, 14 Cal. 59.

12. Lands not Public Domain. Miners have no right to enter upon private land and subject it to such uses as may be necessary to extract the precious metals which it contains. *Henshaw* v. *Clark and 103 Chinamen*, 14 Cal. 460; *Boggs* v. *Merced M. Co.*, Id. 279; B. & W. L. C. 131.

13. Vested Rights under U. S. Statutes. The right to occupy, explore, and extract the precious metals in the mineral lands of the United States becomes vested in the party who locates these lands according to the local rules and customs of the mining district in which they are situated. *Robertson* v. *Smith*, 1 Mont. 410.

14. Location of Ground not intended to be Mined. If parties are allowed by mining regulations to include within their claim, land outside of that which they expect to work, it will be presumed, in the absence of proof to the contrary, that it is for the convenience of working the claims and that its possession is necessary. *Correa* v. *Frietas* 42 Cal. 339.

15. Jurisdiction. Justices of the peace have no jurisdiction in actions to recover damages for injury to a mining claim or for its detention. *Van Etten* v. *Jilson*, 6 Cal. 19.

16. Pre-emption. The right given by the mining acts of congress, is a right to purchase in the nature of a pre-emption, and is not to be compared to the case of an inchoate Spanish grant. *420 Mining Co.* v. *Bullion M. Co.*, 3 Saw. 634.

17. Mining Claim distinguished from Mine. The Nevada tax act of February 28, 1871, considered. The words "mines or mining claims" in section 6 of this act, imposing a tax on ores, and making the tax a lien on the claim from which severed, were intended to distinguish between the cases where the miner is the owner of the soil having the title in himself, and cases where he does not have title to the soil, but only what is known as a "mining claim." In the first case the tax is a lien on the mine, in the second on the claim. *Forbes* v. *Gracey*, 94 U. S. 762.

18. Holding by Occupancy. Where no mining laws exist, the miner locating a claim would hold only by actual occupancy and by such work for the development of the mine as would under all the circumstances be deemed reasonable, and his right of possession would only be continued by occupancy and use. *Mallett* v. *Uncle Sam M. Co.*, 1 Nev. 194.

19. How Lost. The right to a mining claim acquired by appropriation and occupancy may be lost: 1. By forfeiture under the district rules; 2. Where no district rules exist, by failure to work the claim with reasonable diligence; 3. By abandonment. *Mallett* v. *Uncle Sam M. Co.*, 1 Nev. 194.

20. Proof of Size by District Rules. When the size of the claims in a district were fixed by the written district rules, and the location being of "Claim No. 2, in Greenhorn Gulch, below Discovery," a description which could not aid the jury in ascertaining the boundaries of the claim, the rule requiring the best evidence to be produced applied to compel the production of the district rules to identify a particular claim; and it was held no admissions or other secondary proof could be allowed. *Campbell* v. *Rankin*, 2 Mont. 363.

21. Extent of, Limited by General Custom. Where there are no local customs or regulations in force in the district where the mining claim is located at the time of its location, general customs then in force are admissible in evidence upon the question of the reasonableness of its extent. *Table Mt. T. Co.* v. *Stranahan*, 31 Cal. 387.

22. Estoppel—Assertion of Customary width. If the defendants in an action claim that when they took up the ground in dispute a local custom allowed them three hundred feet front to each man, and that they located to that extent, they are estopped from asserting that the plaintiffs' location to the same amount, made before the adoption of the custom, was unreasonable in size. *Table Mt. T. Co.* v. *Stranahan*, 31 Cal. 387.

23. Tenure—Admissions as to Extent. After a vested right to a claim has been acquired by compliance with the law, it is not held by so precarious a tenure that it can be reduced by mere declarations of superintendents or officers. *Overman S. M. Co.* v. *American M. Co.*, 7 Nev. 312.

Dictum as to admissions of officers as evidence, with citation of authorities but no decision. Id.

24. Size of Claim—Subsequent District Rule. Upon the question of reasonableness of the extent of a mining location, a general custom, whether existing anterior to the location or not, may be given in evidence; but a local rule stands upon a different footing, and cannot be introduced to affect the validity of a claim acquired previous to its establishment. *Table Mt. T. Co.* v. *Stranahan*, 20 Cal. 198. S. C. 21 Cal. 548.

25. No Presumption of Uniformity. In the absence of mining regulations the fact that a party has located a claim bounded by another raises no implication that the last located claim corresponds in size or in the direction of its lines with the former. *Live Yankee Co.* v. *Oregon Co.*, 7 Cal. 40.

26. Anomalous Cases—Slide Quartz. In anomalous mining cases (*e. g.* upon the question whether quartz broken from the ledge belonged to the lode claim or to a subsequent surface claim located below it) the custom of miners is entitled to great if not controlling weight. *Brown* v. *49 and 56 Q. M Co.*, 15 Cal. 153.

27. Mining Location on School Section—Claim Protected. At the time of the passage of the Nevada enabling act, approved March 21, 1864 (13 Stat. 30) sections 16 and 36 in the several townships in Nevada had not been surveyed, nor had Congress then made or authorized to be made, any disposition of the public domain within her limits.

The words of present grant in the seventh section of that act are restrained by words of qualification which were intended to protect the proposed new State against loss that might happen through the subsequent action of Congress in selling or disposing of the public domain. If by such sale or disposal the whole or any part of the sixteenth or thirty-sixth section in any township was lost to the State, she was to be compensated by other lands equivalent thereto, in legal subdivisions of not less than one-quarter section each.

A qualified person whose settlements on mineral lands which embraced a part of either of said sections was prior to the survey of them by the United States, and who, on complying with the requirements of the act approved July 26, 1866 (14 Stat. 251)

received a patent for such lands from the United States, has a better title thereto than has the holder of an older patent therefor from the state. *Heydenfeldt* v. *Daney G. & S. M. Co.*, 93 U. S. 634, affirming S. C. 10 Nev. 290.

28. Relation to Other Claims—Tailings. No use of any mining claim is lawful which precludes the owners of other mining claims from the enjoyment of such other claims. *Logan* v. *Driscoll*, 19 Cal. 623.

29. Agent — Possessio Pedis. The holder of a mining claim may be in possession either by himself or his agents or servants. *English* v. *Johnson*, 17 Cal. 108. B. & W. L. C. 172.

Possessio pedis is not to receive a strict interpretation when applied to a mining claim. And the working of part, when the limits are marked in the usual way, constitutes possession of the whole claim—and this though the owner did not enter either in accordance with mining rules or under a paper title. Id. See *Atwood* v. *Fricot*, 17 Cal. 38.

30. Timber. The possession of public land in the mineral districts of the State, acquired and held in accordance with the possessory act for agricultural purposes, carries with it the right to the wood and timber growing thereon, and this right is superior to that of subsequent locators of mining claims who need and seek to use the wood and timber for carrying on their mining operations. *Rogers* v. *Soggs*, 22 Cal. 444.

31. Timber—Prior Equities. As between a party who has located a claim for agricultural purposes and a miner who locates on the same ground for mining purposes, the miner has not by virtue of his mining a superior right to the timber. It belongs to the first locator of the ground. *Rogers* v. *Soggs*, 22 Cal. 444.

The miner who selects a piece of ground to work must take it as he finds it, subject to prior rights which have an equal equity by virtue of an equal recognition from the sovereign power. So held as to water in *Irwin* v. *Phillips*, 5 Cal. 140; B. & W. L. C. 727. As to timber, *Rogers* v. *Soggs*, 22 Cal. 444.

32. Protecting Claim by Injunction. Under existing legislation (1857) the owner of a mining claim has, for all practical purposes, a good vested title, and has the right "to be so treated" in all respects save as against his superior proprietor. His occupation may be treated as that of the lessee for life of the true owner, and as his lease is of the mine he is entitled to the appropriate process of the law for its protection. *Merced M. Co.* v. *Fremont*, 7 Cal. 317.

33. Statutory Preference to Mining Claims. A right to mine for the precious metals upon the public lands must be exercised with reference to any prior appropriations, except appropriations for agricultural and grazing purposes, which are made by statute subservient to the rights of miners. *Tartar* v. *Spring Creek W. & M. Co.*, 5 Cal. 395.

34. Contests between Miners and Agriculturists — California Statute. The act of April 25, 1855, for the protection of growing crops and improvements in the mining districts of the State, seems to proceed upon the supposition that prior to its passage miners had an absolute right to enter upon the possession of others for mining purposes, and limits the exercise of this supposed right, but in fact no such unconditional right existed, and the act would be unconstitutional if construed to give such right. *Gillan* v. *Hutchinson*, 16 Cal. 154.

The public mineral lands are open to the possession of every person desiring to enter upon them in good faith for mining purposes, but prior improvements and growing crops must be respected. No general rule can be laid down in such cases of conflict, but every case must be determined upon its particular facts. *Gillan* v. *Hutchinson*, 16 Cal. 154, affirming *Smith* v. *Doe*, 15 Cal. 101. See *Rogers* v. *Soggs*, 22 Cal. 444.

35. Right to Mine on Agricultural Location — Water Incidental. Miners have a right to enter upon public mineral land in the occupancy of others for agricultural purposes, and to use the land and water for the extraction of gold, the use being reasonably necessary to the business of mining, and with just regard to the rights of the agriculturist; and this whether the land be enclosed or taken up under the possessory act. *Clark* v. *Duval*, 15 Cal. 85.

The right so to enter and mine carries with it the right to whatever is indispensable to the exercise of this mining privilege, as the use of the land and such an element of the freehold as water. Id.

36. Prior Improvements—Orchard. One who appropriates for mining purposes the waters of a ravine or stream, upon the public land in the mineral region, must take and use the same in such measure as not to injure or destroy orchards or gardens bordering on the stream, which have been inclosed and planted before the water was appropriated. *Wixon* v. *Bear River Co.*, 24 Cal. 367. One who incloses a tract of public land in the mineral region, and plants the same with fruit trees, acquires a vested right which will be protected as against one

subsequently entering upon the same for mining purposes. Id.

37. Location of Farming Claims in Mining Districts. The mere entry upon and possession of a given portion of the public mineral lands in California gives no title as against the general right to enter upon the same for mining purposes; they cannot be appropriated in large tracts for agricultural or grazing purposes as against the miner, although lasting or valuable improvements will be protected, and in this matter no general rule can be laid down, but each case must be decided upon its own facts. *Smith* v. *Doe*, 15 Cal. 105.

38. Miners Incorporating—Transfer of Possession. Where plaintiff and others, owners of undivided interests in a possessory mining claim, became incorporate, and from the time of incorporation worked the claim as the property of the corporation: *Held*, upon ouster of one of the original owners and incorporators, that he could sue for his stock but not for an interest in the claim; that under the circumstances he could not question the title of the corporation to a claim which could only be held by occupation. *Smith* v. *Maine Boys T. Co.*, 18 Cal. 111.

39. Joint Interests—Transfer before Location Complete. The estate of the discoverer (or one relocating an abandoned claim), while absolute in the present, exists as to the future upon condition of completing his location with reasonable diligence. If he yield possession to another his right is gone by abandonment, and a new right by virtue of occupancy vests in the second party. If, however, he admit another party into joint possession, or agree for a consideration to locate for another as well as himself, the title when perfected inures to the two jointly. If in fraud of such associate he deliver possession of the entire lode to another, the associate may ratify and sue for his share of the proceeds, or may bring ejectment for his interest in the claim. *Murley* v. *Ennis*, 2 Colorado, 304.

40. Conveyance. A bill of sale not under seal is insufficient to convey a ditch or mining claim. *McCarron* v. *O'Connell*, 7 Cal. 152.

41. Conveyance—Bill of Sale. Mining claims may be conveyed by bills of sale or instruments in writing not under seal; and such conveyances have the same force and effect as *prima facie* evidence of sale as if made by deed under seal. *St. John* v. *Kidd*, 26 Cal. 263.

A bill of sale of a mining claim not under seal can pass only an equity; and such an equity as is subordinate to the legal title or any superior equity. Id.

42. Parol Sale—California. A verbal sale of a mining claim, even if accompanied by delivery of possession, does not pass the legal title since the act of April 13, 1860. *Goller* v. *Fett*, 30 Cal. 481.

A written conveyance is not necessary to the transfer of a mining claim. *Table Mt. T. Co.* v. *Stranahan*, 20 Cal. 198; *Antoine Co.* v. *Ridge Co.*, 23 Id. 219; *Draper* v. *Douglass*, Id. 327; *Gatewood* v. *McLaughlin*, Id. 178.

43. Instructions as to Custom, not based on Evidence. If there is no evidence as to the general custom of the size of locating a mining claim, instructions to the jury upon the reasonableness of its size, depending on general customs, are irrelevant. *Table Mt. T. Co.* v. *Stranahan*, 31 Cal. 387.

44. Wood and Water. The right to mine upon public lands carries with it, as incidents, the right to the use of wood and water found on the public domain and not previously appropriated. *Tartar* v. *Spring Creek Co.*, 5 Cal. 395.

See APPROPRIATION; LODE, PLACER; PUBLIC DOMAIN.

COAL.

1. Shipping—Landing. Where plaintiff contracted to ship defendants coal by boat, and the defendants to unload the boats, the breaking down of the landing wharf was held no excuse for failure to unload, and defendants held bound to pay damages for detention. *Consolidation Coal Co.* v. *Shannon*, 34 Md. 144.

2. Lackawanna. The word "Lackawanna" has become a generic name for the coal produced in a certain section, and the Delaware and Hudson Canal Co. have no exclusive trade-mark in the name Delaware & H. Canal Co. *Delaware & H. Canal Co.* v. *Clark*, 13 Wall, 311.

3. Coal "Fairly Workable." A tenant agreed to work a coal mine so long as it was fairly workable. There were coals in the mine, but of such a description that it would not pay to work it: *Held*, that under these circumstances the tenant was not bound to work the mine, and that under the words "fairly workable" a tenant was not bound to work at a dead loss. *Jones* v. *Shears*, 7 Car. & P. 346.

4. "Coal Raised." The term "coal raised" may signify "coal got or won," or "coal brought to the surface," according to the context. *Senhouse* v. *Harris*, 5 Law Times, N. S. 635.

5. What Coal can be "Fairly Wrought." Profit is not the test whether coal can be fairly wrought, though in one sense it is

so, because the usages of mining are founded on what can be done advantageously. "Fairly wrought" means that which can be fairly and properly gotten, according to mining usage, without extraordinary difficulty or expense. *Griffiths* v. *Rigsby*, 1 H. & N. 240.

COLLIERY.

1. Meaning of the Term. The party claiming under an agreement to sell all of a certain "interest in the Shaft and Slope Collieries," offered to prove that "the term colliery" means a place where coal is dug or mined, embraces all the movable property at the mines, used or placed there to be used in the working of the mines, and was so understood by all persons engaged in mining in the county of Schuylkill, where the collieries were situate, which offer the court refused: *Held*, that he had the right to prove its meaning by the evidence of persons engaged in the same trade or business as a term of art, and that the rejection of the offer was error. But that the court did not err in refusing to define it to the jury according to the meaning expressed in the offer; and that if it were taken from the lexicographers, without the aid of testimony, it would express no more than "a place where coals are dug." *Carey* v. *Bright*, 58 Pa. St. 70.

2. Trade. A colliery is a species of trade; its incidents distinct from other landed property considered. *Williams* v. *Attenborough*, 1 Turn & Russ, 70.

3. Trading Concern. A colliery is not only the enjoyment of the estate, but in part carrying on a trade. Engine for working it to be treated as a trade fixture. *Dudley* v. *Ward*, Ambler, 113.

A colliery is looked to for many purposes as a trade. *Wren* v. *Kirton*, 8 Ves. Jr. 502.

4. Grant to Colliery, as such, construed. When the liberty of making a drain was granted for the purposes of an intended colliery, such grant remains, and the right of repair continues as long as the object of the grant, to wit: as long as the coal might last; and the colliery is not limited in the use of such drain to the working of particular veins, or to working under any particular closes or pieces of ground. *Hodgson* v. *Field*, 7 East, 613; 3 Smith, 538.

5. Devise of Plant. Testator gave all his wagon-ways, rails, staiths, and all implements, utensils and things, at his death, used or employed, together with or in or for working, management, or employment of his collieries, and which may be deemed as of the nature of personal estate, in trust to be held, used or enjoyed with the collieries: under this bequest and upon the circumstances money due from the fitters and others and in the Tyne bank, coals at the pits and staiths, corn, hay, horses, timber, oil, candles, fire-engines, and various other articles of the stock-in-trade passed. *Stuart* v. *Earl of Bute*, 3. Ves. Jr. 212. Affirmed, 11 Id. 657. Reversed, 1873, in House of Lords. See note to 11 Ves. Jr. 657, Sumner's edition.

6. Fixtures—Loose Movables. There may be many things incident to a colliery as fixtures, though not actually affixed to the freehold, but the mere loose movables, in the absence of any usage or general understanding, would no more pass as such than "the tools of a mechanic in the sale of his shop." *Carey* v. *Bright*, 58 Pa. St. 70.

7. Equity Jurisdiction. A court of chancery will not undertake the working of a coal mine, or enter a decree which would involve the superintendence of the workings of a colliery. *Wheatley* v. *Westminster C. Co.*, L. R. 9, Eq. 538.

8. Annuity Charged on Profits of Colliery—Pleading. In an action on a covenant, to do no act whereby an annuity charged upon the profits of a coal mine shall be impeached, it is no ground of demurrer that the declaration does not allege that any profits have been made. *Pitt* v. *Williams*, 5 A. & E. 885; see S. C. 4. N. & M. 412; 2 A. & E. 419.

9. Partnership—Partition. A colliery worked by a partnership upon dissolution cannot be parted—it must be sold. *Wild* v. *Milne*, 26 Beav. 504.

10. Account. A colliery is a kind of trade, and, therefore, an account of profits may be taken in chancery. *Story* v. *Lord Windsor*, 2 Atk. 630.

11. Judicial Sale. The sale of a colliery, in execution of a trust, will not be set aside to let in a higher bid, upon the same footing as other real estate. The incidents attaching to it as a trade and its liability to destruction and to great fluctuations in value considered. *Williams* v. *Attenborough*, 1 Turn. & Russ. 70.

12. Apportionment of Rent of. The rule that a purchaser, upon sale under proceedings in chancery, shall have possession as from the quarter-day preceding the sale, does not apply to a colliery; which is an article of trade, the profits accruing daily. The proper period is the month or week in which the purchase takes place, according to the usual course of taking the account. *Wren* v. *Kirton*, 8 Ves. Jr. 502.

13. Specific Performance not to Interrupt Working. Judgment creditors

seeking to enforce performance of an agreement for carrying on a colliery so as to make it available as assets, must take it subject to all engagements as a continuing concern. *Burroughs* v. *Elton*, 11 Ves. Jr. 29.

14. Act of God—Contracts with Colliery made with Reference to Transportation. A coal company under its charter constructed a railroad to connect with Lehigh navigation, which thus notoriously became indispensable for the transportation of its coal. All contracts with the coal company were made in view of these facts. The coal company contracted with plaintiffs for the delivery of a large quantity of coal during a season. Before the time for delivery of a large part of the coal, a flood swept away all the works of the navigation company, so that the coal company were prevented from filling their contract: *Held*, that they were excused from compliance while they were so prevented. *Lovering* v. *Buck Mt. C. Co.*, 54 Pa. St. 291.

The coal company would be relieved from exact compliance by an act of God, over which they could have no control, and which they, not being the owners of the navigation works, could not have provided against. Id.

In the contract the company stipulated for an advance in price if any advance on freight and tolls accrued before a time fixed. The company had a right to be paid for any such increase by the most usual and ordinary mode. Id.

15. Workings on the Dip—Easement—Drainage—Flooding. Where there are two mining operations, one owner working on the upper level, and one on the lower level of the same vein, the owner of the upper level, operating in the most approved method, and with care, is not required to control the natural flow of the water downward, and may work his coal out down to his line, and the maxim of the common law, *sic utere tuo ut alienum non laedas*, applies.

And the owner of the subjacent level owes a servitude, and must leave a pillar of coal to support the gangway and keep out the water from the level above.

Adjoining owners of the same level of the same vein owe no special duty to each other.

When, however, the owner of the superjacent land has created a servitude upon his land in favor of the subjacent owner, such as a right to drive an airway through his works and to connect with the surface, such owner, after he has worked all his coal out and is about to abandon his workings, must give reasonable notice to the owner of the dominant tenement; and on failure so to do, equity will restrain him from permitting the water to fill up, if by so doing it will destroy the easement, the owner of the dominent tenement to be at the expense of pumping the water until the injury can be remedied. Reasonable notice is relative and depends upon the work to be performed. *Philadelphia C. & I. Co.* v. *Taylor*, 7 Pac. L. R. 127; 5 Leg. Gaz. 392; 1 Leg. Chron. 361.

16. Operation of Mines on the same Dip—Drainage Barrier. Between adjoining collieries, working on the same bed, it is the custom for the miners on the rise to work to their boundary, and for the miners on the dip to leave a barrier of from six to ten yards to protect them against the water from the mine upon the rise. (Decision upon a case in Lancastershire, 1848.) *Clegg* v. *Dearden*, 12 Q. B. 576.

17. Access to Lower Coal Seam through Upper. The upper veins of coal of a tract in the Forest of Dean were "galed" by the Crown, under the Forest of Dean mining act (1 and 2 Vict. 43), to the plaintiff, with a reservation that the underlying veins might be galed to other parties, "but to be worked so as not to impede or injure the working of tracts already allotted." The veins underlying the plaintiff's colliery were afterward galed to the defendants, who sank a shaft through the plaintiff's works: *Held*, that the restriction applied only to the workings of the lower seams when reached, and did not abridge the right of the defendants to sink a shaft through the upper veins. *Goold* v. *Great Western D. C. Co.*, 2 De G. J. & S. 601.

18. Covenant to Work Continuously not Implied. A covenant in a lease of a colliery to work continuously, where not expressed, will not be implied. *Jegon* v. *Vivian*, L. R. 6 Ch. App. 742.

19. Instroke. A lessee of coal mines may work by instroke when the lease does not covenant against it. *Lewis* v. *Fothergill*, L. R. 5 Ch. 103.

20. Mode of Assessment to Poor Rate. The owner and occupier of coal mines is ratable to the poor at the sum for which the mine would let, subject to outgoings. *Rex* v. *Attwood*, 6 B. & C. 277.

21. Exhausted Mine, a Question of Fact—Evidence. Whether a coal mine is exhausted is a question of fact for the jury, and it is proper to hear evidence of usage or custom showing when a mine is deemed exhausted. *Walker* v. *Tucker*, 70 Ill. 527.

See MINES; LEASE; WORKINGS.

COMMON.

1. Subservient to Mining Right. Where under an inclosure act, commissioners awarded that certain persons "shall forever hereafter use and enjoy the said commonable place as a common pasture, exclusive of all others whatsoever:" *Held*, that the right of the commoners was still subservient to the right of the lord to take stone under a claim exercised long prior to the act and since its passage. *Place* v. *Jackson*, 4 D. & R. 318. But such a right cannot be exercised wantonly so as unnecessarily to interfere with the commoner's right of pasture. Ib.

2. Digging to the Destruction of Common of Pasture. The right of common may be subservient to the right of the lord in the soil, so that he may dig claypits or empower others so to do without leaving sufficient herbage for the commoners, if such right of digging can be proved to have always been exercised by the lord. *Bateson* v. *Green*, 5 Term R. 411.

3. Inclosure. The lord of a manor, or his grantee, may inclose and approve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as a right to dig sand, etc., if he leave sufficient common of pasture. *Shakespear* v. *Peppin*, 6 Term, 741.

4. Manor Wastes. The lord has no right under the statute of Merton 20, Hen. 3, C. 4, to inclose and approve the wastes of a manor where the tenants of the manor have a right to dig gravel on the waste. *Duberley* v. *Page*, 2 Term, 391.

5. Grant of Quarry to a Town. A vote of the proprietors of Worcester, in 1733, recorded in their book of records, but not in the registry of deeds, "that one hundred acres of the poorest land on Millstone hill be left common for the use of the town for building stones," constituted, even as against grantees under subsequent conveyances duly recorded in the registry, a grant of the quarry to the town, not for their use in a corporate capacity, but for the use and benefit of those only who were or might become inhabitants thereof, for all purposes for which such materials, in the progress of time and the arts, might be made useful. *Green* v. *Putnam*, 8 Cush. 21.

COMMON CARRIER.

1. Favoring Contract—Ultra Vires. A contract by a common carrier to pay fifty cents per ton to a certain coal company for every ton of coal carried from parties other than such coal company is *ultra vires* and will not be enforced in equity. *Peoria & R. I. R. W. Co.* v. *Coal Valley Co.*, 68 Ill. 489.

2. Special Contract. Where a common carrier is forbidden by its act of incorporation from charging more than a certain amount per ton on coal carried, this does not prevent its making a valid contract to carry at less rates; nor does its entering into a special contract deprive it of the use of a summary remedy for collection of tolls given by the terms of the act which constitutes its charter; the special contract only allows it the additional remedy of an action of covenant thereon. *Delaware & H. C. Co.* v. *Penn. Coal Co.*, 21 Pa. St. 131.

3. Construction of Coal Transportation Contract—Measure of Damages. Defendants agreed to build a railroad communicating with plaintiffs' mines and to furnish plaintiffs "the same transportation facilities and charge them the same price per ton for coal as they may or shall at the same time charge for tolls and transportation," etc., between other named points.

Plaintiffs in consideration agreed to furnish defendants all coal mined to the amount of 1,000,000 tons, and not less than 600,000 tons in eight years, and pay defendants two and a fourth cents per ton until the same should reach $9000 as security for their covenants.

This agreement was a covenant by defendants to receive and transport all the coal the plaintiffs should mine and offer for transportation, not exceeding the contract limit; and so to do in the same manner and with the same diligence as for others, but not limited in quantity by the proportion of others. *Hazleton Coal Co.* v. *Buck Mountain Coal Co.*, 57 Pa. St. 301.

4. Barges—Collieries. Where a coal company furnishes its carriers with boats to be paid for in services to the company and placed its boatmen in possession, but the boats retained the company's marks and were employed in its service, and the contract of sale was in terms executory: *Held*, a valid contract and good against creditors of the carriers. *Lehigh Coal & Nav. Co.* v. *Field*; affirmed in *Farmers' Bank* v. *McKee*, 2 Pa. St. 321.

5. Election—Contract. By covenant between a carrier and salt-works to transport from 1200 to 5000 barrels of salt annually for three years from the works to certain points: *Held*, that the manufacturer, not the carrier, had the right to elect what quantity of salt not less than 1200 nor more than 5000 barrels should be transported annually. *White* v. *Toncray*, 9 Leigh (Va.) 347.

6. Oil—Conversion. A common carrier receiving oil at the wells from a party

in possession, but not the owner of it, is not answerable in *assumpsit* for its value; the demand and refusal do not amount to a conversion in such cases. *Dresser* v. *West Va. Transportation Co.*, 8 W. Va. 553.

7. **Monopoly—Iron Works and Railroad—Covenant not Running with the Land.** The Monmouthshire canal act provided that upon auxiliary railroads the tolls should not exceed the rate charged by the canal company, which for limestone and iron-stone was restricted to two and one-half pence per ton per mile. Certain operators, and among others the lessee of the Beaufort works, formed a company and built a railroad connecting the Trevil lime quarry with Mudy iron-works and with railroads operated by the canal company.

In the partnership deed of the railroad company the lessees of the Beaufort works covenanted for themselves, their heirs, executors, administrators, and assigns, with the other shareholders, their executors, administrators, and assigns, so long as the covenantors, their executors administrators, or assigns, should occupy the Beaufort works, to procure all the limestone used in the said works from the Trevil quarry, and to convey all such limestone, and also all the iron-stone, from the mines to the said works along the Trevil railroad, and to pay a toll of five pence a ton per mile for the same. Upon a bill filed by the shareholders of the railroad to enforce this covenant against a person who had purchased the Beaufort works, with notice of the partnership deed: *Held*, that the covenant did not run with the land so as to bind assignees at law; and that a court of equity would not, by holding the conscience of the purchaser to be affected by the notice, give the covenant a more extensive operation than the law allowed to it: secondly, that the covenant securing a toll of five pence a ton per mile to the shareholders of the Trevil railroad was a fraud upon the canal company and the legislature, and, therefore, ought not to be specifically enforced by injunction. *Keppell* v. *Bailey*, 2 M. & K. 517.

8. **Pipe Line and R. R. Contract. Ultra Vires.** The Oil Creek and Alleghany River Railroad Co. agreed to pay the Pennsylvania Transportation Co., an oil pipe line, a certain sum per barrel on all oil transported by it, in consideration that the pipe line would deliver all the oil under its control to the railroad company for transportation; the pipe line performed its part of the agreement and brought suit to recover the price agreed on: *Held*, that the railroad company could not set up as a defense that the contract was *ultra vires*, the contract being performed. *Oil Creek R. R.* v. *Pa. T. Co.*, 83 Pa. St. 160.

CONFUSION.

1. **Measure of Damages.** Where two lead mines, known as the "Little Ing" and the "Prosperous," were worked together by the defendants, the plaintiff claiming title and seeking an injunction as to Little Ing brought his action, whereupon the defendants agreed that if plaintiff would not prohibit their working of Little Ing they would keep separate accounts of all ore extracted smelted therefrom. Contrary to this agreement defendants kept a mixed account of the produce of the two mines, and allowed part of the workings to fall in and part to be flooded, so that the master (title to Little Ing having been found to be in the plaintiff,) reported that it was impossible to take an account of what ore came from the Little Ing: *Held*, by Lord Eldon, chancellor, that it was a case of willful confusion, and that the plaintiff should have the net produce of both mines, excepting only such as the defendant should prove came from the Prosperous mine. *Lupton* v. *White*, *White* v. *Lupton*, 15 Ves. Jr. 432.

CONSIDERATION.

1. **Inadequacy of—Mineral nature of Land.** No inference can be drawn that a purchaser took the risk of title from the fact that the premises, if oil land, were worth a far greater sum than the amount paid, where it is not shown to have been oil land; on the other hand the risk of its not being oil land may have induced the smallness of the sum accepted. *Babcock* v. *Case*, 61 Pa. St. 427.

2. **Support of Lien.** A promise by a party, who has a claim against a ditch, to another party, who has a lien claim against the ditch, made to protect the promisor's, own interests, and by reliance on which the promisee relinquishes his lien, is based upon sufficient consideration and is not within the statute of frauds. *Carothers* v. *Connolly*, 1 Mont. 433.

CONSPIRACY.

1. **Act of One binds all.** Where two or more have entered into a conspiracy to defraud the plaintiff, any act done by either of the conspirators, in furtherance of the common object and in accordance with the general plan of the conspirators, becomes the act of all, and each conspirator is responsible for such act. *Page* v. *Parker*, 43 N. H. 363; S. C. 40 Id. 47.

2. **Conspirator bound by representations of co-conspirators.** Where a man has combined and conspired with others to cheat and defraud the plaintiff in the sale of certain property, by fraudulent

concealments and misrepresentations, and the fraud has been perpetrated accordingly by some other member or members of the conspiracy, he will be liable, although he may not, individually, have made any fraudulent misrepresentations, or have fraudulently concealed anything in regard to the condition or qualities of the property in question. *Page* v. *Parker*, 43 N. H. 363; S. C. 40 Id. 47.

3. Prospectus Evidence. There being evidence that the purchase and fraudulent sale of land was the combined act of two parties, the publication of a prospectus advertisement, etc., by one is evidence against both. *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202.

CONTRACT.

1. No Property in Quarryman—Trover. One who has been hired to take out stone from the quarry of a third person, by a contractor who has contracted with a turnpike company to stone a portion of their road, has no such property in the stones quarried by him after his employer has abandoned his contract, as will enable him, after leaving possession, to maintain trover therefor against the agent of the company by whose order the stones thus quarried had been subsequently placed upon the road. *Castor* v. *McShaffery*, 48 Pa. St. 437.

2. Contract to dig and clean Ore—Tools—Determination. A. agreed to dig a certain quantity of iron ore annually, to clean it properly of all clay, sand-stone, etc., and deliver it to B., who agreed to furnish all screens, ropes, and other implements necessary to work the banks: *Held*, that A. was only bound so far to cleanse the ore as could be done with the implements furnished by B., by using the same degree of skill and diligence as are ordinarily employed by persons in that business: *Held, also*, that such contract is indivisible. *Campbell* v. *Gates*, 10 Pa. St. 483.

After A. had performed his contract in part, B. wrote him a letter alleging that the ore was not properly cleaned, and refusing to receive any more ore unless A. would allow B. to make the ore good by "docking" what had been and what would be received. A. then tendered ore, but B. refused unless the docking was agreed to. The contract was thereby terminated as to A. at his election, and he may sue for the refusal to perform. Id.

3. To Dig Ore distinguished from Lease. Contract between mine-owner and a second party binding the second party to enter upon a tract containing an opened mine, and raise a certain number of tons of ore within a certain time. A third party by subsequent contract with the mine-owner entered and opened a shaft at another point. *Held*, 1. That the contract gave the second party exclusive possession but not as lessee; 2. That he might maintain trespass against the third party; 3. That plaintiff, the second party, had no right to open a new mine on the tract, and that as defendants' shaft was not parcel of the mine on which plaintiff worked, and plaintiff was not obstructed in completing his contract, only nominal damages could be recovered. (Ogden, J. dissenting on the last proposition.) *Shaw* v. *Wallace*, 1 Dutch. N. J. 453.

4. Delivery—Guaranty of Contract to dig ore—Evidence. A. who was digging iron ore for B. under a parol contract to dig as fast as B. wanted it and could sell it, refused to proceed unless B. would give him a guaranty of payment. The contract was, thereupon, reduced to writing and signed by B. who procured C. to put on it his guaranty of same date, in these words: "I agree to warrant the performance of the within contract on the part of B." The contract and guaranty were then handed to a third person to be delivered to A. In an action brought by A. against C. on the guaranty, it was *Held*, 1. That the delivery of the writings to A. consummated the contract, and no notice to C. of the acceptance of the guaranty by A. was necessary to perfect a right of action in A. against C.; 2. That demand of payment having been made of B. and security given by him to C. against A.'s claim, notice to C. that such demand had been made and that B. had not performed, was not necessary; 3. That notice to C. of the amount due from B. to A. under the contract was not necessary; 4. That evidence showing that soon after A. began to labor under the guaranty, B. having made sale of 600 tons of the ore, came to A. and informed him of the fact and directed him to dig that quantity, was admissible; and the directions so given by B. were conclusive against C. *Bushnell* v. *Church*, 15 Conn. 406.

5. Property—Lien—Ore dug on special contract. Under an agreement with the owner of the land, certain specified lots were set apart to a number of miners, and for digging ore therefrom they were to receive a given compensation in kind or in money. But the contract especially provided that no right, title, or interest in or to any of the ores should rest in the miners, but that the same should remain the absolute property of the owners. *Held*, that the miners had a lien upon the ore and the right of possession till the compensation was paid or tendered, but no other title thereto. They had no right to sell it; and any one purchasing with knowledge of the facts

could take no title. *Granby M. & S. Co.* v. *Turley*, 61 Mo. 375.

6. Special Contract, furnishing or digging ore. The plaintiff, who was the lessee for years of an ore bed, having entered into an agreement under seal to supply the defendant with specified iron ore, annually at a certain price, with a stipulation that if the plaintiff should at any time refuse, or not be able, to dig or raise the ore at a fair price, the defendant should be at liberty to employ others to dig or raise it for him; and the plaintiff having neglected to furnish ore, the defendant entered and dug the ore: *Held*, that an action on the case sounding in tort could not be maintained against the defendant. The plaintiff's real remedy, if any, not considered. *Arnold* v. *Richmond Iron Works*, 5 Cush. 502.

7. Iron Furnace and Ore Contract—Construction, whether sale or license. Articles of agreement between M. and H. were entered into, reading in substance as follows: "M. in consideration of one dollar, receipt acknowledged, doth grant unto H. his heirs and assigns, the exclusive right and privilege of searching for, digging, raising, and carrying away from off the land (description) all the iron ore and limestone on said land, and also timber sufficient to be enabled to work to advantage, with sufficient room for deposit of ore, limestone, and dirt, and also the privilege of erecting as many necessary houses and buildings as the said Hughes may require for the successful operation of an iron furnace: Hughes agreeing to pay twenty cents for each ton of clean ore he takes from said land, in payments on each first day of January." H. entered and mined under this agreement, but erected no iron works. In ejectment by his assigns for a stone quarry of three acres on the land: *Held*, that though the operative words of the agreement would pass all title to the ore; yet that the real consideration was the erection of iron works, which not having been erected the agreement, all its parts being considered, should be taken as a sale without consideration, and, therefore, passing no present interest. *Clement* v. *Youngman*, 40 Pa. St. 341.

8. Ore contract with furnace. An agreement by a corporation to purchase "all the iron ores the said company, (the defendant) their agents or assigns, may want for the use of their furnace for the term of three years," binds them to pay for ores delivered to and accepted by them or their general agent, although not actually used by them; and the entries in their books are admissible to prove such acceptance. *Chapman* v. *Briggs Iron Co.*, 6 Gray 330.

9. Furnace ore contract—Partner—Indemnity. C. one partner, contracted to sell ore from the common property to H. for a particular furnace, to be paid for in iron from that furnace, E., the other party, declining to join. E. and P. afterward bought H.'s furnace; so that he could not furnish iron: *Held*, that the contract with H. did not run with the land, and E. after the purchase was not responsible to C. on it. *Grubb's Appeal*, 66 Pa. St. 117.

E. gave indemnity to H. against damages to C. for failing to fulfill his contract: *Held*, that this created no liability on E. to C. on account of H.'s contract. Id.

The indemnity created no privity between E. and C. Id.

10. Mistake — "Ogden Mine"—Injunction—Delivery of ore. Where a party agreed to deliver ore "at the Ogden mine," and the party to whom it was to be delivered sued for non-performance of the contract, the defendant in the suit at law prayed an injunction to restrain such suit, alleging mistake in the description of the place of delivery, and showed that he had always considered and had cause to believe a certain tract upon a vein opened for more than a mile to be the "Ogden mine," though such name in fact applied to another tract worked on the same deposit, and that the tract intended by him was understood as the "Ogden mine" by the parties at the signing of the contract: *Held*, that it was a case for equitable relief, and the action at law was allowed to proceed, the plaintiffs therein being, however, restrained from "setting up at the trial any other meaning of the contract" than the one found to be its rightful interpretation by the proceedings upon the bill for injunction. *Firmstone* v. *De Camp*, 17 N. J. Ch. 309, 317.

11. Ore buyer holding proceeds for special use—Garnishment. The old firm of B., G. & Co. advanced money to Y., a miner, with a distinct understanding that the next mineral which he should deliver to them should be applied in payment of such advance. The old firm was afterward dissolved and a new one formed of the same name; and B., who was a member of both firms, and was authorized to settle the business of the old one, bought mineral for the new firm from Y. and took possession of the same with the arrangement that the money due for the same was to be applied on the claim of the old firm against Y.: *Held*, that on these facts the new firm were not liable as garnishees in a suit against Y. *Cahill* v. *Bennett*, 26 Wis. 577.

12. Instroke-Construction. The rule that the understanding of parties to a contract may be reached by their own acts under it, applied to a mining contract under which mining had been carried on and royalty paid for seven years without using the premises to operate into neighboring ground, to show that it was the intention of the parties to limit the use of the workings to the ground described in the contract. *Leavers* v. *Cleary*, 75 Ill. 349.

13. Sale of Coal to be found—No Condition Precedent. Declaration in covenant stated that plaintiff, by indenture, granted to defendant all the coal and mines of coal under certain land; that defendant covenanted to pay the plaintiff as the price of the coal so granted £40 for every statute acre of the said coal which should be found under the said lands; and until the said price should be fully paid to pay plaintiff £40, part of the said price in each year, by two equal half-yearly installments, whether the whole of an acre of coal should be gotten in every such year or not. Averment, that, at the time of making of the indenture there were under the said lands divers; to wit: fourteen acres of coal; and that divers, to wit: thirteen acres of the said coal still remained under the said lands, and that £40 for two of the half-yearly installments of the said price for the coal aforesaid became due and still was in arrear and unpaid to the plaintiff: *Held*, that the finding of coal was not a condition precedent to the plaintiff's recovering the annual sum of £40. *Jowett* v. *Spencer*, 1 Ex. 647; 17 L. J., Ex. 367, reversing S. C. 15, M. & W. 662.

14. Purchaser of Mine Proceeds cannot question title. The purchaser of stone who has received it cannot question the ownership of a party in possession of the quarry. *Dictum:* In such case the true owner of the land could not maintain trespass or assumpsit for the value of the stone against the purchaser. *Rhoades* v. *Patrick*, 27 Pa. St. 325.

15. Subsequent Failure of Mine. If representations made in written proposals of sale of stock are true, the subsequent failure of the mine does not impair the right of the vendors to enforce the contract. *Crump* v. *U. S. M. Co.*, 7 Gratt. (Virg.) 362.

16. Drainage Contract — Furnishing Coal — Engine worked into another seam — Apportionment. Two mines being upon the same seam, or at least so contiguous that the engine at A.'s mine drained both mines, so that B. received equal benefit, and at the same time B.'s mine was drowned out when A. ceased, B. agreed to furnish the engine with coal in consideration of the benefit of the drainage. The contract, as expressed in a letter, referred to the veins with the words, "as they now stand." After some time, A. sunk into and worked a seam of coal lying below the old mines, and necessarily drained them both: *Held*, that the contract to furnish coals to the engine was at an end, and that the increased amount of fuel needed to drain a deeper seam could not be apportioned or deducted from the total amount required to work the engine. *Pringle* v. *Taylor*, 2 Taunt. 150.

17. Conditional--Developing Salt-well. An instrument as follows: "April 29, 1841, Jacob Waltz, jr., do promise to pay unto William Morrow the sum of $200 if said Jacob Waltz can get the salt-well to do a good business: that salt-well that Waltz and Morrow bought of Henry Taggart, in Jefferson county, Ohio, on Island Creek." (Signed) "Jacob Waltz, jr,." implies no obligation upon Waltz to endeavor to get the salt-well to do a good business; and without such event no liability attaches. *Morrow* v. *Waltz*, 18 Pa. St. 118.

18. Salt-works—Time. There can be no breach of contract to manufacture a certain amount of salt (60,000) bushels within a certain year until the end of the year. Accordingly, when a lessee of salt-works, bound under such a covenant, assigned to third parties, who within the year took a new lease, this operated to render such a breach of covenant impossible, and their covenant to observe the conditions of the old lease became nugatory. *Preston* v. *McCall*, 7 Gratt. (Va) 121.

19. Oil Engine in exchange for interest in Lease. Defendant owning an oil lease, contracted with plaintiff for an engine, tubing, etc., for which he was to receive an interest in the lease. The plaintiff furnished the engine, and afterward had it repaired, but the defendant refusing to transfer the interest in the lease as agreed, plaintiff declined to furnish any more materials under his contract. The engine was afterward sold to satisfy the lien of the mechanics, who had repaired it at plaintiff's request: *Held*, that upon refusal of defendant to pay the agreed consideration, plaintiff had the right to rescind, and that the sale did not affect his right of recovery for the engine and other materials furnished. *Newell* v. *Haworth*, 66 Pa. St. 363.

20. Owner, Contractor and Workman, Implied Acceptance. An owner, who was having a shaft sunk by contract, and who kept the time books and paid off the contractor's men, paid the plaintiff, one of those workmen, about half his claim, and

at the same time wrote him out an order on himself for the balance, which order he gave to the plaintiff to have signed by the contractor. The order was not signed for six weeks. The owner had meanwhile paid off the contractor: *Held*, that he was liable on the order, and should have retained sufficient to pay it on his settlement with the contractor. *Lumaghi* v. *Neuber*, 67 Ill. 250.

21. Quarrying, Rate of Payment.—Where plaintiff agreed to quarry stone at a fixed price or rate and the contract was not fully completed, the rate agreed on must still govern as to amount of stone which was quarried. *McClelland* v. *Snider*, 18 Ill. 58; *Brigham* v. *Hawley*, 17 Id. 38.

22. Custom of Mining—Aiding Construction. Where the terms of an agreement respecting joint ownership of ore beds were doubtful, the usage of the parties in taking ore for their respective furnaces, would be an important element in their construction. *Coleman* v. *Grubb*, 23 Pa. St. 393.

23. Erecting Mill over Mine—Forfeiture. A written agreement by which, upon certain "terms and conditions," the parties of the second part were permitted to erect a steam quartz mill upon the surface of the mine owned by parties of the first part, and by which it was made the duty of the parties of the second part to finish the mill within a certain time, and afterward, among other things, to keep the said mine free from water, hoist ore, etc., by means of the steam power of the mill—gives the parties of the second part an "estate upon condition" in their improvements: *Held*, further, that upon refusal to pump the mine, a forfeiture was created by breach of condition. And that such forfeiture might be enforced after demand for possession without actual entry. *Hamilton* v. *Kneeland*, 1 Nev. 49.

24. Quartz Mill Subscription. Where certain persons subscribed money toward building a quartz mill, in which all the subscribers were to be interested; and the subscription paper, without naming any payee, provided that the money was to be paid in such manner and at such a time as the majority of the subscribers might order: *Held*, that the subscription was for the mutual benefit of all the subscribers. *Wheeler* v. *Floral M. & M. Co.*, 9 Nev. 254.

25. Prospecting Contract—Adequate Consideration. Considering the uncertain nature of undeveloped mineral land a contract to prove it at the prospector's risk of a certain sum, to be rewarded with a right of purchase at a sum much less than it is *shown to be worth by the adventurer's expenditure*, is a just and reasonable contract. *North Georgia M. Co.* v. *Latimer*, 51 Ga. 67.

26. Note Payable if mine continues good. A note or contract read as follows: "Twelve months from date, with interest from date, I promise to pay William Richards $6662 in the event the Rhodes mine continues to prove, at the expiration of said time, a good gold mine: *Held*, that by force of the word "continues," the parties who dealt with it as an open existing mine, admitted that it was at that time a good mine, and the question for the jury was to determine whether, at maturity, the mine was as good as it was at the making of the note; Second. That it was error to leave it as a general proposition to the jury whether it was a good gold mine at maturity of the note, without reference to the state of the mine at the making of the note, or the force of the word "continues;" Third. That the condition of the note referring to the state of the mine was a condition precedent. *Richards* v. *Schlegelmich*, 65 N. C. 150.

27. Conditional Note—Time—Construction. An instrument was as follows: "Four months after date, for value received, we, jointly and severally, promise to pay J. E. Barber or order $600. *Signatures.* In consideration of the above sum being without interest, we promise and agree that, should Wm. S. Rockwell, one of the signers hereto, effect a sale at the East or elsewhere of certain mining property on the Bobtail lode, and receive his pay therefore, then we will pay an additional $600. *Signatures.*" *Held*, that the above constituted two several contracts, the first of which might have been sued upon at maturity without reference to the second: *Held*, that to recover on the second, plaintiff must prove a sale of the premises intended in the agreement, such sale being a condition precedent, but that such sale was not limited to the period in which the note matured. *Cheney* v. *Barber*, 1 Colorado, 256.

28. Special lot of metal. Ege received from Kauffman an assigned order for pig metal to be delivered on demand at the mill; at the same time he gave his individual promise in writing to deliver the same metal to Kauffman. Kauffman demanded the metal at the mill, and compliance was refused until he produced the original order: *Held*, that this refusal of the mill did not release plaintiff from his individual agreement to produce the same metal at the same mill. *Ege* v. *Kauffman*, 1 Watts & S. 120.

29. Construction—Quantity or special lot. Where the evidence, besides proof of consideration, consisted of a writing in these words, "we have this day sold to

Winslow, Lanier & Co. 400 tons of pig metal now at our landing, or that will soon be delivered there, and we hereby direct Mr. McClure (our clerk) to give them possession thereof:" *Held*, that this was not of itself sufficient evidence of a perfect sale of a specified lot of metal. *Winslow, L. & Co.* v. *Leonard*, 24 Pa. St. 14.

30. Sale—Quarry and Mill—Present capacity. A sale of a quarry contemporaneous with an agreement between the parties to keep a mill or marble-works supplied with marble therefrom is made with reference to the present capacity of the mill, so that the mill cannot call for an increased supply on account of its enlargement. *Rutland M. Co.* v. *Ripley*, 10 Wall. 339.

Nor does such contract prevent the working of the quarry *ad libitum* for the benefit of the owners. Id.

Nor does such contract leave in the grantor a corporeal interest in the marble *in situ*. Id.

31. Subject-matter of Sale—Mines or Mines and Plant—Comparison of values.—Evidence of the valuation of collieries and of their condition, and of the outlay necessary to put the mines in repair, and make the purchase available, or the relative value of the mines and the movable property: *Held*, irrelevant upon the question whether the movable property passed as part of the consideration for money paid to the tenant for a surrender, or whether the mines alone were the subject-matter of the contract. *Carey* v. *Bright*, 58 Pa. St. 70.

32. Lease—Coal-dust contract—Construction. By an instrument under seal it was agreed that the defendants should grant a lease of certain premises to the plaintiff for twelve years, at a nominal rent, for the manufacture of fuel out of coal-dust; that all the coals to be used during the term should be purchased of the defendants, provided the defendants could and should supply him with the quantity that should from time to time be required by him, or to such extent as the defendants could supply, and that the defendants should charge for the same a given price, and no more; and, further, that the defendants should not be compelled to supply more than five hundred tons per week; and that, in case the defendants should, from some substantial cause, be unable to supply small coal to the extent agreed upon, they should give the plaintiff six months' notice of such inability, and in such case the plaintiff should be at liberty to obtain his supply of coal, or the excess beyond the quantity the defendants could supply from any other source: *Held*, that this instrument was properly declared upon as a covenant on the part of the defendants to supply the plaintiff with coal to the extent of five hundred tons weekly, unless unable from substantial cause. *Wood* v. *Copper Miners*, 7 C. B. 906.

33. Shortage on Coal, a defense to draft for its purchase money. It was agreed that in the course of the execution of a contract to deliver coal, drafts were to be drawn weekly on account; in a suit on one of such drafts the drawer may show subsequent non-performance of the contract, by failure to deliver the quantity agreed upon and deficiency in quality or condition as an equitable defense. *Eckel* v. *Murphy*, 15 Pa. St. 128.

34. Coal Sales—Notes running with the account. Where a mining operator sold his coal to a dealer who, under his contract immediately indorsed all notes received for sales to his customers, over to the operator as security: *Held*, that each note so indorsed was taken as security for the whole amount, including what coal had been or might be shipped; and that while any indebtedness existed from the dealer to the operator, payment of his note by the maker to the payee (the coal dealer) did not discharge the maker's liability thereon. *Hecksher & Co.* v. *Shoemaker*, 47 Pa. St. 249.

35. Timber to Coal Mine—Payment pro-rated on Mine—Production. By contract Schultz agreed to furnish the Wolf Creek Coal Company all the timber they should require at their mines during 1867; they to pay him eighteen cents on each ton of coal mined; and if the amount of coal mined fell short of 75000 tons, they were to pay the difference between the actual tonnage and the specified number of 75000 tons: *Held*, that the price agreed on by the parties for the fulfillment of the contract was eighteen cents per ton on 75000 tons; and that the eighteen cents paid on the tonnage not really mined was liquidated damages, and not a penalty. *Wolf Creek Co.* v. *Schultz*, 71 Pa. St. 180.

36. Colliery and Carrier—Coal season, Strikes, Evidence. Where a coal company contracted to deliver during a season to another party, a certain quantity of coal at a designated place, in monthly proportions, it is not necessary for such party in a suit against the company for non-delivery of the coal to prove that he called for the coal in such proportions; the company must show that they delivered or offered to deliver the coal according to their contract. *Rowland & Co.* v. *Lehigh C. & M. Co.*, 28 Pa. St. 215.

Although the contract contained a stipulation that the company was not to be liable for the non-delivery of coal arising from the happening of certain contingencies, such as

miners' strikes and mining accidents, yet the temporary existence of such contingencies would not release them, either in whole or in part, provided the company were able to perform after the contingency had ceased to exist. Id.

The rights of plaintiffs under the contract could not be affected by the customs or usages of other persons who purchase coal from the company, nor by the quantity delivered on other contracts during the same season, and evidence therefore of these facts was irrelevant and inadmissible. Id.

37. Coal Screener—Estoppel. Where a party purchased the right to use an alleged patented "machine for breaking and screening coal," and covenanted "to receive it as good and available to all intents and purposes; and that the transfer shall not be liable to any objection for any supposed defect in or objection to the said letters patent, if such supposed defect or objection should at any time arise," the vendee in an action for the price was estopped by his covenant from alleging the invalidity of the patent. *Heilner* v. *Battin*, 27 Pa. St. 517.

38. Coal Combination—Restraint of Trade. A combination of coal companies, by agreement to sell their coal under an organized system by which no one company could reduce the price independent of the other is in restraint of trade and void; and when under the regulations of the association of such companies a draft had been drawn by one company upon another and accepted, for the purpose of equalizing profits under their arrangement, a recovery thereon was properly disallowed. *Morris Run. Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173.

39. Sale of Coal—Time—Condition—Immediate Delivery. A sale of coal, as soon as it is delivered from the mines, upon a stipulation that it is not to bind if the coal company do not deliver it according to a certain proposal, which is to sell five hundred tons or more for immediate delivery, for a fixed price, and at a certain place, is conditional and mutual. *Neldon* v. *Smith*, 36 N. J. L. 148.

If the coal is received from the mines after the time named in the contract, the seller is not bound to deliver it, nor is the buyer bound to receive it. The buyer has not an option to take it for the price named in the contract. Id.

The term immediate delivery explained to mean, among coal shippers and dealers, a delivery within the present, or in some cases the succeeding month, and thus interpreted in this contract. Id.

Where the coal was accepted by the seller by a parol agreement with the company after the breach, and in settlement of damages claimed for the breach: *Held*, to be by way of accord and satisfaction, and not a delivery under the former contract. Id.

40. Tunnel — Parties — Prospecting. The owner of certain lodes engaged A. to run a tunnel to cut them, in consideration of an interest in the lodes to be transferred; A. sub-contracted with B. to run the tunnel, and in the meantime conveyed all his right to the lodes, or expected interest therein, to a corporation: *Held*, that neither the original owner of the lodes nor the company were necessary parties in the action of B. against A. for work done in running the tunnel. *Barber* v. *Cazalis*, 30 Cal. 92.

41. Measurement: "More or Less"—Pleading. A contract to run a tunnel (or drift) 180 feet, "more or less," is completed when 180 feet have been run. *Gerrens* v. *Huhn & H. S. M. Co.*, 10 Nev. 137.

Where on such a contract plaintiffs sued for 384½ feet, but did not aver that the additional feet were run at the instance of defendant, nor that the defendant had promised to pay for the same: *Held*, that the complaint did not state a cause of action. Id.

42. Tunnel Contract—Provisions. A company owning a quartz-ledge having contracted for the running of a tunnel to cut the same, promised the plaintiff to pay for provisions to be furnished the tunnel contractor, in case the contractor failed to reach the ledge, is bound upon such promise to pay, the tunnel being abandoned without reaching the lode. *Van Dusen* v. *Star Q. M. Co.*, 36 Cal. 571.

43. Time. Where an executory contract for sale of mines was accompanied by a covenant on the part of the purchaser to open them, and an extension of the time was alleged to be proved by certain letters produced: *Held*, that the court must determine as matter of law the effect of such letters, and whether they referred to an extension of all the terms of the contract, or related specially to an extension of time to open the mines only; Second. That an extension of time in general terms would relate to all the terms of the contract. *Luckhart* v. *Ogden*, 30 Cal. 547.

44. Time—Consideration depending on the Adventure. Benninger assigned the lease of a quarry to Hankee, who, at the same time, gave his note to pay "one year after date" to Benninger $500, on condition that the "quarry for the lease whereof this is part payment should be or become" worth $10,000: *Held*, that the sum was payable only if the quarry became worth $10,000 within the year; and that time was of the essence of the contract. *Benninger* v. *Hankee*, 61 Pa. St. 343.

45. Time — Construction — Directors securing payments. By a deed which recited that defendants, the directors of a mine company, had purchased a mine for £4500 to be paid within a twelve-month out of the moneys to be raised by the company, with a proviso that the directors shall be allowed six months further time in case the bankers of the company should not within the twelve months have received sufficient deposits from the subscribers to enable the directors to pay thereout; the directors covenanted that out of the payments so to be made by the subscribers, they would pay the purchase-money at the time specified, subject to the aforesaid proviso: *Held*, that the directors were personally responsible at the expiration of the eighteen months. *Hancock* v. *Hodgson*, 4 Bing. 269.

46. Carrier — Exchange of Stone between quarries. Plaintiff was engaged in transporting stone, and for his own convenience procured the owners of two separate quarries of stone of the same quality, to allow orders on quarry A. to be filled from quarry B. and *vice versa*, an equal quantity to be delivered from each. The owner of quarry A. demanded payment for the stone so delivered from his quarry and the carrier advanced it, whereupon the debt was assigned to him: *Held*, that it was a contract of exchange to be executed by the carrier, and not a sale, "for the carrying out of which" defendant was not shown to be responsible. *Wheeler* v. *Johnson*, 21 Minn. 507.

47. Stone Quarry Contract—Secreting Tools—Recoupment. Plaintiff contracted to quarry stone for defendants, defendants to furnish tools but plaintiff to keep them in order; the price per yard was agreed upon, but no quantity of stone was stipulated for. After plaintiff had opened the quarry and taken out considerable stone defendants dismissed him and took possession of the quarry, alleging that plaintiff was not getting out the stone fast enough for their purposes. In trial upon a *quantum meruit* it appeared that plaintiff when he quit work took away the defendants' tools, which were not found until after ten or twelve days. Defendants offered to recoup damages for expense in searching for the tools and wages paid to men who were compelled to remain idle for want of such tools: *Held*, that although the damages arose from a tort of the plaintiff, yet as it also arose out of the subject-matter of the contract, defendants should have been allowed to recoup such damages. *Brigham et al.* v. *Hawley*, 17 Ill. 38.

48. Hiring - Construction - Mutuality. - A workman entered into an agreement with a coal company to serve them as a collier, in consideration of wages to be paid to him fortnightly; and the company in consideration of such service, agreed that he should not be discharged without twenty-eight days notice in writing, unless in the case of misconduct: *Held*, that this contract necessarily implied an obligation on the part of the master to find work for the servant, and to pay him wages every fortnight; and, consequently, was not bad for want of mutuality. *Whittle* v. *Frankland*, 2 B. & S. 49.

49. Assumption of Miners' Wages and Supply Debts by vendees of iron works. — A debtor leased to others for a term of years certain furnaces and ore-banks, and also sold to the lessees the personal property around the works, the vendees at the time assuming to pay the claims of the workmen, and provision men against his lessor, for which they were to be allowed on the rent, which was reserved in pig metal, and on the purchase money of the goods. The vendees or lessees pnblicly assumed to pay the said claims, but before they paid the same, the plaintiffs, judgment creditors of the lessor, served garnishee process upon the lessees: *Held*, that the lessees were bound by their assumption of the old debts to workmen, etc., and as their assumption was prior to the service of the attachment, such debts must be paid, and the money to pay the same could not be attached to the prejudice of such parties whose debts had been so assumed: *Held*, that after their public assumption of all the debts incurred at the mine and furnace, each creditor of the lessor might severally maintain suit against the lessees. *Vincent* v. *Watson*, 18 Pa. St. 97.

50. From Month to Month. A contract of labor "from month to month," although continued more than a year, does not become a contract to work by the year. *Capron* v. *Strout*, 11 Nev. 304.

51. Oil Contract made before commercial value existed. An instrument purporting to be a grant or a license to take oil, drawn by an ignorant scrivener, and at a time when the nature or value of the mineral was not known, ought to be construed with reference to its subject-matter, and the knowledge of such subject-matter, at the time and as to its inartificial use of technical language, the whole scope of the paper is to be considered. Per Grier, J. *French* v. *Brewer*, 3 Wall. Jr., 346.

52. Promise to sell a mining set and promise to buy — Mutual Covenants — Failure of Title. To a declaration on an agreement setting out that "the plaintiff had agreed to sell, and that the defendant had agreed to purchase of the plaintiff one-

fourth share in a mining sett for £250; and that the plaintiff and the defendant agreed forthwith to form a company, to be registered with limited liability, for working the mining sett; and that, so soon as the company should be registered with limited liability for working the mining sett, the defendants would pay to the plaintiff the sum of £250, as thereinbefore stated; assigning as a breach non-payment of the £250; the defendants pleaded: first, that the plaintiff had not at the time of making the agreement, nor hath he now any title to the said one-fourth part or share in the said mining set, nor any right or title to convey the same; Secondly. That the plaintiff never has been at any time ready and willing to convey said one-fourth share to the defendant, according to the agreement: *Held*, that the covenants were dependent and the pleas good. *Marsden* v. *Moore*, 4 H. & N. 500.

53. Assuming Debt as consideration—Practice. Where a party purchased mining claims, agreeing, as part of the consideration, to pay the debt of his vendor to a third party: *Held*, that suit was rightfully brought against such purchaser by the third party in his own name. *Wiggins* v. *McDonald*, 18 Cal. 126.

54. To form Company and assign Property—Practice. A firm agreed to transfer all their effects, at an appraised valuation, to compose the capital stock of a manufacturing company when it should be formed, and to subscribe for its stock to the amount of the appraisement, the company agreeing to issue the stock therefor. On failure by the company to issue the stock the vendors could not sue for the sum at which the effects were appraised, but might recover such damages as they had sustained. *Weiss* v. *Mauch Chunk I. Co.*, 58 Pa. St. 295.

55. Liability of Organizers of Projected Company. A., B. and C., directors of a projected mining company, contracted in their own name with D. for the purchase of a mine, and after the purchase, as agents of the company but in their own names, entered into a further contract with D.: *Held*, that there being nothing to the contrary on the papers, A., B. and C. were personally liable. *Attwood* v. *Small*, 1 Man. & Ry. 246.

56. Third Party assuming Purchase Money—Dismissing suits, as consideration. Where a party had sold a coal mine and placed the vendee in possession, but under articles of agreement to pay the consideration in instalments; and the vendee being in default, the vendor brought ejectment for the land and estrepement to stay the further digging of coal, whereupon McKelvy, a third party, promised to pay the debt in consideration of the vendor dismissing his suits, and both suits were discontinued accordingly: *Held*, that the contract was made for good consideration, and that McKelvy was liable. *McKelvy* v. *Wilson*, 9 Pa. St. 183. *Held*, further, that after such promise to pay the leasing of the mine by plaintiff to a stranger did not release McKelvy. Id.

57. Compromise—Assuming Debts.—Where, in an action of ejectment between two mining companies, it was agreed that one company should take judgment for the mine in controversy, and in consideration thereof assume the debts of the surrendering company: *Held*, that such contract gave a right of action against the company taking the land to each of the creditors of the surrendering company. *Morgan* v. *Overman S. M. Co.*, 37 Cal. 534.

58. Agent—Gold Contract. Although a salary is payable in specie, and in California, where judgment upon such contract is by statute to be rendered for the amount due payable in the kind of money specified in the contract, yet in an action brought upon it in Massachusetts, judgment can only be rendered for the amount due, expressed in dollars. *Tufts* v. *Plymouth G. M.* Co., 14 Allen, 407.

59. Agency and Salary pending sale or company organization—Reasonable Time. If the owners of mineral lands enter into a written agreement with another person, reciting their purpose either to sell the lands or form a joint stock company for working the mines thereon, and promising, in consideration of services rendered, and to be rendered by him, to pay to him a certain sum "out of the proceeds of the sale of said lands, if the same shall be sold, or if the lands shall not be sold, and a company shall be formed for working the mines thereon," then to convey to him stock to that amount, "it being understood and agreed by and between the parties hereto that the foregoing amount, whether of cash or stock, is to be a charge on the joint estate" of the owners; and he, in consideration of the foregoing agreements, promises to remain in their service as long as they may require, not exceeding one year, for a salary of $100 per month, and a house and lot free of rent; the owners of the land are not bound to sell the same, or form a joint stock company, until, by the exercise of reasonable diligence, they are able to do so advantageously, having reference to the interest of all the parties, and until such sale or the formation of such a company, or the existence of some negligence on their part, he has no claim against them, except for stipulated salary. *Pinch* v. *Anthony*, 10 Allen, 470.

60. Superintendent — Salary — Time — Montana Practice. A party who is employed under a written contract as a superintendent of mines for five years, at a salary of $4000 per year, but in which no time for its payment is fixed, must perform services for the period of five years, before he can bring an action for any part of his salary. *Isaacs* v. *McAndrew*, 1 Mont. 437.

If a contract does not fix the time of a payment of a salary to a servant, who is to work for five years, at a certain salary per year, the law will establish such time at the end of five years. Id.

61. Assumpsit by Agent against non-subscribing adventurer — Married Woman. Assumpsit upon the common counts for services rendered in traveling and examining silver mines in Colorado. Plaintiff had been employed at $50 per week and expenses, according to proceedings attended by parties who had signed written articles of association. Merrill, the appealing defendant, concurred in the hiring, but had not signed the articles of association. Among those whose names had been signed was that of a certain *feme covert* by her husband, of whose authority to sign her name there was no proof: *Held*, that the name of such married woman was properly omitted as defendant, and that there was nothing to prevent persons who had not signed articles of association from being held upon a joint undertaking made by such persons along with those who had signed such articles of an unincorporated association. *Boyd* v. *Merrill*, 52 Ill. 151.

62. Gold Dust — Note payable out of Claim-Double Contract. By an instrument in the form of a promissory note, defendant agreed to pay a certain number of ounces of gold dust, or its value, with interest at five per cent. a month. Afterwards, the parties entered into a written agreement extending the time, reducing the interest, and placing mining claims in the hands of defendant, to get the gold dust: *Held*, that defendant was not released from his liability on the instrument, and that it was not a defense when so plead; whether it might be an equitable defense, or damages under it "set up as an offset," not considered. *Crieghton* v. *Vanderlip*, 1 Mont. 400.

63. Liability of Subsequent Purchaser on Coal Freight Contract. Certain individuals constructed a railroad twelve miles long, extending from a coal mine belonging to a coal company, to a station on the Illinois Central Railroad, and on the thirtieth of April, 1869, they sold the same to a railroad company, and turned it over to them, and on the same day the company purchasing turned it over to another railroad company. The last-named company operated the road in pursuance of the contract of sale between the first owners and the purchasers from them, for three years, complying with the terms of said contract as to rates of freight to be charged to the coal company for transportation of its coal. The individuals building and selling the road, and the coal company, were the same: *Held*, that the railroad company last purchasing, by taking the road and recognizing the rates of freight established by the contract of sale, adopted the contract and were bound by its terms, and that the coal company could maintain an action against them for a breach of it. *Chicago & A. R. Co.* v. *Chicago & W. C. Co.*, 79 Ill. 121.

64. Payments of Freight on sole outlet road from colliery, not voluntary. — In such case where the coal company had no other outlet for its coal, and the railroad company exacted more freight than by the terms of the contract they were entitled to, the coal company should be considered as under a kind of moral duress, and the payment by them of the freight demanded, under such circumstances cannot be considered voluntary, and they would have the right to sue upon the contract, and recover back the excess of freight paid over the contract rate. Id.

65. Pledge of Stock. The pledgee, as against a stranger to the pledgor and wrong-doer, who has converted the pledge, may recover its full value; for he is answerable over to the pledgor for any surplus in his hands; and if he recovers in such action, and the wrong-doer satisfies the judgment, he thereby acquires a title to the pledge. *Thompson* v. *Toland*, 48 Cal. 100.

66. Rules of Board of Brokers. The court will not notice a rule of the board of brokers, not a usage of trade, or allow it to control a contract when no charge of performance or want of performance appears upon the pleadings. *Goldsmith* v. *Sawyer*, 46 Cal. 209.

67. Construction of Subscription — Lease without rent — Bonus. The subscription book of oil adventurer's read: "We the undersigned promise to enter the number of shares set against our respective names, and to pay to" *defendants* "$100 for each and every share so subscribed;" *defendants* "hereby obligate themselves to lease to each and every shareholder for the period of thirty years" certain premises. Defendants upon this subscription tendered a lease reserving a royalty of the oil, and also the surface for agricultural purposes: *Held*, That the lease so tendered was no performance of the obligation of the subscription book; 2. That the consideration of $100

was to be regarded as an advancement of the entire rent for the term; 3. That the failure to tender such a lease as the contract called for within a reasonable time, made defendants liable to an action for money had and received. *Reddington* v. *Henry*, 48 N. H. 273.

Where the subscribers to an oil company signed a subscription book calling for a lease of the oil lands, and at the time a printed blank form of lease was on the table for inspection, but not presented as the form of lease intended in the subscription book, nor otherwise acted on: *Held*, that the subscribers were not bound to accept such lease, and the subscription book was not to be explained by the form of such lease. *Reddington* v. *Henry*, 48 N. H. 273.

68. Mining Pump—Damages—Recoupment. Where a manufacturer undertakes to deliver a pump designed to exhaust water from a mine, there is an implied warranty that in form and structure it shall be suitable for the purpose intended by the purchaser, and the law implies a warranty to that extent. In the case last mentioned, in case the article is defective or unfit for the use intended, the purchaser may bring his action for the recovery of damages, in case the article is defective, for a breach of the implied warranty; or if sued for the price of the article, he may set off his damages in such suit in diminution of the sum stipulated to be paid, and thus recoup from the plaintiff. *Getty* v. *Rountree*, 2 Chand. Wis. 29.

69. Way Leave—Operator working other coal—Intention. The owners of coal lands entered into a contract with a coal company, by which they sold all the coal, coal-oil and other minerals contained in the lands, to the company, and were to convey to the company ten acres of the land for about half its value, and in which the company agreed to sink a shaft to the depth of 230 feet, for the purpose of mining the coal, the owners agreeing that if a good vein of coal was not found within that depth, of sufficient thickness and of such quality as to justify mining the same, the land should be reconveyed to them, the price thereof refunded, and the owners should pay the entire expense of sinking the shaft; but, if the coal was found, the company was to pay the owners ten cents for each ton raised. After operating the mine under the contract for some time, the company sold out to another, who bought lands near the shaft, and proceeded to cut through to reach his own lands, intending after that to quit mining on those where the shaft was sunk: *Held*, on bill filed by the owners to restrain such purchaser from running entries from the shaft to his own lands, and to protect their rights, that the intention of the parties was, that the mining should be confined to the lands embraced in the contract, and that the purchaser, having notice of the contract, could not be allowed to abandon the complainant's land, and use the property conveyed, and the shaft, for the sole purpose of mining other lands, from which complainants would derive no profits. *Leavers* v. *Cleary*, 75 Ill. 349.

70. Ditch Co.—Materials to be paid for out of water sales. If lumber is furnished a ditch company under the agreement that it is to be paid out of the proceeds of the ditch of the company, and the proceeds have all been faithfully applied in payment, according to the agreement; the person who furnishes it is not entitled to recover the deficiency against the members of the company. *McConnell* v. *Denver*, 35 Cal. 365.

71. Stockholders acting for the corporate body—Option—Forfeiture—Conditional sale. A contract with the owners of the stock of a mining corporation, as parties of the first part, reciting that the parties of the second part are desirous of buying the stock and mines if the tests they make prove satisfactory, and shall take possession of the mine, and make improvements on it, and that the stockholders shall assign the stock to trustees, and that the parties of the second part shall pay at a time fixed a certain sum to the trustees for the stockholders and have the stock, but forfeit their improvements and redeliver possession if they fail to pay, accompanied by a resolution of the board of directors to convey the mine to the parties of the second part if the payment is made, merely gives the parties of the second part the option of purchasing, and by their failure to pay they lose the privilege of buying, but do not become liable for the amount they were to pay. *Gordon* v. *Swan*, 43 Cal. 564

72. Divisible Contract—Coal. A contract for the sale of a piece of land "also a tract of coal property;" for the land the vendee "agrees to pay $2500; $2000 to be paid on delivery of the deeds and possession of the property; the coal is to be paid for at the rate of half a cent. per bushel, payments to be made for the coal at the end of each year; vendee agrees to use at least a thousand dollars worth of coal at half a cent. a bushel each year:" *Held*, on its face to be a divisible contract, but that parol evidence was admissible that the land was necessary for vendee's enjoyment of the coal, and that it was the understanding at its execution, that the contract was entire. *Graver* v. *Scott*, 80 Pa. St. 88.

73. Exclusive Delivery. In a contract to deliver coal there was an article in which

defendant agreed to sell coal to no other party to come to a particular section of country. Treating this claim as illegal and void: it was *Held*, that the plaintiff could recover the price of coal delivered under the contract. *Arnot* v. *Pittston & Elmira Co.*, 2 Hun. (N. Y.) 591; 5 Thomp. & C. (N. Y.) 143.

74. Covenant running with the Land.—A court of equity cannot cancel a contract or covenant running with the land which was made at the time, and is inseparable from the conveyance itself. *Rutland M. Co.* v. *Ripley*, 10 Wall. 339.

75. Assignment—Defense to purchase money note. A note given to a mining company in payment for land which the company were to assure by "written contract," which "written contract" the company had failed to execute, when assigned to a party having knowledge of the facts, as collateral security, is subject to any defense which would be good against the original holder; and the averment of the facts stated constitutes a sufficient "affidavit of defense." *Bronson* v. *Silverman*, 77 Pa. St. 94.

76. Lex Loci—Aliens. Where money has been paid on account of the purchase of a foreign mine into the hands of foreign persons, the disposition of such fund (the purchaser dying before sale consummated), should be decided by the foreign tribunal. *Norris* v. *Chambres*, 4 Law Times N. S. 345; 7 Jurist N. S. 689; affirming S. C. 29 Beav. 246.

77. Excessive Loan—National Bank.—A mining company sued by a national bank for an overdraft cannot defend on the ground of the overdraft being a loan in excess of the amount to which banks are limited by section 29 of the national banking act. *Union G. M. Co.* v. *Rocky Mt. Nat. Bank*, 1 Col. 532; 2 Id. 248 and 565.

78. Penalty—Liquidated Damages.—The peculiar nature of mining considered in determining the question of penalty or liquidated damages. *Wolf Creek Co.* v. *Schultz*, 71 Pa. St. 180; *Powell* v. *Burroughs*, 54 Pa. St. 329.

79. Substitution—Pleading. When the North-west M. Co., which had been reorganized as the Pennsylvania M. Co. (the identity of the organizations being undisputed), had owed plaintiff $9378.28, for which plaintiff received the acceptances of the N. W. Co., and afterwards the Co. gave to plaintiff copper, which plaintiff was to sell, and from the proceeds retain $5743.08, in full satisfaction and payment of the entire debt, except "that in case the company should have anything left after settling their debts, or was ever able," it should pay plaintiff $3500; whereupon plaintiff sold the copper, retained $5743.08, gave up the balance. and surrendered the acceptances: *Held*, that this arrangement was a new contract, and abrogated the original liability, and that proof by the defendant of this new arrangement would defeat a recovery upon the old, nor could proof of the new, with the further fact of the present ability of the company, avail the plaintiff, who had declared only on the common counts. *Pennsylvania M. Co.* v. *Brady*, 14 Mich. 260; 16 Mich. 332.

80. Note and Agreement—Stamps. A note and an agreement to deliver stock made at the same time, each in consideration of the other, constitute one contract; and the note being stamped, no stamp is required on the contract. *Bowker* v. *Goodwin*, 7 Nev. 135.

81. Execution—Words below Signatures. Words added to a contract, following the signatures, may be shown by parol evidence to form parcel of the contract. *Verzan* v. *McGregor*, 23 Cal. 339.

82. Insolvent's Discharge—Contract to deliver shares. The discharge of an insolvent under the 1 and 2 Vict. c. 110, does not operate to release him from a claim for unliquidated damages for not redelivering mining shares pursuant to a contract for that purpose. *Owen* v. *Routh*, 14 C. B. 327; 2 Com. Law, 365.

83. Recital No Contract—Stamps.—An instrument amounting to an authority to the purser of a cost-book mine to enter a party's name on the books of the company, and *reciting the fact* of an assignment but not the assignment itself, does not require a transfer stamp. *Toll* v. *Lee*, 4 Ex. 230.

84. Seal. The presence of a seal will not prevent an inquiry into fraud in the contract; and a sealed obligation to secure a former contract will be avoided by the proof of the fraud in such contract. *Hazard* v. *Irwin*, 18 Pick. (Mass.), 95.

85. Practice—Subscription—Several Covenant. K. and B. being possessed of collieries, proposed to sell them by dividing them into eighteen shares of £4000 each, and certain parties, described as shareholders of a company about to be formed, agreed to purchase so many shares in them respectively as were set opposite their respective names. The deed by which the purchase was effected contained the following covenant: Each of them, the said K. and B., severally covenant with each of the said parties, his executors, etc., and each of the parties for himself, his heirs, etc.; and in respect of the shares set opposite his name, doth covenant with K. and B.: 1. That K. and B. should show a good title;

2. That they should effectually assign the premises; 3. That certain works should be completed by K. and B. with all speed: *Held*, First, that the covenant by K. and B. was a several covenant with each of the covenantors; Second, that one of the covenantors had such a general interest in the subject-matter as would empower him to sue alone on such several covenant. *Mills* v. *Ladbroke*, 13 L. J. C. P. 122; 7 Scott, N. R. 1005; 7 M. & G. 218.

86. Retroactive Legislation—Minerals under Church Lands. A contract for the sale of lands with their appurtenances, belonging to a rectory, was entered into under the 38 Geo. 3, c. 60, and 39 Geo. 3, c. 6, which enabled ecclesiastical corporations to sell lands for the redemption of land tax. Before the payment of the purchase-money into the Bank of England, as directed by the acts, and the execution of the conveyance, the 39 Geo. 3, c. 21, was passed, which enacted that all minerals under lands belonging to any ecclesiastical corporation which should be sold should be absolutely excepted and reserved, and that the provisions of this act should, in the execution of the former acts, be applied as if they had been specially enacted in those acts: *Held*, that the minerals passed to the purchaser. *Wilson* v. *Grey*, L. R. 3 Eq. 117.

CONVERSION.

1. Receipt of Royalty. Where a lead mine was leased upon a royalty payable in clean lead, the conversion was: *Held*, complete upon the receipt of the royalty, and a sale is not necessary. *Denys* v. *Shuckburgh*, 4 Y. & C. 42.

CONVEYANCE.

1. Bill of Sale. A bill of sale of a mining claim not under seal cannot convey the legal title to a mining claim. *Clark* v. *McElvy*, 11 Cal. 160.

2. Parol Sale of Claim. A *bona fide* parol sale of a mining claim, accompanied by a delivery of possession, is valid as against a subsequent sale of the same grantor made by deed in writing duly acknowledged. *Patterson* v. *Keystone M. Co.*, 23 Cal. 575.

3. Verbal Sale without Transfer of Possession. The rule allowing mining claims to be transferred by a verbal sale and delivery of possession only applies to cases where the grantor is in actual possession, and can deliver possession to the grantee; and does not extend to cases where, at the time of the sale, the claim is in the adverse possession of third parties. In such cases, there must be a written conveyance to pass the title. *Copper Hill M. Co.* v. *Spencer*, 25 Cal. 18.

4. Bill of Sale—Statutory Control.—The provision contained in the first section of the act of April 13, 1860 (Stat. 1860, p. 175), that "conveyances of mining claims may be evidenced by bills of sale or instruments in writing under seal," is mandatory, and it was intended that the method of conveying such property therein prescribed should exclude transfers by verbal sale, even though accompanied by a delivery of possession. *Felger* v. *Coward*, 35 Cal. 650.

See DEED.

COPYHOLD.

1. Copyholder must prove custom. In lands held by copy of court roll, not at the will of the lord, but according to the custom of the manor, the freehold is in the lord, and in the absence of custom (the onus of establishing which lies upon the tenant), the tenant has no right to work the minerals. *Portland* v. *Hill, L. R.*, 2 Eq. 765.

2. Custom. Neither the customary tenant without the license of the lord, nor the lord without the consent of the tenant, can open new mines, in the absence of custom to such effect. *Winchester* v. *Knight*, 1 P. Wms. 406.

3. No right without custom—Trespass. The lord of the manor has no right, as such, without a custom, to enter upon the copyholds within his manor to bore for and mine the coal under the same; and the copyholder, may maintain trespass against him for so doing. *Bourne* v. *Taylor*, 10 East. 189.

4. Laches, Injunction, Accounting.—When the lord of a manor who claims against the tenants the right of property in the mines, has stood by for a long period, and allowed the tenants, without objection, to work the mines, and to expend large sums of money upon their mining operations, the court will not assist him by decreeing either an injunction or an accounting, but will leave him to his legal remedy. *Parrott* v. *Palmer*, 3 Myl. & K. 632.

5. Reservation of Minerals Implied.—After the passing of the Copyhold Act, 1841, and the Copyhold Act, 1852, but before the Copyhold Act, 1858, an agreement was entered into for the sale of a copyhold estate, together with the timber "and all appurtenances to the same hereditaments belonging," as soon as the same should become freehold, under an agreement of the vendor to use his best endeavors to enfranchise. An enfranchisement was effected under the second act, reserving the minerals to the land: *Held*, that the contract had reference to the fact that those acts usually contained reservations of min-

erals, and the fact that minerals could not be included in such enfranchisement, unless made the subject of express stipulation. *Kerr* v. *Pawson*, 25 Beav. 394.

CORNWALL.

1. Crown Interest—Evidence. On account of the interest the crown has in the duchy of Cornwall, all acts which affect the possessions or revenues of the duchy are to be considered as public acts, and on this ground a document purporting to be a caption of seisin taken to the use of the first duke of Cornwall, by certain persons assigned by his letters patent to do so, was received in evidence to show the rights of the duke. *Rowe* v. *Brenton*, 8 B. & C. 743; 3 Man. & Ry. 133.

The enrollment of a lease of mines granted by the duke of Cornwall is evidence, in the same manner as if it had been granted by the crown when there is no duke of Cornwall.

2. Custom of Cornwall—Renewals.—The conventionary tenants within the assessionable manors of the duchy of Cornwall, have a perpetual indefeasible right to them and their customary heirs and surrenderees, to renew their estate from seven years to seven years, and to the minerals, if there be a usage to that effect. Id.

CORNWALL ORE BANKS.

1. Cases. For cases relating to the "Cornwall Ore Banks" and "Mine Hills," described as a superficial deposit of iron and copper ores mined or quarried as a solid mass, and owned by tenants in common, working separately. See Coleman's Appeal, 62 Pa. 252; Grubb's Appeal, 79 Id. 120; 66 Id. 117; *Coleman* v. *Coleman*, 19 Id. 100; *Coleman* v. *Blewett*, 43 Id. 178; *Blewett* v. *Coleman*, 40 Id. 45; *Coleman* v. *Grubb*, 23 Id. 393; *Grubb* v. *Bayard*, 2 Wall, Jr., 91; *Grubb* v. *Guilford*, 4 Watts. 223; *Grubb* v. *Grubb*, 74 Pa. 25; see Table of Cases.

CORPORATIONS.

A. Organization.

1. Taking grant before organization.—A corporation may take real estate by grant before it has such an organization by the election of officers, etc., as to enable it to enter upon the transaction of general business. *Vermont M. & Q. Co.* v. *Windham Bank*, 44 Vt. 489.

2. Cause of Action arising before incorporation. Thompson contracted to buy an interest in two oil wells; afterward, an oil company was incorporated, to which Thompson transferred his interest, the vendors in the meantime receiving and selling the oil. By agreement, the vendors made the deed to the corporation, and dated it back to the date of the contract, agreeing to deliver Thompson's share of the oil to the company: *Held*, that these facts constituted an original contract between the vendors and the company; and that *assumpsit* could be maintained by the company in its own name for oil received between the time of the contract and the incorporation. *Snow* v. *Thompson Oil Co.*, 59 Pa. St. 209.

3. Agreement between Organizers.—Where two brothers, contemplating the formation of a private corporation, purchased certain coal lands and mining rights, and agreed when the purchase was made that they were to have an equal interest in the stock of the company and to make equal payments on account of the purchase and for carrying on the business; and after the incorporation one of them advanced various sums of money in payment of drafts of the corporation, and in taking up its indebtedness, for which he was credited upon the books of the company: *Held*, in a suit against the corporation to recover such advances, that the agreement was intended only to bind each brother to advance equal amounts as loans and not as donations, and even if this were not so, that the corporation could not set up the agreement as a defense, as it was no party thereto; the court could only look to the legal liabilities of the company. *Merrick* v. *Peru Coal Co.*, 61 Ill. 472, S. C. 79 Id. 113.

4. Contract as to organization—Equities between Corporators disregarded.—In a suit by an individual against a corporation for money alleged to be due from the defendant to the plaintiff, the defendant sought to prove that, before the organization of the corporation defendant, a contract was entered into between the plaintiff and his brother that they would advance equal amounts for the purchase of property and carrying on the business of the corporation; that they would purchase and hold stock in the corporation in equal amounts; that, if one advanced more than the other, the one advancing the lesser sum should pay to the other such sum as would make their advances equal, and that the money sued for was advances made by the plaintiff in pursuance of this agreement: *Held*,

that the corporation was not a party to this agreement and had no concern with it; that the court could look alone to the legal liabilities of the corporation, without regard to the equities between the plaintiff and his brother, and that the evidence was properly excluded. *Peru Coal Co.* v. *Merrick*, 79 Ill. 112. See *Merrick* v. *Peru Coal Co.*, 61 Ill. 472.

5. Organizer conveying mine—Resulting Trust. When one conveys all his interest, say 137½ feet, in a mining company's claim, to trustees to form a corporation, in trust that he is to receive shares in the corporation equivalent to his number of feet in the claim, and afterward conveys the same feet to another party with warranty of title, the last grantee takes an equity, and is entitled to the shares to be issued in lieu of these feet. When, in such case, the company had issued the stock to the last grantee, or the party equitably entitled thereto, the court should not compel them to issue to another, especially when that other can only show his claim by proving his own fraud. *O'Meara* v. *North American M. Co.*, 2 Nov. 113.

6. Definition of "Corporators." The "corporators" of an incorporation are the stockholders, not the trustees. *In re Lady Bryan M. Co.*, 2 Abb. C. C. 527.

7. Inception of Legal Existence. Corporations in California have a legal existence from the date of filing their certificate of incorporation in the office of the county clerk. *Mokelumne Hill Co.* v. *Woodbury*, 14 Cal. 424.

8. Commencement—First Meeting. A corporation exists under the Gen. Sts. c. 61, sec. 1, so as to be able to contract debts as soon as its first meeting has been held and its officers have been chosen, if not immediately upon the signing of the articles of association. *Hawes* v. *Anglo Saxon Petroleum Co.*, 101 Mass. 385.

9. Proof of Organization or Charter.—To establish the existence of a corporation *de facto*, a charter or some law under which the assumed powers are claimed to be conferred, and user of the franchise thereby obtained, must be shown. *Abbott* v. *Omaha Smelting Co.*, 4 Neb. 416.

The existence of a corporation (mining), found under a general statute requiring certain acts to be done before the corporation can be considered *in esse*, when denied, must be proved by showing at least a substantial compliance with the requirements of the statute. *Mokelumne Hill Co.* v. *Woodbury*, 14 Cal. 424.

But as to such acts as are not made prerequisites to the assumption of corporate powers, the corporation is responsible only to the government in a direct proceeding for forfeiture; and of this class is the fact that a duplicate certificate has not been filed in the office of the secretary of State. Id.

10. Filing Certificates Statutory Organization. The signing of articles of association by parties proposing to form a manufacturing corporation, does not create such corporation; the subscribers must also make, sign, and acknowledge the certificate of incorporation prescribed in section 1 of the act for the incorporation of manufacturing corporations, and must file the same in the recorder's office of the proper county, and a duplicate thereof in the office of the secretary of State. Unless these steps have been taken, the corporation has no legal existence. *Indianapolis Furnace M. Co.* v. *Herkimer*, 46 Ind. 142.

11. Certificate of Incorporation—Naming Trustees. The statute of Nevada requiring certificates of incorporation of mining companies to state the names of trustees who shall act for the first six months, implies necessarily that a new election must be held at the expiration of such period, or within a reasonable time thereafter, notwithstanding the section allowing the time of annual election to be fixed by the by-laws (*mandamus.*) *Flagg* v. *Lady Bryan M. Co.*, 4 Nev. 401.

12. Certificate, not Acknowledged.—The certificate of incorporation of a company claiming in good faith to be a corporation under the laws of this State, and doing business as such corporation, is admissible in evidence in a private suit to which the company is a party, as evidence of its right to act as a corporation, although it is not acknowledged by all the corporators. *Dannebroge G. Q. M. Co.* v. *Allment*, 26 Cal. 286.

13. Incorporation, Pennsylvania. A charter for a mining company desirous of being incorporated under the act of April 21, 1854, should set forth that the parties are in possession of mineral lands, and give a description of them. The petitioners should also produce evidence of the truth of such allegations. *In re Lancaster Mining Co.*, 30 Pa. St. 151.

The act of July 18, 1863, does not require corporators to become subscribers to stock; they need not have an interest in the company, and are mere instruments of the law for organization. *Densmore Oil Co.* v. *Densmore*, 64 Pa. St. 43, B. & W. L. C. 370.

14. Filing Articles, Nebraska. In Neaska, the filing of articles of incorporation with the county clerk is a condition precedent to the existence of any corporate franchise. The law and articles so filed,

taken together, are considered in the nature of a grant from the State, and constitute the charter of the company. *Abbott* v. *Omaha Smelting Co.*, 4 Nebr. 416.

15. West Virginia. Notwithstanding the erection of the State of West Virginia, a corporation previously created by the State of Virginia continued to be a corporation of Virginia so long as it did not become affirmatively a corporation of West Virginia by complying with the provisions of the act of the legislature of West Virginia. *Kanawha C. Co.* v. *Kanawha & O. C. Co.*, 7 Bl. C. C. R. 391.

16. Organization—Nul tiel corporations. As to the plea of nul tiel corporation where a corporation has not complied with the statutory requirements as to organization, and the burden of proof in such case, see *Indianapolis F. & M. Co.* v. *Herkimer*, 46 Ind. 142.

17. Collateral attack. The right of a company, doing business as a corporation *de facto*, and claiming in good faith to be a corporation under the laws of this State, to act as a corporation cannot be inquired into collaterally in a private action to which the corporation *de facto* may be a party. *Dannebroye G. Q. M. Co.* v. *Allment*, 26 Cal. 286.

If there is any defect in the proceedings for the organization of a corporation, or any abuse of its powers, or of the statute authorizing the formation of corporations under general or specific laws, the question is one of law, and it is for the State alone to take steps to dissolve such corporation, or forbid the exercise by it of corporate rights and franchises. *Doyle* v. *Peerless Petroleum Co.*, 44 Barb. 239.

18. Nul tiel corporation. It cannot be shown in a collateral proceeding that a corporation (mining) has forfeited its charter. *Crump* v. *U. S. M. Co.*, 7 Gratt. (Virg.) 352.

19. Defective Charter — Legislative Recognition. Defects in the proceedings to incorporate a company are cured by the subsequent recognition of the existence of the corporation by the legislature of the State under whose authority it claims to have been incorporated. *Kanawha C. Co.* v. *Kanawha & O. C. Co.*, 7 Bl. C. C. R. 391.

When a company had attempted an organization for both mining and manufacturing purposes, and their charter had been subsequently recognized by the legislature by the passage of an act amendatory thereto: *Held*, that such act of the legislature cured the defect, if any existed, and rendered the incorporation valid, *ab initio*. *Basshor* v. *Dressel*, 34 Md. 503.

20. Creditor—Regularity of Proceedings. It is not incumbent on a person lending money to a joint stock company, to ascertain that all the proceedings of the company and its shareholders, *inter se*, have been strictly regular. *Bank of Australasia* v. *Willan L. R.*, 5 P. C. 418.

21. Estoppel of Trustees as to Organization.—The trustees of a corporation who signed the certificate of incorporation, and accepted the office of trustees, are estopped from denying the validity of the act of incorporation. *Parrott* v. *Byers*, 40 Cal. 614.

22. Void Charter. The certificate of a ditch and mining company which does not set forth the name of the city or town and county in which its principal place of business is to be located, does not establish the existence of a corporation. *Harris* v. *McGregor*, 29 Cal. 124.

23. Name. Instance of the exercise of mining franchises under a corporate name indicating other purposes, *e. g.* "The Stanhope and Tyne Railway Company." *Ex parte Harrison*, 3 Mont. & Ayr. 506.

24. Misnomer. The omission of the word "Mining" in the name of the "Sierra Buttes Quartz Mining Company," in an assessment roll: *Held*, not a fatal discrepancy. *People* v. *Sierra Buttes M. Co.*, 39 Cal. 511.

25. Assumption of Corporate Name—Usurpation of Franchises. To *assumpsit*, charging the defendants as partners in a company called the Anglo-American Gold Mining Association, upon a contract entered into with the plaintiffs by three individuals (one of them being one of the defendants), as agents for and on behalf of the company, one of the defendants, J. L. H., pleaded that the company or association in the declaration mentioned, was an illegal company, presuming to act as a corporate body without any authority by charter or act of parliament, and also presuming to raise transferable and assignable stock and capital to an unlimited amount, transferable at the discretion of the holders, to the common nuisance of the subjects of the queen, and a further plea containing similar allegations, and adding that at the time of the formation of the company no gold mines had been discovered, and that the objects of the company were fanciful, visionary and fraudulent, tending to the common nuisance, etc., of the queen's subjects: *Held*, that the mere circumstance of the defendants' having called themselves "The Anglo-American Gold Mining Association," and professing to have stock transferable at the will of the holder, subject only to certain regulations as to registering transfers and proof of title, did not show the association

to be a nuisance and public grievance at common law. *Harrison* v. *Heathorn*, 6 Scott N. R. 735; 12 J. C. P. 282.

26. Reorganization — New Company. The stockholders of one or more corporations may form a new company, and the property of the old corporations may be conveyed to the new corporation. *Miners' Ditch Co.* v. *Zellerbach*, 37 Cal. 543.

27. New Company succeeding to Liabilities. H. owns or controls all the stock of the B. corporation, and he contracts with third persons to obtain a charter for another corporation, of which they shall be the corporators, and to transfer to the new corporation all the stock, and convey all the real estate and other property (except slaves) of B., as also some real estate of his own. The charter is obtained, and the stock is transferred, but there is no conveyance of real estate; but the new corporation takes possession of it and holds it as its own. The new corporation is the successor of B., and takes the property, subject to pay the debts of the corporation of B. to the value of the property received. *Barksdale* v. *Finney*, 14 Grattan, 338.

28. Consolidation. A person once entitled to stock can only be deprived of it by transfer, or by such forfeiture for non-payment of lawful assessments as is authorized by law; and a stockholder in one of two mining companies which are consolidated, becomes, by the consolidation, under the statute (Comp. L. 1871, sec. 2892–5), a stockholder in the new company. *People* v. *Minong M. Co.*, 33 Mich. 2.

29. Oil Company — A Manufacturing Corporation. A corporation organized under the Gen. Sts., c. 61, for the purpose specified in the articles of association, of refining and preparing for use, oil, coal, and other minerals, is a manufacturing corporation, within the meaning of the St. of 1862, c. 218, without regard to what other purposes are also specified. *Hawes* v. *Anglo-Saxon Petroleum Co.*, 101 Mass. 385.

30. Seal — Trading Corporation. An incorporated mining company contracted with an engineer for the erection of a pumping engine and machinery for use in a colliery. The contract was not under seal: *Held*, that the rule requiring a corporate seal does not apply to trading corporations contracting with regard to the purpose for which they were formed. That the present was such a case, and the contract was valid. *South of Ireland C. Co.* v. *Waddle*, L. R. 4 C. P., affirming S. C. 3 Id. 463.

31. Frostburg Company Charter. Charter of the Frostburg Coal Company of Maryland, construed. *Frost* v. *Frostburg C. Co.* 24 How. 278.

B. Officers and Agents.

32. Acceptance of Office. When it is shown that a person has been elected a trustee of a corporation, his acceptance will be presumed. *Nimmons* v. *Tappan*, 2 Sw. (N. Y.) 652.

33. Officers de facto. The acts of the *de facto* officers of a mining corporation are valid whenever they concern third persons who had a previous right to demand the act, or had paid a valuable consideration for it. *Savage* v. *Ball*, 17 N. J. Ch. 143.

34. Forcible Intrusion. A forcible intrusion will prevent an officer being considered as an officer *de facto* of a mining corporation. *State* v. *Curtis*, 9 Nev. 325.

35. President, purchasing Realty — Ditches. Where a corporation is engaged in the business of conveying water through ditches for sale to miners, a purchase of additional ditch property, with a view of extending the operations of the company, is not a matter within the ordinary course of business of such corporation, and its president, as such, has no authority to bind the corporation by a contract for such purchase. *Blen* v. *Bear River & A. W. & M. Co.*, 20 Cal. 602.

36. President, sale by. The president of a corporation is not, *ex officio*, the agent of the corporation to sell property, and unless appointed its agent to sell, his representations are not binding upon the company. *Crump* v. *U. S. M. Co.*, 7 Gratt. (Va.) 352.

37. Assignment to President. A corporation having operated iron works assigned the same to its president: *Held*, that it continued liable to all who had previously dealt with it through its agents and who continued to deal in the same way without actual notice. *Conro* v. *Port Henry Iron Co.*, 12 Barb. 27.

38. Lease to President, void. Where a corporation, incorporated for the purpose of manufacturing iron in all its branches, in pursuance of a resolution of its stockholders, made a lease of its iron works and all its property to its president, who owned the majority of its stock, for a period of two years and a half, and the business of the corporation was carried on by the lessee in the same manner as before the lease was given, without notice to persons dealing with it of any change, until the failure of the lessee and his assignment of the property for the benefit of creditors: *Held*, that the lease was void for two reasons: 1. Because it was the act of the stockholders and not of its directors, by whom alone the corporation could act; 2. Because the effect of such lease was to suspend the ordi-

nary business of the corporation for the period of more than one year, and thus amounted to a surrender of its rights, privileges and franchises, within 2 R. S. 463. *Conro* v. *Port Henry Iron Co.*, 12 Barb. 27.

39. Presumptive good faith of President—Letters. To establish that S. was the agent of the corporation defendant, the plaintiff offered letters written by the president of the corporation to S., in which he was addressed as superintendent of the company, and the affairs and prospects of the company were discussed. It was shown that the president, for a considerable time before this, and afterward, had assumed general authority in the affairs of the corporation, the control of its property, payment of its debts and the management of its law suits: *Held*, that the letters were admissible without direct evidence of authority to write them, the presumption being indulged that the president was acting the part of a faithful executive, and with the knowledge and assent of the corporation. *Union M. Co.* v. *Rocky Mt. Bank*, 2 Colorado, 248, 565; S. C. 1 Id. 531.

40. President Undertaking to Call Meeting, a Contract. An undertaking of the president of a corporation to bring before the board of directors at a time specified, a demand against the corporation for money borrowed by an agent of the corporation, is within the scope of his authority as president and the corporation, is bound to consider the demand at the time specified. Id.

41. Declarations of President. Distinction between declarations of president of a company when acting as authorized agent of the company, and when not so authorized. Id.

42. Authority of President to Ratify Contracts. The superintendent of a mining company has no authority, by virtue of his office merely, to borrow money, on the credit of the corporation. The president of the corporation has no authority, as such, to undertake in the corporate name, for the repayment of such an unauthorized loan. Id.

43. President, Debts incurred by.— The president of a private corporation has no authority by virtue merely of his official position, to make contracts binding the corporation, except in relation to matters arising in the ordinary course of the business of the corporation. *Blen* v. *Bear River & A. W. & M. Co.*, 20 Cal. 602.

44. Board of Trustees. The trustees of a corporation can only bind it when they are together as a board acting as such. *Hillyer* v. *Overman S. M. Co.*, 6 Nev. 51.

The corporate powers of a corporation can be exercised by the trustees only when duly assembled and acting as a board. *Gashwiler* v. *Willis*, 33 Cal. 11.

45. Powers of Board of Trustees.— The board of trustees of a corporation may control the corporate property within the limit that the law has assigned to the exercise of corporate authority. *Wright* v. *Oroville M. Co.*, 40 Cal. 20.

46. Power of Trustees Exclusive.— Where the corporate powers are vested in a board of directors or trustees, the proceedings of a stockholders' meeting cannot be shown to establish a disavowal by the corporation, of the acts of one who, without authority, has assumed to contract for it. The delegation of power to the trustees is exclusive. *Union M. Co.* v. *Rocky M. Bank*, 2 Colorado, 565, 248; S. C. 1 Id. 531.

47. Trustees, Deed of. The individuals who are the trustees of a corporation, in their official character as trustees, when not acting as a board, have no authority independent of that conferred by the corporation, to execute a deed of the corporate property. *Gashwiler* v. *Willis*, 33 Cal. 11.

48. Trust relationship of officers. Directors and managers of corporations and other companies, are within the rule which governs the dealings of trustee and *cestui que trust*, and agent and principal; such directors and managers are in fact trustees and agents of the bodies represented by them. *Cumberland C. and I. Co.* v. *Parish*, 42 Md. 598.

In the case of directors of a corporation, there is an inherent obligation implied in the acceptance of such trust, not only that they will use their best efforts to promote the interest of the shareholders, but that they will in no manner use their positions to advance their individual interest as distinguished from that of the corporation, or acquire interests that may conflict with the fair and proper discharge of their duty. Id.

49. Director a Trustee. A director of a corporation is an agent or trustee for the stockholders, and as such is held to the obligations of fiduciary relations. *Cumberland Co.* v. *Sherman*, 30 Barb. (N. Y.) 553.

50. Directors, power in. The directors of a corporation, unless expressly restrained, either by the charter or the by-laws, may exercise the ordinary powers of the corporation. *Wood Hydraulic H. M. Co.* v. *King*, 45 Ga. 34.

51. Authority of Directors to purchase. What is sufficient evidence of authority of directors of a mining company to purchase real estate, considered. *Moss* v. *McCullough*, 7 Barb. 279.

52. Contract of Director with. A director of a corporation is not prohibited

from lending it moneys when needed for its benefit and the transaction is open; nor is his purchase of its property at a fair sale, under trust deed securing his loan, an invalid transaction. *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587.

53. Removal of Directors. One who is named as a director, in the articles of incorporation, and who has acted as such, cannot be removed by parol or by the individual action of other directors and the proceedings by the board without notice, to declare the office vacant, are without jurisdiction. *People* v. *Minong M. Co.* 33 Mich. 2.

54. Promise of officer to pay corporate debt—Pleading—Personal Liability. Evans declared against a corporation and its president and secretary, jointly, but showed no evidence of a joint contract by the defendants, nor of any relation, except that the plaintiff having mined for the company, the president told plaintiff he would see him paid for it: *Held*, that the action could not be maintained; that the promise of the officer, if it created any contract at all, made a contract of suretyship, and created no joint liability upon the contract of the corporation. *Youghiogheny Shaft Co.* v. *Evans*, 72 Pa. St. 331.

Held, further, that the personal liability of stockholders could not be enforced in *assumpsit*. Id.

55. Compensation to officers—Usage. In an action against a mining corporation by one of its members upon an implied contract for the value of his services as secretary, it is competent for the defendant to show that by the usage and custom of the corporation, no compensation was chargeable for such services. *Fraylor* v. *Sonora M. Co.*, 17 Cal. 594.

If such usage existed, plaintiff's position as a member and officer of the company would *prima facie* charge him with a knowledge of its existence, and the inference would be that he accepted the office and performed its duties without expecting compensation. Id.

56. Salary to President. Unless provision is made in the by-laws or resolutions, for compensation to the president of a mining corporation, he cannot recover for his services. *Merrick* v. *Peru Coal Co.*, 61 Ill. 472; S. C. 79 Id. 113.

57. Extra pay to Secretary. The secretary of a private mining corporation at a fixed salary cannot recover extra pay for services in that capacity. *Carr* v. *Chartiers Coal Co.*, 25 Pa. St. 337.

58. Promissory Note—Director. The authority of a director of a mining company (partnership) to draw a bill of exchange, or promissory note, binding upon his partners, is not implied, and must be proved. *Dickinson* v. *Valpy*, 10 B. & C. 128; S. C. 5 M. & R. 126.

59. Note by Superintendent. The superintendent of a mining corporation cannot bind his company by a promissory note where he is not authorized by his company to make notes. *Carpenter* v. *Biggs*, 46 Cal. 91.

60. Overdraft by Agent—Estoppel. A corporation whose agent has obtained money by overdraft at a bank, and applied it to the purposes of the company, is estopped to deny its power to borrow money in an action by the bank to recover the loan. *Union G. M. Co.* v. *Rocky Mt. Bank*, 2 Colorado, 248; S. C. Id. 565; 1 Id. 531.

61. Agent may make Affidavits. Where an affidavit is required in support of legal proceedings, the agent of a mining corporation is a proper party to make the same on behalf of his principal. *Barrett M. Co.* v. *Tappan*, 2 Colorado, 124.

62. Notice to Agents. Notice to the agent of the corporation is notice to the corporation itself. *Conro* v. *Port Henry Iron Co.*, 12 Barb. 28.

63. Notice through its officials. Notice to the president of a mining corporation of the acts of one who, without authority, has assumed to act for it, is notice to the corporation itself, and when sought to be made liable through a ratification by silence, it will not be heard to say that the president in receiving the notice was acting in his individual capacity, and not officially. *Union M. Co.* v. *Rocky Mt. Bank*, 2 Colorado, 248, 565; S. C. 1 Id. 531.

64. Ratification of officer's accounts. A mining corporation which accepts a person as treasurer, and ratifies and audits his accounts, in which a balance appears against the corporation, is bound by the admission as a private person would be under the same circumstances. *Wood Hydraulic H. M. Co.* v. *King*, 45 Ga. 34.

65. Account—Usury money credited to Treasurer. Interest beyond the legal rate paid by the treasurer of a mining corporation, under its authority, or subsequent ratification, may be recovered by him from the company. *Wood Hydraulic H. M. Co.* v. *King*, 45 Ga. 34.

66. California Acts of 1850 and 1872. The act of March 21, 1872, entitled "An act supplemental to an act entitled an act concerning corporations, passed April 22, 1850," providing for the removal of the

board of directors of a corporation applies to mining corporations. *In re Boston M. & M. Co.*, 51 Cal. 624.

The language of the act being plain, its title cannot be used to restrain that language. Id.

C. Stock and Stockholders.

67. Capital Stock — Distributing to Stockholders. Any arrangement which will have the effect to withdraw the capital of an incorporated company, and turn it over to the stockholders, except in the manner prescribed by law, is in violation of that provision of the statute which forbids the trustees to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, and is void as to any creditor of the corporation, either prior or subsequent, who had no notice of the arrangement at the time of giving the credit. *Martin* v. *Zellerbach*, 38 Cal. 300.

By capital stock, the statute intends the capital of the corporation on which it transacts business, whether such capital consists of money, property, or other valuable commodities. Id.

68. Discoverers Incorporate—Error in Issue of Stock—Measure of Damages.— Where the locators of a mining claim and their assigns consolidated their interests, and conveyed to the trustees of a corporation, which corporation was to issue shares of stock to the parties who thus conveyed in proportion to the number of feet each had conveyed, and an error was made in the distribution of shares, the discoverer not being allowed for his additional claim, so that the others received more and the discoverers received less than their respective claims in feet entitled them to: *Held*, that the corporation was bound to purchase shares and transfer them to the discoverer, or pay him their value or issue new shares to him, unless the full quota had been issued: *Held*, further, that the shares wrongfully issued to the other parties in excess of their proportion, were not invalid: *Held*, also *(obiter)*, that the measure of damages would be the value of stock at date of decree, this being a case of mistake, and not the act of a willful wrong-doer. Where the ownership of the additional claim by the discoverer at the time of such consolidation is admitted, it would require clear and positive evidence to show that he waived or relinquished his right thereto, or allowed it to be merged on equal terms with the claims of others who had no additional rights as discoverers. And where in such case one witness declares that the discoverer assented to the division of his additional claim among the company, and another testified that he objected to such division, it was held his assent to such division was not proved. *Smith et al.* v. *N. A. Min. Co.*, 1 Nev. 424.

69. Estoppel—Stockholder—Organization. Until the statutory requirements to organize a corporation have been complied with, a subscriber to the articles of association is not estopped to deny the existence of the corporation. *Indianapolis Furnace & M. Co.* v. *Herkimer*, 46 Ind. 142.

70. Relations of Stockholders to Directors and Corporation. Directors are but the agents of the company, and have power to act only for the interest of the company—not against it. *Simons* v. *Vulcan Oil Co.*, 61 Pa. St. 202.

The shareholders constitute the company, and the acts of the directors may be inquired into at their instance. Id.

71. Personal liability for calls. The act of July, 1863, for incorporating mining companies, does not make a transferee of stock personally liable to pay assessments. *Franks Oil Co.* v. *McCleary*, 63 Pa. St. 317.

No implication of a personal promise to pay assessments arises against the transferee, nor does his voluntary payment of one assessment imply a promise to pay the others. Id.

The company can indemnify themselves only by a sale of the stock and pursuit of the original subscribers. Id.

72. Shares transferable by delivery—Usurpation of franchises. A company was established in 1835 for the purpose of advancing money to mine owners on the produce of mines in Mexico, upon terms contained in the prospectus, which placed its affairs under the management of individual directors, but contained no provision as to the transfers of shares. The certificates of shares purported to give the holder a title to the shares, which accordingly were treated as transferable by delivery of the certificates: *Held*, that the having shares transferable by delivery was not such an assumption of a corporate character as to make the company illegal. *In re Mexican & S. A. Co.*, 4 De G. & J. 544; 28 L. J. Ch. 769.

73. Ultra Vires—Canceling Shares. It is not *ultra vires* for a mining company to agree to cancel the shares of a member if such power is provided for in the articles of association. *Marshall* v. *Glamorgan Iron & C. Co.*, L. R. 7 Eq. 129.

74. Surrender of Stock. A corporation cannot reduce its capital stock, under the provisions of ch. 134, sec. 6, Gen. Stats., by purchasing the shares of any stockholder. In order that such reduction may operate justly to all the stockholders, each stock-

holder should be allowed to surrender such proportion of his stock as the amount of the proposed reduction bears to the whole amount of capital stock. *Currier* v. *Lebanon Slate Co.*, 56 N. H. 262.

75. Equity Jurisdiction between corporation and stockholder. In dealing with the relations between the corporation and its officers on one hand, and the stockholders on the other, in the management of the corporate affairs, courts of equity will look beyond the mere observance of the forms of law, and inquire if the authority has been in good faith exercised to promote the interest of the stockholders. *Wright* v. *Oroville M. Co.*, 40 Cal. 20.

76. Debts contracted while stock held —Practice. Where the stockholders of a lead mining company were made by their charter individually liable for the payment of debts of the corporation: *Held*, that such liability extended only as to each stockholder to such debts as were contracted while he was a stockholder. *Judson* v. *Rossie Galena Co.*, 9 Paige Ch. 598.

Held, further, that creditors whose debts were contracted at different periods of time have no common interest in the individual liability of different stockholders, and cannot litigate their claims against such stockholders in a single suit. Id.

Held, further, that each stockholder being severally liable, the stockholders are not entitled to an injunction compelling the creditors to appear and prove their debts under the decree in the first suit. Id.

See PERSONAL LIABILITY.

D. Powers and Contracts.

77. Implied Powers. It is a necessary incident of a mining corporation that it shall have power to contract and bind itself to those dealing with it in matters within the intent of the charter, even though the charter contains no express grant or power to contract or make debts. *Wood Hydraulic H. M. Co.* v. *King*, 45 Ga. 34.

78. Corporate purposes and powers—Smelting works. A corporation created "for the purpose of raising and smelting lead ores," has power to purchase smelting works, with all the appurtenances which are necessary to carry on the business, and to assume a contract entered into by their vendors providing means for transporting their ores, when smelted, to market. *Moss* v. *Averill*, 10 N. Y. 449.

If, in making such purchase, some articles should be included (to wit: shanties, with stoves, etc.) which were not needed for the business of the corporation, the contract would not be thereby rendered void, if the purchase altogether were made in good faith, for the sole purpose of prosecuting its legitimate business. Id.

79. Judicial conclusions from corporate name — Injunction — Note — Ultra Vires. Where a corporation, organized in Illinois, had borrowed large sums of money which it had used in Colorado Territory, for which money it had given its notes, now held by Ballard and others, the court refused to issue an injunction at the instance of a stockholder, to restrain the collection of such notes, on the ground of the corporation having exceeded its powers, by operating beyond the State, because: 1. From the very corporate name of the company, "North Star *Gold and Silver* Mining Company," the complainant must have known that it was not intended to mine in the State of Illinois; 2. That in any event, the contract was an executed one, and one of which the corporation had already received all the benefit; to which class of contracts, at such stage, corporations cannot object that they were *ultra vires*; 3. That a stockholder who failed to apply for a restraining writ while the contract remained executory, will be presumed to have assented to such contract. *Bradley* v. *Ballard*, 55 Ill. 413.

80. Note for corporate purpose. A corporation allowed by its charter to both raise and smelt galena, for several years confined itself to the business of mining, and its ores were smelted by contract. The company, determining to treat its own ores, bought the smelting works, and the directors gave the notes of the company in payment: *Held*, that the directors had authority to make such purchase, and the notes given therefor were valid. *Moss* v. *McCullough*, 7 Barb. 279.

Corporations having power to purchase property can give promissory notes on such purchases, unless expressly prohibited by statute. *Moss* v. *Averill*, 10 N. Y. 449.

81. Draft without Corporate Name.—A corporation is liable upon a draft drawn or accepted by a party authorized for that purpose, though the corporate name be not mentioned in such draft, if it be drawn or accepted under a name adopted by the corporation. *Conro* v. *Port Henry Iron Co.*, 12 Barb. 28.

82. Timber and Real Estate incident to Mining. The ownership of real estate is incident to the exercise of corporate mining franchises. *Whitman M. Co.* v. *Baker*, 3 Nev. 386.

The holding of a timber claim treated as the exercise of the franchises of a corporation organized for mining purposes. Id.

83. Outside Improvements incident to Extended Mining—Ratification. The Rossie Lead M. Co., a corporation, purchased a

large amount of property which had beent previously used by the vendor in the business of washing and smelting lead ore, among which property was a house and lot, fifty acres of improved land, with several houses thereon, a school-house, threshing machine, etc.: *Held*, in an action on a note for the purchase money that the purchase of such items in connection with the purchase of the smelting works, was not necessarily an excess of the power granted by the charter, and that such items might be incidentally employed in carrying on large mining operations. *Moss* v. *Rossie Lead M. Co.*, 5 Hill, 137; see *McCullough* v. *Moss*, 5 Den. 567.

When a mining corporation allowed two of its officers to purchase property, and afterward received and operated the property: *Held*, a ratification of the purchase, even if originally made without authority, and that the corporation was liable on its note for the purchase money given by such officers. Id.

84. Saw-mill and Hotel. A corporation owning a very large body of lands, had power by charter to aid in the development of minerals and other materials, and to promote the clearing and settlement of the country: *Held*, that the building of a sawmill and hotel in direct connection with its business, was within its powers. *Watt's Appeal*, 78 Pa. St. 370.

85. Power to borrow money. A corporation, unless prohibited, has authority to borrow money to accomplish the purpose for which it was organized. *Union G. M. Co.* v. *Rocky Mt. Bank*, 2 Colorado, 248; S. C. Id. 565; 1 Id. 531.

86. Power to own Steamboat. A corporation created for the purpose of mining and transporting coal, etc., has the power to purchase and use a steamboat for the purposes of its business in transporting and delivering coal. *Callaway M. & M. Co.* v. *Clark*, 32 Mo. 305.

87. Supply Store. A mining corporation may, under a general charter, keep a supply store out of which to pay its employees in kind, instead of money. *Searight* v. *Payne*, 2 Tenn. Ch. 175.

88. Ultra Vires—Flour Mill—Injunction. If an iron company attempt to erect a corn and flour-mill as an independent enterprise, and not as a mere incident to the iron works, it is *ultra vires*. *Cherokee Iron Co.* v. *Jones*, 52 Ga. 276.

And the discretion of a judge in enjoining the erection of such mill, the question of the intended use being one of fact, will not be interfered with. Id.

89. Ultra Vires—Copper Company trading in Iron. *Assumpsit* by a corporation on a contract for the supply of iron rails to defendant, averring mutual promises. Plea, *non-assumpsit*. On the trial the plaintiff proved the making of the contract; the defendant proved a charter incorporating plaintiffs for the purpose of trading in copper ore, but containing nothing as to trading in iron. No other charter was proved. There was no evidence that the contract proved was in any way ancillary to the trade in copper: *Held*, that the contract not being made under seal, and not being for the trading purpose for which plaintiffs were incorporated, did not bind plaintiffs, and that defendant was entitled to the verdict on the plea of *non-assumpsit*, as there was no consideration for his promise. *Copper Miners of E.* v. *Fox*, 16 Q. B. 227.

90. Ultra Vires—Corporation taking stock for land. A company owning land, and having power to sell, conveyed it, and received the stock of the mining company which purchased in payment: *Held*, that such receipt of stock in payment was beyond the powers of the corporation, and the sale was void. *Watt's Appeal*, 78 Pa. St. 370.

91. No ratification of ultra vires. The subsequent ratification by a corporation of acts of its agents not within the corporate powers will not render such void acts valid. *McCullough* v. *Moss*, 5 Denio, 566.

92. Assumption of debts against property acquired. Horn loaned $5000 to six out of nine shareholders in the Volcano Water Company, taking their note, with interest at ten per cent. per month, and a mortgage executed by them, as individuals, on their interest in the company's ditch, etc. Subsequently, he made a like loan of $5000, with like interest; and one T., at the same time, made a similar loan of $4000. Later still, the corporation recognized these loans, and in consideration thereof, and of a further loan of $8000 by Horn, executed to Horn a note of $21,900, and to T. a note of $9679, with mortgages upon the corporate property, the ditches, etc., the former notes and mortgages being canceled. Head, a creditor of the corporation, sues to set aside, as fraudulent, a decree foreclosing these last mortgages: *Held*, that the recognition of these debts as those of the corporation by the stockholders and corporate authorities, in the absence of any showing of fraud or suspicious circumstances, is *prima facie* sufficient to rebut an inference of fraud arising from the mere form of the original transaction, particularly as the court finds that the arrangement was not made to hinder, delay, or defraud creditors, Horn and T. supposing all along that the corporation was bound to them; that the money loaned went immediately into the treasury of the corporation,

and was used for its purposes; that no credit was given the stockholders borrowing the money on the books; that it was regarded as one of the debts of the corporation when there seemed to have been no motive for fraud; and the loan was effected by those holding the largest portion of stock. *Head* v. *Horn*, 18 Cal. 211.

93. Incorporators transferring possession of claims. Where the owners of a mining claim, previously located by themselves and others, became incorporated, and placed the corporation thus formed in possession of the claim as their successor in interest, with the evident intention that whatever rights the unincorporated individuals had should pass to the corporation: *Held*, that the title to the claim passed to the corporation as effectually as it would if the transfer had been accompanied by a conveyance in writing. *Table Mt. T. Co.* v. *Stranahan*, 20 Cal. 198.

94. Assumption of debts of organizers. A mining association, carrying on its business and contracting debts, becoming incorporate to continue the same operations, the corporation may be liable for the debts already incurred by the corporators, but not where the capital of the new organization is contributed only in part by the original mining association, the other part being added by new parties, unless there is an agreement by the corporate body to assume such debts. *Paxton* v. *Bacon M. Co.*, 2 Nev. 257.

95. Contract made through the stockholders. A contract made by the stockholders of a mining corporation, as parties of the first part, with parties of the second part, by which the stockholders agree to assign their stock to trustees, to be by the trustees conveyed to the parties of the second part, upon the payment by them of a certain sum of money to the parties of the first part, through the trustees, accompanied by a resolution of the board of directors of the corporation, authorizing their president to convey the mines to the parties of the second part, upon the payment of the money, is substantially as if the contract had been made with the corporation, instead of the stockholders. *Gordon* v. *Swan*, 43 Cal. 564.

96. Contracts with members. A director or stockholder of a private (mining) corporation may trade with, borrow from, or loan money to the company of which he is a member, as other persons, the contract being without fraud or oppression. *Harts* v. *Brown*, 77 Ill. 226.

97. Sale presumed lawful. A corporation organized for the purpose of owning ditches for the conveyance and sale of water, possesses the power of selling and conveying all its corporate property, provided the sale is made for corporate or lawful purposes, and strangers taking a conveyance, have a right to assume, as against the corporation, that the sale was for a lawful purpose. *Miners' D. Co.* v. *Zellerbach*, 37 Cal. 543.

98. Authorizing Sale. Conferring authority to sell and convey the property of a mining company is the exercise of corporate power. *Gashwiler* v. *Willis*, 33 Cal. 11.

99. Legal Title, where Vested. The legal title to the property of a mining corporation is vested in the corporation, and not in the stockholders as such. *Wright* v. *Oroville M. Co.*, 40 Cal. 20.

100. Statutes of Mortmain. A corporation holding more land than allowed by the law of its organization cannot have its ownership of the excess attacked by trespassers or adverse claimants; such holding is valid, except against the State. *Whitman M. Co.* v. *Baker*, 3 Nev. 386.

101. Corporate Property seized on suit against Individuals. Sale of the property of a mining corporation upon attachment against certain persons sued, as persons composing such company, is void, the corporation having been no party to the suit, although subsequent to the return of the attachment, plaintiffs had attempted to make it a party by amendment, adding its name as a defendant. *Collins* v. *Montgomery*, 16 Cal. 398.

102. Practice—Substitution of Parties in Interest.—When a suit has been commenced in the name of a supposed corporation, which is afterward shown to have no legal existence, it is within the power of the court of chancery to allow the parties who took the stock of the organization, and who advanced the proceeds which paid for the subject-matter of the suit (a quarry) to be added as plaintiffs. *Vermont M. & Q. Co.* v. *Windham Bank*, 44 Vt. 489.

E. Torts and Frauds.

103. Liable for Torts. A corporation carrying on the business of mining, is liable for its torts. *Kielley* v. *Belcher S. M. Co.*, 3 Saw. 437.

104. Timber—Trespass. A mining corporation directing the cutting of timber on land not its own, is liable in trespass the same as an individual. *Yahoola River M. Co.* v. *Irby*, 40 Ga. 479.

105. Knowledge. The same rule where knowledge is material (as knowledge or means of knowledge of the limits of coal lands), is applicable to corporations as to

individuals. *Barton Coal Co.* v. *Cox*, 39 Md. 1.

106. Mismanagement amounting to Fraud. The directors of a corporation are liable at the suit of a shareholder, for mismanagement so gross as to amount to fraud. *Watt's Appeal*, 78 Pa. St. 370.

107. Fiduciary Relation of Officers to Stockholders. The corporate authority is considered to have been conferred by the stockholders upon the trust and confidence that it will be exerted with the view to advance the interest of the stockholders, and not used with a purpose to injure or destroy that interest. *Wright* v. *Oroville M. Co.*, 40 Cal. 20.

108. Fiduciary Parties making Profit. Promoters, directors or agents of a company, are not permitted to make profit out of it in buying lands or dealing with it. *Rice's Appeal; Ahl's Appeal*, 79 Pa. St. 168.

109. Fraud of Directors—Parties. A fraud against a corporation by any or all of the directors may be redressed by an action in the name of the corporation. Id.; *Simons* v. *Vulcan Oil Co.*, 61 Pa. St. 202.

110. Action against fraudulent officers—Pleading—Nevada. Sherman, a stockholder in a mining corporation, filed a bill against Clark, who united in himself the offices of superintendent of the mine, and secretary, trustee and treasurer of the company, alleging that the latter had: 1. Seized and retained the books and ousted the president from his office; 2. Removed the office of the company without the consent of the board of trustees; 3. Wrongfully canceled the stock of another stockholder and issued it to himself; 4. Deposited the funds of the company with a merchant, instead of in bank; 5. Refused to pay the company's debts out of said funds; 6. Was applying for a patent to the mining ground of the company; 7. Was working the mine without the control of the trustees or president, and was threatening to continue his unlawful acts, and praying an injunction to restrain him from interfering with the books or property, and from exercising any of the functions of superintendent, trustee, secretary or treasurer:

Held, 1. That the right to an office cannot be tried upon application for injunction; nor if an officer be wrongfully removed, can he be restored by injunction; 2. That although an unauthorized and injurious removal of the office of a company might be restrained, yet that such act when consummated, cannot be remedied by such proceeding; 3. That if stock had been wrongly cancelled and reissued, its transfer might be enjoined, but only upon a showing of the illegality of the issue and proposed transfer; 4. That, though the deposit of the company's funds with an individual was out of course, yet it must further be shown that the individual is not a safe custodian; 5. The refusal to pay the just debts of the company is not sufficient in of itself to show neglect of duty, without a showing as to his authority and duty to pay; 6. That the fact of applying for patent is presumably beneficial to the company, it not being shown that he applied in his own name, and no other facts showing injury to the company being alleged in connection with such application; 7. And that the allegation as to his working the mine without control of the board, raises no presumption that he was working the premises to the injury of the mine or the damage of the company. *Sherman* v. *Clark*, 4 Nev. 140.*

111. Directors Speculating with Funds—Parties. Where the directors of a mining company employed the funds of the company in the purchase and sale of various stocks: *Held*, a palpable violation of duty which rendered them personally liable to make good the loss. *Robinson* v. *Smith*, 2 Paige Ch. 222.

Held, further, that in a suit to compel them to account, the corporation was a necessary party either as complainant or defendant. Id.

112. Breach of Trust by President. The President of a corporation is a trustee for the company, and cannot speculate in its funds, nor make any gain, profit or advantage from their use. An assignment of its property to secure his personal debts is a breach of trust. *Conro* v. *Port Henry Iron Co.*, 12 Barb. 27.

113. Purchase by Director. A director in a corporation at the time a sale of part of its property was contemplated and made, and who actively participated in all the measures tending to its completion, and had full knowledge of all the circumstances attending its progress, is not competent to become a purchaser of such property, and the sale to him cannot be upheld if resisted by the corporation. *Hoffman S. C. Co.* v. *Cumberland C. & I. Co.*, 16 Md. 456.

114. Sale of Entire Assets. Conceding it to be unlawful for a corporation to make a sale of all its property to another corporation, and receive in payment thereof the stock of the grantee to be distributed among its own stockholders, yet if such

* This was an appeal from a decision refusing an injunction, heard upon bill, answer and testimony, but the entire opinion is devoted to defects in the bill. The court also state that a certain person for whom Sherman held his shares in trust should have been made a party, but this point had not been raised. Johnson J., in a separate opinion, places his opinion on this ground alone, and does not assent to the reasoning of the other members of the court considering the various points as not necessarily presented by the record.

sale is made, and the contract fully executed, the corporation itself cannot recover back the property sold, or set aside the contract on account of its illegality. *Miners' D. Co.* v. *Zellerbach*, 37 Cal. 544.

115. Sale where sole capital is the property purchased, and the sale also illegal. Rhodes constructed a private railroad to his own mines through an alley on the line of an incorporated railroad company, with their consent; he was enjoined from using it, and ordered to remove the rails, etc. He procured the incorporation of himself and six others as a railroad, coal and oil company, with a capital of $100,000; they were authorized to buy any railroad partly or wholly completed, and damages were to be ascertained, etc., according to the general railroad law. The company was organized before any stock was taken, and Rhodes sold to them his railroads, mines, etc., for $100,000, payable in the stock of the company, which had no other assets than the property sold by Rhodes. The company relaid the road, and operated it with locomotives, etc: *Held*, that Rhodes was the owner after the organization and his sale to them, as he had been before; 2. The road sold by Rhodes, having been built without authority of law and being a nuisance, the act of incorporation did not authorize the company to purchase such road. *McCandless' Appeal*, 70 Pa. St. 210.

F. By-Laws, Elections, Meetings, Dissolution.

116. By-law — Necessary Expenses. A by-law restraining trustees from incurring a debt to exceed $10,000 construed not to prevent their making assessments beyond that sum to pay the "legal and proper expenses." *Sullivan* v. *Triunfo G. & S. M. Co.*, 29 Cal. 585.

The board of trustees of a corporation formed for the purpose of carrying on mining, have the power to levy and collect, for the purpose of paying the proper and legal expenses of the company, assessments exceeding ten thousand dollars, even though the by-laws provide that the trustees shall not have power to incur indebtedness exceeding ten thousand dollars, and the indebtedness then incurred and existing exceeds that amount. Id.

117. By-Laws—Irregularity. Where what purported to be the by-laws of a California mining corporation, though adopted by the stockholders instead of the trustees, appeared to be the only by-laws ever adopted by the corporation, were found duly recorded in the books kept by the trustees, and had been used and acted upon as the by-laws by both trustees and stockholders for more than ten years, and ever since their adoption: *Held*, that they were to be considered the regular by-laws of the company. *State* v. *Curtis*, 9 Nev. 325.

118. Elections—By-Laws. If the day provided for an election in the by-laws have passed, it is still the duty of the trustees to call the meeting within a reasonable time; and a meeting called at such later period is valid. *Flagg* v. *Lady Bryan M. Co.*, 4 Nev. 406; *State* v. *Wright*, 10 Id. 167.

119. Compliance with Charter presumed. Where a public company has been incorporated by virtue of a statute which prescribed certain rules for the constitution of such companies, and for regulating their proceedings, it will be assumed, in judging of the transactions between the company and other parties, that the requirements of the statute have been complied with. *Colonial Bank of Australasia* v. *Willan L. R.*, 5 P. C. 417.

120. Nul Tiel Corporation—Balloting. Where in consequence of all the stock of a mining corporation being owned by only three persons they did not practice taking formal ballots for directors, but proceeded informally, and continued to re-elect the same officers: *Held*, that they did not cease to be a corporation *de facto*. *Vermont M. & Q. Co.* v. *Windham Bank*, 44 Vt. 489.

121. Election of Trustee. The election of a trustee of a mining corporation is a corporate act, and must be conducted in the manner required by the charter. *State* v. *Curtis*, 9 Nev. 325.

Where the statute under which the corporation was organized required a majority of the trustees to do a corporate act, a by-law authorizing a vacancy in the board of trustees to be supplied by less than a majority, was held contrary to the charter, and void. Id.

Under the California statute regulating mining corporations, the manner of the election of a trustee may be regulated by the by-laws, but the substance must be in conformity with the statute. Id.

122. Elections. An election at which all the stockholders are present, but a portion decline to participate, the same being held without the action of such presiding officer as the by-laws prescribed is not a legal election. *State* v. *Pettineli*, 10 Nev. 141.

It is the legal right of any stockholder of a mining corporation that an annual election of trustees be held, without regard to the number of shares such stockholder may have. *State* v. *Wright*, 10 Nev. 167.

123. Meetings, how called. When the by-laws provide that meetings of stock-

holders shall be called by the board of trustees, a meeting called by the president of the company is illegal. *State* v. *Pettineli*, 10 Nev. 141.

But such a meeting might bind by consent of all the stockholders. Id.

124. Power to convene Directors. The president of a mining corporation has power to convene the board of directors for the purpose of laying before them any matter affecting the business of the corporation. *Union G. M. Co.* v. *Rocky Mt. Nat. Bank*, 1 Colorado, 532; S. C. 2 Id. 248 and 566.

125. Correction of minutes. A corporation may introduce parol evidence to show that a resolution of its board of trustees, spread upon the minutes of its proceedings, does not express correctly the proposition which was voted by the board. *Gilson Quartz M. Co.* v. *Gilson*, 51 Cal. 341.

126. Successors—Practice. A creditor of a corporation, the whole stock and property of which has been transferred to its successor, which takes it subject to the debts of the first corporation, and which it is ample to pay, is not bound to convene all the creditors before the court, but may prosecute his own claim alone. *Barksdale* v. *Finney*, 14 Grattan, 339.

127. Dissolution — Insolvency — Non-user. A mining company cannot be dissolved by insolvency or non-user; those are only grounds upon which courts may base a decree of dissolution. *Nimmons* v. *Tappan*, 2 Sw. (N. Y.) 652.

G. Duties and Penalties.

128. Annual Report—Time. Where the charter of a corporation required its officers annually, between the first and twentieth of January, to make and publish a certain report: *Held*, that a company incorporated in May, 1867, was bound to make and publish such report in the following January. *Union Iron Co.* v. *Pierce*, 4 Biss. C. Ct. 327.

129. Annual Report — Explanatory Statute Void. And an act of the legislature declaring the meaning of the section under which such annual report was required and personal liability thereunder attached is utterly void. Id.

130. Duty to sell Assets and pay Debts. Where the lands of a coal company, its shafts, railroad tracks, rails and mining rights were sold under a deed of trust given to secure the payment of its bonds, and brought a sum sufficient to pay the bonds, and the company owed other debts, it was: *Held*, that it was not only the right but the duty of the directors to sell the remaining property to meet the other liabilities of the company, and that they might authorize its sale at auction by the party selling under the trust deed. *Harts* v. *Brown*, 77 Ill. 226.

131. Issuing Currency Notes—Proof of Office. In a suit for a penalty against a mining corporation for illegally issuing notes, the official character of the officer signing such notes may be sufficiently proved by showing that he acted as such officer *de facto*. *McGargell* v. *Hazleton Coal Co.*, 4 W. & S. 424.

132. Issuing Corporate Paper to circulate as Money. An act to prevent mining and other corporations from issuing bills or notes "upon loans," or to circulate as money, construed to not prevent a corporation issuing its notes in the usual course of business for money borrowed by it, holding that the word loans in the statute prohibited issuing of notes only where the corporation was the lender. *Magee* v. *Mokelumne M. Co.*, 5 Cal. 258.

133. Proceedings outside of State. Although a corporation, as such, can do no corporate act out of the limits of the state granting its charter, yet its agents and officers may bind it by contracts and engagements made in other states, and the minutes of its board of directors may be used as evidence of the acts of the board, even though the meetings of the board appear to have been held out of the state, chartering the corporation. *Wood Hydraulic H. M. Co.* v. *King*, 45 Ga. 34.

COST BOOK.

1. Not judicially noticed as a custom. The cost book system is of comparatively modern institution; it cannot, therefore, be a custom, because a custom is immemorial, and though frequently recognized by the courts, they will not take judicial notice of its principles. *In re Bodmin U. M. Co.*, 23 Beav. 370.

2. Working before Capital paid in. A company formed on the cost book system has no right to begin operations until all of the capital is paid in. *Johnson* v. *Goslett*, 3 C. B. N. S. 569, affirming S. C. 18 C. B. 728.

And if the directors begin operations with only a small amount of the capital paid in, and sink that capital, they are liable to the subscribers. Id.

3. Evidence of the Book. The cost book is not evidence against strangers claiming adversely to the adventurers. *Curling* v. *Flight*, 6 Hare, 41; S. C. 2 Phillips, 613.

4. New Shareholder — Substitution. In a cost book company a new shareholder

comes in, not as a new partner, but in place of the share vendor. *Geake* v. *Jackson*, 36 L. J. C. P. 108.

5. New Adventurer liable for old debts—Apportionment. A new partner coming into a cost book company becomes liable for the old debts, and in dealing with a party furnishing supplies he can appropriate payments to the old bills, and is not bound to credit them against supplies, furnished since any new adventurer bought into the concern. *Geake* v. *Jackson*, 36 L. J. C. P. 108.

6. Holding of the Realty—Capital. In a cost book mining partnership the legal title to the mine is held by one or more members of the partnership, and this title can only be created or transferred by deed. But the interest in the partnership is divided into a fixed number of shares, and the capital is supplied by the shareholders, and these shares are not an interest in land. *Watson* v. *Spratley*, 10 Ex. 222.

7. Calls—Registry. The plaintiff, the owner of 500 shares in a cost book mine, according to the rules of which the person registered as owner in a cost book was subject to the payment of calls in respect of the shares so long as he continued registered as the owner, sold his shares to the defendant, and delivered to him a document addressed to the secretary of the mine, by which the plaintiff requested the secretary to enter a transfer of the shares from his name to that of the transferee, subject to the rules, but leaving a blank for the name of the transferee, to be filled up by the holder of the document, which also contained at the foot an agreement on the part of the transferee to accept the shares subject to the rules, with a blank also left for the name of the party so agreeing. The defendant did not cause the shares to be registered in his name, and the plaintiff in consequence of his name being continued in the cost book as the owner, was compelled to pay some subsequent calls: *Held*, by the exchequer chamber, that there was no legal obligation on the defendant to cause the shares to be registered in his name as the owner, but that there was an implied obligation on him to indemnify the plaintiff against calls made during the time when he was virtually and potentially the owner of the shares. *Walker* v. *Bartlett*, 18 C. B. 844, *on app. from* S. C. 17 Id. 446.

8. Purser—Transfer—Contributory. A shareholder in a company carried on upon the cost book principal, relinquished his shares upon paying his *pro rata* portion of the liabilities of the company. All the formalities required for the relinquishment of such shares were regularly complied with and entered into the books of the company, and the correspondence was conducted with the purser, who fixed the amount to be paid by the shareholder without the sanction of the managing committee: *Held*, that the purser being the authorized officer of the company to conduct such transactions, the shareholder was exempted from liability in respect of any excess of power on the part of the purser, and upon the winding up of the company it was ordered that such shareholder should not be placed upon the list of contributaries. *In re Wrysgan Slate Co.*, 28 L. J. Ch. 894.

9. Proof of Transfers. Shares in a cost book mine may be transferred by mere entry in the cost book by the purser. At least such entry is evidence of a transfer, and the erasure of the entry apparent upon the face of the books is not evidence to compel a jury to find the fact of a retransfer. *Reynolds Exr.* v. *Bassett Exr.*, cited Coll. on Mines, p. 100, note.

10. Transfer—Notice to Purser. The rules of a mining company, carried on upon a cost book principle, provided that no shareholder should dispose of his shares without giving notice in writing to the purser of the intended transfer, and that every transfer should be according to a particular form provided for that purpose. The form was printed, and contained a notice that no transfer was valid or complete unless entered in the cost book and acknowledged by the purser. A shareholder agreed to transfer his shares, and the proposed transferee stipulated that the transferor should pay the calls then due. They went together to the office of the company and deposited with the purser a transfer of the shares executed by them both and in the required form, and the transferor paid the calls, but no notice in writing was given of the transfer, nor was there any formal acknowledgment on the part of the purser: *Held*, that the transfer was complete; that notice to the purser was but matter of form, and that the purchaser had become a contributary and was liable to the debts of the company incurred before the transfer. *Mayhew's Case*, 5 De G. M. & G. 837.

11. Prior Debts—Transfer of Shares. The transfer of shares in a mining concern (cost book) carries with it liability for the prior debts of the concern. *Mayhew's Case*, 5 De G. M. & G. 837.

12. Abandonment or Transfer, a question for the Jury. If by the local usage of the cost book system of mining partnership, a partner can determine his liability by transfering his shares to the purser, or by assignment, the fact of abandonment or transfer becomes the material issue in an

action by a creditor, and should be left to the jury. *Courteis* v. *Johnson*, 10 Ex. 242, note.

13. Notice. By one of the rules of a "cost book" company, any shareholder might determine his responsibility by notifying the purser in writing of his intention to retire, transferring his shares to the company and depositing a release with the purser. The prospectus, also, of the company stated the substance of the rule: *Held*, that compliance with this rule, under the cost book principle, which is recognized by statutes, released the shareholder from all liability as between himself and his co-adventurers for the past or future debts of the mine. *Fenn's Case*, 4 De G. M. & G. 285.

14. Notice—Retiring Member. A shareholder in a mining company, on the cost book principle, gave notice, according to the rules of the company, of his ceasing to be a member of it. Afterward the company was registered under the joint stock companies' act 1856, as a limited company and was subsequently wound up: *Held*, that the shareholder was not liable to be placed on the list of contributaries of the company ordered to be wound up. *In re Welsh Potosi M. Co., Lofthouse's Case*, 2 De G. & J. 69.

15. Right of Shareholders to retire. It is a rule of the cost book system that as between the existing shareholders and apart from their liability to the then existing creditors of the concern, any shareholder may retire on paying up all the calls then due from him at that time. *In re Bodmin U. M. Co.*, 23 Beav. 370.

16. Registry—Retiring Members. B., a shareholder in a mining company, on the cost book principle, retired from it under a provision in the cost book enabling a shareholder to surrender his shares. A few weeks afterward the company was registered under 19 and 20 Vict. c. 47, and B.'s name was entered in the register and returned in the list of shareholders. An order having been subsequently made for winding up the company, the commissioners placed B.'s name on the list of contributaries: *Held*, that B.'s name ought never to have been on the register of shareholders, and ought to be removed from it, under the power given by 19 and 20 Vict. c. 46, s. 25, of amending the register, and that it ought also to be removed from the list of contributaries. *In re Welsh P. M. Co., Birch's Case*, 1 De G. & J. 10.

17 Withdrawing Member—Contributory—Practice. A. B. was the holder of shares in a mining company, established on the cost book principle. In accordance with one of the rules of the company, he gave notice in April, 1857, to relinquish his shares, but he had not then paid all his arrears, and the purser declined to take the relinquishment. In May the arrears were paid, and on the fourth of June his solicitor applied to the purser to know why the name was retained on the list. On the twenty-sixth of June the company was registered as a limited company, under the 19 and 20 Vict. c. 47, and A. B.'s name was then returned as a shareholder. The company being in July ordered to be wound up, A. B.'s name was placed by the commissioners on the list of contributaries. On appeal it was considered that the proper course was for A. B. to apply to have his name removed from the list of shareholders, and the petition of appeal being agreed to be treated as such application, the name was removed from the list. *Ex parte Birch*, 27 L. J. B. C. 4.

18. Surrender of Shares. In a company, conducted on the cost book principle, shareholders in arrears were, by a general meeting, allowed to surrender their shares without discharging such arrears. The court, from the practice of the company in other cases, inferred that this was authorized: *Held*, that the shares having been legally surrendered, the surrenderors were not contributaries. *In re Bodmin U. M. Co.*, 23 Beav. 370.

19. Unauthorized Registry. A. agreed to accept a transfer of shares (in trust) from B., with an understanding that the transfer was to take effect only in the event of B. going abroad. B. never went abroad, but without (as the jury found) A.'s authority, registered the transfer: *Held*, that this unauthorized registration did not render A. liable as a partner for the debts of the company. *Thomas* v. *Clarke*, 18 C. B. 660.

20. Debts before Registry of Shares. A transferee of shares in a cost book mine, the rules of which require transfers to be registered in order to convey an interest in the mine, is not liable for debts of the concern contracted before his transaction is registered. *Thomas* v. *Clarke*, 18 C. B. 660.

21. Change of Organization into Joint Stock concern. When the owner of shares in a cost book company has parted with them and afterward the remaining members register it as a joint stock company, there is no identity of companies or of liabilities, and the outgoing shareholder must answer to his common law liability for debts contracted by the cost book company, but is not to be proceeded against as a contributary of the joint stock company. *Lanyon* v. *Smith*, 3 B. & S. 937; *Harvey* v. *Clough*, 8 Law Times N. S. 324.

22. Bank Account. All the directors of a cost book company are liable, although the bank account into which the subscriptions sued for had been paid, was kept in the name of only five out of the seven directors. *Johnson* v. *Goslett*, 3 C. B. N. S. 569 affirming S. C. 18 C. B. 728.

23. Practice—Public Company. It is doubtful whether a mining company, formed on the cost book principle, is a public company within the 1 and 2 Vict. c. 110, s. 14, and whether the interest of a registered proprietor in certain shares in a company can be charged by a judge's order made under that section, if the shares have been sold previously to such order, but no notice of the sale has been given to the purser of the mine, and the shares are still remaining in the name of the judgment debtor. In such a case, therefore, the court confirmed a judge's order for charging the debtor's interest in such shares, as this court would not decide such matter on a summary application from which there was no appeal. *Nicholls* v. *Rosewarne*, 28 L. J. C. P. 273; 6 C. B. N. S. 480.

24. Winding-up Act. A mining company, on the cost book system, formed before the passing of the joint stock companies' winding-up act, 11 and 12 Vict. c. 45, is not within its operation. *In re Wheal Lovell M. Co. ex parte* Wyld, 18 Law J. Ch. 139; 1 *Mac. & Gor.* 1.

25. By-Laws Attempting to Affect Form of Action. It is not competent to the adventurers or shareholders in a cost book mine to stipulate by their rules that unpaid calls shall be recovered as a debt due from the defaulting shareholder to the purser; such an action would be an action by a party not a party to the contract. *Hybart* v. *Parker*, 4 C. B. N. S. 209.

CRIMES.

1. Drowning Mine—Indictment. In an indictment under 7 and 8 Geo. 4, c. 30 s. 6, for drowning a mine, the mine may be laid as the property of the person in possession and working it, though only an agent for others. *Reg.* v. *Jones*, 2 Moody C. C. 293.

2. Counterfeit Gold Dust. "Simply passing counterfeit gold dust is not an offense under" the penal code of Idaho. It must be a passing with an intent to defraud. *People* v. *Sloper*, 1 Ida. 189.

3. Embezzling Gold Dust. In an indictment against a post-office employee for embezzling gold dust sent by mail, it must be alleged in the indictment and the evidence must show that the gold dust was contained in a letter or packet of letters. *Parsons* v. *U. S.*, 1 Colorado, 309.

4. Gold Dust—Robbing the Mail. An indictment under section 5479 of the R. S., which charges the defendant with receiving, concealing and aiding in the concealing of gold dust stolen from the mails, only charges one crime, and proof of doing either will warrant a verdict of guilty. *U. S.* v. *Montgomery*, 3 Sawyer, 544.

5. Malicious Mischief—Sollar—Steam Engine—Drum. The bottom of the shaft of a mine had water in it, and the owner of the mine had caused a scaffold to be erected at some distance above the bottom of the mine for the purpose of working a vein of coal which was on a level with the scaffold: *Held*, that this scaffold was an "erection used in the conducting the business" of a "mine" within the stat. 7 and 8 Geo. 4, c. 30, s. 7, and that the damaging it with intent to destroy it, or to render it useless, was felony. *Reg.* v. *Whittingham*, 9 Carr & P. 234.

A coal mine was worked by a steam engine which caused a cylinder, called a drum, to revolve and take up the rope as the coal was drawn up from the mine: *Held*, that proof of damaging the drum would not support an indictment which charged the damaging of a steam engine used in working a mine. *Reg.* v. *Whittingham*, 9 Carr & P. 234.

6. Malicious Mischief—Starting the Engine. A steam engine, used in draining and working a mine, had been stopped and locked up for the night. The prisoner got into the engine house and set it going, and, there being no machinery attached, the engine went with great velocity and received damage: *Held*, that this was a damaging of the engine within the stat. 7 and 8 Geo. 4, c. 30, s. 7. *Reg.* v. *Norris*, 9 Carr & P. 241.

7. Nuisance—Negligent Quarrying. An indictment charged the defendant with working quarries of stone near to public streets and dwelling-houses, and unlawfully and injuriously throwing and discharging pieces of rock and stones into and upon the streets and dwelling-houses, whereby the streets were rendered unsafe for passengers and the dwelling-houses, and the inhabitants were injured, etc. Other counts of the indictment charged the defendant with negligence in the working of quarries. On the sixth of May the defendant caused a number of stones and pieces of rock to be thrown from a quarry by blasting it; and it was proved by one witness that a piece was thereby cast into her bedroom in a house in a street near the quarry; by another, that a piece ten inches by seven or eight inches, was thrown into his garden; by another, that a piece struck his horse in the street; and by two witnesses,

that many stones fell into the adjacent streets. On a case reserved as to whether, upon these facts, the defendant could properly be convicted upon the indictment: *Held*, that he was rightly convicted. *Reg.* v. *Mutters*, 10 Cox C. C. 6; 34 L. J. M. C. 22.

8. **Nuisance—Accountability of Absent Master.** The workmen of the defendant, a colliery owner, in working the colliery, stacked the refuse in such a manner that it fell into a navigable river and caused an obstruction therein. The defendant was indicted for a nuisance in causing such obstruction: *Held*, that the facts of his not having personally superintended the works, of his having given express orders to the workmen that the refuse should be deposited in a particular place where it would not do any harm, and that it was not to be thrown into the river, would not relieve him from liability upon this indictment. *Reg.* v. *Stephens*, 35 L. J. Q. B. 251; L. R. 1 Q. B. 702.

9. **Workmen—Obeying Orders.** If A. and B. are the owners of adjoining mines, and A., asserting a certain airway belongs to him, directs his workmen to stop it up, and they, acting *bona fide*, and believing that A. has a right to give such an order, do so, they are not guilty of felony within the stat. 7 and 8 Geo. 4, c. 30, s. 6, for stopping up the airway of a mine, even though A. knew that he had no right to the airway; but if either of the workmen knew that the stopping of the airway was a malicious act of his master, such workman would be guilty of a felony. *Reg.* v. *James*, 8 Carr & P. 131.

10. **Leaving Machinery in charge of Women.** To make a contractor for working a mine liable to a conviction for allowing females to have charge of the machinery or tackle, by means of which persons are brought up or passed down a vertical shaft of a mine, contrary to the 5 and 6 Vict. c. 99, secs. 8 and 13, knowledge of or acquiescence in their being so employed must be brought home to him. Evidence of females being found in charge of such machinery and tackle on one occasion only is not sufficient. *Reg* v. *Handley*, 9 Law Times, 827.

11. **Breach of the Peace.** An indictment charging that the six defendants, with others unknown, "unlawfully assembled to disturb the peace of the king, and being so assembled," the defendants, "with force and arms at, etc., the mine of black lead of A. B., did unlawfully break and enter, and sixty pounds of black lead, etc., did unlawfully take and carry away, against the peace, etc.:" *Held*, to show sufficient offense to sustain the indictment on motion to quash. *Rex* v. *Jopson*, 3 Burr. 1702 n.

12. **Extortion—Land-office.** The register of the United States land-office cannot act as an attorney for an applicant for patent to mineral land; and if he receive from such applicant a gross sum in part as his official fee, in part as charge for services as an attorney, such receipt of money is extortion. *U. S.* v. *Waitz*, 3 Sawyer, 473.

13. **Foreign Miners' Tax.** Where an indictment averred that the defendant had collected four dollars from Ah Koo under color of the foreign miners' tax law of California, contrary to the terms of the act of Congress of May 31, 1870, the indictment was held defective in not alleging that Ah Koo was a foreign miner, and within the provisions of the State law. *U. S.* v. *Jackson*, 3 Sawyer, 59.

14. **Mining Police — Pennsylvania.** The act of April 12, 1867, for the protection of person in the mining regions is constitutional, so far as it provides for the appointment of police, and their compensation out of the county treasury. *Northumberland County* v. *Zimmerman*, 75 Pa. St. 26.

15. **English Police Regulations—Commitment.** A commitment based on a previous conviction for refusing to work (leaving without warning), need not show on its face the fact of trial; it refers to the record, and need not show the facts required in a special commitment under the act. *Ex parte Bailey*, 23 L. J. M. C. 161.

16. **Boiler Regulations—Joint Owners.** Under complaint for working a colliery without providing the boiler with a proper steam-gauge, under secs. 4 and 11 of 18 and 19 Vic. c. 108, it is not necessary that all the owners be joined in a complaint. A resident owner taking an active part in the management may be proceeded against alone. *Reg* v. *Brown*, 7 El. & Bl. 757.

17. **British Statute—Miner quitting without Notice.** Proceedings and form of commitment under 4 G. 4, c. 34, for quitting service in mines without notice. The conviction and commitment may appear on one instrument. The relation of master and servant must exist to give the justice jurisdiction, and affidavits are admissible to show a want of jurisdiction. *In re Bailey; In re Collier*, 3 El. & Bl. 606.

A commitment under 4 Geo. 4, c. 34, s. 2, stating that the defendant, a miner, had contracted to serve A. B., but omitting to state "in the employment of a miner:" *Held*, bad. *Reg* v. *Lewis*, 13 L. J. M. C. 46.

Requisites of commitment considered, on conviction under 4 Geo. 4, c. 34, s. 3, for leaving work in mine without giving employer one month's notice. *In re Tordoft*, 1 New Sess. Ca. 171; *In re Walker*, Id. 182.

18. Absenting Collier. No appeal lies to the sessions against a conviction and order of commitment in execution for three months, under statute 6 G. 3, c. 25, of a collier for absenting himself from his master's service. *Rex* v. *Staffordshire*, 12 East, 589.

19. Allowing more than Eight Men in a Cage. By a special rule for the regulation of coal miners under the 23 and 24 Vict. c. 151, the banksman is directed to "take care that the persons descending or ascending the pit shall in no case exceed the number of eight men and boys." A breach of these rules is by sec. 22, punishable on summary conviction by fine and imprisonment. A., the charter master of a pit (who by the rules is declared to be the responsible manager of the pit under his charge), was close to the pit, and was cognizant that more than eight men were being lowered down at one time, and had power to prevent the banksman (who is his servant), from so doing, and did not interfere: *Held*, that A. was properly convicted of a breach of the regulations, as being a person "aiding, abetting, or procuring the commission of the offense." *Howells* v. *Wynne*, 15 C. B. N. S. 3.

See CHAMPERTY, CONSPIRACY, LARCENY, MANSLAUGHTER, STRIKES.

CROWN GRANT.

1. Reservation—Construction—Gold—Right of Entry. By a grant from the crown of a tract of land "with the appurtenances and hereditaments thereto belonging, and mines and minerals, saving and reserving all mines of gold, silver, copper, lead and coals;" coal mines are excepted, though no other minerals have been discovered in the land. But such an exception, without reserving a right to enter and dig the mines, will not, as a legal incident thereto, give a right to do any act on the land which will injure the surface, and, *query*, whether a bare right of entry would be given as incident to such exception. *Semble*, that if the mine had been opened and worked by the crown before the grant of the land, the rights incident to the exception would have been more extensive. *McMahon* v. *Berton*, 2 Allen (New Br.) 321.

2. Exception of Minerals—Surface Injury. A license from the crown to dig minerals in granted land where the mines are excepted out of the grant will not justify an injury to the surface soil. *Gesner* v. *Cairns*, 2 Allen (N. B.) 595.

3. Royal Instructions. The construction of a crown grant cannot be limited by the royal instruction directing the governor of the province to reserve to the crown certain minerals. *Gesner* v. *Cairns*, 2 Allen (N. B.) 595.

If the exception is larger than the instructions authorized, it may be a ground for repealing the grant, or the grantee may refuse to receive it; but the crown may ratify the act of the governor. Id.

CUSTOM.

1. Not to Divest Title. Where a party's rights to a mining claim are fixed by the rules of property which are a part of the general law of the land, they cannot be divested by any mere neighborhood custom or regulation. *Waring* v. *Crow*, 11 Cal. 367.

2. Distinguished from Prescription—Profit a Prendre. A custom gives a right local to a district or community: prescription is a right attaching to the person or to a particular estate. *Perley* v. *Langley*, 7 N. H. 233; B. & W. L. C. 95.

Whether rights are held as a custom or as a prescription depends upon whether they are held as a local usage or *contra* as a personal claim or as dependent on a particular estate. Id.

All rights which may be held under a custom may be held by prescription, but the reverse of this is not true. Id.

A profit in another's land must be established as a prescription by the individual through his ancestors, or a corporation and its predecessors, or as appurtenant to some estate held by the claimant. Id.

"There are no authorities that sustain the removal of the soil or the taking of profits from the soil of another as a custom." Id.

3. Profit a Prendre. A profit *a prendre* in another's soil (to quarry stone) cannot be claimed by custom, however ancient, uniform and clear the exercise of that custom may have been. *Atty.-gen.* v. *Mathias*, 4 Kay & J. 579; 27 L. J. Ch. 761.

4. Sea-shore—Profit a Prendre—Pleading. To an action of trespass for breaking and entering certain lands of the plaintiff, being part of the sea-shore between high and low water mark in or adjoining the township of Owthorne, and taking gravel, stones, sand, etc., the defendant pleaded several pleas of justification, some setting up a right in the inhabitants of the township of Owthorne to take the gravel, etc., to be used for the cultivation and improvement of their land; others claiming it for the necessary repairs of the highways in the township, others setting up a proscriptive right under a thirty and sixty years'

user respectively; and others claiming to exercise the right as parish officer for the repair of the highways: *Held*, that the pleas were bad; for that, so far as they were capable of being construed as justifying under a custom, such custom would be void, being a claim of a profit *a prendre in alieno solo*, which can only exist by grant or prescription, and that if the claim were founded on prescription, it would be equally bad, inasmuch as it was a claim by persons who, not being a corporation, were incapable of taking by grant and not being claimed in a *que* estate. *Constable* v. *Nicholson*, 14 C. B. N. S. 230.

5. Profit and Use without Stint or Compensation. A custom to sink pits for coal, to throw the earth upon the surface in heaps, and to coke the coal, pile timber, etc., upon the surface near the pits, is unreasonable, as tending to destroy the surface estate, and is therefore void, though found by verdict to in fact exist. *Wilkes* v. *Broadbent*, 1 Wils. 63; S. C. 12 Strange, 1224; *Broadbent* v. *Wilkes*, 1 Willes, 360.

A custom to use surface ground in aid of mining without compensation at will and pleasure is void. Id.

6. Custom to take Sand — Plea. In pleading a right to enter a common to dig for and carry away sand and gravel for the repairs of a house, it is necessary to allege that the house was out of repair; that the party entered for the purpose of digging for and carrying away sand and gravel for the necessary repairs of that house, and that the materials were used for that purpose. *Peppin* v. *Shakespear*, 6 D. & E. 748.

7. Accretion, Sand. Sand drifted by the wind from the sea-shore upon a close becomes a part of that close, and a plea of custom to take such sand is bad, because such a custom would be void. *Blewett* v. *Tregoning*, 3 Ad. & El. 554.

8. Gravel. A custom to take gravel may be good although a profit *in alieno*. *Johnson* v. *Wyard*, 2 Lutw. 1344, N. L. 425.

9. Ballast. A custom to dig gravel for ballast for ships is a good custom. *Linn Regis* v. *Taylor*, 3 Lev. 160.

10. Clay. A custom to take clay to supply a brick-kiln would be unreasonable, and a plea to such effect is bad. *Clayton* v. *Corby*, 5 Q. B. 415.

11. Brick. A custom to break the surface and dig clay for brick for sale without limit and without the license from the lord: *Held*, a good custom in law. *Salisbury* v. *Gladstone*, 9 H. L. Ca. 692.

12. Copyhold — Limited to Coals for use. The customary of a manor compiled within a period of legal memory, recognized a right in the tenants to dig coal "*propriis usis*." It appeared, from subsequent documents, that the priyilege of digging coal for their own consumption had been enjoyed by the tenants under the waste, but there was no evidence of a similar restricted enjoyment by the tenants under their customary inclosures. There was evidence of tenants having, during a long period, dug coal in their customary inclosures for sale: *Held*, that the custom was restricted to digging in the waste for coal for the tenants' own consumption, and that the tenants had no right of digging coals under their customary inclosures. *Portland* v. *Hill*, L. R. 2 Eq. 765.

13. Picking dump—Derbyshire. It is not the custom of Derbyshire that the working miners may take the "spar," refuse of the lead ore, as their own perquisite. *Lee* v. *Shore*, 2 D. & Ry. 198; 1 B. & C. 94.

14. To Mine, leaving no pillars. A custom to mine coal without leaving supports for the surface is unreasonable; it is destructive to the upper estate; and if it can be allowed as a custom it must be uniform in the region where the premises are situate, and so ancient that the memory of man runneth not to the contrary. *Jones* v. *Wagner*, 66 Pa. Stat. 430; B. & W. L. C. 608; 5 Am. R. 385; *Horner* v. *Watson*, 79 Pa. Stat. 242.

15. Destructive. A claim destructive of the subject-matter out of which a grant of mines is carved, cannot be supported by any usage. *Horner* v. *Watson*, 79 Pa. Stat. 242.

16. To work Mines without leaving Support. Plea of custom, that from time immemorial mines had been worked without leaving support for the surface: *Held* bad, as the custom was void and unreasonable. *Blackett* v. *Bradley*, 1 B. & S. 940.

And the same as to pleas of prescription of twenty and forty years respectively on the same grounds. *Id.*

17. Tin streaming. The privilege of sending the tailings from tin streaming down a natural water-course and over lands of other persons may be allowed by local custom. *Carlyon* v. *Lovering*, 40 Eng. L. & E. 448.

18. Water for Tin Streaming. The stanners of Devonshire are not entitled by custom to divert water from streams into their mines, or for that purpose to dig trenches over other people's lands. *Bastard* v. *Smith*, 2 Moody & Rob. 129.

19. Royalty — Illinois Lead Mines. It is a custom, in the Jo Daviess lead dis-

trict of Illinois, for miners, mining on land without any agreement, to pay a royalty of one-sixth of the mineral raised. *Alderson* v. *Ennor*, 45 Ill. 129.

20. Ancient Royalties—Lot and Cope. For case showing ancient mode of severing and paying royalties of lot and cope, and the sizing of the ore, and what might by custom be exempt from royalty, upon which point a trial at bar was directed, see *Attorney-general* v. *Wall*, 4 Br. Pa. Ca. 665.

21. Ancient Customs—Mendip Mines—Forest of Dean, etc. Ancient customs of the Mendip mines, punishing ore stealing with "banishment" and burning of the domicile; prescribing that a dead miner be dug out and brought to christian burial, though forty fathoms deep, etc. *Smirke's Rep.* 127.

Ancient customs of the stannaries and Forest of Dean. Id.

22. British Local Customs. For instance of ancient privilege of mining "to all the king's subjects," by "conforming to the mineral customs used within the said soak," analogous to the manner of locating land on the public domain of the United States, see *Rowls* v. *Gells*, 2 Cowp. 451.

23. To flood Claims above. A custom to work claims by means of a dam, resulting in the flooding of claims above, considered, and the case adjudicated upon it as a good custom. *Stone* v. *Bumpus*, 46 Cal. 218; 40 Id. 428.

24. Prospecting—Gardens. In trespass q. c. f. defendant pleaded an immemorial custom to search for minerals in the district in which the *locus in quo* was situate, the sites of gardens, etc., excepted. The question as to whether plaintiff's close was a garden left to the jury, and the finding upon the facts stated as to planting, etc., not disturbed. *Gilbert* v. *Tomison*, 4 D. & R. 222.

25. Limiting Size of Claim. Testimony as to local usages and customs in different counties in the mineral regions, varying from each other as to the size of locating a mining claim, is not admissible in evidence to show the reasonableness of its extent. A general uniform custom should be proved if one exists. *Table Mt. Co.* v. *Stranahan*, 31 Cal. 387.

26. Instruction—Size of Mining Claim. An instruction as follows: "No location of a mining claim can be so extended as to amount to a monopoly, and in the absence of local regulations prescribing a limit, recourse must be had to general usage. If the quantity of ground included be unreasonable, the location will not be effectual for any purpose, and possession under it will only extend to the ground actually occupied. In other words, the extent of the occupancy will determine the extent of the claim, and whether the quantity be unreasonable or not, must depend upon the customs prevailing generally upon the subject," is a proper presentation of the law, and the law being applicable to the facts: *Held*, error to refuse such instruction. *Table Mt. T. Co.* v. *Stranahan*, 21 Cal. 548; S. C. 20 Cal. 198.

27. Evidence. A deed purporting to recite the customs of a manor wherein no mention is made of a custom to take minerals, is evidence against a person claiming title through a party to it, in disproof of the existence of such a custom. *Anglesey* v. *Hatherton*, 10 M. & W. 218.

28. Insufficient Proof—Miners' Right. A custom allowing strangers to enter upon lands of another, and mine for lead, locally called "miners' right," cannot be proved by the usage of a single mine, or the practice of a few persons. *Fuhr* v. *Dean*, 26 Mo. 116.

29. Slight Variance in Old Records. Certain variations in old entries of receivers' accounts, as to a manorial customary payment of a coal toll, extending over three centuries, and uniform in amount: *Held*, to be no objection to the validity of the claim. *Beaufort* v. *Smith*, 4 Exch. 450.

30. Written and Unwritten District Rules. Where any local mining customs exist, controversies affecting a mining right must be solved and determined by the customs and usages of the bar or diggings embracing the claim as to which such right is asserted or denied, whether such customs and usages are written or unwritten. *Morton* v. *Solambo C. M. Co.* 26 Cal. 527; B. & W. L. C. 107.

31. Evidence of in Other Mining Districts. The rule of law excluding evidence of custom in neighboring manors has been varied in "mine countries, Derbyshire, etc." to admit evidence to explain or corroborate the custom of the manor in question; and the same exception was in this case extended to the custom of digging turf, by analogy. *Ely* v. *Warren*, 2 Atk. 189.

32. Custom in Other Districts. Query—whether custom in other mining districts admissible. *Brown* v. *49 & 56 Q. M. Co.* 15 Cal. 153.

33. Proof of Custom in an Adjoining Manor. On the question of the existence of a custom (as to minerals) in a certain manor, evidence of such custom in an adjoining manor is not admissible, unless such adjoining manor and the manor in

question were parcels of one original manor, and had been severed since legal memory; otherwise they might have had different immemorial customs. *Anglesey* v. *Hatherton*, 10 M. & W. 218.

84. Evidence of Mining Custom in Neighboring Manors. Where, in each of several manors belonging to the same lord, and part of the same district, it appeared there was a class of tenants answering the same description, miners taking copper and paying a customary toll, and to whom their tenements were granted by similar words: *Held*, that the evidence of what rights had been enjoyed by those tenants in one manor might be received to show what were their rights in another. *Rowe* v. *Brenton*, 8 B. & C. 758; 3 Mann & Ry. 133.

85. Custom Controlled by Agreement. The general established custom of miners enters into and forms a part of a lease of mining lands, in the absence of any express stipulation to the contrary, or of a private custom of the lessor known to both parties. *Beatty* v. *Gregory*, 17 Iowa, 109.

86. Private Custom. The lessee of mining lands is not bound by the private custom of the lessor, unless the lease was executed with knowledge thereof by such lessee or his assignor. *Beatty* v. *Gregory*, 17 Iowa, 109.

87. Certainty in Pleading. Plea of a custom to dig and take away lead after the customary duties were paid, adjudged bad for uncertainty, not showing what the duties were, nor to whom payable, etc., upon the rule that every parcel of a custom must be alleged in the plea. *Bereeford* v. *Bacon*, 2 Lutw. 1317.

88. Incompetent Witness—Practice—England. A person who pays highway rate within a parish, is not rendered a competent witness by the 54 G. 3, c. 170, s. 9, upon the trial of an issue whether within that parish there is a custom that all persons residing therein whose duty is to cause the highways within the parish to be repaired, may take shingle from the sea beach for the purpose of such repair, the custom not being a matter relating to *ratio* or *cesses*, within the meaning of the act. *Oxenden* v. *Palmer*, 2 B. & Ad. 236.

89. Form of Interrogatory as to. An interrogatory put to a witness as to a prevailing custom in regard to the discovery of lead mineral, without by the question disclosing the pertinency and object of it, is inadmissible, unless the question discloses the custom proposed to be proved, so that the court can see its relevancy. *Ecker* v. *Moore*, 2 Chand. Wis. 85.

See DISTRICT RULES; USAGE.

DAM.

1. To what extent an Appropriation. A dam across a natural water-course is an actual appropriation of the water at that point, but not below it, even though the water flowing over the dam has been brought into the water-course by ditches constructed by the owners of the dam. *Kelly* v. *Natoma W. Co.*, 6 Cal. 105.

2. Upper and Lower Dams—Effect of Booming. Where, in 1865, A. built a dam and mill upon a certain stream, afterwards B. built another dam about 155 feet below the mill-wheel of A., which lower dam of B., however, at the time when constructed, and for a long time afterward, in no wise interfered with the mill or dam of A.; but in 1869, parties owning mining claims above both dams began to work their claims by a system entirely unknown at the time the dams in question were built, which system (booming) consisted in alternately checking the flow of water, and then letting it out suddenly at a full head, whereby great quantities of tailings, etc., were carried down stream, and settling between the two dams in question, caused an obstruction to the upper one belonging to A., the plaintiff: *Held*, that B., the defendant, was not responsible; that it was a damage resulting only as a remote result of his building the lower dam, and that it was a clear instance of *damnum absque injuria*. *Proctor* v. *Jennings*, 6 Nev. 83.

3. Canyon Claim. The owner of a mining claim comprising the bed of a canyon may erect dams across the bed of the canyon for the purpose of enabling him to work the same, even if thereby mining claims on the banks of the canyon belonging to others are flooded; provided the claim in the bed of the canyon is the oldest location, and in such case the injury sustained by the owner of the bank claim is *damnum absque injuria*. *Stone* v. *Bumpus*, 46 Cal. 218; S. C. 40; Id. 428.

4. Right to Flow. The reservation of a stream upon which is erected a dam, implies the reservation of the right to set the water back at all times to the same extent as it was set back by the dam at the time of the grant. *French* v. *Carhart*, 1 N. Y. 96.

DAMAGES.

See MEASURE OF DAMAGES.

DEED.

1. Mines Pass as of course. Mines not severed from the general title pass with the soil without being expressly mentioned in the deed. *Hartwell* v. *Camman*, 2 Stock. (N. J. Ch.) 128.

2. Mines and Minerals—Parol Evidence—Known Minerals. Parol evidence is not admissible to show that when a deed was made conveying "all mines and minerals" copper ore alone was contemplated by the parties, or known to exist on the land, so as to restrict the operation of the words of the grant. Id.

Parol testimony may be received to explain the technical meaning of such words as "mines" and "minerals," but not to show that the parties to the deed gave any peculiar or restricted meaning to such words. Id.

3. Omission of "Mines" after "Quarries"—Construction. D. mortgaged in fee lands having beds of coal under them, the conveyance expressly mentioning the mines to T. for securing a sum of money and interest; then devised all the mines under the land to her seven children, as tenants in common in fee, and all other her real estate to A., B. and C., their heirs and assigns upon trust to sell; then demised to A. and B. two seams of coal under the lands for fifty years, at £105 rent, and afterward died, and after her death the rent was paid to the seven children. Previous to her death T. died, after having devised all freehold estates held by him in mortgage to H. and J., their heirs and assigns. Afterward, by lease and release between A., B. and C. of the first part, H. and J. of the second, mortgagee of other premises of the third part, and K. of the fourth part, reciting that A., B. and C. had put up for sale the lands comprised in the mortgage, and K. had been declared purchaser of the lands (except the beds of coal beneath), it was witnessed that H. and J., at the request of A., B. and C., did bargain, sell and release unto K. the closes of land, together with all and singular the quarries, etc., (omitting the word "mines"), except and always reserving unto A. and B., during the term of thirty years, all the mines and beds of coal under the lands, etc., to hold the said closes of land (except as before excepted), unto K., his heirs and assigns forever: *Held*, that the mines or seams of coal did not pass to K. *Denison* v. *Holliday*, 3 H. & N. 670; 1 Id. 631.

4. The Right to Mine Created by Deed. The right to mine ore upon the land of another, whether it be an easement or by license, cannot be created except by deed. *Fuhr* v. *Dean*, 26 Mo. 116.

5. Of Foreign Mine. The conveyance of a mine in a foreign country not required to be proved by the production of a deed in a collateral proceeding. *Steigenberger* v. *Carr*, 3 Scott's N. R. 466; 3 Man. & G. 191.

6. Oil—Peculiarities of Subject-matter—Science—Obscure Contract. In cases of obscure instruments, especially on motion for a preliminary injunction, a court may inquire into the actual state of the knowledge which the parties to it had upon the subject of it, and where it involves questions of science, may refer to the state of public knowledge, or that of learning at the time the deed was made: *So held* upon the construction of an indefinite and uncertain grant, or lease, or license of the oil, or the right to take the oil upon a tract of land made at a time before oil was known to be produced by boring, and was only collected in small quantities from the surface of the water. *French* v. *Brewer*, 3 Wall. Jr. 346.

7. Blind Lode—Tunnel Discovery—Parol Explanation. Where a lode known as the Gold Hill Ledge had been discovered and located on the surface, and it remained in doubt whether it was the same lode which had been cut by a tunnel below and the said tunnel was prosecuted for blind lodes, as well as for the lode discovered on surface: *Held*, that not only could the *habendum* of a deed which was uncertain as to its conveyance of the Gold Hill Ledge be used to explain or qualify the description in the granting clause, but that parol evidence was admissible to show the circumstances under which the deed was made to reach the intent of the parties as to the Gold Hill Ledge. *McCurdy* v. *Alpha G. & S. M. Co.*, 3 Nev. 29.

8. Identification of the Vein—Emery—Iron Ore. Where there was a grant of the metals and minerals in a certain tract "beginning at the center of the vein of iron ore on the line between, etc.," and in trespass for taking ore there was conflicting evidence as to whether there was any such vein, or whether there was not more than one vein, and whether the parties agreed on a line of rocks as marking a supposed vein, and whether if any vein it was not a vein of emery instead of iron: *Held*, that if there was one vein of iron ore as called for in the deed, parol evidence could not affect the construction of the deed upon the question of boundary; 2. If more than one vein parol evidence must show which was intended; 3. If it was a vein of emery or a line of rocks it would be a good boundary under the deed though treated by the parties as a vein of iron ore. *Chester Emery Co.* v. *Lucas*, 112 Mass. 424.

9. Parol Explanation. In an action involving title to a mining claim, plaintiff offered a deed conveying "all that certain piece of mining ground situated in Comer's field, on Swindle Hill, south of the road leading from Yankee Jim's to Todd's Valley, known as the Booth claims and marked by stakes and corners, four hundred feet front, more or less, and running back into

the hill," which deed, it was alleged, covered the ground in dispute: *Held*, that parol evidence should have been allowed to show the relation of all the calls in the deed; that if part of the claims were north of the road there might still be enough true calls to enable the false to be rejected as surplusage; and that the phrase "running into the hill," might be shown to be a mining term and its meaning explained. *Reamer* v. *Nesmith*, 34 Cal. 624.

10. Grant of Zinc Ores enlarged by grant of Estate—Construction. A deed conveying "all the zinc ores in the following described premises," proceeding with a description by metes and bounds, and continuing with the words, "and also all the estate, right and title of the said parties of the first part in the before described premises," construed to convey all the interest of the grantors within the metes and bounds. *New Jersey Zinc Co.* v. *Boston Fr. Co.*, 15 N. J. Ch. 418, overruling S. C. 2 Beas. 13 N. J. Ch. 322. (Five out of twelve judges dissented.)

11. Two Locations on same Lode, same Vein under different names. Where the language of a deed admits but one construction, and the premises exist as called for in the deed, the grant of the deed cannot be limited by acts done in connection with the original location of the vein nor the failure to use all the names by which the vein may have been located or claimed. *Philpots* v. *Blasdell*, 8 Nev. 61.

12. Misdescription of Ore Vein, mistake—Injunction against suit on warranty, pending reformation. A., the owner of a lot of land, conveyed to B. all the minerals upon a portion of the lot, describing it by metes and bounds, following the course of a vein of iron ore, with the right to enter for the purpose of digging and carrying away the same. Subsequently A. conveyed by warranty deed to C. all the minerals upon the whole lot, describing it by metes and bounds, with the like right to enter, dig and carry away, excepting and reserving all rights, privileges and easements conveyed to B. by the first deed. In fact B. and C. bought the property described in the second deed upon joint account, and C. took the deed in trust for himself and B. While the property was so held B. and C. negotiated a sale of one-third thereof to D., and C. executed a deed of warranty to B. and D., purporting to convey to them two undivided third parts of all the rights, privileges and easements described in the second deed, repeating the description of the whole lot by metes and bounds, "meaning hereby to convey to B. one undivided third part of the above described rights, privileges and easements, and one undivided third part to D." The third deed as between C. and B. was without further consideration, and was intended and understood to execute the trust above mentioned by conveying to B. the legal title to one-third of the interest conveyed by the second deed, and to convey for the joint benefit of B. and C. a like third to D. The scrivener who wrote the third deed had the second deed before him, and was directed to make a warranty deed, but was not told either to omit or insert the exception, and he omitted it, supposing that its omission was immaterial. At this time B. and C. and the scrivener, under a mistake as to the true interpretation of the deed in the location of the premises, supposed the situation of the iron vein, described in the first deed, to be such that no part of the property conveyed by that deed was included within the description in the second deed. D. at this time knew nothing about the vein of iron ore, or the first deed. After this C. conveyed his remaining third in the property to B., and D. did the like, and B. became sole owner, subject to a mortgage made by him to D. In an action of tort brought by E., who had become owner of the rights conveyed by the first deed against B., it was determined that the minerals described in the first deed were upon the land described in the second and third deeds. B. paid the judgment recovered against him in that action, and began an action against C. for breach of the covenants contained in the third deed. On a bill in equity brought by C. against B. and D. to reform the third deed, so that the property and rights described in the first deed might not be included therein, and to restrain B. from prosecuting his action at law against C.: *Held*, that the plaintiff was entitled to an injunction against B., restraining him from setting up the third deed or covenants therein contained as applicable to the vein of iron ore, so far as regarded the third part thereby conveyed to B.; and also in order to prevent circuity of action, so far as regarded one-half of the third part thereby conveyed for the joint benefit of B. and C. to D., and afterward conveyed by B. to D.; and also restraining B. from prosecuting his action against C., except so far as might be necessary to ascertain the amount of damages, until B. should have procured D.'s assent to such a reformation of this deed, or to such a release as would secure C.'s rights. *Wilcox* v. *Lucas*, 121 Mass. 21.

13. Conditional Severance — Limitation of Time—Option. The grantee of a right of mining, who, by the terms of the deed, is bound to surrender the right at the end of a year, if he finds it unprofitable, and who, at the end of the year, indicates

no intention to do so, cannot have his right limited to one year. *McBee* v. *Loftis*, 1 Strobh. (S. C.) Eq. 90.

14. Agreement distinguished from—Stamps. A paper signed by the defendants stated that the plaintiffs agreed to sell to the defendants all the two upper veins or beds of coal (describing them by their name and locality), containing by admeasurement sixteen acres, at the price or sum of £77 per acre, to be paid for as follows: the sum of £100 on the day of the date thereof, and the remainder by equal quarterly payments of £25 each, and it was stipulated that, if the defendants should work more coal than in any year should exceed £100, at the rate of £77 per acre, they should pay for such excess: *Held*, that the instrument was not a conveyance, and therefore did not require a stamp as such. *Phillips* v. *Morrison*, 12 M. & W. 739.

15. License—Witnesses.—An instrument of writing which does not, and was not intended to, grant the soil in fee, but the use only for the purpose of mining, is not a deed for the conveyance of the land within the act of 1795, requiring two witnesses. *McBee* v. *Loftis*, 1 Strobh. (S. C.) Eq. 90.

16. Ditch in Sections—Construction—Feeders. One water ditch cannot pass by a deed of another water ditch as an appurtenance thereto, although the latter ditch is a feeder to the former, and its waters unavailable unless carried into and through the former. *Donnell* v. *Humphreys*, 1 Mont. 518.

But where the description of the ditches conveyed is not definite, and it requires parol evidence to identify the particular ditches intended, evidence of such relationship of the ditches is admissible in aid of the contention of the grantee that such last mentioned or feeding ditch was intended to be conveyed. Id. (Knowles, J., dissented.)

17. Construction—Absolute Grant.—A deed after the grant of a distinct parcel in fee continued "also the right of digging for coal under the adjoining land lying east of said lot (describing such adjoining land), together with all and singular the tenements, hereditaments and appurtenances, to the said lot or parcel of ground belonging, with the right of digging for coal as aforesaid." Also a covenant of warranty of the lot, "with the right of digging for coal as aforesaid," to the grantee, his heirs and assigns "free from the claim of all persons:" *Held*, a conveyance of the absolute property in the coal, with the exclusive right to mine and remove the same. *List* v. *Cotts*, 4 W. Va. 543.

18. Construction—"Dexter Ledge." If the term "Dexter Ledge of Lime Rock," used in a charter of incorporation as descriptive of the corporate property, has acquired a settled definite meaning in the community, as including certain lime rock of definite extent and excluding all other, such lime rock only would be deemed to be intended by the charter, whatever might have been the general expectation of the corporators; and parol evidence is admissible to prove that the term has acquired such meaning. *Dexter Lime Rock Co.* v. *Dexter*, 6 R. I. 353.

If, however, the petitioners for the act of incorporation use the term, or expressly, or by plain implication, define its extent in their petition, such definition may be resorted to, to explain the meaning of the term in the charter. Id.

19. Construction—Grant of Ore. A grant to one and his heirs of all the iron ore, metals and minerals in a described tract of land, with the right to enter and dig and carry away the ore, etc., the grantor "having one year's notice previous to commencing to dig upon the premises," is a grant of a present estate in fee of the ore, etc., and gives the grantee possession so as to maintain an action against a trespasser who removes the ore, although the grantee had given no previous notice of his intention to dig upon the premises. *Chester Emery Co.* v. *Lucas*, 112 Mass. 424.

20. Construction—Grant—License. An instrument authorizing defendants "to enter upon our lands * * and dig up, remove and take away from said lands so much gravel * * as the said company may choose for the construction of their gravel road," construed to be a grant and not a license, and therefore irrevocable. *Bracken* v. *Rushville & V. G. R. Co.*, 27 Ind. 347.

21. Construction—Conveyance of Land and Not License. A conveyance of a tract of land with "the full right, title and privilege of digging and taking away stone-coal to any extent" the grantee might think proper from under an adjoining tract owned by the grantor, is not a license but a conveyance of entire ownership of the coal in place, beneath the adjoining tract. *Caldwell* v. *Fulton*, 31 Pa. St. 474. See 32 Id. 241; and 53 Id. 229.

A grant of the privilege of raising iron ore in the lands of the grantor, at a certain price per ton, is an incorporeal hereditament, not a mere license revocable at the will of the grantor. *Johnstown Iron Co.* v. *Cambria Iron Co.*, 32 Pa. St. 241.

Such a right is not exclusive in the grantee but to be enjoyed in common with the grantor, his heirs and assigns. Id.;

Caldwell v. *Fulton*, 31 Pa. St. 474, distinguished.

22. Construction—Reservation—Non-user—Grants of Minerals after Original Reservation. By indenture of 1738, A. granted to McC. certain lands, and amongst them "ten acres of creggan," excepting mines, minerals, and quarries, with liberty to enter, search, dig, etc. By deed of settlement 1739, A. granted to trustees "all that and those the baronies, townships, manors, towns, lands, fee-farm rents and hereditaments" thereinafter mentioned, amongst which were "the ten acres of creggan," and "the chief or fee-farm rents out of the premises mentioned," and "the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of all and every the aforesaid baronies, lordships, manors or reputed manors, lands, tenements, hereditaments and premises, and all parts, parcels and members of the said premises, or any of them," to hold for certain uses. By another deed of 1822, were granted "all the baronies, lordships, castles, manors, towns, lands, quarter-lands, fee-farm rents, and other rents, tenements and other hereditaments, with their and every of their rights, royalties, members, and appurtenances," etc., subject to incumbrances upon certain trusts: *Held*, in an ejectment on the title to recover the quarries and limestone on certain of the lands so granted, that the words in either deed were sufficient to pass the quarries; 2. That the failure to work the mines under the reservation of the deed of 1738 for twenty years did not bar the right of the owner, in whom they remained the same as if he had not granted the surface, nor amount to a discontinuance under the act of 3 and 4 W. IV, c. 27, s. 3. *McDonnell* v. *McKinty*, 10 Irish L. R. 514.

23. Identifying Property described. Where documentary evidence in the shape of conveyance of mining claims is admitted, further proof may be given, if requisite, to show the identity of the claims with those mentioned in the complaint, and the court will not control the order of proof. *Jackson* v. *Feather River Co.*, 14 Cal. 19.

24. Parol Evidence—Ditches. Parol evidence is not admissible to show that the grantors in a deed in which the property is described as "all the water of the right-hand fork of Oro Fino gulch," intended to convey the water of the left-hand fork of the same gulch. *Taylor* v. *Holter*, 1 Mont. 688.

25. Of Water—Habendum—Construction—Moiety. A deed conveying the undivided half of a certain ditch, from the Truckee river to a certain mill, the granting clause and description being followed by the words "and all the water of said Truckee river, which may or can be led through said ditch and flume, or either of them, or as the same may be enlarged at the cost of the party of the second part," conveys only an undivided interest in the ditch, flume and water. The sweeping clause does not enlarge the grant as to the amount of interest conveyed. *Fogus* v. *Ward*, 10 Nev. 269.

26. Deed of One Co-Tenant Inoperative. A deed by one tenant in common of minerals, of a portion of the common estate by metes and bounds, is inoperative as against his co-tenants. *Hartford Ore Co.* v. *Miller*, *Same ads. Same*, 41 Conn. 112.

27. Tenant for Life—The Word Mines. One seized in fee conveyed his lands containing mines, all of which were unopened, with all "mines, waters, trees," etc., to A., tenant for life, remainder to B., etc.: *Held*, that the tenant for life could not open the mines; that the meaning of inserting mines, trees and water was that all should pass, but not to grant a power over them, except to those who had an estate of inheritance. *Whitfield* v. *Bewit*, 2 P. Wms. 240.

28. Warranty—Outstanding Lease. A warranty of title upon sale of the surface, reserving minerals, is broken by the existence of an outstanding lease of the minerals, under which the lessees are bound to get all the coal without leaving support to the surface. *Taylor* v. *Shafto*, 8 B. & S. 228.

29. Fraud in Sale not to affect Construction. No weight is to be given to parol testimony which is contrary to the obvious construction of written documents confirmed by the acts of the parties and their acquiescence, although hardly any length of time would bar them from redress against fraud if proved. *Atwood* v. *Small*, 6 C. & F. 232.

30. Latent Ambiguity—Letters of Agent. Where a deed purported to grant all the coal mines in the lands in the occupation of K., and the grantor had not at that time any lands in the occupation of K., and the deed was founded upon a contract of sale executed some months before, to which the grantor's land steward was the subscribing witness: *Held*, that for the purpose of explaining the latent ambiguity in the deed, lettters written by the latter to the grantees, respecting the sale to them by the grantor of the coal mines in the deed, and purporting to be written by his directions, were admissible evidence, without showing an express authority from the grantor to write them. *Beaumont* v. *Field*, 1 B. & Ald. 247.

31. By Grantor out of Possession. Adverse possession (of mining land in Michi-

gan) does not invalidate a conveyance by the party out of possession. *Roberts* v. *Cooper*, 20 How. (U. S.) 467.

32. Escrow — Consideration out of Claim. Where White, in consideration of $1500, conveyed an undivided interest in certain mining claims by deed containing the following condition: "The said Beem shall pay to the said White all the dividends that shall at any and all times be declared to one-twelfth of said claims, also all the proceeds of his wages due him for labor in said claims, after receiving $10 per week for his own support, until the amount paid shall equal the sum of $1500, with interest mentioned above; then this bill of sale shall be given unto the said Beem by him who may have it in possession, thereby giving unto the said Beem full possession and control of said property:" *Held*, that Beem was bound to contribute his labor on the claims until his labor (less $10 per week reserved) and the proceeds of the claim equaled the price to be paid. *Beem* v. *McKusick*, 10 Cal. 538.

Held further, that the deed was but an escrow in the hands of McKusick, the holder, and B. was entitled to nothing more than the delivery of it, and was only entitled to this on a strict compliance with the stipulations of the contract on his part. Id.

33. Real Consideration — Estoppel. The parties to a deed are not estopped by the consideration expressed in it, from showing what the real consideration was. *Irvine* v. *McKeon*, 23 Cal. 472.

34. Before Territorial Organization. A deed for a mining claim executed and recorded in the district where the claim is situated, before any act was passed by the territorial assembly relating to such instruments, cannot be given in evidence without proof that it was executed by the grantor. *Sullivan* v. *Hense*, 2 Colorado, 424.

35. Prior and later Grants. When the common owner of adjoining tracts sells the coal under one tract to A., and the coal under the adjoining tract at a later date to B., any right of privilege directly conferred by the former deed "must dominate any conflicting right" found in the conveyance to B. *Horner* v. *Watson*, 79 Pa. St. 242.

36. Defective conveyance good as bill of Sale. A paper purporting to be a deed of trust, reciting a corporation as grantor, and having affixed thereto the following attestation: "Witness the signature and seal of William Scott, president of said Blennerhassett Oil Co., and who is legally authorized by the board of directors of said company to make this grant, this date afore written. William Scott," is not the deed of the corporation. *Rauch* v. *Blennerhassett Oil Co.*, 8 W. Va. 36.

Such paper, however, relating merely to goods and chattels, is valid. Id.

37. Bill of Sale. A bill of sale purporting to convey only the interest of the vendor without warranty, conveys only the present right of the maker of such instrument. *Clark* v. *McElvy*, 11 Cal. 160.

38. Seal—Bill of Sale. It is no objection to the admissibility of a bill of sale of a mining claim that it is not under seal, whatever may be the effect of it as evidence. *Jackson* v. *Feather River Co.*, 14 Cal. 19.

39. Bill of Sale of Claim—Execution. A bill of sale of a mining claim executed by three grantors is admissible in evidence if the execution of only two of the grantors is proven. If the execution of the third grantor is not proven, the failure to make this proof should be taken advantage of by asking the court to instruct the jury to disregard it so far as it purports to convey the interest of the person whose signature is not proven. *St. John* v. *Kidd*, 26 Cal. 263.

40. Mortgage—No Corporate Seal. A mortgage made in connection with a bond to secure the debt of a corporation styled the Scott River Water and Mining Company, named as parties of the first part (grantors), W. P. Poole, C. W. Tozer, G. T. Terry and J. Reid, "president, directors, and members of the Scott River Water and Mining Company," and concluded as follows: "In witness whereof, the said parties of the first part hereunto set their hands and affix their seals," followed by the signature of the four persons above named, with a seal or scrawl affixed to each: *Held*, that this conveyance was not sealed with the corporate seal, and was therefore inoperative as the foundation of any right or claim to the corporate property which it purported to convey. *Richardson* v. *Scott River Water and Mining Company*, 22 Cal. 150.

41. Under Seal—No Power under Seal—Parol Contract. A license of the privilege to exsect iron ore at a certain rate per ton, containing covenants signed "Michael Garner (seal), William Irwin (seal), by agent Miles McHugh:" *Held*, that McHugh not being attorney in fact created by instrument under seal, and Irwin never having confirmed the instrument by deed, that it was not his deed. But that having accepted the benefit of it, he was liable as upon a parol contract. *Grove* v. *Hodges*, 55 Pa. St. 504.

42. Bill of Sale—Intent. No precise form of words is necessary to work a con-

veyance in a bill of sale for a mining claim. If it be clear from the language of the instrument that the maker intended to pass thereby the title to the property the law will, if possible, so construe the words used as to effectuate that intent. *Meyers* v. *Farquharson*, 46 Cal. 190.

43. Parol Sale—California. Prior to the act of the legislature of California, of April 13, 1860, a parol sale of a mining claim accompanied by transfer of possession was valid; but since the passage of that act a deed or a bill of sale is necessary to convey title. *King* v. *Randlett*, 33 Cal. 318; B. & W. L. C. 334; *Goller* v. *Fett*, 30 Cal. 481; see *Patterson* v. *Keystone Mining Company*, 30 Cal. 360.

44. Conveyance—California. The act of April 13, 1860, relative to the conveyance of mining claims (requiring a writing) applied to gold claims until the amendment of 1863, since which it has applied to all mining claims. *Patterson* v. *Keystone M. Co.*, 30 Cal. 360.

45. Of Corporation, Authority. The power to sell and convey corporate property can be conferred only by the board of trustees when assembled and acting as such. The board may confer this power upon themselves as individual trustees, or upon any other person or persons. *Gashwiler* v. *Willis*, 33 Cal. 11.

46. Company name—Competent grantee. A deed or bill of sale to a mining company by its name, *e. g.*: The "Guatamala Mining Company," shows on its face a grantee capable of taking as against a general objection to its admission. *Cochran* v. *O'Keefe*, 34 Cal. 554.

47. To non-existing Corporation. Burns contracted for the purchase of oil land from S., and sold shares with the purpose of obtaining an incorporation of a company. The vendor conveyed to "The Middletown Oil Company," no such company having been incorporated: *Held*, that the deed passed no title, and that the shareholders took no title either from Burns or the vendor. *Burns* v. *McCabe*, 72 Pa. St. 309; *McCabe* v. *Burns*, 66 Pa. St. 356.

48. Corporate Seal—Recital of Authority. A deed, without the corporate seal, purporting to have been executed on behalf of a corporation by its board of trustees, is inadmissible as evidence without first showing their authority to execute the same. The recital of such authority in the deed is no evidence of its existence. *Gashwiler* v. *Willis*, 33 Cal. 11.

49. Corporate Seal implies Authority. A deed signed by the trustees, and having the corporate seal affixed, is *prima facie* the deed of the corporation, and all proceedings of the company necessary to authorize its delivery, or to give it validity, are presumed. *Miners' Ditch Co.* v. *Zellerbach*, 37 Cal. 543.

50. Of Corporation Seal—Prima Facie Evidence. Where the deed of a (mining) corporation has the corporate seal affixed, and is signed by the proper officers, no vote of the directors need be shown authorizing its execution; the seal itself is *prima facie* evidence that it was executed by proper authority. *Union G. M. Co.* v. *The Bank*, 2 Colorado, 226. (Wells, J., dissented.)

51. Rejection of Repugnant Clause. An estate with the "mines and minerals" was settled, and power was given to the trustees to demise the hereditaments and the coal and minerals, etc., but so as the lessees should not be "dispunishable for waste:" *Held*, that the last clause was repugnant, and that the trustees might demise mines, both open and unopened at the date of the settlement. *Daly* v. *Beckett*, 24 Beavan, 114.

52. Deed must be Produced or Accounted for. An interest in a mining claim being purchased by deed, the transfer can be shown only by production of the deed, or by proof of its loss and secondary evidence of its contents. *King* v. *Randlett*, 33 Cal. 318; B. & W. L. C. 334; *Patterson* v. *Keystone M. Co.*, 30 Cal. 360.

When a mining company has taken up a claim by location, proof of a person being a member of the company would be competent proof upon a question of title, and would show his interest in the claim as a joint locator; but where a party claims by purchase he can only show title by the production of his deed, or proof of contents after loss and search. *King* v. *Randlett*, 33 Cal. 318, B. & W. L. C. 334.

See CONVEYANCE; GRANT.

DELIVERY.

1. Oil from Tank. The property in oil in a partially laden barge in the process of filling, does not pass as the oil flows from the tank into the barge. *Rochester & O. O. Co.* v. *Hughey*, 56 Pa. St. 322.

2. To Agent. Coal received by an agent for purposes of reshipment merely on a further section of the route is not delivered; it is still in transit; otherwise, if so received by a general agent of the buyer having power to alter its destination although between the points of transit. *Pottinger* v. *Hecksher*, 2 Grant Ca. (Pa.) 309.

3. Wood delivered in absence of agent—Want of Assent. When a mining com-

pany, by its agent, had negotiated for 3000 cords of wood, and the agreement was reduced to writing and signed by the company, but not by the other party, an item of the contract being that the other party should furnish a bond to secure performance, and the bond not being furnished, the agent of the company left the State, considering the contract abandoned: *Held*, that the contract was never consummated, and the company was not bound to receive or pay for wood furnished during the absence of the company's agents by the party with whom the negotiation had been commenced. *Morrill* v. *Tehama M. & M. Co.*, 10 Nev. 125.

4. Of Salt, complete when loaded. — N. is the lessee of L. of a salt property, the rent of which is reserved in salt. N., in July, sells to L. all his salt then on hand, or which he shall make before the first of next January, except what may become due to L. for rent. A. sends his boat, early in December, to N.'s wharf for a load of the salt, and the salt is put in the boat; but after the boat is loaded, and while the boatman is fixing his oars to start, L. comes to the place and forbids him to take the salt away, saying he has a landlord's warrant, or would get one, to take the salt for rent. Soon afterward, the deputy sheriff comes also, and forbids the boatman removing the salt saying he had a landlord's warrant, or notice, though he does not appear to have had such a warrant, whereupon the boatman leaves the boat, and L. takes possession of it, and sends it down the river, and it is wrecked. In trover by A. against L.: *Held*, that there had been a complete delivery, that the salt belonged to A., and that the boatman had no authority to abandon the salt to L. *Lewis* v. *Arnold*, 13 Gratt. (Va.) 454.

DENOUNCEMENT.

1. Forfeiture Saved by Life Tenant.— Moneys expended by tenant for life in working a foreign mine (in Colombia, South America), to prevent its forfeiture or liability to denouncement, ought to be refunded out of the estate. *Dent* v. *Dent*, 30 Beav. 363.

DESCRIPTION.

1. Magnetic Variation. In an action concerning disputed boundary between two mining claims, depending on an agreement between the parties, in which the word "north" was used, and parol evidence was admitted to prove that it was the custom of the locality to run boundary lines by the magnetic meridian, and that that was the understanding of the parties: *Held*, that such evidence was admissible, not to contradict or vary the term, but to ascertain the sense in which it was used. *Jenny Lind Co.* v. *Bower & Co.*, 11 Cal. 194.

2. Location. In premising the decision upon the sufficiency of description in a tax levy, the court say: "We know it is a common and almost universal custom for prospecters in this state to take up claims for mining purposes on the public domain, describing them as so many feet of a certain lode, lead, ledge, or mineral vein, with all its dips, spurs and angles, but giving no lateral boundaries to the claim." (1865.) *State* v. *Real Del Monte G. & S. M. Co.*, 1 Nev. 524.

3. Bar Claims. Description of bar placer claims, giving name of claim and adjoining claim, size and location in canyon: *Held*, sufficient. *Grady* v. *Early*, 18 Cal. 109

4. Ledge. The term, "Great Hill or Ledge of Lime Rock," in a deed, is to be construed, in order to ascertain its extent and limits, in the light of the circumstances attending the transaction, according to the intent of the parties, derived from the language employed by them, rather than according to geological notions, however correct, concerning the continuity and extent of the stratum of lime at the place referred to; and where the hill or ledge is described in the deed as "lying southerly from my dwelling-house," and another ledge is described in the same deed as "lying easterly from said dwelling-house, and northerly from the driftway leading from said Great Ledge to the lime-kilns," the limits thus implied are to be observed, irrespective of the continuity and extent of the stratum of lime. *Dexter Lime Rock Co.* v. *Dexter*, 6 R. I. 353.

5. Lode held under Different Names. When a lode is conveyed it must be ascertained by the best means in our power what lode is intended; and if this can be done, it makes no difference that it has been called by a name illegitimately acquired. *Phillpotts* v. *Blasdel*, 8 Nev. 61.

6. "Coal Bank"—Lease. Where the lease described what was let by the lessors as their "coal bank and the appurtenances thereunto belonging," and did not otherwise describe the premises leased, nor the boundaries, in an action for the rent reserved, in which eviction is set up as a defense, it is for the jury and not for the court to say what was the extent of the demise, it being rather a latent ambiguity to be solved, than an instrument of writing to be construed. *Tiley* v. *Moyers*, 43 Pa. St. 404.

7. Variance—Coal Vein. "The grantor of real estate, in a contract of sale of a

certain tract of land, reserved "twenty feet of stone coal running east and west through the same." In the deed tendered to the purchaser, this reservation was described as "a strip or belt of stone coal twenty feet wide, and running through or across said tract, in an easterly or northeasterly direction, conforming to the course of the coal vein:" *Held*, that the description in the deed was essentially different and more extensive than that set out in the contract of sale." (Entire report.) *Ferron* v. *Sturgeon*, 10 Iowa, 586.

8. Boundary "Ten Paces North of Quarries." A contract to convey lands bounded on the south by a line "ten paces north of the quarries," the face of the quarries as worked being toward the south (the intention being to exclude his lime quarries from the grant), construed to mean lands bounded on the south by a line ten paces north of the face of the quarries as worked, without regard to the extent toward the north of the stone constituting the quarries. *Huffman* v. *Hummer*, 18 N. J. Ch. 83.

9. Shawnee "Iron Works"—Appurtenances. A sheriff's sale of the "buildings, furnaces and other improvements * * * known as the Shawnee Iron Works," passes a railroad used in connection with the furnaces, though passing over intervening lands between two parcels of the lands of the defendants in execution—although the word appurtenances was omitted from the levy. *Wright* v. *Chestnut Hill Co.*, 45 Pa. St. 475.

10. Reservation—Extent of "Rolling Mills"—Improvements. In a deed conveying a tract of land was this exception: "Saving and excepting a small part of the said piece or parcel of land hereinbefore firstly conveyed, upon which the rolling-mill improvements now in part stand." There were three separate buildings, constituting one establishment, for the manufacture of iron, a rolling-mill, a slitting-mill and a puddling-mill, and the whole together were commonly called "The Rolling Mills:" *Held*, that this exception is not confined to the land on which one of these buildings, the rolling-mill proper, in part stood, nor to the ground actually covered by all of them, but embraces all the ground covered by any improvement connected with the whole establishment, and necessary or convenient for its use and actually used in connection therewith; 2. That any structure made by the expenditure of labor or money by the owners of the rolling-mills, intending to make the same more useful or valuable, and actually used in connection therewith and visible to the eye at the date of the deed, is an improvement within the meaning of this exception; 3. That the phrase "now in part stand" does not confine the improvements meant to such as were erected or elevated; but, of the land conveyed, that part is within the exception whereon any of the rolling-mill improvements were, at the date of the deed, situated, or placed, or remained. *Carroll* v. *Granite Mfg. Co.*, 11 Md. 400.

11. Erroneous Map—Boundary of Sett—Practice. In a "sett," or lease of a mine, the boundary line was thus described, "a line drawn from J. V.'s house," to a boundstone; and in the description of the parcels in the lease, it was said, "which said premises are particularly described by the map on the back of this sett." On this map the boundary line appeared to be drawn from the north-east corner of the house. The position of the house itself was incorrectly represented on the map: *Held*, that the judge was bound to look to the map as forming part of the deed, and to tell the jury that the line was to be drawn as marked on the map; the position of the house on the map being first corrected according to the fact. *Lyle* v. *Richards*, L. R. 1 H. L. 222.

Per Lord Westbury Dis.: In this case, it being ascertained that the house itself was incorrectly laid down on the map, it was impossible to know by an examination of the deeds, and by their construction alone, from what corner of the house the boundary line was to be drawn; that consequently there was a latent ambiguity, which was to be determined by evidence, and was not dependent on construction. Id.

12. Mechanic's Lien on Quartz Mill. A mechanic's lien which describes the property as a "quartz mill, being at or near the town of Scottville, in Amador county, known as Moore's New Quartz Mill," contains a sufficient description to hold the property, where there is no evidence that there was any other quartz mill at the place so designated so as to render it uncertain which was intended. *Tibbetts* v. *Moore*, 23 Cal. 208.

13. Construction—Warranty of Lands "Described." Where the deed of S. Fowler conveyed certain tracts by metes and bounds and "also all the iron, zinc, and other ores on or within any of the lands of the said S. Fowler in the county of Sussex," with covenant of warranty of the "lands and premises described" in it: *Held*, that the warranty did not extend to the grant of ores and that the grantor was not estopped from buying in an outstanding title. *Boston, etc. Co.* v. *Condit*, 19 N. J. Ch. 394.

14. Parol Evidence to Identify. Where a mortgage describes the property as the "interest in the quartz mill and lode formerly owned by John H. Hancock, said interest being one-half of the mill and lode,"

extrinsic evidence is admissible to identify the property. *Hancock* v. *Watson*, 18 Cal. 138.

15. Identification of Monuments. The following description of a mining claim in a bill of sale "commencing at an oak bush near the gate of Myers' cow-yard, running straight across the river to the head of the wing-dam put in by Owens & Co., in 1868; from thence to a prominent point of granite bed-rock in El Dorado county; from this line down to the old Willow Bar line," no State mentioned: *Held*, sufficient to allow the paper to be received in evidence, as the points mentioned might be well known monuments easily found and distinguished. *Meyers* v. *Farquharson*, 46 Cal. 190.

16. Parol Evidence to Explain. Where the description of a mining claim is differently stated in the complaint and the instrument sued on, but the descriptions are not contradictory, parol evidence is admissible to show that the two descriptions cover the same ground. *Began* v. *O'Reilly*, 32 Cal. 11.

17. Surplusage. If a deed of a ditch or right of way contain two descriptions of the property intended to be conveyed, one of which sufficiently describes the property and the other is false in fact, the latter should be rejected as surplusage. *Reed* v. *Spicer*, 27 Cal. 57.

18. Expressio Unius Exclusio Alterius. The rule *expressio unius est exclusio alterius* applied to the construction of a deed which proceeded "together with, etc., quarries," etc.; omitting the word "mines" usually found in that connection when it is intended that the whole corpus shall pass. *Denison* v. *Holiday*, 3 H. & N. 670, 1 Id. 631.

19. Certainty, Forcible Entry. A complaint in forcible entry setting forth that "the said George H. Cox was on the first day of January last, has been, and still is, the owner of and justly entitled to the possession of a certain range of lead ore, and a strip of land or piece on each side thereof, twenty-five yards wide on each side, running easterly and westerly across the land hereafter described, and the right of searching and digging for lead ore thereon, in section 17, township No. 4, north of range No. 3 west, in said Grant county:" *Held*, that the description of the premises did not amount to reasonable certainty. *Cox* v. *Groshong*, 1 Burnett, Wis., 150.

DEVISE.

1. Mines open at date of will. A devise of lands to one person and of mines or pits to another, passed only mines and pits which were open at the date of the will before the new statute of wills (7 Will. 4 & 1 Vic. c. 26). *Query*, whether since that statute mines open at death of testator would pass? (Per M. R.) *Brown* v. *Whiteway*, 8 Hare, 150.

2. Devise, annuity, profits—Proceeds. A testator, by a will technically drawn, gave to a daughter a certain annuity, and in another clause directed the sale, after a certain period, of his "coal land," after which sale the annuity was to abate upon the payment to such daughter of her share of the proceeds, and to proportionately abate upon the payment of any part of the proceeds. This coal land before sale was leased for mining purposes, as allowed by the will, and her share of royalty paid to the daughter: *Held*, that such payments of royalty were not the proceeds of sale, although mining might be a destruction of the land itself, and that the annuity could not be diminished. *Brisben's Appeal*, 70 Pa. St. 408.

3. Construction of limitation in Will. A testator devised certain real estate to A. and B. in trust for the heirs of his body issuing; and in default of such issue, in trust to pay the rents, issues and profits to C. for life, but impeachable of waste as to timber, houses, or "for digging or getting any coal or cannel coal opened, or to be opened otherwise than under and by virtue of and agreeable to the power thereinafter given for that purpose," with remainder to D. in the same manner, except as to timber, with sundry further remainders. Then followed a power to the person or persons, except C., who, by virtue of the will, should for the time being be seized of or entitled to the actual freehold of the hereditaments thereby devised in strict settlement, or to the annual rents, issues and profits thereof, to grant leases in possession of the mines at a mine rent: *Held*, that the trustees who had the legal estate during the life of C., had during her life, power to grant leases of the coal or cannel mines. *Leigh* v. *Balcarres*, 6 C. B. 847.

DIAMONDS.

"Valuable mineral deposits," U. S. Stat. 1872. The words "valuable mineral deposits," used in the act of May 10, 1872, entitled "An Act to promote the development of the mining resources of the United States," R. S., sec. 2319, include diamonds; and the title to public lands containing these minerals may, accordingly, be acquired by individuals or associations under the provisions of that act. 14 Op. Att. Gen. 115.

DIP.

Drainage — Flooding from Watercourse. Each of the owners (of coal mines

on the dip) is entitled by law to get out the whole of the mineral from his mine, leaving the water to take its own course; but this does not allow the owner of the upper mine to so work his mine as to drain water from a river into it, and let it flow down upon the lower mine. *Crompton* v. *Lea*, L. R. 19; Eq. 115.

SEE DRAINAGE, FLOODING, COLLIERY, WORKINGS.

DISCOVERY.

1. Discovery not followed up. A discoverer who neglects to have his title adjudicated and registered agreeably to the ordinance, or to have his pertenencias measured and marked, does not, by such negligence, forfeit his title, but simply fails to acquire any title which could be the subject of forfeiture. *U. S.* v. *Castillero*, 2 Black, 20.

2. Title of Discoverer—Time for Location. The discoverer of a mineral deposit on the public domain is entitled to a reasonable length of time in which to perfect the development which the local law requires of him; has a right to the possession without interference, and his right is as absolute as after the development is complete. *Murley* v. *Ennis*, 2 Colorado, 305.

3. Discoverer's Right. Under the "Spanish and all other mining ordinances" the discoverer was considered as the true owner and creator of the minerals he had discovered, and the surface was under servitude to his right of entry, actual damages only being paid. *U. S.* v. *Castillero*, 2 Black. 286.

4. One Wall of Lode must be found. Before a quartz claim can be legally located a lode must be discovered, and "before such discovery can be called a discovery, at least one well defined wall or side of the lode must be found." *Foote* v. *National M. Co.*, 2 Mont. 402.

5. Discovery and Registry—Mexican Grant. Title to a mine is vested by the adjudication or decree of the proper tribunal in a case duly presented for decision, and by the registry of the adjudication, together with the proceedings on which it is founded. *U. S.* v. *Castillero*, 2 Black, 18.

The mere fact of discovery, without such adjudication and registry, gives no title to the discoverer, though it is also true that without proof of discovery there can be no adjudication in his favor. Id.

6. Customary arrangement with Discoverer—Patent. M. was aware of a valuable mining location on Lake Superior, and was regarded by other explorers in that region as entitled to it. He made known this location to an incorporated mining company under an agreement that he should be compensated for the communication; but the mode of compensation was not determined. The company having availed itself of the discoverer's communication, it was held that M. was entitled to compensation in the manner usual in such cases. The usual mode was proved to be by receiving a share or partnership interest in the mine when the patent is procured: *Held*, that this mode was not *ultra vires* of the company or the directors. *McDonald* v. *Upper Canada M. Co.*, 15 Grant (Canada), 179 and 551.

DISTRICT RULES.

1. Common Law of Miners. The rules and customs of miners in a particular district are laws, and constitute the American common law on mining for precious metals. *King* v. *Edwards*, 1 Mont. 235.

2. Before Territorial Legislation. Before any law was enacted by the territorial assembly, regulating the manner of locating and conveying mining claims on the public domain, that matter was regulated solely by rules or by-laws made by the inhabitants of the district in which the claim was situated, or in the absence of such rules and by-laws, by the local customs and usages of the district. *Sullivan* v. *Hense*, 2 Colorado, 424.

3. Are Conditions Precedent. The rules and customs which point out the manner of locating mining ground are conditions precedent, which must be substantially complied with. *King* v. *Edwards*, 1 Mont. 235.

4. Validity. The rules adopted by the miners of a district acquire validity not from their mere enactment, but from the customary obedience and acquiescence of the miners following the enactment. *Harvey* v. *Ryan*, 42 Cal. 626.

5. Subject to Statute. The miners of a district have authority to prescribe the rules governing the acquisition and divestiture of possessory mining titles, subject only to the general laws of the state. *English* v. *Johnson*, 17 Cal. 108; B. & W. L. C. 172.

6. Cannot defeat Patent — Mexican Grant. A patent from the United States upon the confirmation of a Mexican grant carries with it the ownership of the minerals in the land patented; and in ejectment for such land defendant cannot set up, as against the United States, or as against parties claiming from the United States—the paramount proprietor—a title resting upon mining rules and regulations. *Fremont* v. *Seals*, 18 Cal. 434.

7. Affecting Vested Rights. In suit for mining claims, the court permitted defendants to introduce in evidence district rules adopted after the rights of plaintiffs had attached: *Held*, that admitting plaintiffs' rights could not be affected by such rules, still, as defendants claimed under them, they were competent evidence to determine the nature and extent of defendants' claim; the effect of such rules upon pre-existing rights being sufficiently guarded by instructions of the court. *Roach* v. *Gray*, 16 Cal. 383.

8. Change of District bounds—Vested Rights. The extent of a mining district may be changed by those who created it, if vested rights are not thereby interfered with. *King* v. *Edwards*, 1 Mont. 236.

9. Construction by the Court. Mining district laws, when introduced in evidence, are to be construed by the court; and the question whether by virtue of such laws a forfeiture has accrued is a question of law; and the case was reversed because such question was submitted to the determination of the jury. *Fairbanks* v. *Woodhouse*, 6 Cal. 433.

10. Judicial Notice. Judicial notice cannot be taken of the rules, usages and customs of mining districts, and they should be proved at the trial, like any other fact, by the best evidence that can be obtained respecting them. *Sullivan* v. *Hense*, 2 Colorado, 424.

11. Nevada—Judicial Recognition. The mining laws when once established and recognized by the courts, and in Nevada by statute, have the force and obligation of legislative enactments. *Mallett* v. *Uncle Sam M. Co.*, 1 Nev. 194.

12. Holding under local rules presumed. It will be presumed, in the absence of evidence, that the parties in possession of mining claims hold them according to the local rules and customs of the miners in the district. *Robertson* v. *Smith*, 1 Mont. 410.

13. Presumed in Force. It is presumed that the written laws of a mining district are in force, and any custom that conflicts with them must be clearly proved. *King* v. *Edwards*, 1 Mont. 236.

It is a legal presumption that the written laws of an organized mining district are in force. *Campbell* v. *Rankin*, 2 Mont. 363.

14. Continued Observance. To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply with the mining rules and customs established and in force in the district where the claim is situated. *Oreamuno* v. *Uncle Sam G. & S. M. Co.*, 1 Nev. 215.

15. Disuser, a Question of Fact. As the "mining law" of a district must not only be established but in force, it is void whenever it falls into disuse or is generally disregarded; and the question whether it is in force at a given time is one of fact for the jury. *Harvey* v. *Ryan*, 42 Cal. 626.

16. Usages and Regulations, parol and disused.—Section 621 of the Practice act makes 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; and a custom reasonable in itself, and generally observed, will prevail as against a written mining law fallen into disuse. *Harvey* v. *Ryan*, 42 Cal. 626.

17. Rules of Other Districts. — The rules and customs of the miners of one district cannot be introduced to vary those of another district. *King* v. *Edwards*, 1 Mont. 235.

18. Officious Alteration of.—An alteration, made after their adoption, in one of the several mining regulations by the officers of the meeting in reducing them to writing, does not change the legal effect of the other articles. *Table Mt. Co.* v. *Stranahan*, 31 Cal. 387.

19. Irregularities.—The fact that mining laws and regulations were passed on a different day from that advertised for a meeting of miners, does not invalidate them. Courts will not inquire into the regularity of the modes in which these local legislatures, or primary assemblages, act. They must be the judges of their own proceedings. It is sufficient that the miners agree — whether in public meeting or after due notice—upon their local laws, and that these are recognized as the rules of the vicinage, unless fraud be shown, or other like cause for rejecting the laws. *Gore* v. *McBrayer*, 18 Cal. 583, B. & W. L. C. 191.

20. Parol Proof—Disuse.—If written laws exist in a mining district, and the proof renders it doubtful whether they are in force, both the mining laws and the parol proof of the mining customs may be offered in evidence. *Coleman* v. *Clements*, 23 Cal. 245.

21. Written and Parol rules—Posting Notices.—In an action for possession of a mining claim, where plaintiff relied upon a location under certain written rules adopted by the miners of the district some five years before, which did not require the posting of notices upon the claim at the time of location; and defendants offered to prove that there was a custom in the district requiring the posting of such notices; and the court excluded the evidence upon the ground that

the written rules superseded any custom: *Held*, that the exclusion of such evidence was error. *Harvey* v. *Ryan*, 42 Cal. 626.

22. Labor—Contiguous Claims. A rule of a mining district in Nevada county, California, reading as follows: "That when two or more separate sets of claims and separate locations lie immediately contiguous to each other, any and all work and labor expended upon any one set of contiguous claims is considered work upon them all, and will hold them all under the unwritten local customs:" *Construed* to mean that work to the value of $100, performed on a claim or any one of a set of adjoining and contiguous claims owned by the same party is sufficient to hold the same for one year. *Bradley* v. *Lee*, 38 Cal. 362. *

23. Appropriation Under. Where courts presume title in the first appropriator it can only be a title subject to the conditions imposed by the mining laws and customs under and by virtue of which it was acquired. *Mallett* v. *Uncle Sam M. Co.*, 1 Nev., 194.

24. Location prior to Adoption. A local mining regulation or custom adopted after the location of a claim, cannot be given in evidence to limit the extent of a claim previously located. *Table Mt. T. Co.* v. *Stranahan*, 31 Cal. 387.

25. In force at Location—Govern Working. Mining claims on the public lands must be held and worked in accordance with the local mining laws adopted and in force in the mining district where the same are located. *Strange* v. *Ryan*, 46 Cal. 33.

26. Effect after Location. To maintain a right to a mining claim after the right is acquired it is necessary that the party continue substantially to comply with mining rules and customs established and in force in the district where the claim is situated, upon which such right is made to depend. *Doak* v. *Brubaker*, 1 Nev. 217.

27. Size of Claims. The quantity of ground a miner can claim by location or prior appropriation for mining purposes may be limited by the mining rules of the district. *Prosser* v. *Parks*, 18 Cal. 47.

28. Length of Lode Claim. In the absence of the district rule itself, the book of records showing that claims were uniformly recorded of a certain length is good evidence of the existence of a custom limiting the claim to such length. *Sullivan* v. *Hense*, 2 Colorado, 424.

29. Purchased Claims. The mining rules of the district cannot limit the quantity of ground or the number of claims a party may acquire by purchase. *Prosser* v. *Parks*, 18 Cal. 47.

30. Non-Compliance—Forfeiture. A right to hold and work a mining claim when acquired, may be lost by a failure or neglect to comply with the rules and regulations of the miners, relative to the acquisition and tenure of claims in force in the bar or diggings where the claim is located; and if such rules and regulations are not complied with by those holding claims in the district, the ground becomes once more open to the occupation of the next comer. *St. John* v. *Kidd*, 26 Cal. 264.

31. Pleading and Proof. There can be no constructive possession of mining claims on the public domain, except under mining district rules. There must be such rules in fact, and proof of compliance with them must follow proof of their existence. *Pralus* v. *Jefferson G. & S. M. Co.*, 34 Cal. 558.

32. Not proved as Customs. Mining customs, under the Nevada statute, may be proved, however recent the date or short the duration of their establishment. The common law doctrine, as to customs, does not govern in such cases. *Smith* v. *North American M. Co.*, 1 Nev. 424.

33. Proof of general custom—California Practice. Under the California statute, recognizing local customs, governing the location of mining claims, it is error for a court to charge generally as to customs, when evidence of outside customs has been wrongfully admitted. The statute refers only to local customs. *Table Mt. Tunnel Co.* v. *Stranahan*, 31 Cal. 387.

34. The Entire Book. The whole of the book of mining district laws may be considered as one entire instrument, and it is not error (the book itself being produced in court) to require all the rules to be offered together. *English* v. *Johnson*, 17 Cal. 108; B. & W. L. C. 172.

35. Proof—The District Books—Montana Practice. The book containing the mining laws of a district is competent evidence under section 504 of the Montana practice act, viz: "In actions respecting mining claims, proofs shall be admitted of the customs, usages and regulations....and such customs, usages and regulations, when not in conflict with the laws of this Territory, shall govern the decision of the action." And, under section 207 of the same act, the book was rightfully taken by

*Twenty days' labor are stated in the opinion as equivalents of $100; but whether by admission of counsel or as part of the evidence, or as a district mining regulation, does not appear from the report. Sprague, J., delivered dissenting opinion.

the jury to the jury room. *Orr* v. *Haskell*, 2 Mont. 225.

36. Best Evidence. The written rules of a mining district are the best evidence, and secondary evidence of facts which could be proved by them, cannot be admitted until it is shown that they are lost or destroyed. *Campbell* v. *Rankin*, 2 Mont. 363.

37. Not specially pleaded. In ejectment to recover possession of a mining claim, where the complaint alleges in general terms that plaintiffs are the owners of the mining ground in controversy, they are entitled to show in evidence the rules and customs of the mining district in support of such alleged ownership, without averring such rules and customs in the complaint. *Coleman* v. *Clements*, 23 Cal. 245.

38. Proof by Copy—Affidavit. In order to introduce evidence of the local mining laws of a district, it is necessary that it should be made to appear *aliunde* that the copy offered comes from the proper custodian, and that such person was empowered to give certified copies thereof, so as to become evidence, and that such was a copy of the laws in force in such district. *Roberts* v. *Wilson*, 1 Utah, 292.

Such copy cannot be proved by affidavit. Id.

DITCHES.

1. Nature of Property. A ditch used for the conveyance of water for mining purposes is not a mere easement or incorporeal hereditament. *Reed* v. *Spicer*, 27 Cal. 57.

2. Real Estate. Dam and ditch property for mining purposes on the public domain, as to its transfers, is to be treated as real estate. *Partridge* v. *McKinney*, 10 Cal. 181.

A mining ditch is real estate. *Bradley* v. *Harkness*, 26 Cal. 69.

3. Deed—Right of Way—Property. A deed conveying a right of way upon land, in, to, and for a ditch called the Mountain-brow Ditch, is a conveyance of the ditch itself. *Reed* v. *Spicer*, 27 Cal. 57.

4. Property or Right. The owner of a ditch has exclusive and absolute power of control over and right of enjoyment in the water running in his ditch, whether the water is or is not, in a strict legal sense, his private property. *Kidd* v. *Laird*, 15 Cal. 163.

5. Measure of Capacity. It seems that the quantity of water appropriated in any given case is to be measured by the capacity of the ditch or flume at the smallest point; that is, at the point where the least water can be carried through it. *Ophir S. M. Co.* v. *Carpenter*, 6 Nev. 393.

Where a finding for plaintiff as to the amount of water appropriated was founded upon the basis that the flume was of a certain size, and also of certain grade, but it appeared on appeal that there was no sufficient proof of the grade: *Held*, sufficient to reverse the judgment. Id.

The amount of water appropriated by a mining ditch is the amount of water the ditch will convey *from* the stream which supplies it, "without running over its banks, and not the number of inches it might convey *to* the place to be used some miles perhaps distant." *Caruthers* v. *Pemberton*, 1 Mont. 111.

6. Idem—Seepage. In measuring the appropriation of a ditch, the amount appropriated at its source is to be taken, and not the amount at its mouth—as it necessarily decreases by seepage and evaporation. Id.

7. Estoppel—Statement as to Capacity. Where it appeared that two ditches appropriating water for mining purposes had been located prior to defendant's ditch, one of which older ditches had been also purchased by defendant; and that the owner of the other ditch had represented that he only claimed twenty-four inches of water for his ditch, it was: *Held*, that such declarations of the plaintiff, owner of the other ditch, must be shown to have been inducements to the defendant to buy the ditch he purchased, and to the making of his new ditch, before they could be considered as an estoppel against the plaintiff, whose ditch was found in fact to have a capacity for more than twenty-four inches of water. *Duell* v. *Bear River Co.*, 5 Cal. 85.

8. Conveyed by Deed. The sale of a ditch used for appropriating water must be evidenced by a deed. Such sale cannot be proved by parol evidence. *Smith* v. *O'Hara*, 43 Cal. 371.

9. Deed—Construction—Identifying Property—Intent—Feeders. Upon a deed conveying the "ditches known as the Silver Bow Company's ditches, said ditches conveying water from Silver Bow creek to Butte City and the placer mines in that vicinity, and more particularly known as the Humphreys and Allison ditches:" *Held*, that parol evidence was admissible to show what ditches were known as the Silver Bow ditches or the Humphreys and Allison ditches; 2. That parol evidence was admissible to show that a certain ditch, known as the Park ditch, was an upper section, furnishing the whole supply of water to the other ditches (though longer than either of them), and that the others would be worthless without it, as going to show its being parcel of the ditches, or system of ditches, mentioned in and passing under the convey-

ance, not as an appurtenance, but as part of the subject-matter of the grant; and this though such Park ditch conveyed water to Silver Bow creek instead of from it. (Knowles, J., dissented.) *Donnell* v. *Humphreys*, 1 Mont. 518.

And this though the question of intent is not to be aided by parol evidence. Id.

10. Purchase of—Payment out of Water Sales—Guaranty—Measure of Damages. Defendant purchased of plaintiff certain ditches for $14,500, payable $2500 in cash and $12,000 as follows, to wit: the expenses of keeping said ditches in good order, and of employing agents to attend the same being first deducted from the proceeds of the sale of water; the balance of the proceeds was to be applied to the liquidation of said $12,000, until the whole was paid, "and to hasten and make certain the time of early payment of said sum of money by the sales as aforesaid, said company promise to furnish from their ditch, to be used in the above-named ditches, so much water as added to the water supplied to said ditches from their other sources shall be sufficient to effect sales to the amount of $1000 per month; and when said company shall fail to furnish water as aforesaid, the said company hereby obligate themselves to pay to said Blen interest at the rate of ten per cent. per annum on the said monthly deficiency until met by receipts from sales over and above the said thousand dollars per month:" *Held*, that such contract was not an agreement by defendants to pay the balance over the $2500 only from the proceeds of the ditches named therein, but was a guaranty on their part that the mode of payment prescribed should be effectual to pay the debt in a given time. *Blen* v. *Bear River Co.*, 15 Cal. 97.

The company were bound by the contract to furnish and sell the stipulated quantity of water and apply the proceeds monthly to the payment of plaintiff's claim, and failing so to do, were responsible in damages. Id.

The last clause in the contract did not give defendants the right to refuse to supply this water, but simply provided a measure of damages for the breach of it. Id.

11. Loss of Customers. On the trial of an action to recover for interruption of flow of water, proof that in consequence of the irregularity of the flow of water, the owners of the ditch have lost their customers, is competent evidence "as showing that the damage to the plaintiff was not trivial or temporary, but of such a character as to cause actual and serious injury." *Natoma W. & M. Co.* v. *McCoy*, 23 Cal. 491.

12. Title in the United States—Public utility against right. In an action to abate a nuisance, to wit: a ditch constructed across the land of another without his consent, it is no defense to the ditch claimant that the plaintiff has no title from the United States, that his inclosure is part of the public domain; nor can they set up in their answer as a defense the great cost of the undertaking, its great length, or its utility, or the fact that it is constructed for mining purposes. *Weimer* v. *Lowery*, 11 Cal. 104.

13. Notice—Posting—Extension. The prior appropriator of water, who posts notices of his appropriation near the stream, and immediately constructs his dams and ditches, is not required to give any actual notice to subsequent appropriators of his intention to extend his ditches and reclaim the waste water from his mining operations, and use such waste water at another place. *Woolman* v. *Garringer*, 1 Mont. 535.

14. Priority, Mining claim. As between ditch owners and miners using the waters of a stream in the mineral region for mining purposes, the law does not tolerate any injury by one to the prior rights of the other. *Hill* v. *Smith*, 27 Cal. 476.

15. Ditch across claim previously located. A subsequent party has no right to carry a ditch upon a previously located claim in the absence of mining custom to that effect, although it be constructed upon ground not in actual use, and although upon a part of the claim not valuable for mining purposes. *Correa* v. *Frietas*, 42 Cal. 339.

16. Appurtenance—Use with Mining claim. If there is a ditch leading out of a creek, and a mining company owns the ditch, and also owns a mining claim, and uses a portion of the waters of the creek in working its claim, it does not follow that the ditch is an appurtenance of the mining claim. *Quirk* v. *Falk*, 47 Cal. 453.

17. Not appurtenance to Mining Claim. The purchase of water rights with the mining claims on which the water is used does not of itself constitute the ditches purchased appurtenances to the claims. *Quirk* v. *Falk*, 47 Cal. 453.

18. Natural channel—Ravine. Where a natural ravine is adopted as part of the course of a water ditch, the ditch owner is not responsible for an overflow of the water naturally running in such ravine. He adopts such natural water-course only to the extent of the flow of his ditch, and is only responsible for the overflow of the water resulting from his use of the ravine for the purposes of a ditch. *Richardson* v. *Kier*, 34 Cal. 63.

19. Ravine used as Ditch bed. A ditch company who avail themselves of a

dry ravine to conduct their water a portion of the distance to their dam, where they use it, do not abandon the water thus carried by them, and are entitled to the same enjoyment of it as if conducted through an artificial ditch. *Hoffman* v. *Stone*, 7 Cal. 46.

The natural water in such ravines belongs to the first appropriator thereof, and for either a diversion or appropriation thereof an action will lie. Id.

20. Enlargement of Ditch. Where the defendants had constructed a ditch for mining purposes, and the plaintiffs had subsequently constructed another, taking its water from the same stream, and brought suit for damages sustained by reason of an enlargement of defendant's ditch made after the commencement of plaintiff's ditch, causing a diversion of a greater quantity of water, the bill praying for an injunction: *Held*, that defendants were not limited to the quantity of water turned into their ditch in the first instance, unless by the general plan, size and grade of the ditch it was not capable of carrying more water than was then diverted. *White* v. *Todd's Valley Water Co.*, 8 Cal. 443.

21. Idem—Time to Clean out Ditch. If, by reason of obstructions in the ditch or irregularity in the grade at that time, it was not capable of diverting as much water as its general size would indicate, the defendants would have a reasonable time to adjust the grade and remove such obstructions, and then fill the ditch to its capacity. Id.

But if they continued to divert only the original quantity of water long enough to indicate that they only intended to divert that amount, or failed for an unreasonable length of time to remove the obstructions or adjust the grade, they would be limited to the amount thus diverted, and the plaintiffs would be entitled to the residue. Id.

22. Reasonable Time in Appropriation. The line upon which a ditch is actually intended to be dug should be run within a reasonable time after the line of preliminary survey has been run, in order to make the right of the ditch-owners date back to the survey. What is a reasonable time must depend upon the circumstances of the case. *Parke* v. *Kilham*, 8 Cal. 78.

23. Relation—Time. In the matter of the appropriation of water by canals and ditches, time is necessary for their completion, and the right of the appropriator therefore begins with their inception, and not their completion. *Conger* v. *Weaver*, 6 Cal. 548.

24. Due Diligence. Pecuniary Inability. The pecuniary inability of parties projecting a ditch is not an excuse for failure to complete it in a reasonable time. *Kimball* v. *Gearhart*, 12 Cal. 28.

25. Local Considerations—Climate—Difference. In determining the question of diligence in the construction of a ditch, the jury may rightfully consider the circumstances surrounding the parties at the date of appropriation, such as the nature of the climate and country, as well as the difficulty of procuring labor and materials. *Kimball* v. *Gearhart*, 12 Cal. 28.

26. Extending or changing use. One who has appropriated the waters of a stream by means of a ditch, for the purpose of working a particular mining claim, may, after he has worked out the claim and abandoned the same, extend his ditch, and use the water at other points and for a different purpose, without losing his priority of right as against one who afterwards dug a ditch from the same stream, and appropriated water before the claim was worked out. *Davis* v. *Gale*, 32 Cal. 26.

27. Enlargement. If the owner of a ditch is entitled to all the water flowing down the stream where the ditch starts out, other parties having ditches on the same stream cannot complain of its enlargement. *James* v. *Williams*, 31 Cal. 211.

28. Relation of Water to Mining. Review of the enlarged use of water by progress in the art of mining for superficial deposits of gold, with the history of the recognition of its necessity, as first by the action of miners on the public domain who were followed by the local judicial decisions, and finally by Congressional legislation in the acts of 1866 and 1872. *Titcomb* v. *Kirk*, 51 Cal. 289.

29. New Appropriation dating from date of Parol Sale. One who enters into the possession of a ditch used for appropriating water, under a verbal sale made to him of the same, does not succeed to the rights of the seller so as to claim the benefit of the seller's prior appropriation of the water flowing in the same, but must date his appropriation from the time he enters into possession. *Smith* v. *O'Hara*, 43 Cal. 371.

30. Changing the Line—Location. Where the owners of a ditch had commenced their ditch and run their line before the location and appropriation of a lot of land by the plaintiffs, who sued them for trespasses thereon: *Held*, that a slight divergence from the original line in the construction of the canal after the plaintiffs' location and appropriation, both lines run-

ning equally through the plaintiffs' claim, did not constitute the construction of the ditch on the new line a trespass, and if the plaintiffs suffered no actual injury by the change, it was *damnum absque injuria*. *Conger* v. *Weaver*, 6 Cal. 548.

31. Right of surface support. As to whether the general rule giving to the surface of land the right of surface support applies to the case of a ditch. *Query: Clark* v. *Willett*, 35 Cal. 534.

32. Conditional injunction to protect. If a plaintiff owns a ditch and right of way for the same by priority of location, a court of equity has no power, by its judgment, to allow the same to be washed away for mining purposes, provided an aqueduct of sufficient capacity to carry the water is previously built in its place. *Gregory* v. *Nelson*, 41 Cal. 279.

33. Tenancy in Common—Partnership. In the absence of any special facts, the co-owners of a ditch are to be considered tenants in common, and from the mere fact of co-ownership, no partnership can be presumed. *Bradley* v. *Harkness*, 26 Cal. 69.

The averment of a purchase of an undivided interest in a ditch does not imply a partnership. The relation of tenant in common is created by the purchase, but a partnership is the result of contract. Id.

34. Consistent decisions on same parcel—Subdivision of ditches. The supreme court of the United States having held, as to a certain water ditch or canal several miles in length, that different parcels of it are separate structures (6 Wall. 561), the supreme court of California are compelled to hold as to the same property that there having been a sale of the lower section separate from the upper section, "there is no legal duty upon the part of the owner of the upper section to permit" the water brought by the upper section to flow into the lower section. *Reynolds* v. *Hosmer*, 51 Cal. 205.*

35. No Right of Way. A person has no right to construct a mining ditch through the inclosure of another without his consent. *Weimer* v. *Lowery*, 11 Cal. 104.

36. Construction of United States Mining Acts. The mining acts of Congress of 1866, 1870 and 1872 (Rev. Stats., secs. 2318-2342) do not grant to the owner of ditches on the public lands any right not "recognized and acknowledged by the local customs, laws, and the decisions of the courts;" they do not authorize the construction of a ditch across the mining claim of another, where such mining claim was located prior to the ditch. *Titcomb* v. *Kirk*, 51 Cal. 289.

37. Act of 1866—Grant—Eminent domain. Section 9 of the mining act of Congress, of July 26, 1866, construed as a grant of the right of way to mining ditches: *Held further*, that being a grant of that which belonged to the United States, the question of taking property for public uses could not arise under it. *Hobart* v. *Ford*, 6 Nev. 79.*

38. Act of 1866—Location over Mining claim—Compensation. Section 9 of the mining act of congress of 1866 (Rev. Stat. s. 2339), does not authorize the construction of a ditch over the mining ground of another to the partial or total destruction of his property, without showing a necessity therefor, and paying or securing the damages. It grants the right of way to ditch owners, but not to the exclusion of other rights granted under the same law. *Noteware* v. *Sterns*, 1 Mont. 311.

39. Contract—Payable in Water. Plaintiff contracts to dig a ditch for a water company, the company agreeing to pay three dollars per rod; one-third of it in money, on the completion of each mile; the other two-thirds to be paid in water, at the rate of twenty-five cents per square inch, delivered through an orifice under six inches of pressure, anywhere along and at the main ditch; the company having the right of paying the two-thirds in cash instead of water, if they so elect: *Held*, that said two-thirds, if elected to be paid in cash, need not be paid as the other third on the completion of each mile. If the payment were made in water, it could not be claimed before the completion of the ditch, and the cash could not be required sooner. *Myers* v. *South Feather R. W. Co.*, 14 Cal. 269.

40. Pleading—Denial of unlawful breaking. Where the fact that defendant wrongfully broke a flume is denied, the fact that he broke it is admitted, and no proof of breaking is required, and conceding plaintiff's right of property in the flume would entitle him at least to nominal damages. *Feely* v. *Shirley*, 43 Cal. 369.

41. Action as to Quantity diverted—Verdict—Practice. H. constructed a water ditch, by which he appropriated three hundred inches of water from a running stream, but not all of the stream. B. appropriated the remainder of the water. Subsequently H. made a new ditch, ap-

*This decision is based expressly on the case in 6 Wallace, and is not expressed as deciding a general proposition of law.

*In this case there seems to have been no improvements on the land claimed for the flume, and the proviso of the section is not noticed.

propriating water from the same stream. In a suit to enjoin B. from interfering with H. in the use of the water, H. obtained a verdict that the second ditch did not diminish the quantity appropriated by B., and judgment was rendered enjoining B. from disturbing H. in the use of three hundred inches of water: *Held*, that the judgment was consistent with the verdict and with justice. *Higgins* v. *Barker*, 42 Cal. 233.

42. Injuries from. The owner of a ditch is bound to keep it in repair so that it will not overflow or break through its banks to the injury of lands of other parties; and if through his fault in failing to keep it in repair it washes away the soil or deposits sand on the land along which it passes, he is responsible therefor. *Richardson* v. *Kier*, 34 Cal. 63.

43. Injuries from Ditch—Degree of Care. If the owners of a ditch or flume for the conveyance of water erect a dam above mining claims, and the claims are afterward damaged by reason of the breaking of the dam, its owners are not liable for the damages, if it was constructed with that reasonable care which prudent men would use, and no negligence is shown in its care and management. *Everett* v. *Hydraulic F. T. Co.*, 23 Cal. 225.

44. Flooding with Tailings. Where a ditch has been excavated in the bed of a stream and its water has been diverted through the same for mining purposes, a miner has no right to work a claim located above its head after the ditch is dug, in such manner as to mingle mud and sediment with the water and injure its value to the ditch owner for mining purposes, or to fill up the ditch and reservoirs with the same so as to lessen their capacity and increase the expense of cleaning them. *Hill* v. *Smith*, 27 Cal. 476.

45. Finding, Montana Practice. In an action to recover damages for the diversion of water and "for a decree of title and perpetual injunction," a verdict that plaintiff is entitled to the water is a finding on the material issue, and entitles him to a judgment for costs and to a perpetual injunction although the jury did not assess any damages. *Harris* v. *Shontz*, 1 Mont. 212.

46. Force. In an action for injuring a ditch it is not necessary to allege force or to prove that the injury was forcibly done: an unauthorized entry implies force, which need not be actual. *Febes* v. *Tiernan*, 1 Mont. 179.

DOWER.

1. Ancient. *Query:* An early case (1648 in which the subject of dower in mines and quarries is repeatedly discussed without final decision. *Thynn* v. *Thynn*, 1 Style, 67, 77, 91, 98, 101, 143.

2. Of Mines generally. Dower is due of all mines wrought during the coverture whether by the husband or lessees, whether paying rents or royalties, and whether the husband owned the surface or the mineral only. *Stoughton* v. *Leigh*, 1 Taunt. 402.

3. Generally, Clay Banks. Dower assigned in clay banks. Dower is assignable in mines, quarries and in whatever is part of or appurtenant to the land, whether assignable by metes and bounds or not. *Rockwell* v. *Morgan*, 13 N. J. Eq. 389.

4. Open Mines. If land assigned in dower contains an opened mine, tenant in dower may work it for her own benefit. *Stoughton* v. *Leigh*, 1 Taunt, 402.

Dower is due of mines opened during coverture, but not of unopened mines. *Coates* v. *Cheever*, 1 Cow. 463.

5. Lime Quarry. A widow is dowable of a lime-rock quarry which was owned by her husband, and had been opened and wrought during her coverture. *Moore* v. *Rollins*, 45 Me. 493.

6. Unopened Mines. Dower is not due of unopened mines or deposits. *Stoughton* v. *Leigh*, 1 Taunt, 402.

7. Unopened Coal Beds. A widow is not entitled to dower out of unopened mines—beds of coal underlying the land. *Dickin* v. *Hamer*, 1 Drew & Sm. 284.

8. New Shafts on same vein. It is not waste for tenant in dower of coal lands to take coal to any extent from a mine already opened or to sink new shafts into the same vein of coal. *Crouch* v. *Puryear*, 1 Rand. (Va.) 258.

9. Underlying Seams. Tenant in dower may penetrate through a seam of coal already opened and work a new seam that lies under the first. *Crouch* v. *Puryear*, 1 Rand. (Va.) 258.

10. Rent of Mines. A widow is entitled to one-third of the rent paid by tenant of mine, in which she has no dower, for the surface used in connection with the working of such mines, the same having been opened by her consent. *Dickin* v. *Hamer*, 1 Drew & Sm. 284.

11. Profits of Mine opened after decease.—As to the right of the widow and the heir in the working of mines opened by consent after decease of the intestate, when the widow has done no act to bar dower and is not restricted by any proceedings operating to fix her *status: semble*, that she might be entitled to one-third of the "income of the proceeds arising from the royalties." Id.

12. How Assigned.—Dower of a mine may be assigned either collectively with other lands, or separately of itself; by metes and bounds, or a proportion of the profits or alternate enjoyment for short periods. *Stoughton* v. *Leigh*, 1 Taunt. 402.

Dower of mines may be assigned either severally or collectively with other lands; by metes and bounds if practicable, and if not, then by an apportionment of the profits, or by assigning its enjoyment to the widow for short alternate periods. *Coates* v. *Cheever*, 1 Cow. 463.

13. Collusive Allotment.—The profits of coal works on parcel of the deceased's lands must be considered in the assignment of dower to the widow; and if the land containing the coal work be collusively allot ed to the widow, without consideration of the coal work thereon, a new assignment of dower will be awarded. *Hoby* v. *Hoby*, 1 Vernon, 218.

14. Extent of Quarry.—A husband died seised of a tract of land, of four acres in extent, consisting of a slate quarry, mostly below the surface of the ground, but partially above ground. One quarter of an acre of the quarry had been dug over, and the practice was to take a section of ten or twelve feet square on the surface, and go down to a certain depth, and then begin on the surface again. It was *held*, that not only that portion of the quarry which had been actually dug, but the whole extent owned by the husband must be considered as opened, and so the widow was entitled to dower in the same. *Billings* v. *Taylor*, 10 Pick. 460.

DRAINAGE.

1. Adjoining Mines.—The owner of a mine at a higher level than an adjoining mine has a right to work the whole of his mine, in the usual and proper manner, for the purpose of getting out the minerals in any part of his mine; and he is not liable for any water which flows by gravitation into such adjoining mine from works so conducted. *Smith* v. *Kenrick*, 7 C. B. 515; *Baird* v. *Williamson*, 15 C. B. N. S. 376.

The owner of a mine adjoining another mine has no right by pumping or otherwise to be an active agent in sending water from his mine into the adjoining mine. *Baird* v. *Williamson*, 15 C. B. N. S. 376.

2. Adjoining Workings—Dip—Pumping into Neighbor's Mine. The plaintiff and defendant were owners of adjoining mines, the defendant's mine being on a higher level than the plaintiff's. In each mine there were two seams of iron-stone distant a few fathoms from each other. In order to get the mineral in the lower seam he defendant cut a cut or passage from the upper seam to the lower, and the head of this passage being on a higher level than the plaintiff's mine, the water flowed, some naturally, and some through being pumped up, in and through the plaintiff's mine and damaged it. It was admitted that the passage was made by the defendant in the usual course of skillful mining: *Held*, that the owner of the mine on a higher level had a right to work his whole mine in the usual and proper manner for the purpose of getting any kind of mineral in any part of the mine, and was not liable for water which flowed by gravitation from work so conducted, but that he was liable for damage by foreign water pumped up through the passage. *Williamson* v. *Baird*, 10 Jurist, N. S. 152.

3. Upper and Lower Mines—Natural Percolation—Working. The natural percolation of water from one mine to another is not a matter as to which the owner of the lower mine has any right of complaint against the owner of the other mine. The owner of the upper mine has a right to work it just as he likes, and his neighbor below cannot complain unless he finds that the water has been turned into his mine by a channel or artificial arrangement. *Phillips* v. *Homfray*, L. R. 6 Ch. 770.

4. Upper and Lower Mines. The rule that the owner of the upper-lying mine is not responsible for the flow of water into an adjoining under-lying mine, is not restricted to the case of the flow of water down and along the same seam or stratum. And if, in the usual course of skillful mining, water from another seam is carried into the lower mine, the rule still applies. *Baird* v. *Williamson*, 15 C. B., N. S. 376.

5. Upper and Lower Mines—Necessity. (*Obiter.*) From the necessity of the case, every owner of a mine must submit to the inconvenience of having the water of an adjoining mine upon a higher level descend upon his mine so long as it descends in the natural course of drainage; but that does not entitle the owner of the adjoining mine to throw upon him in some other and more objectionable way, water which might be allowed to descend upon him in a modified form not occasioning the same amount of injury to his property. *Att'y General* v. *Birmingham*, 4 Kay & J. 542.

6. Servient Tenements — Drainage obstructed by dump. Plaintiff and defendant were owners of adjoining lots in a thinly settled part of the city of Morris. Plaintiff (Sanford) had a large lot of valuable young trees and vines on his lots, while defendant, Gormley, had opened a coal mine on his lots. Plaintiff alleged damage by water caused by a pile of earth dumped

on rear of defendant's lots from defendant's shaft. The relative situation of the lots as to drainage remained uncertain: *Held*, that the owner of a servient heritage has no right by embankments or other artificial means to stop the natural flow of the surface-water from the dominant heritage, and thus throw it back upon the latter. *Held*, that where adjacent lands owned by different proprietors are upon a common level, there being no natural drainage from one to the other by a surface channel. then the land of neither proprietor will occupy the relation of a servient heritage. *Gormley* v. *Sanford*, 52 Ill. 159.

7. Lessees' Pump to drain part of mine worked by Lessor—Drainage in such case treated as incidental. Defendant by indenture leased to plaintiffs certain mineral lands adjoining his own "diggings," the lessees covenanting to work the premises in a good and miner-like manner, and "to use such machinery as may be necessary to unwater and work said tracts or mines," paying a royalty of one-sixth. In this case plaintiffs sue upon an alleged oral agreement, entered into on the day before the deed of lease was executed by the defendants, owners of the whole vein, and on the same day that the terms of the lease were agreed on; by this oral agreement plaintiffs were to put a pump into the grounds then being worked by them (the same lands demised in the lease), and drain the plaintiff's adjoining mine, for which defendant was to pay them one-sixth of the mineral which he might take out of his mine below the line at which the water would stand if such pump were not erected: *Held*, 1. That such oral agreement was merely in the nature of a contract to pay for services, created no interest in defendant's land. and was therefore not void by reason of the statute of frauds; 2. That as the substance of the alleged oral contract was to do no more than would necessarily and incidentally result from the performance of the covenants in the lease, evidence of such oral agreement tended in effect to prove an additional and different consideration from that named in the lease for unwatering the mine, and that such evidence was inadmissible. *Townsend* v. *Peasley*, 35 Wisc. 384.

8. Drain and drain Waters—Rights of Third Parties. Allowing water drained from their mine to flow by an artificial watercourse or sough for more than sixty years would not, it seems, impair the right of the mine owners to divert it. But rights may accrue as between third parties using the water. *Wood* v. *Waud*, 3 Ex. 748.

9. Repairs of drain. The grant of liberty to make a sough (or drain) carries with it the right of making sough pits at any time afterward, being necessary for the repair of the sough, as incident thereto. *Hodgson* v. *Field*, 7 East, 613; 3 Smith, 538.

And this, although special mention had been made in the grant of the right to make certain sough pits in the course of the construction of the drain, for the more easy and safe carrying up of the tail of the sough. Id.

See FLOODING.

DUMP.

1. Possession—Right of Action—Real Estate. Land was let to farm, a lead mine on the farm being reserved. About this lead mine was a dump of "spar," defined as "part of the refuse dug from lead mines together with the ore, and after being separated from it is thrown upon the land adjoining the mine." Afterward the lessor let to A. the right to remove this spar, which he continued to exercise, the farming tenant making no objection. But from time to time spar was removed by B., a trespasser without any license from any party, against whom A. brought *assumpsit* for "goods sold and delivered:" *Held*, that the landlord could give no right to take the spar to plaintiff, without consent of the farm tenant; 2. That there was not sufficient possession or property in plaintiff to maintain the action after granting that he may waive the tort; 3. That the spar was parcel of the demise. *Lee* v. *Shore*, 2 D. & Ry. 198; 1 B. & C. 94.

See TAILINGS.

EASEMENT.

1. Runs with the Title. An easement obtained by prescription through tin bounders enures to the benefit of the owner of the soil after its abandonment by the tin bounders. *Ivimey* v. *Stocker*, Law R., 1 Ch. App. 396.

2. Ditch Right by Prescription. If the owners of a ditch constructed for conveying water, use the same peaceably, openly and exclusively under a claim of right, with the knowledge of the owners of the land, for a continuous period of five years, they acquire by prescription an easement over the land for the same. *Campbell* v. *West*, 44 Cal. 646.

3. Right of way "reserved." The "reservation" (so called) of a right of way and carriage of minerals in an indenture of lease, is an easement created by grant of the lessee. *Durham & S. R. Co.* v. *Walker*, 2 Q. B. 940; S. C. 2 G. & D. 326.

4. Railroad crossing. An easement of crossing a railroad by another railroad from a mine must be established by twenty years

user, uninterrupted and as of right. The continuity is broken by an interruption, and it is not exercised as of right, if by leave from the proprietors of the road crossed. *Monmouthshire Can. Co.* v. *Harford*, 5 Tyrw. 68.

5. Flowage of Ore mud — Extent of Easement to land not described. Bushnell conveyed to defendants the right, after washing their ore in a stream running through his land, to discharge the dirt upon his "meadow lot," lying below on the stream. A great quantity of dirt accumulated upon this meadow lot, so that it spread and was carried upon plaintiff's "pasture lot" adjoining. Plaintiff was owner of both lots when the deed was given: *Held*, that defendants were not liable for any damage to the pasture lot resulting naturally from the discharge of dirt on the meadow lot. *Bushnell* v. *Proprietors of Ore-bed*, 31 Conn. 150.

6. Ore Washing—Lands. An action by the owner of a mill privilege and a mill used in tanning hides, against defendant for washing iron ore in the stream above the mill and filling up his vats, is an action respecting an easement on real estate, of which the supreme judicial court has exclusive jurisdiction. *Crittenton* v. *Alger*, 11 Metc. 281.

7. Surface Right restricted to Coal Breaker and Dump. The grant of a surface right, with a stipulation that it shall not be "for the purpose of laying out a town or building thereon, but only for the purpose of a coal breaker and dirt room for the deposit of coal dirt," is the grant of an easement only, though it be in fee. *Big Mountain Co's. Appeal*, 54 Pa. St. 361.

8. Incidents necessary to Enjoyment. A party having an easement on the land of another may go upon the land for the purpose of the enjoyment of such easement to its fullest extent, either to construct or repair—or secure it from danger—doing as little damages as possible and responsible for that damage, for the grant of a privilege carries with it everything necessary to its enjoyment. *Phil'a C. & I. Co.* v. *Taylor*, 7 Pac. L. R. 127. (C. P. Schuylkill Co. Pa.) S. C. 5 Leg. Gaz. 392; 1 Leg. Chron. 361.

ECCLESIASTICAL LAW.

1. Consent to open Mines. The incumbent of a living cannot open mines without the consent of the patron and ordinary. *Holden* v. *Weeks*, 1 Johns. & H. 278; S. C. 30, L. J. Ch. 35. 3 L. T. N. S. 437.

The patron is the proper person to institute a suit to restrain the opening of mines and generally the only proper person; but, *semble*, the ordinary may take proceedings to prevent waste by collusion between the patron and incumbent. Id.

The patron's right is only to restrain future waste, and does not extend to an account of past profits before the filing of the bill. Id.

Upon a bill by patron to have an agreement between himself and the incumbent, for opening and working mines, declared void and canceled; and, to restrain future workings, the court declared that the workings were not lawful and that the proceeds ought to be laid out for the permanent benefit of the living; but being of opinion that, if duly authorized, the workings would be beneficial to the living, directed an inquiry what steps should be taken to obtain the concurrence of all necessary parties and gave liberty to continue the workings in the meantime, subject to account. Id.

2. Consent of Ordinary. The parson with the consent of the patron and ordinary may cut timber, and open mines. *Marlborough* v. *St. John*, 5 De G. & S. 174.

3. Open Mines — Digging Stone. Neither parson nor bishop may open mines, but may work those already opened. They may dig stone for repair, and have been indulged in selling stone, where the money was applied to repairs. *Knight* v. *Mosely*, 1 Amb. 176.

4. Bishop—Inclosure Act. An act (13 Geo. 3, c. 67), for inclosing commons contained a saving of the rights of the bishop of Durham, as lord of the manor, and also provided that the bishop, his successors and assigns should work all mines under the commons, with liberty of carrying coals and minerals gotten thereout, or out of any other lands, or grounds whatsoever: *Held*, that the bishop had no right to carry over the inclosed lands coal got from mines within the manor, but not belonging to the see; 2. That the expression "other lands or grounds," referred to pits or quarries, or workings, other than what are strictly termed mines. *Hedley* v. *Fenwick*, 3 H. & C. 349; *Midgley* v. *Richardson*, 14 M. & W. 595.

5. Glebe Lands — Waste. A parson may open mines in his glebe. It is not waste. *Lord Rutland* v. *Green*, *Rutland's case*, 1 Sid. 152; 1 Keble, 557; 1 Lev. 107.

6. Lease. The perpetual curate of a curacy augmented by the governors of Queen Anne's bounty, with the confirmation of the ordinary and immediate patron, granted a lease for years of unopened mines which had not before been leased; but the patron of the advowson was no party: *Held*, that the lease was void at common law, for want of confirmation by such patron paramount. *Doe* v. *Collinge*, 7 C. B. 938.

See TITHE.

EJECTMENT.

1. Early decisions. Ejectment lies for a coal mine. *Lawson* v. *Williams*, cited Cro. Jac. 150 (second year of James I). And for a salt boilery. *Wyld's Case*, Id.

2. For mines in terms. Ejectment lies for mines; and a declaration general *de minerís carbonum* held good, although the number of mines not stated. *Andrews* v. *Whittingham*, Carthew, 277; 4 Mod. 143; 1 Salk. 255; Comb. 201; 1 Show, 364.

3. For coal pits. Ejectment lies for a coal mine or coal pit. *Comyn* v. *Kyneto*, Cro. Jac. 150; Jenkins, 313; S. C. styled *Comyn* v. *Wheatly*, Noy. 121.

And for land and a coal pit in the same land. *Harebottle* v. *Placock*, Cro. Jac. 21.

4. Tin bounds. The interest of an owner of tin bounds in Cornwall is not, it seems, a mere easement or incorporeal hereditament, but may be the subject of an action of ejectment, even where he is not in actual possession at the time of the wrongful entry of the defendant. *Vice* v. *Thomas*, 5 Y. & C. 538; Smirke's Rep. 1.

Tin bounds, *eo nomine*, are not the subject of ejectment. They should be described as a mine lying within certain bounds called tin bounds. *Doe* v. *Alderson*, Tyrwh. & G. 543; S. C. 1 M. & W. 210; S. C. Dow. Pr. R. 701.

5. Quarry. *Query*, whether ejectment will lie for a quarry. *Brown* v. *Chadwick*, 7 Irish, C. L. 101.

6. By Licensee. Ejectment will not lie for a mere license to mine. *Crocker* v. *Fothergill*, 2 B. & Ald. 652.

7. By Licensor of oil land — License made irrevocable after condition performed. Rynd granted to Watson the exclusive right of digging for oil on a certain farm, reserving the right to farm the surface. If the boring proved profitable, the writing was to be construed as a perpetual lease; if otherwise, possession was to revert to Rynd. On part of the farm the boring had been profitable. Rynd alleging that the boring had not been profitable on another part of the farm, brought ejectment for that part: *Held*, that ejectment would not lie to test Rynd's right to bore for oil.* *Rynd* v. *Rynd Farm Oil Co.*, 63 Pa. St. 397.

When the land was entered upon and the license made effectual by Watson's performance of the covenants and a successful result of the experiment, it became perpetual and irrevocable. Id.

8. Oil Lease. A lease of land "for the sole and only purpose of mining and excavating for petroleum, coal, rock or carbon oil, or other valuable mineral or volatile substances," vests a corporeal interest for which ejectment will lie. *Barker* v. *Dale*, 3 Pgh. 190.

9. Against Lessor of Oil Well. Ejectment will lie for the wrongful ouster of a tenant (of an oil well), notwithstanding the grant under the lease may have been of an incorporeal hereditament. *Karns* v. *Tanner*, 66 Pa. St. 297.

10. Agreement for oil lease—Incorporeal hereditament—Case. An agreement was to lease "exclusive right and privilege of boring for oil, etc., upon the farm upon which the first party now resides, with the right of access to and from such places as may be selected by the party of the second part; said boring to be done so as to do the least possible injury to the farm." The consideration was $150, and one-third of product. The holes to be sunk to satisfy the parties as to practicability and profit for oil: *Held*, that this created an incorporeal hereditament, and the only possession of the grantee was such as was necessary for the enjoyment of the right. *Union Petroleum Co.* v. *Bliven Pet. Co.*, 72 Pa. St. 173.

Held further, that the remedy for disturbance of the right was case; that ejectment would not lie; and that possession is not necessary to enable the owner of an incorporeal hereditament to maintain an action for its disturbance.

11. Lease—Forfeiture. Lessors having entered for alleged breach of condition, in ejectment against them, the burden is upon them, although they are defendants in possession, to prove a forfeiture. *McKnight* v. *Kreutz*, 51 Pa. St. 232; S. C. 53 Id. 319.

12. Recovery of Lode without its Hoisting Works — Severance. The fact that plaintiff recovered a vein or lode gives him no right to hoisting works erected for the purpose of taking ore from that vein, unless he had also recovered the surface on which such hoisting works were erected. *Bullion M. Co.* v. *Croesus G. & S. M. Co.*, 2 Nev. 169.

13. Vendor and Purchaser—Specific Performance. C. agreed, in writing, to convey to F. an undivided interest in a mining claim, upon the fulfillment of cer-

*This is the syllabus, in substance, of the reporter The decision, as reported on this point, is not clear.

*The hoisting works in this case seem to have stood at the top of a shaft not sunk on the vein, but tapping it through its eastern wall about 250 feet below surface. The opinion in the case also states as a query, whether when a blind lode, as in this case, dips at an angle of 45°, whether the supposed surface should be taken immediately above the point where the lode is first reached below ground, or whether its last, or whether its average dip should be followed or protracted to the surface?

tain specified conditions, to be thereafter performed by F., and let F. into possession. Thereafter, on the failure of C. to convey as stipulated, F., who was at the time out of possession, brought ejectment to recover the same, the complaint being in the usual form: *Held*, that ejectment would not lie, but that the appropriate remedy of F. was by action for specific performance, and, as incidental thereto, a delivery of the possession. *Felger* v. *Coward*, 35 Cal. 650.

14. Tenant in common. One tenant in common in a mining claim may, as against mere trespassers, recover in ejectment the entire claim. *Rowe* v. *Bacigalluppi*, 21 Cal. 633.

15. Partnership Equities. In ejectment for an interest in a mining claim, defendant cannot defeat the action by showing the claim to partnership property. Rights arising out of the partnership must be asserted in equity, and cannot defeat the recovery of the legal title. *Lowe* v. *Alexander*, 15 Cal. 297.

16. Title—Proof—Partnership—Possession. Plaintiffs in ejectment for mining ground were an ordinary joint stock company, or partnership, claiming by purchase and transfer from the company originally locating the claims; the practice of the company was to issue to members certificates of stock which certificates constituted the only evidence of membership recognized by the company. Transfers were made by assignment of the certificates: *Held*, that these certificates and their assignments, their execution first being proved, were competent and proper evidence upon the question of possession. *Pennsylvania M. Co.* v. *Owens*, 15 Cal. 135.

In ejectment for mining ground, plaintiffs may rely for recovery upon either title or possession. Id.

Plaintiff in ejectment for mining claims, must rely upon the strength of his own title; defendants, in actual possession, are not required to show anything beyond it, until a prior and paramount right is shown by plaintiff. Id.

17. Parties—Undivided Interest. In ejectment for an undivided interest in a mining claim, it is not necessary to make parties defendants who are in possession of such claim as holders of other undivided interests, and assert no right in the interest sued for; it is only necessary in such case for the plaintiff to sue the party who interferes with his rights. *Waring* v. *Crow*, 11 Cal. 366

18. Company Organized, but Title not conveyed. If several persons who own mining ground agree in writing that they will incorporate, and that as soon as the corporation is formed each one will convey to the corporation his interest in the ground, receiving as a consideration stock of the corporation, and the corporation is formed as provided in the agreement, but the conveyances are not executed, the agreement is not sufficient in law to divest the title of the parties to it, so as to enable the corporation to recover the ground in ejectment. *San Felipe M. Co.* v. *Belshaw*, 49 Cal. 655.

19. Collusion by Tenant in Ejectment — Estoppel — Damages against Tenant. Demise by lease of certain lands, together with the mines under them, with liberty to dig for ore in other mines, under the surface of other lands not demised: the tenant fraudulently concealed a declaration in ejectment delivered to him, and suffered judgment to go by default. The declaration in ejectment did not mention mines at all, but the sheriff, in executing a writ of possession, by the concurrence of the tenant, delivered possession of the premises demised to the tenant, and also of those mines of which he had liberty to dig: *Held*, that although the latter could not be recovered under the declaration in ejectment, still that the tenant, by his own act, had estopped himself from taking that objection, and that in an action for the three years' rent, the penalty for such conduct of tenant, under the statute of 11 G. 2, c. 19, the landlord might recover the treble rent, in respect, not only to the demised premises, but of the mines in which the tenant had only a liberty to dig. *Crocker* v. *Fothergill*, 2 B. & Ald. 652.

20. Possession. Possession of a mining claim taken without reference to mining rules, is sufficient in ejectment for the claim, as against one entering by no better title, and not in compliance with any mining rule. It is simply prior against subsequent possession. *English* v. *Johnson*, 17 Cal. 108; B. & W. L. C. 172.

21. Possession—Legal Title — Cestui que use. Continued possession for many years (of a lead mine) under a deed (120 years old) declaratory of a beneficial interest in which a covenant to convey the legal estate is inserted, will not raise a presumption that such estate has been conveyed, nor sustain ejectment which can be supported by the legal title only. 1756. *Goodright* v. *Swymmer*, 1 Kenyon, 385.

22. Recovery on Possession. Plaintiff in ejectment for a mining claim may rest his recovery upon prior possession, and the action does not necessarily put in issue the legal title. *Grady* v. *Early*, 18 Cal. 109.

23. Possession — District rules, Evidence. Possession of mining ground acquired by an entry under a claim for mining

purposes, upon a tract the bounds of which are distinctly defined by physical marks, accompanied with actual occupancy of a part of the tract, is sufficient to enable the possessor to maintain ejectment for the entire claim, although such acts of appropriation are not done in accordance with any local mining rule. *Table Mt. T. Co.* v. *Stranahan*, 20 Cal. 198; *English* v. *Johnson*, 17 Cal. 107.

The exclusion, therefore, of evidence tending to prove a possession of this character is error. *Table Mt. T. Co.* v. *Stranahan*, 20 Cal. 198.

24. Possession—Tracing Title. It is only necessary for plaintiffs to prove the right of possession as against the defendants to maintain ejectment for a mining claim; and for this purpose it may not be necessary to connect themselves with the title of the original locators. *Antoine Co.* v. *Ridge Co.*, 23 Cal. 219.

25. Right to Immediate Possession. In ejectment for a mining claim plaintiff must prove the right to immediate possession at the time of instituting the suit. *Herbert* v. *King*, 1 Mont. 475.

26. Possession not Inferred from Title—Montana. The presumption that possession follows the record-title has been changed by statute in Montana (Act of January 11, 1872), and in ejectment to recover a mining claim the plaintiff must show that he or his predecessor in interest "was in the actual seisin or possession" of the (lode) claim within one year next before suit brought. *Davis* v. *Clark*, 2 Mont. 394, 310.

27. Evidence as to Possession. An "agreement of cancellation" of a lease of a ditch and the surrender of possession to the lessor, although no consideration may have been expressed in the agreement is sufficient to justify a finding that the tenant (defendant in ejectment) was not in possession of the premises. *Burke* v. *Table Mt. Co.*, 12 Cal. 404.

28. Defendant out of Possession—Practice—California. In ejectment against two for a mining ditch, when A. was found to be in possession and B. was found to be not in possession, having previously surrendered his possession to his co-defendant. Judgment going against A. alone, the right of B. is not adjudicated, and he is not precluded from afterward asserting his title, if he have any. *Burke* v. *Table Mt. Co.*, 12 Cal. 404.

29. Public Domain—Title Outstanding. In actions to recover possession of mining claims located on the public lands, the doctrine that the plaintiff, if he recover at all, must recover on the strength of his own title, has no application; for neither party has any legal title. *Richardson* v. *McNulty*, 24 Cal. 339. B. & W. L. C. 206.

In such actions, where prior possession is relied on by plaintiff, the defendant cannot justify his entry by showing the true title outstanding. Id.

30. Outstanding Title. Defendant in ejectment for a mining claim may show a conveyance by plaintiff or plaintiff's grantor prior to the bringing of the action, to show as a defense that plaintiff has no title through the chain of title by which he claims. A naked trespasser cannot show outstanding title in a third party, except as a means of showing the want of all title in the plaintiff. *Mallett* v. *Uncle Sam M. Co.*, 1 Nev. 194.

Where in a suit for the recovery of a mine upon the public domain, the plaintiff requested the court to charge "that the doctrine that plaintiff must recover upon the strength of his own title, and not upon the weakness of that of the defendant, has no application in this case—the real question here involved is, which of the parties, the plaintiff or defendant, has the better right to mine the land in question;" and it was claimed that without it the jury might have presumed the title to be in the United States, and therefore found against plaintiff, but no suggestion on such point appeared to have been made to the jury on the trial: *Held*, that the refusal of the instruction was not error. *Schissler* v. *Cheshire*, 7 Nev. 427.

31. Outstanding Title—Abandonment. In an action of ejectment, one of the material allegations of the complaint is that plaintiff was the owner and entitled to the possession at the time of the alleged entry by defendant, and under a direct denial of this averment, the defendant may show that, previous to his entry, a title which once existed in the plaintiff had been lost by abandonment and forfeiture. *Bell* v. *Brown*, 22 Cal. 671.

32. Ouster of Third Party under Writ of Restitution. A party who is removed from the possession of real estate (quicksilver mines) by virtue of a writ of restitution issued on a judgment in ejectment, and who moves to be restored to the possession on the ground that he was not a party to the action, must make out a clear case, free from ambiguity. *California Quicksilver M. Co.* v. *Redington*, 50 Cal. 160.

33. Pleading—Double defense. In an action to recover a mining claim, the complaint, duly verified, alleged title and possession in plaintiffs on a certain day. The answer, also verified, denied that plaintiffs ever had either title or possession, and afterward averred that if plaintiffs ever had had a title to the claim, they had aban-

doned and forfeited it before the defendants' entry. At the trial, on motion of plaintiffs, the court ordered defendants to elect on which of the above defenses they would rely, and defendants, after excepting to the order, having elected to rely upon their denial, were precluded from introducing proof of the abandonment and forfeiture: *Held*, that the action of the court was error; that defendants had the right to set up both defenses in their answer, and support both by proof. *Bell v. Brown*, 22 Cal. 671.

34. Pleading—Variance—California. In ejectment for a mining claim, where plaintiff, in his complaint, avers the facts upon which his title is based, he must be held on trial to the title alleged, and defendant may well claim surprise if another and different title is allowed to be proved. *Eagan* v. *Delaney*, 16 Cal. 86.

35. Prayer for Injunction. A complaint in ejectment for a mining claim, which also prays for an injunction to restrain its working, should not be dismissed, because as to the injunction prayed for it does not set forth sufficient grounds to give the court jurisdiction to grant the injunction. *McNeady* v. *Hyde*, 47 Cal. 482.

EMINENT DOMAIN.

1. Mining Use not a public use. The legislature cannot constitutionally declare a private mining enterprise to be a public use. *Consolidated C. Co.* v. *Central P. R. Co.*, 51 Cal. 269.

2. Mining purposes—Public use. Section 44 of chapter 43 of the code of West Virginia, which in terms provides for the condemnation of land and right of way for mining purposes: *Held*, to be controlled by the provisions of section 45, referring it to the court as to whether the facts show the land to be taken for purposes "of public utility," which words should be deemed synonymous with public use. And upon the facts of the particular case the condemnation was held to be not for a public use. *Valley Salt Co.* v. *Brown*, 7 W. Va. 191.

3. Flumes, Tunnel, etc.—California Act void. Subdivision 5 of sec. 1238 of the code of civil procedure authorizing the exercise of the right of eminent domain to condemn land for tunnels, flumes, ditches, dumps, etc., for working mines, and declaring them to be public uses, is unconstitutional and void. The legislature cannot make a use a public use when it is manifestly not a public use. *Consolidated Channel Company* v. *Cen. Pacific R. Co.*, 51 Cal. 269.

4. Constitutionality—Nevada Act—Duty of Legislature. The act of the legislature of Nevada entitled "An act to encourage the mining, milling, smelting or other reduction of ores in the State of Nevada," allowing, among other things, the condemnation of land for the purpose of transporting timber necessary to work a mine is constitutional. *Dayton M. Co.* v. *Seawell*, 11 Nev. 394.

"If, in its practical operation, it is found to be incompatible with a just preservation of the rights of individuals in private property, it will be the duty of the legislature to repeal the act." Id.

5. Underground way to Mining Company not of "Public Utility." An incorporated company, being the owner of coal lands, desires to obtain a subterranean right of way through or under the lands of another person, for the purpose of mining and removing its own coal, and applies to the court for the benefit of sections 44 and 45 of chapter 43 of the code. The report of the commissioners and the evidence in the case show that the company is the owner of some thirty acres of coal land, from which the coal could not be mined and transported without going through the land of the defendants; that the company use said coal for the purpose of manufacturing salt at their furnaces, and to sell to the people living in and about the town of Hartford City; that the people living in and about said town could obtain coal also from other sources, and that the public would not use the subterranean way set out and described in the commissioner's report, through the land of the company, but the company only: *Held*, that the report and evidence do not show that the purpose for which the property is to be taken is of such public utility as that said report should be confirmed by the court under section 45 of said chapter. *Valley Salt Company* v. *Brown*, 7 W. V. 191.

6. Act cumulative to right by Custom—Tunnels. The act of 1870, providing for the condemnation of the right of way over or through a mining claim for ditches, tunnels, flumes, etc., necessary for the convenient working of another mining claim, is merely cumulative, and does not have the effect of excluding a party from the enforcement in court of the right to construct such tunnels, ditches, flumes, etc., when that right exists independent of the statute, as by local customs. *Bliss* v. *Kingdom*, 46 Cal. 651.

7. Right, not transferable. A mining company authorized to condemn a railroad from their mines, cannot delegate their right to an individual; corporate power cannot be sold or assigned. *Stewart & Foltz's Appeal*, 56 Pa. St. 413.

8. Mining Companies—No implication in favor of Eminent Domain. By the

act of 1856, authorizing the incorporation of mining companies, it was provided that any company might construct a railroad from its mines to connect with another railroad, but made no provision for condemnation of land otherwise than that such mining company "shall, in respect to such railroad, be subject to, and governed by the acts in relation to railroads, so far as applicable:" *Held*, that under the strict construction applicable to such laws they were not authorized to exercise the power of eminent domain conferred on railroad companies by certain sections of the "acts in relation to railroads." *Miami Coal Co.* v. *Wigton*, 19 Ohio St. 560.

9. No Right of, in favor of Nuisance. A private railroad from a party's mines, which has been declared a nuisance, and ordered to be abated, is not entitled to the privilege allowed under the railroad law of Pennsylvania. *McCandless' appeal*, 70 Pa. St. 214.

10. Condemnation an Entirety—Tramway. In proceedings for the condemnation of land, the commissioners reported certain damages, and reserved to the party whose lands were condemned liberty to construct a tramway over the land condemned for the transportation of minerals from the residue of the tract: *Held*, erroneous on its face; that the condemnation must be absolute, and the compensation complete in money for the entirety. *Chesapeake & O. R. Co.* v. *Halstead*, 7 W. Va. 301.

11. Measure of Damages. Upon the condemnation of land (part of a tract of coal severed from the surface estate), the measure of damages is the injury done to the tract, as a whole, or the difference between its value at the time of the entry and its value after the completion of the road. *Brown* v. *Corey*, 43 Pa. St. 495.

In the condemnation of mineral land the inconvenience to the future working of that part of the tract not taken, is to be considered. Id.

12. Measure of Damages—Unopened Mines. In estimating the damages that will be sustained by the construction of a railroad through the property of a land owner, the jury may allow the party the market value of the land taken, and all actual damages arising from the manner in which the road passes through the property, and affects the improvements, but they are not at liberty to estimate the value of unopened mines, as mines, or to estimate that there is a certain value in coal under the surface, and so raise the quantum of damages above the present salable value of the tract condemned. Nor is it a subject of damages that the owner, when he begins to open his mines, will find the road-bed an obstruction. *Searle* v. *Lackawana R. Co.*, 33 Pa. St. 57.

13. Measure of Damages — Mines — Water-power. In case of condemnation of land, in the exercise of the right of eminent domain, under the statute of Illinois, the true test as to the damages to be paid is the market value of the land; but in ascertaining this value, reference may be had, not merely to the uses to which it is actually applied, but to its capabilities, so far as they add to its market value. If the land has a mine under its surface, that fact may be considered, if the mine adds to the market value of the land, even though such mine has never been used. So, of a water-power, even though it has never been utilized. *Haslam* v. *Galena & S. W. R. R. Co.*, 64 Ill. 353.

14. Damages for future inconvenience. Where a railway act provided that the company should "from time to time pay to the owner, lessee, or occupier of mines extending so as to lie on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner," etc., by reason of the severance of the surface land, or of the continuous working of the mines being interrupted, or by reason of the same being worked so as not to prejudice the railway: *Held*, that an arbitrator appointed to assess under this section the losses or expenses sustained or incurred by a mine-owner, by reason of his land being severed, and the working of his mines being interrupted, rightly included in his award items of compensation for additional losses or expenses not then actually sustained or incurred in working the mines, but which were capable of being immediately estimated with reasonable certainty. *Whitehouse* v. *Wolverhampton & W. R. Co.*, L. R. 5, Ex. 6.

15. Compensation for Workable Minerals. A party whose lands have been taken by a canal, reserving to the owner the minerals, with restriction upon his working to the prejudice of the canal, and providing for compensation in case of loss to the owner by reason of not being able to extract his minerals on account of the canal, cannot be restrained from having such compensation assessed by the proper tribunal, upon the allegation of the canal company that the working would do it no injury where it appears from the evidence that there may be injury—otherwise, if the court were satisfied that no injury whatever would result for which compensation could be claimed. *Cromford Canal Co.* v. *Cutts*, 5 Railway Ca., 442.

16. Flooding Mine—Compensation—Practice. A canal was constructed under an act of parliament, the minerals under the

land taken being expressly reserved to the owners, with liberty to work the minerals, provided no injury was done to navigation. By another clause, the owners were not to work without notice to defendants who might inspect the mines and purchase. The canal company (the defendant) upon such notice refused to purchase. The owner worked his mine under the canal until flooded from the canal: *Held*, that no action of tort could be maintained, there being no wrongful or negligent act done by the defendant. That it was a case for compensation only to the extent which the act might provide for. *Dunn* v. *Birmingham Can. Co.*, L. R. 8 Q. B. 42, affirming S. C. 7 Id. 244.

17. Compensation — Specific proceedings the only remedy. The local act, 1 Will. 4, c. 55, providing for the condemnation of land by the company defendant, and for compensation to mine owners, with special reference to minerals under and within forty yards of its canal: *Construed*, to allow only of the feigned issue mentioned in the act, and not to allow an action on the case at common law. *Fenton* v. *Trent & Mersey N. Co.*, 9 M. & W. 203; 2 Railway Ca. 837.

And that the company was entitled to compensation for the coal left standing within said distance to protect the canal. Id.

18. Election to take minerals. The use of clay out of land condemned for public uses is not an election to take the minerals with the land. *In re Huddersfield*, L. R. 10 Ch. App. 92; L. R. 17 Eq. 476.

19. Compensation to Lessee. A canal company was authorized by its act to purchase the coal which the safety of the canal required to be left unworked. The purchase of part was delayed many years, and in the meantime a lease had been granted by the owner to a coal-worker. The company purchased the interest of the owner: *Held*, that the coal-worker was also entitled to compensation. *Barnsley* v. *Twibell*, 7 Beav. 19.

20. Compensation for deprivation of highway. The owners of a colliery sustaining a private and particular injury from the diversion or obstruction of a public road by the works of a railroad company hindering access to their mine, which diversion or obstruction, if it had been made without the sanction of an act of parliament would have given a right of action, are entitled to compensation under the land clauses act. *Wood* v. *Stourbridge R. Co.*, 16 C. B. (N. S.) 222.

21. Failure to purchase minerals allows their working. A canal act forbade the working of mines under the canal or its reservoirs, or within a certain distance thereof, without previous notice to the canal company, who might thereupon purchase the minerals or permit the working. Another clause reserved the mines in terms to the owners, and the right to work them, provided no injury be done to the navigation: *Held*, that such proviso was not to be so construed as to make the mine owner responsible for injuries occasioned to the canal in the course of careful working after notice given as required by the act, and the failure of the company to pay for the minerals. *Dudley Can. Co.* v. *Grazebrook*, 1 B. & Ad. 59.

22. Injunction — Compensation — Construction. A canal act provided that in case the company and the coal owner could not agree as to the amount of compensation for the coal taken for the purposes of the canal, it should be settled by a jury summoned by the commissioners whose finding was "to be conclusive, and should not be removed by *certiorari* or other process whatever into any of the courts of record at Westminster or any other court." A bill was filed, praying an injunction to restrain proceedings before a jury on the ground that the defendant was entitled to no compensation, and that the special jurisdiction provided by the act was not so constituted as to be likely to come to a just conclusion: *Held*, that the plaintiffs were not entitled to an injunction if the defendant was entitled to any compensation, the amount of which had to be ascertained; but whether this court had any jurisdiction to interfere in the matter if it had clearly appeared that the defendant was entitled to no compensation, *Quaere: Barnsley Canal Co.* v. *Twibell*, 7 Beav. 19; S. C. 13 L. J. Ch. 434.

23. Canal Act — Inconvenience Ultimately resulting to owner of Minerals — Injunction. By a local act, tenants for life were empowered to sell lands to a canal company for the purposes of their undertaking. It was provided that in case the parties should differ as to the amount of the purchase-money, a jury should assess the amount and ascertain what sum should be paid for the land, and also what other sums should be paid for past and future damage. The mines and minerals under the lands conveyed were reserved to the owners, with power to the owners to get them, provided no injury should be done to the canal thereby. And the company was empowered to inspect the mines and to compel the owners to desist from working so as to injure the canal. Under the act a tenant for life sold lands to the company which were known to contain coal, though at the time it was not known whether the coal would be gotten. Some years afterward a mine

was opened for the purpose of getting the coal underlying the canal. The company restrained the owners of the mine from working so as to endanger the canal: *Held*, that in the absence of a special provision in the act to that effect the company was not liable to make any compensation to the owners of the coal mine for the loss incurred by them by reason of this restriction on their powers of working the mine. *Reg.* v. *Aire & C. N. Co.*, 8 Jur., N. S. 115; 30 L. J. Q. B. 337.

24. Construction—Canal Company refusing to Purchase Minerals must take consequences of the undermining. By a canal act it was provided that no owner of any mine should work the same under the reservoir of the canal company, except as therein mentioned, without the consent of the company; and that when the owner of any mine under the canal works should be desirous of working the same, such owner should give notice in writing of such, his intention, to the company before beginning to work, that the company might then inspect such mine; and upon failure or neglect of the company to so inspect within thirty days after such notice, the owner of such mine might work and get such part of the said mine as lay under the said canal and works; and that if, upon such inspection, the canal company should refuse to permit the owner of the mines to work such part of the mine, the company should, within three calendar months after such refusal, purchase the same. And it was further provided that nothing therein contained should be construed to prejudice the right of the lord of the manor or waste, or any owner of any ground through which the canal company's works should be made, to the mines under such ground; such lord or owner being thereby empowered to work the same, subject to the condition therein contained, provided that no injury was done in the working to the said navigation: *Held*, (affirming the judgment of the court below), that this last proviso was not to be construed as rendering futile all the previous provisions of the act; therefore, where the owner of the mines had given notice of his intention to work them, and the company had neglected to purchase the mines in the manner prescribed by the act, it was held that the owner of the mine might work the same under the company's works, and the company's works having been damaged in consequence of such working, that the company could not maintain an action against the mine owner to recover compensation for such damages. *Stourbridge Canal Co.* v. *Dudley*, 3 Law Times, N. S. 449; 30 L. J. Q. B. 108.

25. Canals—Pennsylvania. Lands condemned under the canal system of Pennsylvania were condemned to the extent of the fee, embracing the coal under the bed of the canal; and such coal passes to the grantee of the canal. *Wyoming Coal Co.* v. *Price*, 81 Pa. St. 176.

26. Oil-tubing Company. The right of eminent domain may be exercised in favor of a corporation chartered to construct a line of tubing for the underground transportation of oil by the action of gravity upon the liquid. *West Virginia T. Co.* v. *Volcanic Oil & C. Co.*, 5 W. Va. 382.

27. Railroad—Support—No Title to Minerals. By the effect of the sections 77, 78, and 79, of the railway clauses, consolidation act, 1845, a railway company, on purchasing under that statute, land for the purposes of a railway, does not become entitled to the mines under the land; the owner may work them after notice duly given, and if after such notice the company, though desiring to prevent the working, does not give compensation for the minerals, the owner may work them up to and under the railway, working them in a "proper manner," and "according to the usual manner of working such mines in the district." The company cannot, under this statutory purchase, claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters, by which alone the rights of the company and the mine owner are regulated. *Great Western R. Co.* v. *Bennett*, L. R., 2 H. L. 27.

28. Railroad—Acquiescence in construction. A railroad constructed in aid of mines, under an act of parliament, providing for compensation, without authority from the owner, but acquiesced in for fifteen years, cannot be interfered with by such owner of the land. His only relief is to ask for the compensation. *Mold* v. *Wheatcroft*, 27 Beav. 510; 29 L. J. Ch. 11.

29. Railroad—Ownership of Minerals. Where land is condemned for railroad purposes, the company owns the earth and minerals above the level of the track, if their excavation be necessary for the construction of the road; minerals lying below the level of the road, and whose excavation is not necessary, belong to the owner of the land condemned. *Evans* v. *Haefner*, 29 Mo. 152.

30. Railroad Engine House—Estoppel. An engine house, built for the operation of a road constructed for the carriage of mine produce, under authority of an act of parliament, cannot be disturbed, and must be treated as rightfully erected (subject to compensation), where the owner of the land has allowed, for several years, its

undisturbed enjoyment by the mine owners. *Mold* v. *Wheatcroft*, 27 Beav. 510; 29 L. J. Ch. 11.

31. Lateral Railroads—Private Contracts. An entry on land of another to build a lateral railroad (connecting mines with highways) is an entry under the state in its exercise of the right of eminent domain, in pursuance of public law, and all private contracts are subordinate thereto. *Brown* v. *Corey*, 43 Pa. St. 495.

32. Lateral Railroad Act—Pennsylvania. The act of the Pennsylvania legislature of May 5, 1832, authorizing the construction of lateral railroads to connect private property (coal mines) with the public improvements, is not unconstitutional; and where a petitioner under the act had proceeded so far as to have the damages assessed by verdict, which he was to pay to the owner of the intervening land, but judgment was not yet entered in his favor, he was held liable in trespass for commencing the road before judgment, but not for vindictive damages. *Harvey* v. *Thomas*, 10 Watts, 63.

33. Necessity—Expense—Lateral Railroad Act—Pennsylvania. The necessity of a lateral railroad from a mine to a point of connection with the line of the state navigation works is not an absolute, but a reasonable necessity, and may exist, although, at great expense, a railroad might be built over petitioner's own land. *Harvey* v. *Lloyd*, 3 Pa. St. 331.

For form of proceedings to condemn land for purposes of lateral railroad from mines under act of May 5, 1832. Id.

34. Lateral Railway Act—Easement—Ownership of Minerals. The lateral railway act of May 5, 1832, is intended to give the petitioner nothing more than a privilege to open, construct, complete and use a railway through the land of another. *Lyon* v. *Gormley*, 53 Pa. St. 261.

The owner of the land is not divested of his right to the freehold, nor of his title to the stone, wood, or mineral. The act fastens on his land a servitude, but does not disturb any right not essential to the servitude. Id.

The petitioner does not acquire the ownership of materials he may displace, or any more than the right of way and the right to use those materials in the construction of his way. Id.

35. Special use—Pennsylvania. Where land is condemned under Pennsylvania statutes, allowing private railroads from coal property to connect with public highways, the party condemning cannot use the land for any other purpose than that for which it was originally taken, nor can he change the location of his road. *Lance's Appeal*, 55 Pa. St. 17.

36. Underground access to mines—Pennsylvania. The act of April 16, 1838, allowing the condemnation of land for use as a private road under the surface of any land to coal mines, is imperfect in itself, and must be carried out by treating it as if it were a section of the general road law, and is therefore subject to the provisions governing the laying out of ordinary private roads. *Neeld's Road*, 1 Pa. St. 355.

37. Condemning Way—Pennsylvania. The owner of coal mines cannot, for the benefit of the mines, organize a railroad corporation and condemn land under the general railroad laws, nor otherwise than by strict compliance with the lateral railroad laws. *Edgewood R. R. Co. Appeal*, 79 Pa. St. 257.

38. Right of Way through Coal. An underground right of way through a bed of coal may be condemned under the lateral railway acts. *Brown* v. *Corey*, 43 Pa. St. 495.

39. Contract with mortgagor in possession. An act of parliament authorized the lessees of mines to make a railroad to a canal through the intervening lands on making compensation. The lessees entered into an agreement with a mortgagor in possession for making the railway and paying an annual rent. The mortgagee afterward entered into possession and received the rent for some time: *Held*, that the mortgagee and all claiming under him were bound by the agreement. *Mold* v. *Wheatcroft*, 27 Beav. 510; 29 L. J. Ch. 11.

EQUITY.

1. Mutual mistake as to existence of minerals. In an action by the lessor of supposed oil land to recover damages against his lessee for failing to commence to bore as covenanted in his lease, the defendant, by appropriate cross-pleadings, sought to be released from the contract entirely, on the ground that it was executed in consequence of the mutual mistake of lessee and lessor as to the existence of oil on lessor's land: *Held*, that the circuit court erred by failing to transfer the action to equity for preparation and trial on the lessee's claim, to be relieved for mistake in the contract. *Bell* v. *Truit*, 9 Bush. Ky. 257.

2. Laches—Mines. If a person having a just right to mines stand by until he sees whether the adventure of opening them result in a profit, a court of equity will lend him no assistance. These observations extend to every kind of trade, but not with such force as they do to mines. *Ernest* v. *Vivian*, 33 L. J. Ch. 513.

3. Ouster—Relief at law. The owner of mines (tin bounds) being ousted therefrom cannot seek repossession in chancery, or an account in equity, but must proceed by ejectment or otherwise at law. *Vice* v. *Thomas*, 4 Y. & C. 538; Smirke's Rep. 1.

4. Trespassing adjoiner. For proceedings in equity by a mine owner against the proprietors of an adjoining mine who had encroached upon complainant's iron ore-bed by underground mining operations, praying account, injunction, etc. See *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80.

5. Interpleader—Oil Royalties—Privity of Contract. G., and G., his wife, by deed of lease duly executed, acknowledged and recorded, grant to P.'s assignors, for a large money consideration, paid down, and for a large rent to be paid in oil as the oil is produced from the leased premises, a hundred acres of land for a term of twenty years. G., the wife, is the fee-simple owner of the land, subject to the marital rights of G., the husband therein, which is at least an estate during the joint lives of G. and G., the wife. G., the husband, prior to the date of the deed of lease, by contract, sold to C. his entire interest, for his life, in a tract of 250 acres, covering the said 100 acres. P. and his assignors, at the date of the lease and purchase from G. and G., the wife, and for a long time afterward, had no notice or knowledge whatever of the contract of G., the husband, with C., about said land. After P. had obtained the lease and taken possession of the leased premises, and had paid the oil rent to G., the husband, under the deed of lease, as it accrued, for some time, C. brought suit against G., the husband, to compel him to execute to him a deed conveying the legal title to the 250 acres for his life estate. C. obtained a final decree against G., the husband, for such deed, and appointing a commissioner to convey the life estate of G. in the 250 acres of the land to C.: G., and G., his wife, then notified P. that they each claim the unpaid and accruing rent oil under the lease. C. notifies P. that he claims the unpaid and accruing rent oil under the lease, by virtue of said decree, and notifies P. not to pay it to G., nor to G., his wife. P. is ready and willing to pay the rent oil arrear to the proper claimant, and has it on hand for the purpose; but is ignorant as to which has the better right among the claimants. G., the husband, is insolvent, and sues out a distress warrant against P.'s property on the leased premises, and causes the oil rent in P.'s possession, together with a large amount of other personal property of P. on the leased premises to be levied on for the rent oil in arrear. P. files his bill of interpleader against G., and G., his wife, and C.: *Held*, that the plaintiff has no adequate remedy at law; 2. That it is a case for the interference of equity; 3. That C.'s claim to the royalty oil reserved in the lease under G., must be considered, for the purposes of the case, to have commenced at the date of the decree, which was after the date of the lease; 4. That the persons claiming the royalty claim in privity of contract, and tenure sufficiently for the purposes of the bill. *Oil Run Co.* v. *Gale*, 6 W. Va. 526.

6. Parties in interest — Void Incorporation. Where three persons who were, or claimed to be, incorporators under legislative charter, in a certain mining company, advanced the funds and bought a quarry in the name of such corporation, and caused all the stock to be issued to themselves, being the only persons interested: *Held*, that even if there was no corporate organization, the persons so advancing the consideration, were the equitable owners of the real estate so purchased. *Vermont M. & Q. Co.* v. *Windham Bank*, 44 Vt. 489.

ESTOPPEL.

1. Mining claims generally. The same rules of law relating to estoppel, *in pais* apply to mining ground as to any other real estate claimed under a similar kind of title. *Kelly* v. *Taylor*, 23 Cal. 11.

2. Title necessary to. A party cannot be estopped by matters *in pais*, unless at the time the supposed matter of estoppel occurred he held the title to the property (a mining ditch) in controversy. *Marquart* v. *Bradford*, 43 Cal. 526.

3. Boundaries—Award—Jet Ore. An award fixing the boundaries between two parishes, and fixing the *locus in quo* for the getting of stone (or jet ore) by the lords of the two manors: *Held*, not an estoppel upon a subsequent action of trespass for taking jet ore in the awarded premises, the estoppel not being plead specially and at the first opportunity. *Feversham* v. *Emerson*, 24 L. J. Ex. 254.

4. Statements as to boundary. The fact that plaintiff tells defendant that he did not know where the line ran, but that defendant need not be uneasy, for he was not near the line, and had fifty feet still to run before he could reach it, does not amount to a license or permission from plaintiff for defendant to work on plaintiff's ground; nor does it estop plaintiff from recovering the damage he has actually sustained. *Maye* v. *Yappen*, 23 Cal. 306.

5. Expenditures under license. The rule, that a license to do something on the licensor's land followed by expenditure on the faith of it is irrevocable, rests upon the

principle of estoppel, because the parties cannot be placed in *statu quo*, and equity treats the license thus executed as a contract giving absolute rights. *Huff* v. *McCauley*, 53 Pa. St. 206.

6. Revocation of License—Compensation. It seems that the principle of estoppel will not allow a mining license to be revoked without notice or compensation for outlays. *Fuhr* v. *Dean*, 26 Mo. 116.

7. Acquiescence—Disclaimer by Mistake—Standing by. Neither the public disclaimer of title, such disclaimer being based upon an erroneous survey, nor the attempt to confirm title upon such survey, nor the acquiescence in the occupation, mining and improvements of defendants, without assertion of title, amount to an equitable estoppel, and do not prevent a party claiming the full extent of the grant of his patent afterwards acquired, there being no proof of fraud. *Boggs* v. *Merced M. Co.* 14 Cal. 367, B. & W. L. C. 131.

An instruction to the jury "that if they believed from the evidence that plaintiffs stood quietly by, and saw and knew of defendant's purchase of the premises, his possession (mining) and improvements of the same, and that the defendant purchased and improved the same in good faith, and not in fraud of plaintiff's rights, and that the plaintiffs did not notify him of their claim, then that they the plaintiffs are estopped from denying his rights:" *Held*, error, upon the facts stated in the case, and *Boggs* v. *Merced M. Co.*, *supra*, affirmed, as stating the correct rule. *Green* v. *Prettyman*, 17 Cal. 401.

8. Standing by—Labor. It is not the making of improvements or expending money upon another's claim which gives title as against the owner, but the fraud of the owner who silently, or otherwise, encourages the expenditure with the knowledge that they are being made in good faith and upon a reasonable belief that he is the owner of the property. *McGarrity* v. *Byington*, 12 Cal. 427.

9. Redemption—Co-tenants—Permitting Expenditures—Affirmative Relief. Where a purchaser of real estate sold by a sheriff on execution, being the fourth part of an ore bed, of which such purchaser already owned three-fourths, with knowledge of an attempt having been made by the judgment-debtors to redeem the premises, and that the latter considered the redemption valid, failed to give them notice of his objection to the redemption in time to enable them to procure a redemption through a friendly creditor, and stood by for several years and suffered the judgment-debtors to expend money on the premises in the erection of valuable buildings, etc., under the belief that they were part owners of the property with him, without making known to them his own claim to the debtor's share of such property, under his purchase, at the sheriff's sale, in the meantime recognizing them as co-tenants of the lot: *Held*, that the circumstances ought to be regarded, in a court of equity, as a ratification of the redemption, and a waiver of any irregularity or defect therein; and that principles of equity would not permit such purchaser afterward to assert his title as against the judgment-debtors. 2. That under these circumstances the court ought to go further than merely to compel the purchaser at this sheriff's sale, or his assignees, to pay the judgment-debtors a compensation for their improvements; that it would hold the purchaser estopped in equity as against the judgment-debtors, from exercising any legal right whatever over the latter's share of the property. *Hall* v. *Fisher*, 9 Barb. 18.

For proceedings for account, etc., in equity in same case, see 1 Barb. Ch. 53; 3 Id. 639; 20 Barb. 442.

10. Acquiescence in payments to third Party—Ore dues—Revocation of License. A widow owning a life interest in an iron ore-bed allowed her son-in-law, who was the owner of the reversion, to make a conveyance of it to an iron company, at a given rate per ton. The dues for ore were paid to him alone, or to her alone, or to either in the presence of the other, the receipts of either were taken by the company, and for a number of years she allowed him to receive half the profits. Afterward she notified the company to not pay any dues, except on her order, to which the company refused compliance, and she brought *assumpsit* for the dues accruing for the ore since the notice: *Held*, that as under the will the widow was entitled to the profits of the iron ore for life, and there was no evidence that she had parted with her title thereto, she was not estopped from setting it up, as against her son-in-law, whose right was but a benefit or privilege granted by her, and which she could revoke at her pleasure; 2. That she was bound by the sale by him to the company, made with her knowledge and consent, and was estopped from repudiating it so long as the ore-bed was worked in good faith; 3. That her notice to the company was a good revocation of the authority of her son-in-law to receive any part of the amount due for ore; and that consequently, the company were liable to her for all ore mined thereafter in *assumpsit*. *Troxell* v. *Lehigh Crane Iron Co.*, 42 Penn. St. 513.

11. Water—Allowing Ditch expenditures. Where a party stands by and sees a ditch owner appropriate the water of a

creek to his own use, at a great expense, and does not inform him of his claim to the waters, he and his vendees are estopped from afterward claiming the water. *Parke* v. *Kilham*, 8 Cal. 77.

12. Instruction—Acquiescence. On the trial of an action for the alleged trespass of the defendants on the plaintiff's mining claim, in which the title to the *locus in quo* constituted the main issue, the court gave the following instruction to the jury, viz.: If the jury believe, from the evidence, that plaintiffs, * * * more than five years prior to the commencement of this suit, in good faith and under a claim of right, entered into the possession of said disputed ground, and have continued in possession thereof, and expended labor thereon (with the knowledge of defendants, * * * * they making no objections thereto), and that defendants have not forbidden plaintiffs' possession so acquired, then the plaintiff is entitled to a verdict:" *Held*, that this instruction, as an abstract proposition fails to state the essential elements of an estoppel *in pais*, and was improperly given. *Maine Boys' T. Co.* v. *Boston T. Co.*, 37 Cal. 40.

13. By Abandonment. The prior appropriator is estopped from asserting a claim to water after it has been abandoned by him and recaptured by another. *Barkley* v. *Tieleke*, 2 Mont. 59.

14. Dealing with corporation. Though the officers of a mining company were in fact ineligible at the time when a contract was made with them, this fact cannot be taken advantage of to invalidate the contract by the party which contracted with them under such circumstances. *Delaware & H. C. Co.* v. *Pennsylvania C. Co.*, 21 Pa. St. 131.

15. Adverse claim—Cross lodes—Representations to intending purchaser. The owner of the American lode made application for United States patent. The owner of the Bull of the Woods lode filed his adverse claim, and brought ejectment to support it. The surface plats showed an interference or crossing. Prior to such application an agent of such owner of the American lode (who was then about to purchase the same and was investigating the title) inquired of the owner of the Bull of the Woods, whether he knew of any other claims that conflicted with such American lode? He replied that he did not unless it were the Inter-Ocean (a lode not in controversy). At the same time such agent remarked that his (plaintiff's) Bull of the Woods claim crossed the American but that he understood it was a later location, to which such owner of the Bull of the Woods assented: *Held*, 1. That the first reply above stated was a false representation of fact, if the Bull of the Woods Claim then existed, and that failure to assert a seniority to the Bull of the Woods title was a concealment of a material fact amounting to a representation as to a material fact; 2. That the presumption was that such owner of the Bull of the Woods had full knowledge of the facts relating to his own title unless the contrary was affirmatively shown, which accordingly brought the case within the rule that false representation to amount to an estoppel, must be made with knowledge of the facts; 3. That although both lodes were at the time recorded, but under a law which only required the record to state "the general course of the lode as near as may be;" the record did not necessarily show the interference, and that therefore, the owner of the Bull of the Woods could not escape an estoppel under the rule, excepting cases where the real title is equally well known to both parties, nor could the record show which was the junior or senior title, as the older record may have been founded upon a junior discovery or *vice versa*, and while both location and record of one lode might be senior to the location and record of the other, if the date of discovery, which does not appear of record, were junior, such senior record and location would avail nothing against such senior discovery, discovery being the inception of title; 4. That if the effect of such representations was to work a fraud, by inducing the inquirer to make a purchase, which he would not otherwise have made, the actual intent of the speaker cannot be material; 5. That the facts therefore brought the case within all the requirements essential to an estoppel, and justified the evidence being left to the jury. (1878.) *Patterson* v. *Hitchcock*, 3 Colorado.

EVIDENCE.

1. Mines and minerals. The rule that words should be understood in their natural and usual meaning applied to "mines and minerals." *Listowell* v. *Gibbings*, 9 Irish C. L. 223.

2. Quarry "recently" opened. A declaration by a lessor in 1840, that a quarry on the premises had been "recently," or "a short time ago," worked by W., cannot be construed as an admission, or to mean that such quarry was open at a period four years previous—1836. *Owings* v. *Emery*, 6 Gill (Md.), 260.

3. Quality of slate—Reputation of the quarry. The quality of slate furnished under a contract cannot be shown by the reputation of the quarry from which it came—but direct evidence as to the quarry from which it was extracted is admissible. *Chalmers* v. *Whittemore*, 22 Minn. 305.

4. Real and Market value. In ascertaining whether the price paid for a parcel of property was inadequate, the inquiry must be restricted to the market value of the property at the time of sale. And this may be very different from its intrinsic value. This is peculiarly the case with a mine, the real value of which, at any given time, can only be ascertained when the mine has been exhausted. *Henry* v. *Everts*, 29 Cal. 610.

5. Of claim including ground not mining. Evidence that a portion of a mining claim is not valuable for mining purposes is not admissible, on general principles, to prove that the owner of the claim has no right to hold such portion. *Correa* v. *Frietas*, 42 Cal. 340.

6. Block of stone left on land conveyed. Allowing a block of stone loosened from the ledge, and intended for a gravestone, to remain on land conveyed for thirty years, is an element for the consideration of the jury, but is not conclusive of abandonment. *Noble* v. *Sylvester*, 42 Vt. 46.

7. Mining supplies to cost-book company. General evidence of supply with proof of orders of the purser and accounts submitted by him to, and passed by the "committee" of a cost-book mine, is sufficient proof of a claim for goods sold and delivered, without showing that such accounts were approved by a "general committee." *Geake* v. *Jackson*, 36 L. J. C. P. 180.

8. Grant—Mixed Ore—"Premises." Where it was in doubt whether the word premises, as used in a deed, referred to a grant of certain ores or to the land in which the vein of ore was found "by metes and bounds:" *Held*, that a previous agreement between the parties, upon which the deed was based, might be resorted to in ascertaining the meaning of the deed. *N. J. Zinc Co.* v. *Boston F. Co.*, 15 N. J. Ch. 418, overruling S. C. 13 Id. 322.

9. Specific Performance—Proving "fault." Where a party claims specific performance of a contract to lease coal land bounded by a certain fault, it lies upon him (in a case where the location of the "fault" is uncertain, or complicated by the existence of another "fault") to prove such fault so as to leave no reasonable doubt as to its location. *Davis* v. *Shepard*, L. R. 1. Ch. App. 410.

10. Colliery to be paid for out of proceeds—Parol evidence explanatory. In an action on a contract for the sale of a colliery for a gross sum of money, to be paid at a certain rate per ton on the first coal mined therefrom, until the full consideration was paid, parol evidence is admissible to prove that at the time of the execution of the contract it was agreed between the parties that the vendees should not be bound to mine the necessary amount of coal, and that the vendor should take the risk of their doing so; the English rule that parol evidence is inadmissible to vary the legal operation of an instrument does not obtain in Pennsylvania. *Chalfant* v. *Williams*, 35 Pa. St. 212.

11. Depreciating mineral value of land. An offer on the part of the plaintiff to prove that the defendant having knowledge of the nature and value of sand chrome, and with knowledge that such a deposit existed on the plaintiff's land, had put in circulation a report that sand chrome was of no value, without further offer to show that the supposed declarations of the defendant were made in plaintiff's presence or were communicated to him: *Held*, properly rejected. *Harris* v. *Tyson*, 24 Pa. St. 347; B. & W. L. C. 351.

12. Copyhold—User—Proof of possession. Upon an issue as to whether the iron and coal under certain lands belonged to the lord or to the tenants, evidence considered of the digging of clay and cutting of timber by the tenants, not as decisive, but as showing a practice of dealing with timber and subsoil, things generally in the lord. *Parrott* v. *Palmer*, 3 Myl. & K. 632.

13. Severance—Separate valuation. Upon an issue whether there was a severance between the title to the mineral and the title to the surface, evidence admitted that a former possessor had sold for less than half the amount which a party employed by him to value the land had estimated it to be worth, including the minerals. *Barnes* v. *Mawson*, 1 Maule & S. 77.

14. User of minerals—Proof of severance. Title to the minerals beneath the surface may be shown to be in a party, other than the owner of the surface, by proof of the immemorial exercise of the right of extracting them, although the original presumption is strong that the minerals belong to the same party who claims the lands generally in fee. Id.

15. Trespass on the Surface. In trespass (for pulling down a wall) evidence of the leasing of the minerals under the *locus in quo* is not evidence of any right in the soil. *Tyrwhitt* v. *Wynne*, 2 B. & Ald. 554.

16. Theory of Veins. When the establishment of a plaintiff's case depends upon the establishment of a theory (as to a vein formation), the correctness of the theory need not be established by any stronger proof than would be required for the case

itself, which is generally only a preponderance of proof. *The Silver M. Co.* v. *Fall*, 6 Nev. 117.

17. Mining Terms and Phrases. Mining terms, or expressions having a technical or peculiar meaning among miners, may be explained the same as mercantile terms or phrases having a different meaning when applied to a particular subject-matter; the phrase in this case was "running into the hill," used in describing mining claims. *Reamer* v. *Nesmith*, 34 Cal. 624.

Such expressions do not come within the rule of patent ambiguities. Id.

18. Level. Certain words, "level," etc., were proved to bear a certain meaning in a district where a certain coal mine, by lease using such terms, had been let, but the parties to the lease were not all residents of that district: *Held*, that it is not a conclusion of law that the words were used with such local meaning. *Clayton* v. *Gregson*, 5 Ad. & El. 302; S. C. 4 Nev. & Man. 602; S. C. 6 Id. 694; S. C. 1 Har. & W. 159.

19. Mining in other Lands. When evidence is admitted of acts of ownership, by taking coals from the land, such evidence of acts of ownership is not confined to the particular lands in question, but may be shown at any point within the ambit of the claim. *Barnes* v. *Mawson*, 1 Maule & S, 77.

The right of mining coal is a right apt to be exercised on the same spot, at repeated intervals, until the subject-matter is exhausted; it cannot, therefore, be expected to be exercised in every place to which it may extend. Id.

20. As to same Seam in other Mines. Evidence of working upon the same seam in other mines admitted upon questions of its value, products, and mode of working. *Carr* v *Benson*, L. R. 3 Ch. App. 524.

21. Old Leases on larger Tract. Leases of minerals upon other parts of unenclosed waste, but not including the *locus in quo*, are not evidence unless the *locus in quo* formed part of one entire waste to which those leases applied. *Tyrwhitt* v. *Wynne*, 2 B & Ald. 554.

22. Miners' Memorandum Book. A book of entries kept by a coal miner, in which the account of coal mined was taken by the miner from the daily returns of loads delivered, as given to him every day by the wagoner, in the employ of the owner of the coal mine, is a valid book of original entries. *Jones* v. *Long*, 3 Watts, 325.

23. Books of Entry. Sales of lime by the wagon load, from the kiln, may be proved by books of original entries. *Curren* v. *Crawford*, 4 S. & R. 3.

24. Merchants' Books no proof of customer's partnership. Charges on plaintiff's books against defendant as (mining) partners are not evidence of the fact of partnership. *Severance* v. *Lombardo*, 17 Cal. 57.

25. Colorado, Record—Conveyance of claims. Statutory regulations of Colorado as to proof of District Records, of claims and conveyance of claims considered, together with the provisions of the Conveyance Act, relating to the proof of lost deeds. *Sullivan* v. *Hense*, 2 Colorado, 424.

26. Transfers on District Records. The entry of the transfer of a mining claim upon the district record, is not admissible as evidence of such transfer in the absence of a district rule making it evidence of such transfer; but such book is evidence to the extent of showing compliance with the district rule requiring such transfer to be recorded. *Attwood* v. *Fricot*, 17 Cal. 37.

27. Deed—Sale of Mining Claim. When the sale of a mining claim was by writing, the writing must be produced or accounted for, although such sale would at the time have been valid without any written conveyance. *Patterson* v. *Keystone M. Co.*, 30 Cal. 360.

28. Parol, affecting writing—Pleading. A plea to assumpsit upon a note, setting up the fact that the note was given for money borrowed by the maker to enable him to procure sale of plaintiffs' mining property to be repaid in case of sale, and not until sale, the plea not stating that such contemporaneous agreement was in writing, presents no defense. *Peddie* v. *Donnelly*, 1 Colorado, 421.

29. Bill of sale of claim. Where a mining claim is conveyed by a written bill of sale, the bill of sale is the best evidence of the transfer, and parol evidence of the conveyance is inadmissible. *Crary* v. *Campbell*, 24 Cal. 634.

Where a witness, in his direct examination, testifies to a sale of a mining claim, and on cross-examination states that the sale was in writing, it is error for the court to refuse, on motion, to strike out the parol evidence of the transfer. Id.

30. Surface damage—Effect of like workings in the vicinity—Experts. Plaintiffs brought action to enjoin the defendants from the further mining, tunneling or drifting of their mining claims beneath the surface of the earth across and on top of which plaintiff's ditch extended, and which had already somewhat settled, and the earth beneath it become cracked, on the ground that said ditch, the right of way for which was older than the mining right of the defendants, would be irrepara-

bly injured by reason of the further settling, cracking, and caving of said earth, which, as was alleged, would be caused thereby. The defendants joined issue on said last point. The plaintiffs offered to prove at the trial, in support of their side of said issue, that at a point in the vicinity, but below defendants' claims, where, as was alleged, similar conditions to those of defendants' claims and contemplated mining operations existed, the earth had been caused to settle, crack, and cave. The evidence was excluded on defendants' objection thereto as irrelevant and incompetent: *Held*, that the evidence was properly excluded. *Clark* v. *Willett*, 35 Cal. 534.

In such case, as the cause of the settling and cracking of the earth at the surface is matter of opinion rather than direct and positive testimony, the proper mode of proof is to take the opinions of witnesses who have examined the premises, and who are qualified by learning, observation, and experience to judge intelligently of the cause. Id.

81. Ambiguity—North — Magnetic variation. Where an ambiguity in an instrument of writing consists in the use of a word which has a settled meaning (North) but at the same time consistently admits of two interpretations, according to the subject-matter in the contemplation of the contracting parties, it is not such a patent ambiguity as falls within the rule forbidding its explanation by parol testimony. It belongs to that intermediate class of cases which partake of the nature of both patent and latent ambiguities. *Jenny Lind Co.* v. *Bower & Co.*, 11 Cal. 194.

82. Description—Negative Testimony. The rule in respect to the relative value of positive and negative testimony has no application to the case where one party to a verbal mining lease testifies that it did, and the other that it did not, include certain premises. *Sobey* v. *Thomas*, 39 Wis. 317.

83. Location Certificate in U. S. Land-office. A location certificate of a mining claim in controversy being shown to have been filed in the United States land-office: *Held*, that it must be produced, unless it were further shown that it could not be produced, but if it were required to remain there for the purpose of procuring patent, a certified copy from the proper officers of the land-office would be admissible. *Stapleton* v. *Pease*, 2 Mont. 550.

84. Receipt of Government Officer. A receipt for rent paid to the agent of the United States as rent of lead lands of the government is a full discharge, although the officer never accounted to the government for the proceeds. *U. S.* v. *Gear*, 3 McLean, 571.

85. Presumption as to Public Domain —California. The presumption under the statute of California is that land in controversy is public land until the legal title is shown to have passed from the government to private parties. *Burdge* v. *Smith*, 14 Cal. 380.

This presumption is reconcilable with the presumption of title arising from possession. Id.

The possession of agricultural land is *prima facie* proof of title against a trespasser, but where it is shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption that it is public land applies, in the absence of proof of title in the person claiming it as agricultural land. Id.

86. Res Gestæ—Declarations of Miner. Plaintiff located a quartz lode and commenced work, digging up the rock towards the lode at a distance of fifty or one hundred feet from it: *Held*, that his declarations made at the time, as to his object in commencing work at that point, were admissible in evidence. *Draper* v. *Douglass*, 24 Cal. 347.

87. Admission of Legal Conclusions. Where an agreement to work mines on the cost-book principle has been entered into by several persons, the written statement of one of them (made subsequently to the date of the agreement), that his shares are liable to forfeiture on non-payment of calls, will not affect his rights under the agreement. *Clarke* v. *Hart*, 6 H. L. Cas. 633; see *Hart* v. *Clarke*, 19 Beav. 349, 6 De G. M. & G. 232.

88. Admissions of Agent — Oil Well. The declarations of an agent employed to sink a well (for oil) are not evidence of the reasons of the principal for ceasing to operate. *Karns* v. *Tanner*, 66 Pa. St. 297.

89. Declarations of Agent. The declaration of an agent of a mining company as to his authority is hearsay testimony. *Brown* v. *Gaston M. Co.*, 1 Mont. 57.

The declarations of an alleged agent of a mining company are not evidence to prove the fact of his agency. *Union M. Co.* v. *Rocky M. Bank*, 2 Colorado, 565.

40. Agent — Declarations — Demand. The declarations of a person in charge of the plant of a colliery that he is agent of another, and a refusal to deliver possession to a claimant on the ground of such agency, are not evidence to prove the fact of agency or to relieve him from the proper effect of the demand against him individually. *Carey* v. *Bright*, 58 Pa. St. 70.

41. Proof of Agency. Where the principal issue was as to the existence of an

agency of one defendant for the plaintiff in certain mining ground, evidence tending to show the nature of plaintiff's interest or claim in the property was relevant and competent, although it did not tend to establish title to the property in plaintiff. *Hardenbergh* v. *Bacon*, 33 Cal. 356.

42. Authority of Agent — Litigation. The acts and declarations of the officers of a mining company are admissible to show authority of the agent to make expenditures in litigation and in compromising claims; and no resolution or formal corporate action for such expenditures need be shown. *Wild* v. *New York & Austin S. M. Co.*, 59 N. Y. 644.

43. Dam — Backwater — Expert. In an action to abate a nuisance caused by the erection of a dam, and the consequent overflow of land by backwater, the evidence of an expert as to the effect of an obstruction in causing the backwater is admissible. *Grigsby* v. *Clear Lake W. Co.*, 40 Cal. 396.

44. Dam—Overflow—Evidence of rise of water in other bodies of water. When the owner of a dam is charged with damages produced by its overflow, evidence of streams in the neighborhood being at flood, and as to the same condition of the water, in other lakes near that dammed by the defendant is admissible, as tending to show that the high water at the point in question was not caused by the defendant's dam. *Grigsby* v. *Clear Lake Water Co.*, 40 Cal. 396.

45. Diversion of Water. Where parties go to issue in actions for the diversion of water, upon general averments and denials of title, anything that legally attacks or supports the respective titles is admissible in evidence. *Kimball* v. *Gearhart*, 12 Cal. 28.

46. Loss of Customers to Ditch Co. In action for diversion or interference with water from a ditch for supplying mines, evidence of loss of customers is admissible testimony, as showing the materiality of the diversion. *Natoma Water Co.* v. *McCoy*, 23 Cal. 491.

47. Assertion of Right, no Threat. The declaration of the owner of a canyon claim before building a dam that he would put in a dam that would flood plaintiff's claim (a junior claim lying above) is entirely consistent with the necessity or utility of the structure in the working of the canyon. *Stone* v. *Bumpus*, 46 Cal. 218.

48. Draft with Contract. A draft of a coal lease was prepared by the lessor in pursuance of a written contract which was not objected to by the lessee, who afterwards refused to complete: *Held*, that the draft lease could not be used for the purpose of controlling or explaining the contract itself. *Haywood* v. *Cope*, 25 Beav. 140.

49. Handwriting—Bill of Sale. A bill of sale of a mining claim is sufficiently proved when the handwriting of the subscribing witness, who is absent from the State, and the execution by the vendor, is proven. *Jackson* v. *Feather River Co.*, 14 Cal. 19.

50. Hearsay. Declarations of a deceased lord of a manor as to the extent of his rights over the wastes of a manor are not admissible in evidence; *aliter*, if spoken of the extent of the wastes only. *Crease* v. *Barrett*, 1 C. M. &. R. 919; S. C. 5 Tyrwh, 458.

51. Prior Lease. A lease of tin mines and toll tin was surrendered in 1810, and another lease taken on payment of a fine, part of which was a compensation for the surrender of a former lease. A statement in a lease of the surface, made by the same lessor during the existence of the former lease, is admissible in evidence against the lessee in that second lease of the mines and toll. *Crease* v. *Barrett*, 1 C. M. &. R. 919; S. C. 5 Tyrwh. 458.

52. Receipt—Settlement between Partners. A receipt showing a settlement between mining partners is *prima facie* evidence that they have adjusted all matters touching the business or adventure to which it relates; and until rebutted by showing that it was obtained by fraud, executed without proper knowledge of the facts, mistake or the like, is conclusive evidence of what it contains. And when the evidence supporting and impeaching such a receipt is balanced, the receipt must have a *prima facie* effect. *Levi* v. *Karrick*, 13 Iowa, 344; S. C. 8 Id. 150.

53. Acquiescence — Rescission — Attempt to sell shares. The attempt to sell shares which a party had a right to repudiate on account of variation between the prospectus under which he purchased and the subsequent organization of the company: *Held*, to not preclude the holder from relief or to amount to acquiescence. *In Re Russian Vyksounsky Iron Works*, L. R. 1 Ch. 574; 35 L. J. Ch. 738.

54. Private Act—Custom. A private act is not evidence in support of an ancient customary payment of toll within a manor. *Beaufort* v. *Smith*, 4 Exch. 450.

55. Knowledge—Animus. Where the claim of the plaintiff is only for compensatory damages, and not founded on the *animus*, but on the acts of the defendant, it is not material whether or not the plaintiff

knew the extent of the injury he was committing. *Wheatley* v. *Chrisman*, 24 Pa. St. 298.

56. Prospectus of Corporation. Where a printed circular produced by stockholders of a mining company, defendants, under notice, was offered in evidence by the complainant to prove a statement as to the amount of defendant's capital: *Held*, that complainant must first prove that defendants had issued and circulated the paper. *Berry* v. *Mathewes*, 7 Georgia, 457.

57. Proof of Corporate Meetings. Oral evidence of the proceedings of a corporate meeting, of which a record is shown to be in existence, is inadmissible. When a corporation relies upon its own record, strict proof of its authenticity is required. *Union M. Co.* v. *Rocky Mt. Bank*, 2 Colorado, 565, 248; S. C. 1 Id. 531.

58. Parol Proof of Corporate Minutes. The records of a corporation being lost their substance or contents may be shown by parol. *Vermont M. & Q. Co.* v. *Windham Bank*, 44 Vt. 489.

59. Admissions of President. In a former trial, and between other parties, the president of the corporation, defendant, was selected by his company to go with the jury to examine the premises: *Held*, that his declarations made at the time as to the company not claiming a certain part of the ledge or ledges, was relevant in a subsequent suit by a party claiming the ground referred to by the president of the company. *Green* v. *Ophir M. Co.*, 45 Cal. 522.

60. Admissions of Stockholders. An incorporated company is not bound by the acts or admissions of its members, unless acting by its express authority. *Shay* v. *Tuolumne Water Co.*, 6 Cal. 73.

61. Fraudulent sale of stock--Broker. In an action for money had and received, evidence that there was an understanding between the parties that when the defendant sold his own stock in a certain company he would sell the plaintiffs' stock therein; that the plaintiff's delivered their stock to the defendant to be sold under this agreement; and that the defendant sold it for $60 a share, and paid the plaintiffs only $40 a share, will support a verdict for the plaintiffs; and such verdict will also be supported by evidence that the defendant told the plaintiffs that certain persons wanted to buy the stock, but would pay only $40 a share; that the defendant was negotiating a sale to these persons for the plaintiffs and others, as well as for himself; that the said persons gave the defendant $60 a share, and that the defendant paid the plaintiffs only $40 per share. *Cutler* v. *Demmon*, 111 Mass. 474.

The defendant promised the plaintiffs to sell their stock in a company at the same rate at which he sold his own; he then agreed with third persons to sell them stock of the company at a certain price, and employed a broker to procure the stock for him; the broker applied to the plaintiffs and told them that the purchasers would pay only a certain price, which was, in fact, smaller than the purchaser had agreed to pay the defendant: *Held*, that the plaintiffs' knowledge or ignorance that the broker was employed by the defendant would not affect the defendant's liability to them. Id.

In an action for not selling the plaintiffs' stock at the same time the defendant sold his own, as he had agreed, the defendant testified that he had never so agreed: *Held*, that the plaintiffs might introduce evidence of an admission by the defendant that he had agreed to sell the plaintiffs' stock at the same time he sold his own, although the circumstances, when this agreement according to the admission was made, were not the same as at the time of the agreement relied upon to support the action. Id.

In an action for procuring shares of stock from the plaintiffs at a certain price and selling them to third persons at a higher price, contrary to an agreement with the plaintiffs, evidence that the defendant procured shares of the same stock from other persons at the same price as he had paid to the plaintiffs is inadmissible. Id.

62. Original stock certificates. The neglect to produce original certificates is no defense to an action based on a refusal of the officers of a company to transfer stock, where the production of the originals could have been readily made, was not insisted on, and the refusal put upon entirely different grounds. *Bond* v. *Mount Hope Iron Co.*, 99 Mass. 505.

63. Expert—Underground railroad crossing. When it is sought in the exercise of eminent domain, to construct an underground railroad, crossing the railroad of a coal mine owner, down in the mine, "the dangers and delays of crossing the plaintiff's road," are fit matters to be considered by the jury, aided by the testimony of skilled witnesses, in arriving at the measure of damages, to wit: the depreciation in value of the entire tract through or under which such railroad is condemned. Such dangers and delays may be reasonably anticipated, and the plaintiff is not bound to wait until their actual experience, when it would be too late for compensation. *Brown* v. *Corey*, 43 Pa. St. 495.

See WITNESS.

EXCEPTION.

1. Incidents to the exception. Whatever is necessary to the fair and reasonable

use of the thing excepted, is also reserved as incident to the exception. *French* v. *Carhart*, 1 N. Y. 96.

2. Construction. Where a deed in fee of land was made. the grantor "saving and reserving, nevertheless, for his own use the coal contained in the said piece or parcel of land, together with free ingress and egress, by wagon-road, to haul the coal therefrom as wanted," it was: *Held*, that the saving clause operated as an exception of the coal, and, therefore, that the entire and perpetual property therein remained in the grantor. *Whitaker* v. *Brown*, 46 Pa. St. 197.

3. Construction—Open quarry. A lease for lives contained the following exception: "Excepting and reserving unto the said lessor, all mines, minerals and other royalties whatsoever, with liberty to search for, dig, raise, manufacture on the premises and carry away the same:" *Held*, not to include open limestone quarries which the lessee had been in the habit of working. *Brown* v. *Chadwick*, 7 Irish C. L. 101.

4. "Reserving" construed as excepting. The words, "reserving all the minerals underlying the soil," in the granting clause of a deed for the conveyance of real estate, constitute *prima facie* an exception of the minerals from the operation of the grant. *Sloane* v. *Lawrence Furnace Co.*, 29 Ohio St. 568.

See RESERVATION.

EXECUTION.

1. Mining not an ordinary use—Practice, Cal. The working of mines is something more than the ordinary use of real estate by one in possession, and requires the use of more than ordinary remedies to protect the rights of the purchaser at a judicial sale. It may probably be restrained as waste, under section 235 of the practice act, but the appointment of a receiver is the more appropriate remedy, as it permits the continued working of the claims. *Hill* v. *Taylor*, 22 Cal. 191.

2. Levy on goods in the mine without sight—Sheriff's sale of colliery. Where, upon an issue whether a sale by the sheriff of property at a colliery, consisting of the plant of the coal works, was upon a val'd levy of the property sold, part of the property being down in the mine at the time: *Held*, error in the court below in refusing to allow the party claiming against the sale to ask the sheriff (a witness) whether he had ever been down the shaft; 2. That it was essential to the validity of such levy that the property "should be in the power, or at least in the view of the officer at the time it was made." *Carey* v. *Bright*, 58 Pa. St. 70.

3. Officer working Claim. An officer cannot enter upon a mining claim, and work it, or lawfully take the proceeds from a party in possession, and justify under his execution. *Rowe* v. *Bradley*, 12 Cal. 227.

4. Ejectment—Restitution—Tenants in common. Where an undivided portion of a mine is recovered, the sheriff would not be justified in expelling the tenants who are in possession, if they made no opposition to a joint or common possession by those recovering the judgment. *Bullion M. Co.* v. *Cræsus M. Co.*, 2 Nev. 169.

5. Elegit—Kentucky. When upon a bill filed praying order of sale of a debtor's land upon judgment (Kentucky, 1839), it appeared that defendant was possessed of an interest in coal lands not yielding annually an amount equal to the interest on the judgment, the court ordered a sale instead of the writ of *elegit*. *Burton* v. *Smith*, 13 Pet. 464.

EXECUTORS AND ADMINISTRATORS.

1. Ore Contract. Plaintiff contracted with Farr & Kunzie, partners, to take out 4000 tons of iron ore, at $1.12½ per ton, an entire contract. After partial performance by plaintiff, Farr died: *Held*, such a contract as an executor might rightfully release as to any further performance, in which event the plaintiff could recover from the estate for the work already done. *Dougherty* v. *Stephenson*, 20 Pa. St. 210.

2. Renewal of Lease—Assignment. The interest of a deceased mining partner represented and continued by his administratrix and widow, considered with respect to a subsequently acquired lease, holding that the right of action was in her as administratrix. *Clegg* v. *Fishwick*, 1 Mac. & Gor. 294.

3. Completion of Sale of Decedent—Pennsylvania. The act of the legislature of Pennsylvania of March 31, 1872, allowing executors to complete executory contracts of their decedents relative to lands and tenements, applied to an executory contract for sale of an undivided interest in a coal "reserve" or mining privilege. *Wetherill* v. *Seitzinger*, 9 W. & S. 177.

4. Usurping Trust, Profits. A person whose duty it was (an executor and residuary legatee) to have sold a mine at the end of a certain time, neglecting so to do, may not be allowed the benefit ultimately resulting from such neglect (the mine having realized largely) to the detriment of a party whose right it was to insist on a sale at the end of the time limited. *Wightwick* v. *Lord*, 6 H. L. Ca. 217, aff'g same ads. same, 4 De G. M. & G. 803.

5. Trespass in taking coal—Survival of right of action. An administrator is liable to an action for money had and received by the intestate for coal tortiously taken by him from the plaintiff's land, if the intestate has sold it and received the money. *Powell* v. *Rees*, 7 Ad. & El. 426.

And this, although no direct evidence be given of the actual sum received on the sale, if the jury believed the fact of the sale. Id.

And where a part has been raised more than six months before the intestate's death, and part within six months, the plaintiff may bring trespass, under stat. 3 & 4 W. 4, c. 42, s. 2, for so much as was raised within the six months, and also money had and received for so much as was raised before; the acts being distinct, and therefore the two actions not incompatible. Id.

6. Paying Assessments. A probate court has power to order an executor to pay assessments on mining stocks, and such order is a protection to the executor in any event; but this class of personalty, when it becomes a matter of expense, ought in general to be disposed of by sale. *Estate of Millenovich*, 5 Nev. 184.

7. Right of Action against. Lord of a manor may bring a bill for an account of ore dug or timber cut by defendant's testator; otherwise, as to plowing up of meadow or of such torts as die with the person. *Winchester* v. *Knight*, 1 P. Wms. 406.

8. Mining, after decease of testator. A direction in a will that the testator's trade (mining under a lease) shall be carried on, does not of itself authorize the employment in the trade of more of the testator's property than was employed in it at his decease; nor does such a direction, coupled with a direction that the testator's debts shall be paid, authorize a mortgage of his real estate not employed at his death in the trade for the purpose of carrying it on. *McNeillie* v. *Acton*, 4 De G. M. & G., 744, 23 L. J. Ch. 11, reversing in part S. C.; 22 L. J. Ch. 820.

EXPERT.

1. Mining Expert—Credibility. "An expert is not like an ordinary witness who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by the person who calls him." Their testimony considered. *Abinger* v. *Ashton*, L. R. 17 Eq. 358; 9 Moak. 585.

2. Caution against Expert testimony. Where an expert is called by one of the parties to an action, his evidence should be received with great caution by the jury, and should never be allowed except on subjects which require unusual scientific attainments or peculiar skill. *Grigsby* v. *Clear Lake W. Co.*, 40 Cal. 396.

3. Workmanlike manner. The phrase in a covenant, to work "in a proper and workmanlike manner" may be explained by the evidence of experts. *Lewis* v. *Fothergill*, L. R., 5 Ch. 103.

4. Soap Stone—Experience not Science. The question of the quality of the soap stone in an action based on the fraudulent sale of a soap stone quarry is peculiarly a question of scientific skill and knowledge. And it was held error to allow a witness to testify on such question who had had forty years' experience in quarrying soap stone, it not appearing that he had devoted study to the subject—not appearing to be any more than a laborer engaged in the mechanical part of the work. *Page* v. *Parker*, 40 N. H. 47; S. C. 43 Id. 363.

As to another witness who had worked slate more than twenty years, had worked twenty tons from the quarry in question, and was in the business of manufacturing soap stone into various articles, but had never visited the quarry in question: *Held*, that his opinions were properly rejected. Id.

5. Form of Interrogatory. The question upon an issue as to the quality of soap stone, "State whether or not any of this stone was so hard that it could not be sawed with the common saw used in sawing soap stone?" to a witness offered as an expert: *Held*, leading and objectionable. *Page* v. *Parker*, 40 N. H. 47.

6. Eminent Domain—Cross Tramways. In cases of eminent domain, in this instance the condemnation of a railroad across another railroad and through a seam of coal, the evidence of persons familiar with the land and with other lands in the vicinity, should be admitted to ascertain the depreciation in value to the whole tract, which will result from taking the part condemned; and their evidence is not to be excluded because they include the dangers and delays of such underground crossing as an item of the depreciation. *Brown* v. *Corey*, 43 Pa. St. 495.

FAULT.

1. Ordinary incident to coal mines. Faults are a common incident to coal mines, known to every man who has anything to do with mining. *Seymour* v. *Morrell*, M. S., cited Rogers on Mines, 272; *Ridgway* v. *Sneyd*, 1 Kay, 635.

2. Caveat emptor. In applying the rule of *caveat emptor* to the case of leases of coal mines, it must be remembered that every one acquainted with that kind of property is aware that coal mines are liable

to be interrupted by faults. *Ridgway* v. *Sneyd*, 1 Kay, 627.

3. Fault taken as boundary—Angle—Variation. When a "fault" was supposed to run in a certain direction, so as to cut a piece of land into two tracts of about eighty-three acres and about ninety-eight acres respectively, but it afterwards was so developed as to show that only about eight acres was on one side and the balance on the other: *Held*, that it was such a misconception of the truth that although the two tracts had been bargained for knowing there was some uncertainty as to quantity, no specific performance should be decreed of a contract to lease the parcel found to contain so many acres of excess. *Davis* v. *Shepard*, L. R. 1 Ch. App. 410.

4. In Mine under Contract to produce Ore—Hardship considered. Where it was agreed that defendants would deliver a certain quantity of iron ore, which was to be the ore mined by E. B. on the lands of either Montgomery or Frick; and the plaintiff afterward refused to receive any more ore from the Montgomery mine, and it appeared that there was sufficient ore in the Montgomery mine to fulfill the contract, but that a fault existed in the Frick mine which rendered it expensive to work, the defendants were thereby excused from delivering any more ore. *Grove* v. *Donaldson*, 15 Pa. St. 128.

It was not error under such state of facts for the court to instruct the jury that it would be a hard case to subject the defendant to heavy damages. Id.

FIXTURES.

1. Amalgamators. Amalgamating machinery in a quartz mill, pans, bottoms, etc.: *Held* to be realty, and as such cannot be treated as personalty on account of contract between parties. *Prescott & Booth* v. *Wells, Fargo & Co.*, 3 Nev. 87.

2. Machinery—Rails. Machinery and fixtures (*e. g.*, rails in tunnel and gangways) set or erected by a lessee in the operation of a mine are personal property during his term, and as such may be sold on execution, and removed by the purchaser before the expiration of the term. *Heffner* v. *Lewis*, 73 Pa. St. 302.

3. Tramways. Where certain coal mines were held to be devised to a certain party a reference was directed to the master whether the mine tramways and engines were deemed, according to the custom of the county "of Cumberland and other counties in the north," as fixed to the freehold and passing therewith, or as going to the executor. *Lowther* v. *Cavendish*, 1 Eden, 99.

4. "Ways and Roads"—Tramway. A lease of coal mines and iron works contained a covenant by the lesse to yield up to the lessor, at the expiration or other sooner determination of the term, all "ways and roads," in or under the demised hereditaments in such good order, repair, and condition as that the said coal and iron works might be continued and carried on by the lessor: *Held*, that this covenant did not extend to trams fastened to sleepers, not affixed to the freehold, which the tenant had placed upon roads for the purpose of using them as tramways, and that the landlord was not entitled to an injunction to restrain the tenant from disposing of them during the term. *Beaufort* v. *Bates*, 3 De G. F. & J. 381; 31 L. J. Ch. 481.

5. Engine at Salt-well built into wall. A steam-engine erected by the lessee of a salt-well for running the same is a trade fixture, is personal property, may be levied on by *fi. fa.*, goes to the executor, and is removable by the tenant though built into a stone wall. *Lemar* v. *Miles*, 4 Watts. 330.

6. Contingent Title in Lessor. The fact that on a certain contingency such a fixture was to become the property of the landlord does not alter the case until such contingency actually occurs. Id.

7. Boilers—Change of Property by Annexation. Boilers fixed in a smelting works so that they could not be removed without destroying the building, pass as part of the realty, although the company which originally placed them there had no title to them. *Fryatt* v. *Sullivan Co.*, 5 Hill, 116.

And the owner cannot recover them from an innocent purchaser of the realty, his only remedy being against the original wrongdoer. Id.

8. Engine and Boiler, Furnace. A steam-engine and boilers fixed in an anthracite furnace for the manufacture of iron are a part of the realty. *Roberts* v. *Dauphin Bank*, 19 Pa. St. 71.

9. Engine and Boiler, as trade fixtures and mining improvements—Lease. A steam-engine and boiler, fastened to a frame of timber bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture. *Merritt* v. *Judd*, 14 Cal. 59.

Such machinery is a trade fixture, removable by the tenant during the tenancy, if otherwise entitled to remove it. Id.

Such machinery so fixed is included by the phrase in a lease "improvements that may be put on the ground for working the lead." Id.

10. Steam-engines — Lease — Forfeiture. Steam-engines erected by a tenant for the purpose of working mines, affixed to the freehold and not removed during term, go to the landlord. So held in a case where the term was determined by forfeiture. *Minshall* v. *Lloyd*, 2 M. & W. 450.

11. Engines. When tenant for life, or in tail, erects an engine to work a colliery, it is on his death to be considered personalty, and does not go to the remainder-man. *Dudley* v. *Lord Ward*, Ambler, 113.

12. Engine — Executor. A steam-engine set up for the benefit of a colliery by a tenant for life shall be considered as part of his personal estate, and go to the executor, for the increase of assets in favor of creditors. *Lawton* v. *Lawton*, 3 Atk. 13.

13. Boilers and Engines in Quartz-mill. Boilers and engines in a quartz-mill erected by a tenant are trade fixtures, which he has a right to remove during the tenancy. *Hayes* v. *New York M. Co.*, 2 Colorado, 273.

14. Mill fixtures distinguished from house fixtures. The criterion of a fixture in a mansion-house or dwelling is its actual, and permanent fastening to the freehold, but this is not the criterion of a fixture in a manufactory or a mill. *Voorhis* v. *Freeman*, 2 Watts & S. (Pa.) 116.

15. Iron Work—Lease—Construction—Removal from brick work. A lease contained a covenant to repair and yield up in repair the furnaces, fire engine, iron works, dwelling-houses, and all other erections, buildings, improvements and alterations, to be thereafter erected, built or set up, except the iron-work castings, railways, wimseys, gins, machines, and the movable implements and materials used in or about the said furnaces, fire engines, iron works, stone pits, and premises; and there was a power given to the lessors to purchase those articles, giving a certain notice before the expiration of the lease: *Held*, that the defendants had a right to remove whatever was in the nature of a machine or part of a machine, but not what was in the nature of building or support of building, although made of iron; and that in such removal the defendants might disturb such brick work as was necessary, and were not bound to restore it to a perfect state, as if the article it was intended to support or cover were still there; but that the defendants were liable for any unnecessary disturbance of brick work. *Foley* v. *Addenbrooke*, 13 M. & W. 173.

16. Sale to Lessor — Realty. Upon the sale of trade fixtures in a quartz mill by the tenant to his landlord, or where there is a covenant to not remove them, such fixtures become a part of the realty. *Hayes* v. *New York M. Co.*, 2 Colorado, 273.

17. Plant — Realty — Colliery. Mining plant and machinery affixed to the freehold for the operation of a colliery, as pumps, engines, rails, goes to the heir as parcel of the real estate, no distinction existing whether the land had descended to the owner or had been purchased. *Fisher* v. *Dixon*, 12 Cl. & Fin. 312.

If the corpus of such machinery goes to the heir, all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir. Id.

18. Engine House. Where the engine is the thing of value, though a house be erected over it, it may be removed by the executor, though the house be thereby injured. *Dudley* v. *Ward*, Ambler, 113.

19. Salt Pans—Heir and executor. Salt pans at salt springs fixed with mortar to a brick floor over furnaces, removable without injury to the buildings, but the salt springs of no value without them: *Held*, accessories necessary to the enjoyment and use of the realty, going to the heir, and not to the executor. *Lawton* v. *Salmon*, 1 H. Blackstone, 259 note.

20. Salt Pans—Tenant. Plaintiff demised salt springs to defendant, who was to erect salt works on the premises: and pay a rent in proportion to the number of works erected. Defendant covenanted to leave the works in good repair at the end of the term: *Held*, that iron salt pans placed by defendant on the frame of brick and used in the boiling of salt, and also the pipes for carrying the brine from the springs to the pans were parcels of such works, and that defendant was not entitled to remove them. *Manefield* v. *Blackburne*, 6 Bing. N. C. 426; 8 Scott, 720.

21. Salt Kettles — Purchase-money—Mortgage. Salt kettles were bought and mortgaged to the seller as personalty. They were imbedded in brick arches, but could be removed without injury to them, by displacing a considerable portion of the brick at inconsiderable expense, and the course of the manufacture required them to be thus removed, and be reset annually: *Held*, that they continued personalty as against a subsequent purchaser of the salt works, who had no notice of the facts, other than constructively from the filing of the chattel mortgage. *Ford* v. *Cobb*, 20 N. Y. 344.

22. Purchase-money—Mortgage. A., the owner of a quartz mill in Amador

county, executed a mortgage on the same to B. Afterwards, A. purchased at Sacramento a steam-engine and boiler, and to secure the purchase-money, executed to C. a chattel mortgage of the same, and then transported them to Amador, and placed them in the quartz mill, so that they became a part of the realty: *Held*, that C.'s mortgage on the steam-engine and boiler had priority over the mortgage of B. *Tibbetts* v. *Moore*, 23 Cal. 208.

28. Mortgage — Iron Rolling Mills. Machinery, which is a constituent part of the manufactory to the purpose of which the building has been adapted, without which it would cease to be such manufactory, is part of the freehold, though it be not actually fastened to it; and this criterion has a place in questions between vendor and vendee, heir and executor, as well as debtor and execution-creditor, but not between tenant and landlord and remainder-man; *Ruled*, therefore, that a mortgage and sale of a lot and iron rolling mill, with the buildings, apparatus, steam-engine, boilers and bellows attached to the same, passed the entire set of rolls used in the mills, whether actually in place or temporarily detached to make room for such as were; and that such rolls could not be seised and sold as chattels on *fieri facias* against the mortgagor. *Voorhis* v. *Freeman*, 2 Watts & S., Pa. 116.

FLOODING.

1. Flooding Neighbor by bad mining. An owner is not liable for the flow of subterranean water into neighboring mines, following as the natural result of the proper working of his mine; but is liable for damage caused by surface water introduced through his mine by the cracking and sinking of the surface, which cracking and sinking of the surface was directly owing to his working the mine according to an unreasonable custom, *i. e.*, removing the ribs or supporting pillars of coal. *Horner* v. *Watson*, 79 Pa. St. 242.

2. Mine Flooded through heavy rains: bursting a diverted water-course used by another mine. The defendant's mines adjoined and communicated with the plaintiff's; and in the surface of the defendant's land were certain hollows and openings, partly caused by and partly made to facilitate the defendant's workings. Across the surface of their land there ran a water-course, which in the year 1865 was diverted by them into another channel. In November, 1871, the banks of the water-course (which were sufficient for all ordinary occasions), burst, in consequence of exceptionally heavy rains, and the water escaped into and accumulated in the hollows and openings, where the rains had already caused an unusual amount of water to collect, and thence by fissures and cracks passed into the defendant's, and so into the plaintiff's mines. If the land had been in its natural condition the water would have spread itself over the surface and have been innocuous. The defendants were not guilty of any actual negligence in the management of their mines.

At the trial of an action brought by the plaintiff to recover the damage he had sustained, the learned judge directed a verdict for the plaintiff, holding that the case was governed by *Fletcher* v. *Rylands*, and that the defendants were absolutely liable; and rejecting evidence offered by the defendants that every reasonable precaution had been taken to guard against ordinary emergencies: *Held* (reversing the judgment of the court below), that the case was not beyond all question governed by *Fletcher* v. *Rylands*; that the water coming from the natural overflow, and that coming from the diversion of the water-course might possibly admit of different considerations; that if the evidence tendered had been received there might have been questions for the jury; and that under all the circumstances there ought to be a new trial.

The opinion of the jury at such trial ought to be taken as to whether what was done by the defendants, was done by them in the ordinary, reasonable and proper mode of working the mine. *Smith* v. *Fletcher*, L. R. 9. Ex. 64.

3. The claim of right to flood lower diggings — Custom. Plaintiffs were owners of mining claims located in the bed of a creek, and were the first locators. Defendants' claims were upon a hillside above. The tailings and water from the hill claims were deposited on plaintiffs' claims to such an extent as to render working impracticable: *Held*, 1. That the rule *qui prior est in tempore potior est in jure* applies in such cases; 2. That plaintiffs were entitled to damages and a perpetual injunction against future injuries; 3. That the enjoyment of such claims lies in the use necessary to obtain the gold, and that to prevent this use defeats the object of their location; 4. That the fact of the use of the hill claims being itself also lawful is no defense if such use is enjoyed to the injury of the prior claims of plaintiffs. *Logan* v. *Driscoll*, 19 Cal. 623. Compare *Esmond* v. *Chew*, 15 Cal. 137, and *Lincoln* v. *Rogers*, 1 Mont. 217.

The first locators of mining ground have no right to allow tailings to run free in the gulch to the extent of rendering valueless the mining claims of subsequent locators below them. *Lincoln* v. *Rogers*, 1 Mont. 217.

A special mining custom to such effect as found by the jury in this case to exist, is unreasonable and void. Id.

The necessary inconvenience or loss resulting to subsequent locators from the working of prior claims above in the same gulch, conducted with reasonable care and diligence and proper precautions to crib or otherwise prevent their tailings from accumulating on the claims below, would be *damnum absque injuria*. Id.

4. Free Tailings—Location of dump. The boundaries of ground taken up for the dump of a placer claim must be distinctly marked, and the custom of "free tailings" is inconsistent with this rule. Id.

FLUME.

1. Indivisibility—Mortgage. A mortgage upon a mining ditch or flume in course of construction, and purporting to grant not only the work as it stood, but as it should be when completed: *Held*, valid as against the entire flume, and not to be limited to the part constructed at its date, in favor of a later mortgage. *Union Water Co.* v. *Murphy's Flat F. Co.*, 12 Cal. 620.

2. Real Estate—Mortgage. A flume for the conveyance of water is in the nature of real estate, and a mortgage upon it will, without any special provisions, include all improvements then upon the line of the work; and also all those which may afterward be put thereon. Id.

See DITCHES.

FORCIBLE ENTRY.

1. Both parties trespassers — Public domain. Forcible entry may be maintained between parties, both of whom may be trespassers. So held with regard to parties occupying lead mines of the United States in Iowa. *Lorimier* v. *Lewis*, 1 Morris (Ia) 253.

In an action of forcible entry (on lead lands of the United States in Iowa) it matters not that the plaintiff is a trespasser; this action may, under certain circumstances, be maintained even against the legal owner. Id.

2. Ouster—Force—Fraud. If a party had the right of entry upon a mining claim, his right is not vitiated by his forcible or fraudulent exercise of such right, and the party whom he ousted cannot be restored by ejectment. *Depuy* v. *Williams*, 26 Cal. 309.

3. Dispossession of Tenant at will. There is at common law no civil remedy for the dispossession of a tenant at will (mining lead ore), against a forcible dispossession by a mine owner; the only action is the statutory proceeding for forcible entry. *Fuhr* v. *Dean*, 26 Mo. 116.

4. Forcible dispossession of Tin bounds — Remedy at Law. A bound-owner demised his bounds to A. B. for years, with liberty to work therein. A. B. after working the mines therein for some years, discontinued, but left the machinery on the land with the intention of resuming the works at a future time; after a discontinuance of nearly seven years, during which the bounds had been duly renewed and kept on foot according to custom, the defendants forcibly took possession of the mines, removed the machinery, and worked the tin mines for their own benefit: *Held*, that a petition by A. B. on the equity side of the Vice-Warden's court, praying for redelivery of possession by the defendants, and for an account of the produce of the mines, was bad on demurrer, the remedy being by ejectment or otherwise at law. *Vice* v. *Thomas*, 4 Y. & C. 538; Smirke's Rep. 1.

5. Jurisdiction—Value. The value of a mining claim is immaterial on the question of jurisdiction in an action of forcible entry and detainer. *Small* v. *Gwinn*, 6 Cal. 447.

6. Practice—Several defendants. In an action for a forcible and unlawful entry and detainer of a mine against a corporation, and C. and V.; the jury returned a verdict of guilty as to C. and V., and not guilty as to the corporation: *Held*, that such verdict is conclusive that the plaintiff was peaceably in actual possession of the premises at the time of the entry; that unlawful and forcible entry on his possession was made by the defendants C. and V., and that the corporation did not participate in the trespass. *Fremont* v. *Crippen (sheriff)*, 10 Cal. 211.

The peaceable and actual possession of the plaintiff is incompatible with the lawful possession of another, and such verdict is conclusive against the possession of the corporation. Id.

7. Mandamus in aid of restitution. Where a writ of restitution has been awarded in such a case, and the sheriff refuses to execute the same, on the ground that the mine is in the possession of certain persons, not parties to the suit, who claim to hold under the corporation, the court will award a peremptory mandamus against the sheriff to compel him to execute the writ. Id.

8. Effect of Judgment — Evidence. Judgment in an action of forcible entry and detainer of a mining claim does not determine either the right of property or the right of possession, and constitutes no de-

fense to an action of ejectment. *Mitchell* v. *Hagood*, 6 Cal. 148.

9. Facts amounting to Forcible Entry. S. was in possession of a quartz mill under a lease; the mill had been run until one or two o'clock in the morning, when the employees of the plaintiff closed up and retired to rest in the mill. Before daylight, and while the hands were actually sleeping in the mill, and the products of the last day's work were still in the amalgamating tubs, the defendants—some five or six in number—entered the mill, took possession, commenced tearing down the stamps, under pretense of making repairs, and retained possession against repeated demands and protest of the plaintiff and his employees: *Held*, that these facts constituted sufficient evidence of force to maintain the action of forcible entry. *Scarlett* v. *Lamarque*, 5 Cal. 63. (See facts of this case, as stated by the court in *Fogarty* v. *Kelly*, 24 Id. 319.)

FOREIGN CORPORATIONS.

1. Incomplete Organizations — Evidence. In order to prove that a certain company, for working mines in Westphalia, had never been finally constituted, the plaintiff proved by the solicitor of the company in this country, that nothing had been done here (England) toward its final constitution: *Held*, that in the absence of any evidence on the part of the defendant, the jury were warranted in finding that the company never were finally constituted. *Bristow* v. *Sequeville*, 5 Ex. 245.

2. Filing Certificates. The Nevada act of March 3, 1869, requiring foreign (mining) corporations to file a copy of their charter in the office of the recorder, was passed for the object of furnishing easily accessible evidence of their corporate name and officers, and the impression of the corporate seal impressed thereon proves its corporate seal; nor can the corporation object to such certificate as evidence, because it is not a full compliance with the statute. *Evans* v. *Lee*, 11 Nev. 194.

3. Organized in New York to quarry in New Jersey. A corporation organized under the laws of New York for the purpose of operating a quarry in New Jersey cannot be recognized as a lawful corporation in New Jersey. *Hill* v. *Beach*, 1 Beasley (N. J. Ch.) 33.

4. Statutes of Mortmain. Where, by the law of the State of its organization, a mining corporation is limited to the ownership of a certain amount of land, whether such restriction extends to its ownership of land in another State is questionable. *Whitman M. Co.* v. *Baker*, 3 Nev. 386.

5. Mortmain—Pennsylvania. A foreign corporation cannot hold mining land in Pennsylvania without the license of the commonwealth. *Brick* v. *Coster*, 4 W. & S. 494.

By the law of Pennsylvania (1840) a foreign corporation may acquire lands in that State, but subject to forfeiture to the commonwealth; against parties other than the commonwealth its title is complete, and strangers cannot take advantage of the statutes of mortmain. *Runyan* v. *Coster*, 14 Pet. 122.

6. Right to hold land—Nevada. A mining corporation organized in another State may hold land in Nevada. *Whitman M. Co.* v. *Baker*, 3 Nev. 386.

7. Lex Loci. Where, by the charter of a corporation created by the State of New York, the company had power to acquire coal lands in Pennsylvania: *Held*, that the rights of such corporation to hold lands in Pennsylvania must depend upon the permission of the latter State. *Runyan* v. *Coster*, 14 Pet. 122.

8. Lex loci—Stockholders. In a suit arising under a charter of another State the decisions in that State are the best evidence of the rights and duties of stockholders under it. Id.; *Merrimac M. Co.* v. *Levy*, 54 Pa. St. 227.

9. Citizenship. A mining corporation, created by the legislature of Pennsylvania, but doing business in California, cannot be sued in the United States courts as a citizen of California. *Pennsylvania* v. *Quicksilver Co.*, 10 Wall. 553.

10. Jurisdiction—U. S. Courts. A mining corporation organized in the State of California, but owning and working mines in the State of Nevada, having agents who are served with process in Nevada, is a person found in the district within the meaning of the judiciary act of 1789. *Thornborough* v. *Savage M. Co.* (Baldwin, J.), 1 Pac. Law. Mag., 267.

A mining corporation organized in California, but owning and operating mines in Nevada, is subject to all the liabilities growing out of its mining business, or its ownership of mining property, and can be reached by process of the circuit court, by service upon its resident managers, under section 29 of the practice act of Nevada, adopted by the rules of the United States Circuit Court. Id.

Such corporation is a body politic within the State of Nevada. Id.

11. Estoppel—Powers in other States. It is not contrary to public policy, nor against the laws of Ohio for a corporation (oil company) organized in another State to

do business or to sue in Ohio; and persons contracting with such corporation will be estopped from denying its rights and powers in the premises. *Newburgh P. Co.* v. *Weare*, 27 Ohio St. 343.

12. Power to Sue—Retroactive Statute. Pa. A foreign corporation prohibited from holding real estate in this commonwealth, brought an action of replevin for ore taken out by them under a mining lease; subsequently an act was passed allowing them to sue, and providing that any pending suit should be treated as brought under such act: *Held*, that the action could be maintained. *Green* v. *Ashland Iron Co.*, 62 Pa. St. 97.

13. Injunction—Amendment of Charter. A company was formed in California for purposes connected with land in that country, but nearly all the shareholders were residents in England. A resolution was passed at a meeting of English shareholders, authorizing the trustees to take steps for increasing the preference shares to an extent not allowed by the existing constitution of the company. It appearing that there was no intention to create preference shares, except with the sanction of the California legislature: *Held*, that an injunction ought not to be granted to restrain the company from acting on the resolution; for that the court will not, in general, restrain parties from applying to the legislature, whether of this or of a foreign country. *Bill* v. *Sierra N. L. W. & M. Co.*, 1 De G. F. & J. 144.

14. Practice—Ohio. A mining corporation organized in a sister State may hold property in Ohio, and sue and be sued in her courts; and the agent of such company being made defendant, the corporation, in a proper case, may be substituted in his place. *Hanna* v. *International Pet. Co.*, 23 Ohio St. 622.

15. Practice — Presumption. Where defendants alleged to be a corporation doing business within the State, the court will not presume as a matter of law that it is a foreign corporation. *Acome* v. *American Mineral Co.*, 11 How. Pr. 24.

16. Relation to different Sovereignties. A corporation can have no legal existence out of the sovereignty by which it is created; as it exists only in contemplation of law, and by force of the law: and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it may live and have its being in that State only, yet it does not follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. The corporation must show that the law of its creation gave it authority to make the contract in contention; yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person in the State of its creation is acknowledged and recognized by the State or nation where the dealing takes place; and that it is permitted by the laws of that place to exercise the powers with which it is endowed. *Runyan* v. *Coster*, 14 Pet. 122.

Every power which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised: and a corporation can make no valid contract without the sanction, express or implied, of such sovereignty, unless a case should be presented in which the right claimed by the corporation should appear to be secured by the constitution of the United States. Id.

FOREST OF DEAN.

1. Free Miner. All that is required to constitute a free miner of the Forest of Dean, is that he be twenty-one years of age, and have resided in a particular parish for a year and a day. *James* v. *The Queen*, L. R. 17 Eq. 502.

2. Free Miner entitled to three gales. When a free miner in the Forest of Dean has had three gales or allotments granted to him, and has surrendered one of such gales on the ground that there was not sufficient coal to make a gale worth working, he will be entitled to another gale, equally as if the coal in one of the three gales had been exhausted, within the language of the 61st section of 1 & 2 Vict. c. 43. *Ellway* v. *Davis*, L. R. 16 Eq. 294.

3. Gales—Dead rent. A dead or minimum rent is payable on gales granted by the crown, though no coals are raised, under the act regulating the working of the mines of the Forest of Dean. *Seymour* v. *Morrell*, MS. p. 8, 25, cited Rogers on mines, 398.

4. Substituted Gale. A free miner of the Forest of Dean is entitled to hold three gales; and if three have been granted of which one has been surrendered, he is entitled to a grant of another gale in its place. *Ellway* v. *Davis*, L. R. 16 Eq. 294.

5. Gale--Devise. A gale in the Forest of Dean goes of right to the applicant, after it is duly allowed, and the right is transmissible by will, upon the decease of a free miner, pending the grant after its allowance by the gaveller—with costs

against the crown, in a case of cruel and unreasonable delay. *James* v. *The Queen*, L. R. 17 Eq. 502.

6. Miners' Court. Nothing being presumed in favor of a court of inferior jurisdiction, a plea setting forth the jurisdiction and process of the Mine Law Court in the Forest of Dean, which has cognizance of all actions personal touching the mines and miners of the said Forest, must allege affirmatively that the party was a miner, or that it was an action personal concerning mines. (1738.) *Morse* v. *James*, Willes, 122.

7. Statute not retroactive. Commissioners appointed under an act of parliament, to set out the metes and bounds of mines and quarries in the Forest of Dean, and to fix the rent to be paid for the same: *Held*, under the terms of the act, to have no power to compel the miner to pay, in money, for by-gone workings, or to exclude him from the award, if he refused to make such payment. *Attorney-general* v. *Jackson*, 5 Hare, 355.

8. Invalid award—Practice. Commissioners appointed by an act of parliament to determine the respective rights of the crown and the customary miners on crown lands, had made an award, giving a benefit to a miner, but had required such miner to submit to terms which they had no power to impose, and which the miner did not afterward fulfill: *Held*, that after the time limited by the act for making the award had expired, the court would not set aside the award at the suit of the crown, as it could not then restore the miner to his right under the act. *Attorney-general* v. *Jackson*, 5 Hare, 355.

FORFEITURE.

1. Abandonment distinguished. The term forfeiture is often employed by miners as synonymous with abandonment. The distinction between abandonment and forfeiture stated. *Wiseman* v. *McNulty*, 25 Cal. 230.

2. Forfeiture, a legal conclusion. An averment of forfeiture is a legal conclusion upon which no issue can be taken. The facts should be stated so as to enable the court to determine whether a forfeiture did accrue. *Dutch Flat W. Co.* v. *Mooney*, 12 Cal. 534.

3. Intent. The question of intent is not involved in the question of forfeiture. *St. John* v. *Kidd*, 26 Cal. 263; *Bell* v. *Bed-rock Co.*, 33 Cal. 214.

4. Defined, District Rules. The term forfeiture as used in our mining customs and codes, means the loss of a right previously acquired, to mine a particular piece of ground, by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situated. *St. John* v. *Kidd*, 26 Cal. 263.

5. District Rules. The failure of a party to comply with a mining rule or regulation, cannot work a forfeiture of his title thereto, unless the rule itself so provides. *Bell* v. *Bed Rock Co.*, 36 Cal. 214.

In charging the jury upon the question of such forfeiture, the court should narrow its charge to such rules or regulations as expressly provide that a non-compliance with their provisions shall be cause of forfeiture. Id.

6. District Rule without penalty. The failure to comply with any one rule of a mining district does not work a forfeiture; it is enough to hold a forfeiture in the case of those rules which provide for it. *McGarrity* v. *Byington*, 12 Cal. 427.

7. Pleading forfeiture under District Rule. An answer to a complaint in ejectment for mining claims which alleges forfeiture by non-compliance with mining customs, etc., is insufficient in not setting forth the customs alleged to have been violated and so to have produced the forfeiture. *Dutch Flat W. Co.* v. *Moony*, 12 Cal. 534.

8. Must be Acted on. The provision for forfeiture in case of failure to work a mine does not operate to cause a forfeiture *ipso facto* upon the breach; there must be some act of the lessor showing his election to take advantage of the clause. *Roberts* v. *Davey*, 4 B. & Ad. 664; S. C. 1 Nev. & Man. 443; *Doe* v. *Bankes*, 4 B. & Ald. 401.

9. Parties necessary. In order to a forfeiture, there must be some person, natural or artificial, who is entitled to receive the benefit of the forfeiture when it accrues. *Wiseman* v. *McNulty*, 25 Cal. 230.

10. Strict construction. Where a forfeiture of an interest in a mining claim for non-payment of assessments is claimed under an agreement entered into by all the tenants in common forming the same, the parties claiming the benefit of the forfeiture must show an exact compliance on their part with all the conditions in the agreement, or they will not be entitled to the forfeiture. Id.

Articles of association of a mining company to be construed strictly against forfeiture. *Von Schmidt* v. *Huntingdon*, 1 Cal. 70.

Mining customs to be construed strictly against forfeiture. *Coleman* v. *Clements*, 23 Cal. 248.

11. Forfeiture considered as aiding development. The condition of develop-

ment should be attached to every mining claim. The policy of the government is to encourage the extraction of the precious metals, and courts should maintain that construction of mining customs which will accomplish this end. This policy considered with relation to enforcing forfeitures. *King* v. *Edwards*, 1 Mont. 235.

12. The right not exercised. A shareholder against whom a right of forfeiture exists, being still treated as a shareholder, and his shares not forfeited, must be treated as a contributory upon the winding up. *In re East Kongsberg Co., Bigge's case*, L. R. 1 Eq. 309.

13. Not worked ipso facto. A clause in articles of association, providing that "in the event of non-payment at the time and place appointed by the notice, any share might thereupon be forfeited, without any further act to be done by the company:" *Held*, that this did not work a forfeiture *ipso facto* upon non-payment of calls, but that an option remained with the company. *In re East Kongsberg Co. Bigge's case*, L. R. 1 Eq. 309.

14. Burden of Proof. A party who insists upon forfeiture or abandonment, and relies thereon to build up a right in himself to the thing, franchise or easement forfeited or abandoned, is upon first principles bound to establish the fact or facts upon which his asserted claim or right depends. *Oreamuno* v. *Uncle Sam G. & S. M. Co.*, 1 Nev. 215.

15. Against tenant in common. In order to enforce the forfeiture of the interest of a tenant in common, some appropriate suit must be undertaken to liquidate the demand and sell his interest, or there must be clear and unequivocal proof of abandonment. *Waring* v. *Crow*, 11 Cal. 360.

16. To Associates. Several persons owning a tract of mining claims as tenants in common, and acting under a company name, have not the capacity to take or hold, in the name of the company, the interest of any one or more of the tenants in common, by forfeiture. *Wiseman* v. *McNulty*, 25 Cal. 230.

Obiter: Tenants in common of a tract of mining claims, acting under a company name, are incapable, in the company name, of taking and holding mining claims by grant, or by any other means by which title to real estate would pass. Id.

17. Against Lessee — Presumption — Laches. A coal lease required the lessee to make monthly returns, under oath, and to pay the rent monthly; and to take out 72000 bushels per annum; with privilege of re-entry in case of breach. A breach of these covenants being proved, and the lessors having resumed possession, it should have been presumed that possession had been resumed under the clause to that effect in the lease, and in the absence of proof to the contrary, it was error to submit to the jury whether they had waived their right to determine the lease. *McKnight* v. *Kreutz*, 51 Pa. St. 232; S. C. 53 Id. 319.

The neglect to enforce a forfeiture during more than two years, while in the meantime lessees were not working the mine, was not a waiver of the right to insist upon forfeiture. Id.

18. Refusal to pay royalty — No forfeiture by words. An oil company, in 1864, took a lease of a large tract of oil land for twenty years, paying a bonus of $20,000, and rendering one-fourth of the oil. It paid royalty till 1872, when it refused to render further, alleging that a certain third party had notified it to not pay rent to said lessor; but it did not appear from the bill that it claimed the land itself or recognized any title in the third party: *Held*, that the refusal to pay royalty did not, under the facts stated, work a forfeiture of the term; 2. That an estate, for years created by deed, could not be forfeited by a refusal to pay rent, or any mere words where there was no act of open hostility or assertion of adverse title; especially where the term was of a number of years, beyond which a parol lease is within the statute of frauds. *Gale* v. *Oil Run Petroleum Co.*, 6 W. Va. 200.

19. No Set-off to sub-lessee if forfeiture would follow. The lessee of a coal mine, being in arrears with his royalty and his lease liable to forfeiture therefrom, executed a sub-lease, in which the sub-lessee covenanted to pay all such arrears as well as the accruing royalties of the original lessor: *Held*, in suit upon such covenant, that the defendant was equitably and legally precluded from using a plea of set-off; that the allowance of set-off would defeat the very end for which this covenant in the sub-lease was inserted. *Ardesco Co.* v. *North American Co.*, 66 Pa. St. 375.

20. Tenant cannot enforce. A tenant cannot force a forfeiture or insist that his lease is void against his lessor's will by his own default or wrongful act. *Doe* v. *Bankes*, 4 B. & Ald. 401.

21. Lease — Cesser of mining — Occasional entry. Where a lease provided for forfeiture in case lessee should cease mining operations for twelve months, the entry of lessees during such period, from time to time, to grease an engine which had been set up in the mine: *Held*, not to be a continuance of mining operations within the terms of the lease, and that such entry did not prevent a forfeiture. *Davis* v. *Moss*, 38 Pa. St. 346.

22. License — Election. Where the grant of a license to mine ore was made subject to a condition that if the grantee, his executors, etc., should neglect to work the mines for a certain time, or should fail in the performance of all or any of the covenants, then, and from thenceforth, the indenture, and the liberties, and licenses thereby granted, should cease, determine and be utterly void and of no effect: *Held*, that the failure to work within the time limited did not operate as a forfeiture without some act on the part of the grantor to show his election to avoid the license. *Roberts* v. *Davey*, 4 B. & Ad. 664; 1 Nev. & Man. 443.

23. Where Default is Mutual. A copyholder procuring a person to commit waste upon assurance of a license to dig on condition of filling up the pits again, cannot eject him as for forfeiture for breach of condition without having fulfilled his own contract by procuring him the license. *Doe* v. *Morris*, 2 Taunt. 52.

24. Of shares—Notice—Time. Where there was a right of forfeiture of shares, on giving ten clear days notice, held that a notice to forfeit "on Monday, the ninth," was insufficient, the ninth day of the month falling, in fact, upon a Friday. *Watson* v. *Eales*, 23 Beav. 294; 26 L. J., Ch. 361.

25. Shares — Conditions precedent. The right to forfeit shares in any joint stock undertaking must come from the law, and be exercised as prescribed by law. In this case the articles of association provided for forfeiture upon non-payment of assessments, and were, therefore, the law governing the right of forfeiture, and all the conditions precedent required by them should have been strictly complied with; not being so, the proceedings were void. *Westcott* v. *Minnesota, M. Co.*, 23 Mich. 145.

26. Share of deserting Adventurer. Where one of the articles of association of a mining company declared that "any operative stockholder, who shall within three months, after the arrival of the company in California, desert the company without leave, shall, in addition to his labor stock, forfeit his two shares of money stock;" and it was shown that a certain operative stockholder had clearly deserted the company, and even acted in opposition to its interests, the court declared that it could not relieve from the forfeiture thus incurred. *Von Schmidt* v. *Huntingdon*, 1 Cal. 70.

27. Where shares forfeited, owners not liable as Contributories. The proprietors of a mine in 1835 agreed to form themselves into a company, upon the plan that the mining property should be divided into 12000 shares, of which 5500 should be retained by themselves, and the remaining 6500 allotted to the public at £40 a share, the allotment moneys being retained by the proprietors. The deed of settlement provided, that if default should be made in payment of the installments of £40, the shareholder should cease to be a proprietor, and the share should be forfeited. Powers were reserved to increase the capital by (amongst other means) augmenting the amount of the shares, and of altering the existing laws, rules and regulations of the company. In 1836 another deed of settlement was executed, the effect of which was to make the shares transferable by simple delivery of the certificates. In 1866 it was resolved at a general meeting held under the deed of settlement, that the capital should be increased by augmenting the 12000 shares from £40 to £50, to be paid by installments, upon non-payment of which the share was to be forfeited; that within a certain period the shareholders were to bring in their certificates, with the name, residence and description of the holders, to be registered, and in default, that the shares should be forfeited for the benefit of the company. It was also resolved that the company should be registered as a limited company under the act of 1862. Copies of the resolutions were sent to all the shareholders whose addresses were known; but the holders of 2405 of the 12,000 shares did not send in their certificates to be registered. The holders of the 9595 shares who sent in their certificates were, in December, 1866, registered as a limited company, which in 1868, went into voluntary liquidation, afterward continued under supervision: *Held*, that the shares of the members who did not send in their certificates had been effectually forfeited, and that they were not liable to be placed on the list of contributaries. *In re Cobre Copper M. Co.; Kelk's case*, L. R. 9 Eq. 107.

28. Exercise of power of, by joint-stock company—Notice. The deed of settlement of a joint-stock company, completely registered under the 7 & 8 Vict. c. 110, was executed by one-fourth of the shareholders, and contained a clause providing that the shares of every subscriber who should not execute the deed within three months from its date, should be forfeited, if the board of directors thought fit; and that the amount paid upon such shares should become the property of the company. Under this clause, the shares of a scripholder in the company, who had not applied to sign the deed within three months from its date, were declared forfeited, without any reasonable notice having been given, and a subsequent application to be allowed to sign was refused: *Held*, in an action for

such refusal and for not causing a certificate of proprietorship of the shares to be delivered to the plaintiff, that the clause of forfeiture could not be objected to as being *ultra vires* or unreasonable, and that as the deed did not require notice to be given before forfeiture, no such notice was necessary; and, therefore, that after the forfeiture the plaintiff's title to the shares ceased. *Stewart* v. *Anglo-Cal. G. M. Co.*, 21 L. J. Q. B. 393.

29. Cost-book Company—Forfeiture after acquiescence. A., B. and C. joined in a mining adventure on the cost-book principle, as recognized in Devonshire and Cornwall. A. fell into arrears with his calls. Notice was given him of a meeting to declare his shares forfeited. The meeting was held, but instead of his shares being declared forfeited, a resolution was passed granting him an extension of time. No payment was made, and no further notice was given; but a fortnight after the extended time had expired the shares were declared forfeited: *Held*, that such declaration of forfeiture was invalid. *Clarke* v. *Hart*, 6 H. L. Cas. 633. See *Hart* v. *Clarke*, 6 De G. M. & G. 232; 19 Beav. 349.

30. Cost-book Company—Strict Construction of power to forfeit shares. A power in co-adventurers to forfeit the shares of one of their number for non-payment of calls is not necessarily incident to a mining adventure conducted on the cost-book principle. *Clarke* v. *Hart*, 6 H. L. Cas. 633. See *Clarke* v. *Hart*, 19 Beav. 349; 6 De G. M. & G. 232.

Where such a power exists by agreement between the parties, it is to be treated as *strictissimi juris*, like a power of forfeiture with respect to an estate, and the forms to be observed in declaring the forfeiture must be strictly followed. Id.

31. Forfeited payments—Relief. Defendants entered into a contract with the Table Mountain Ditch Company to perform certain labor on the ditch of the company. The contract contained many stipulations; one of which was, that if the work was not completed by a certain time, defendants should forfeit the contract, and also all money due on the same: *Held*, that if this clause in the contract was inserted under a mistake as to the amount and difficulty of the labor to be performed, it was void; and that it did not deprive defendants of the benefit of the other clauses in the agreement. *Verzan* v. *McGregor*, 23 Cal. 339.

32. Application to redeem from—Practice—Relief in Equity. A lessee, applying in equity to redeem a lease which has become forfeited by non-payment of rent, is not required by 4 Geo. 2, c. 28, s. 3, before the hearing, to pay into court the arrears of rent or the costs of law, if no injunction is granted until the hearing, and the lessor is in possession. *Bowser* v. *Colby*, 1 Hare, 109.

Where a suit to redeem a lease was brought by the representatives of the lessee, evidence having been given tending to show that the lessee in his lifetime was insolvent and had committed breaches of covenant, and that his estate was also insolvent, the court directed an issue to try whether other breaches of covenant had been committed or waived, but imposed it as a term upon the plaintiff that he should previously pay into court the costs at law and the arrears of rent due at the time the lessor sued out a writ of possession. Id.

A court of equity will relieve a lessee from a forfeiture by non-payment of rent, where there is a proviso that in that case the lease shall be void as well as where there is a mere power of re-entry. Id.

33. Forfeiture for arrears—Forest of Dean—No Equitable Relief. The gaveller of the Forest of Dean granted a gale or colliery to J. B., a free miner, he paying for all coal brought out two pence per ton, and so working the colliery as to gain 24,000 tons a year: Provided that if the coal gotten should not amount to that quantity, a minimum rent of £200 should be paid: Provided also, and the grant was made upon the further condition that the gale should be worked in manner therein mentioned. The gale not being worked, the galee paid the minimum rent for several years; but upon arrears of rent becoming due, the gaveller declared the gale forfeited, and entered into possession thereof. Ten months after the declaration of forfeiture the galee tendered the arrears of rent, which were refused: *Held*, upon a petition of right by the representatives of the galee to be reinstated in the gale, that the grant was properly made upon conditions, one of which was the payment of rent; that upon breach of that condition by non-payment, there had been a legal forfeiture, and a right of the Crown to re-enter; and that the arrears not having been tendered, nor any proceedings taken within six months, there was no power in the court to relieve against the forfeiture. *In re Brain*, L. R., 18 Eq. 389.

34. Copyhold. There is no relief in chancery against a voluntary forfeiture of a copyhold estate, as by working a quarry without right, etc. *Peachy* v. *Somerset*, 1 Str. 447.

FRAUD.

A. In General.
B. By Vendor.
C. By Vendee.
D. Practice, Parties, Evidence.

A. In General.

1. Constituents of Fraud. Representations to sustain an action for deceit

(in the fraudulent sale of a soap stone quarry), must be shown not only to be groundless, but that those who made them did not believe them to be true, and must be such as to impose upon a man of ordinary caution, and throw him off his guard on points where he might be expected to rely on the representations, and not on his own means of observation. *Page* v. *Parker*, 43 N. H. 47; S. C. 43 Id. 363.

2. Value of Mine. A reckless statement of the capacity of a mine put forth with a view to influence persons to take shares, and not upon a fair and reasonable belief of its truth: *Held*, to amount to fraud. *Glamorganshire I. & C. Co.* v. *Irvine*, 4 F. & F. 947.

3. Evidence of Value from subsequent working. Where in support of an allegation of fraud in the purchase of a mining claim it became material to show that the purchaser knew that he was paying an inadequate price, it was: *Held*, that the amount of gold dust extracted from the mine subsequent to the sale was not admissible to prove knowledge by the purchaser of the real value of the mine. *Henry* v. *Everts*, 29 Cal. 610.

4. Coal Vein in river-bed—Contract for working. Rosevelt, by extravagant representations, induced Fulton to purchase a coal mine for a sum in cash and an annuity of $1000 for twenty years, unless after the mine had been faithfully worked it should not produce a certain amount, and under the contract a certain tract was conveyed. The coal bank in fact cropped out between high and low-water mark on the Ohio river, on the borders of the tract conveyed. From that fact the court concluded that any attempted working of the mine was necessarily useless and unprofitable, and the contract to be fraudulent; and the defendant was restrained from any attempt to collect the annuity. *Rosevelt* v. *Fulton*, 5 Johns. Ch. R. 174; S. C. 2 Cow. 129.

5. Payments based on Developments by faithful working—Rescission. Where F. purchased of R. a tract of land on the bank of the Ohio river, R. representing and believing that it contained a valuable coal mine, and besides a payment of $4400 covenanted to pay an annuity of $1000 for twenty years, unless after the mine was faithfully worked by the purchaser it should not yield a certain quantity of coal, and it appeared that there was no mine of any such value, accessibility, or productiveness as alleged by the vendor: *Held*, that F. was not obliged to work the mine to determine in that manner whether it would yield the prescribed quantity, and that R. should be perpetually enjoined from prosecuting at law for the annuity. *Rosevelt* v. *Fulton*, 2 Cow. 129; see *Fulton's Executors* v. *Rosevelt*, 5 Johns. Ch. R. 174.

6. Wrong inference of value from true statement of price. Where $1000, out of the total of $6000, secured by a mortgage consisted of mining stock, which the borrower had accepted as $1000 cash, upon the representation of the mortgagee that he had paid that much for it, which the evidence showed to be the fact, there being no misrepresentation or fraud by the mortgagee, the $1000 ought not to be deducted from the mortgage. *Renton* v. *Maryott*, 21 N. J. Ch. 123.

7. Value misstated—Note. Fraudulent representations as to the value of the mine of a corporation, made by the seller of the stock of the company to the purchaser, as an inducement for the purchaser to buy, may be given in evidence, under a proper state of the pleadings, to defeat the collection of a promissory note given for the stock. *Gifford* v. *Carvill*, 29 Cal. 589.

8. False representations. Where representations are made as to the nature and character of property offered for sale, affecting its value, and those representations turn out to have been false, to the knowledge of the party making them, a foundation is laid for an action for damages for the deceit and for a suit in equity to set aside the contract of sale. *Attwood* v. *Small*, 6 C. & F. 395; Reversing *Small* v. *Atwood*, 1 Younge, 407.

9. Elements of Misrepresentations. Misrepresentations to constitute sufficient grounds for setting aside a purchase must be material, as being of such a nature as, if true, to add to the value, must not be evidently merely conjectural statements, and must be made without a belief in their truth, or without reasonable grounds for such a belief. *Jennings* v. *Broughton*, 5 De G. M. & G. 126; affirming 17 Beav. 234.

10. Representations amounting to cause of action. Representations which will entitle a party to recover on the ground of deceit must be both false and fraudulent, and such as tend to induce and result in actually inducing the party to part with his money. *McAleer* v. *McMurray*, 58 Pa. St. 126.

The instrument of the alleged fraud must not only be fraudulent in its representations but intended to defraud the plaintiff, or the plaintiff and all others, in order to be the foundation of an action for deceit. Id.

11. Sole Inducement. The false representations inducing purchase of mining shares need not be the sole inducements to such purchase. *Clarke* v. *Dickson*, 6 C. B., N. S., 453.

12. Non-reliance on representations. The fact of defendants examining a mine before taking lease, and having it examined by others, considered as evidence that he had taken such lease on his own or his friends' judgment, and not on the representations of the lessor. *Haywood* v. *Cope*, 25 Beav. 140.

13. Joint reliance upon letters of third parties—Vendor and Purchaser. A., the vendor, who had never been on the oil lands sold, employed his brother to examine them, who wrote describing certain property as good, and that it might be sold for a higher price than he had the refusal of it for. A. read these letters to B. (the purchaser), who told A. that if he bought it would be because of his confidence in him, to which A. replied that his brother was trustworthy; and because of these and other like statements, B. bought the property. In an action for the price of the property by A., to which B. set up in defense fraudulent misrepresentations by A., the judge instructed the jury that a fraudulent misrepresentation which would enable B. to avoid the contract must be a misrepresentation of matters of fact, and made by A. as of his own knowledge; that no expression of opinion or judgment made in good faith, and no statements made in good faith and known to be founded on the representations of others, would constitute such misrepresentations; that no statements as to the cost or value of the property, or of offers made therefor by others, if untrue, were sufficient to sustain this defense; that if A. made false representations as to the contents of the letters, or in bad faith withheld any information therein contained upon any material particulars, the allegations of fraud were sustained; but that if he truly read the contents thereof, believing them to be true, having no personal knowledge himself of the property, and so representing to B., such acts would not be fraudulent: *Held*, that B. had no ground of exception. *Cooper* v. *Lovering*, 106 Mass. 77.

14. Positive statement without knowledge. If persons make assertions of facts as to which they are ignorant whether such assertions are true or untrue, they become, in a civil point of view, as responsible as if they had asserted that which they knew to be untrue. (Per Lord Cairns.) *In re Reese River M. Co.; Smith's case*, L. R. 4 H. L. 64.

15. Statements false in fact though innocently made — Facts—Opinions. A false affirmation of a material fact, though innocently made, is ground for rescission if the other party was misled by it. *Smith* v. *Richards*, 13 Pet. 39.

To set aside a contract upon the ground of false representations, they must be shown to be allegations of fact as contrasted with matters of opinion, must be material, constituting a motive to the contract, and have actually misled the purchaser. Id.

16. Representations, false though not fraudulent. The sale of mining stock upon false representation of material facts in regard to which the purchasers may be presumed to have trusted the vendors, is void whether the vendors knew such representations to be false or not, and whether made with a fraudulent intent or not. *Crump* v. *U. S. M. Co.*, 7 Gratt. 362.

17. Speculative character of mining operations — Exaggerated Statements—Personal inspection. Upon a bill by a shareholder against the projectors and lessees of a mining company to rescind the contract and return the shares, on the ground of misrepresentation in the prospectus: *Held*, upon the evidence, that although it stated, in glowing and exaggerated colors, what was really in the mine, yet that such statements in the prospectus were not such misrepresentations as to avoid the contract: *Held*, also, that the same sources of information were open to the plaintiff and defendant, and that they availed themselves of them; and the bill was dismissed with costs. Observations as to the doubtful and speculative character of mining operations. *Jennings* v. *Broughton*, 17 Beav. 234; affirmed, 5 De G. M. & G. 126.

18. False Representation must come to Plaintiff's knowledge. To maintain an action for deceit on the ground of fraudulent representations, it must be affirmatively shown that they came to the plaintiff's knowledge, and induced him to give the credit which resulted in the loss. One fact cannot be presumed from another which is in itself but an inference. *McAleer* v. *McMurray*, 58 Pa. St. 126.

19. Representations of one of several Co-adventurers. When a party is induced to become a partner in an oil company by the fraudulent representations of one of the adventurers: *Held*, that such representations do not release him from his obligations with respect to the other partners in the adventure. *Kimmins* v. *Wilson*, 8 W. Va. 584.

20. Advertisements, not relied on. Where advertisements for the sale of shares in a mine had been issued containing unfounded statements, but the purchaser had not relied upon them, and had had opportunities of judging of their accuracy: *Held*, that he was not entitled by reason of them to have the contract rescinded. *Jennings* v. *Broughton*, 5 De G. M. & G. 126; affirming S. C. 17 Beav. 234.

21. Assertion of good Title. Where land is bought upon vendor's assurance that he had examined the title, and that the title was good, the parties not being in a situation to have the title examined, and the vendee stating that he must take the vendor's word for it, there is a relation of trust and confidence between the parties; and the ignorance of the vendor as to the facts of the title cannot excuse his positive assertions that the title was good. *Babcock* v. *Case*, 61 Pa. St. 427.

22. Matters of opinion — Existence of Oil. False and fraudulent affirmations by the vendor of lands that "said lands had large deposits of oil in them, and were of great value for the purpose of digging, boring for, and manufacturing oil," accompanied with the statement that the lands had not been tested, are matters of opinion, and not actionable. *Holbrook* v. *Connor*, 60 Me. 578.

23. Matters of fact and opinion. The value and richness of a mine belonging to a corporation, and its convenience to wood and water, are not mere matters of opinion or information; as to which the purchaser of stock from a stockholder has no right to rely upon the representations of the seller. *Gifford* v. *Carvill*, 29 Cal. 589.

24. Opinion—"Paying"—"Superior quality." Statements that an oil well was "paying," and the oil was of "superior quality:" *Held*, matters of opinion rather than assertions of facts. *Kimmins* v. *Wilson*, 8 W. Va. 584.

25. Sale of Engine for Mine. It appeared that the plaintiff fraudulently represented to P., the vendee of machinery sold for mining purposes, and for which to secure the consideration a trust deed upon the vendor's gold mine in South Carolina was given, that the engine was a twenty horse-power engine; that it was fit for mining purposes; that it was in good order, and had been so certified by engineers; that it was free from rust; that it had been standing but two or three years: *Held*, that these false representations related to matters of fact and not of opinion; and that as they were material to the interests of P., and had a tendency to prevent him from inquiring into the condition of the engine, and as he reposed confidence in them, they rendered the contract of sale voidable by him. *Hazard* v. *Irwin*, 18 Pick. 95.

26. Specific Performance—Depth and Thickness of coal beds—Reliance upon Representations. Upon a bill to compel specific performance of an agreement to take a lease of coal mines, defendant alleged misrepresentations of the depth and thickness of the beds. It did not appear that the land had been bored, and the depth and thickness were known to vary. The court made an issue to the jury whether any false representations were made, and whether such false representations were relied on by the defendant, which issue being found for plaintiff, the court refused to disturb the finding. Statement by the court as to the rule of determining whether a party shall be held to have acted on his own means of knowledge, or upon the false representations. *Clapham* v. *Shillito*, 7 Beav. 146.

If the party to whom the representations were made, himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representation be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded. Id.

Further, courts must consider such representations with reference to the subject-matter and the means of knowledge, and the fact that all the knowledge of the subject-matter may be but inference upon a subject of uncertain nature. Id.

27. Contract with Discoverer—Trustee—Patent. Plaintiff was the discoverer of a valuable mine on the Canada shore of Lake Superior. Instead of making claim and seeking a patent from the government, as he might have done, he made known his discovery to a company, who agreed to cede to him a half interest, according to the usual custom of mining adventures. A director of the company availing himself of his position first secured the patent, but after suit brought, the company compromised with him, and yielded their claim in consideration of $5500: *Held*, that the discoverer was entitled to one-half of this sum. *McDonald* v. *Upper Canada M. Co.*, 15 Grant (Canada), 179 and 551.

28. Effect of fiduciary relation. Persons already owning property of any kind (oil land), may enter into an association, and sell to their associates, at any price, without disclosing the profit they make, and without standing in any relation of agency, trust or confidence, if there be no fraudulent representations. *Densmore Oil Co.* v. *Densmore*, 64 Pa. St. 43; B. & W. L. C. 370.

But from the moment the association is started a relation of confidence begins to-

wards each other, and to all who may become members, and none can purchase property for the purpose of the association, and sell it at an advance without a full disclosure of all the facts, and must account to the company for the profit. Id.

29. Collusion between Trustee and purchaser. Six months after the order of confirmation of a sale of extensive iron works (for the price of £72,000) a discovery was made by two of the three trustees of the estate that A., the purchaser, had before the sale entered into an agreement with Llewellyn, their co-trustee, who was also the acting manager of the iron works, to admit him into partnership in the iron works in case he, A., should become the purchaser at a certain sum (£63,000), and accordingly, after he was declared purchaser, although at a price £9000 greater than such sum, he proposed to give Llewellyn one-eighth of the profits of the concern as managing partner, though afterward he gave him a bonus of £1500 instead, to withdraw. Upon affidavits showing these facts, the sale was rescinded, and upon appeal to the house of lords, the order of rescission was affirmed. *Bailey* v. *Watkins*, 6 Bligh N. R. 275 n. See citation Bainbridge on Mines, 180 and B. & W. L. C. 400.

30. Between Partners—Loss by Fraud. Plaintiff and defendant were partners in the purchase of mining claims. Defendant was the active partner, and acquainted with the value of a certain claim owned by the firm, plaintiff being ignorant of its value. Plaintiff sold his interest in this claim to the defendant for greatly less than its value: *Held*, that in a suit to set aside this sale for fraud and for an account, that an averment of defendant's indebtedness to plaintiff in a sum greater than that paid by defendant for the mining claim is in effect an offer to place defendant in *statu quo*, as per the rule of law that a party seeking to rescind must restore the other party to the condition in which he was before the contract. *Watts* v. *White*, 13 Cal. 321.

31. Fraudulent Bonus to Partner. A person employed on behalf of himself and his copartners in negotiating the terms of a lease, is not entitled to stipulate clandestinely with the lessors for any private advantage to himself. When therefore a sum of £12,000 was paid in pursuance of such a stipulation, the party receiving it was declared to hold it in trust for the partnership. *Fawcett* v. *Whitehouse*, 1 R. & M. 132.

Before the transaction was discovered, one of the partners withdrew, and subsequently another partner assigned a share in the stock and in his proportion of this claim to persons then admitted into the concern: *Held*, that the retired, the continuing, and the new partners were properly joined as co-plaintiffs in a suit to have the trust declared. Id.

32. By Attorney of two adventurers, favoring one of them. One Taylor, a professor of mineralogy, informed plaintiff of a deposit of zinc on a farm in Sinking Valley, Blair county. Plaintiff, Taylor, and Wilson (plaintiff's attorney) visited the valley to obtain mining leases. Besides other leases, they obtained on a joint arrangement a lease from one Waite, which was signed by him, but which his wife refused to sign, and it was therefore never complete and never delivered. Afterward, one Lewis, as a party proposing to buy out Taylor's interest in the mining adventure, accompanied Taylor and the attorney Wilson, to the mineral region. This attorney fraudulently concealed the fact of the lease from both Lewis and Taylor. Lewis declined to buy out Taylor, but purchased the Waite farm for himself, through the attorney Wilson. Tatham had previously declined to buy the farm. Tatham, the plaintiff, now claimed to share in the benefit of Lewis's purchase: *Held*, that the lease referred to was void, having never been executed or delivered; 2. That it having been found as a fact that there was no confidential relation between Lewis and Tatham, the plaintiff, at the time of the purchase of the farm, the defendant Lewis was not bound by the knowledge of the lease which Wilson possessed as the attorney of Tatham; 3. That, as the remedy at law was complete, no bill in equity would lie against the attorney for his fraud or negligence, the plaintiff's remedy being by action for damages. *Tatham* v. *Lewis*, 65 Pa. St. 65.

33. False Statement of price paid. An action of tort for deceit in the sale of real estate, oil land, does not lie for the fraudulent misrepresentations of the vendor as to the price which he paid therefor. (Kent and Dickerson, JJ., dissenting.) *Holbrook* v. *Connor*, 60 Me. 578.

34. By agent, Oil Sale. An agent for sale of (oil) lands learning of an increased price to be got therefor, connot make a valid bargain with his principal and become the purchaser himself, without disclosing such fact. *Bell* v. *Bell*, 3 W. Va. 183.

35. Agent—Assent—Increased price. The statement of assent made by a principal to a sale from himself to his agent after being informed of fraud practiced on him in procuring such sale: *Held*, on the facts, not to prevent an accounting for an increased price received by the agent. Id.

36. Agent making secret profit—Practice. Parties purchased oil land, and

shortly afterwards, with others, formed a corporation to which the land was conveyed at an advance. If the purchasers acted as agents of the company in purchasing the land, they could not charge a profit against their principal. *Simons* v. *Vulcan Oil Co.*, 61 Pa. St. 202.

They would be in the same position if they assumed so to act without precedent authority if their doings were accepted as the acts of agents by the company. Id.

If, in order to raise a company, they represented themselves as having acted for one to be formed, proposed to sell at the prices they had paid, and their purchases were taken, and stockholders invested on these representations, it was a fraud on those interested to allow them to retain profits paid them by the company in ignorance of the sums advanced. Id.

If they had disclosed the exact sum paid for the land, and had refused to sell except at an advance, which was thereupon paid, they would have had a right to retain the profits. Id.

Where parties have so acted, an action in form *ex contractu* (*e. g. assumpsit*) can be maintained only by showing fraud in dealing with the company by reason of which they should not, *ex æquo et bono*, retain the money wrongfully obtained from it. Id.

37. Agent to consummate Fraud allowed his hire against his Principal. Stonebraker was the owner of a lead mine, and agreed to pay Hardy $3,000 if he would effect a sale of the property for $8,000. Hardy procured one Grant as a purchaser, inducing him to close with the bargain at $8,000, by representing the land as of great value, that the owner would take no less, acting ostensibly as the friend of the purchaser, and concealing his own agency. When the deeds were made, three-fourths were conveyed to Grant, and one-fourth to Hardy, but the money paid by Hardy was immediately refunded to him. Stonebraker was cognizant of all the concealments or misrepresentations which were made. In an action by Hardy to recover the $3,000, less the amount refunded, defendant was held liable, and, the injured party not complaining, the court ruled that the defendant could not claim the benefit of the fraud of plaintiff towards a third party. *Hardy* v. *Stonebraker*, 31 Wis. 640.

38. Ratification — Collusion between President and Agent of Corporation, and party loaning money borrowed in Corporate name. S., assuming to be the agent of a mining corporation, borrowed money in its name without authority, and expended it partly in mining upon the property of the company, and partly in developing and mining upon adjoining premises, belonging in part to B., the president and general manager of the company, and in part to S. himself. It was sought to charge the company with the loan, upon the ground that having been informed of the acts of S., it had omitted to repudiate them. No officer or member of the company except B. was informed of the expenditure of a portion of the moneys upon the property of B. and S. The notice to B. was held notice to the company itself. *Union M. Co.* v. *Rocky M. Bank*, 2 Colorado, 565, 248; S. C., 1 Id. 531. Dissenting opinions of Wells, J., and Belford, J., 2 Id. 264, 266.

In the same case, the total loan amounted to $20,000, and more, and was obtained by successive over-drafts at the plaintiff's bank, where the over-drafts amounted to something over $10,000. S. gave promissory notes in the corporate name for that sum, and this was credited to the defendant in the account. The notes were not, however, accepted as payment, and this action was brought as for money lent for the whole sum. At a previous trial the notes were surrendered and cancelled; prior to such surrender no member of the defendant corporation had notice of the execution of the notes, and there was evidence tending to show that the bank and S. had deliberately concealed the fact from the officers of the mining company: *Held*, that the ignorance of the corporation as to this was not material, as to the question of ratification. Id.

39. Company affected by fraud of its Organizers. A director having purchased lands from a corporation, united with others in forming a new corporation, he subscribing for almost all of the stock therein, and becoming one of its officers and directors; and on the next day, in pursuance of one entire plan, conveyed the same lands to the new company in payment of his subscription for such stock: *Held*, that the new company is affected with notice of the circumstances impairing the title of the party so conveying the lands to it, and cannot claim to be a *bona fide* purchaser without notice. *Hoffman S. C. Co.* v. *Cumberland C. & I. Co.*, 16 Md. 456.

40. Organizer alleging False Consideration for Oil Lands—Recovery of subscription. Stevenson being in negotiation for oil land, proposed to form a company to purchase, representing that the land could be bought for $12,000, and induced Short to take and pay for a share in it at $1000. Stevenson bought the land for $6000, without disclosing to his associates the price which he gave: *Held*, that on these facts Short could recover the whole amount he had advanced. *Short* v. *Stevenson*, 63 Pa. St. 95.

If Stevenson had disclosed the sum for which the land could be bought and which he paid, and refused to sell for less than $12,000, and Short had agreed to pay $1000 for a share, with a knowledge of the facts, the transaction would have been unimpeachable; but he bought for his associates as well as himself, and good faith requires that he should charge them no more than he actually paid. Id.

41. "Original owner"—Construction of prospectus. A prospectus of an oil company stated that the company had purchased their land from the "original owner:" *Held*, that this was not a term of art to be explained by experts, but implied that no profits were added to the price paid by the company on account of an intermediate buyer, etc., and excluded the idea of a purchase at speculative prices. *Simons* v. *Vulcan Oil Co.*, 61 Pa. St. 202.

42. Prospectus and advertisements—Whether Shareholders would have purchased in any event. Upon the formation of a company the directors and the persons who take shares are contracting parties, and the prospectus and advertisements issued by the directors are the representations *quae dant locum contractui*. If these be false and cannot be made good by the persons making them, the contract may be avoided. It has, however, to be considered whether it is reasonable to believe that if the real truth had been stated the shares would not have been taken. *Jennings* v. *Broughton*, 17 Beav. 234; affirmed in 5 De G. M. & G. 126.

43. Board of Directors—Prospectus. In an action by a company for calls: plea, that the defendant was induced to become a holder of shares by means of the fraud of the plaintiffs: *Held*, that fraud of the directors as a board, and as a body, was fraud within the plea, and would avoid the contract; 2. That the publication by the directors of statements in their prospectus, false in fact, and calculated to mislead the public, if careless whether their statements were true or false, would amount to fraud; 3. That this would not the less be so, merely because the prospectus referred to reports of surveyors, which had, in fact, been received, and might have been referred to by the shareholders, if, in point of fact, they relied upon and were influenced by the prospectus; 4. That the publication, by the directors, of a prospectus prepared by the attorneys, the main promoters, without referring to the reports, or taking any pains to verify its statements, was evidence of such recklessness as would tend to show fraud, within the above definition. *Glamorganshire Iron & C. Co.* v. *Irvine*, 4 F. & F. 947.

44. Prospectus—Failure to get the Property intended. In the prospectus, the company set forth a description of ten tracts of land it proposed to purchase, but only purchased eight, owing to the defective title to the others: *Held*, that on an action brought for fraud in the representations of the prospectus, it was error for the court to charge that if from the prospectus the plaintiff had a right to believe the company would acquire the property, and that the company were organized with a view to the ownership of those pieces of property, and if it did not obtain them, the plaintiff would be entitled to recover,—where the evidence showed the purchase by the company of one other tract supposed to be equally valuable for mining purposes, and that the company had retained $75,000 in the treasury, as the price of the remaining tract. *Kelsey* v. *Northern Light Oil Co.*, 45 N. Y. 505.

45. Director of Corporation. A party joining in a purchase from a corporation, with knowledge of the fact that his co-purchaser was a director in the corporation, is affected with whatever legal disability belonged to the director by reason of that relation. *Hoffman S. C. Co.* v. *Cumberland C. & I. Co.*, 16 Md. 456.

46. Shareholders against Directors. The holders of shares in a joint stock company purchased immediately from the company, are entitled to relief, in equity, against the fraudulent conduct of the directors. *Blain* v. *Agar*, 2 Sim. 289; 1 Id. 37.

47. Shareholder purchasing at Sheriff's sale while holding its funds, sufficient to redeem. B., a member of a quartz mining company, received as the proceeds of quartz-rock belonging to the company, and crushed in their mill, $7073.98. Subsequently, the mill, lode, and ditch of the company were sold at sheriff's sale under execution on a judgment in favor of A. against the company for $2558, C. becoming the purchaser for $2756.02, funds furnished by B., receiving the sheriff's certificate, and then assigning the same to B. Still later, W. obtains judgment against the company for $2,310.97, and under execution thereon, the same property was sold by the sheriff to C., who received the certificate, and assigned it to B., C. having bought the claim before judgment for $2254 with money furnished by B. Plaintiff, a member of the company, sues to cancel these certificates, prevent a sheriff's deed to B., and to hold him, on a dissolution of the company, as trustee for the company of the interest bought at the sheriff's sale: *Held*, that the conduct of B. was grossly inequitable, and that if the company is

willing to affirm his purchase as done for its benefit, the money paid should be credited to him on his indebtedness, and the title of the property go to or remain in the company, unaffected by the transaction. *Bradbury* v. *Barnes*, 19 Cal. 120.

48. Collusion under form of New Company to oust Stockholders. Complainant Titus, as president and agent of the Baltimore Mining Company, made a written agreement with Hickock and his associates to sell them the mineral location of the Baltimore company for $4,500, and the delivery to complainant of one-fifth of the stock of a company to be formed by H. and his associates for mining thereon. The money was paid and the location conveyed, whereupon H. undertook to have the said one-fifth of the proposed stock of the new company issued to complainant, to be by him indorsed to the stockholders of the Baltimore company. A new company, the Vulcan, was then formed under this arrangement, to which H. conveyed the location of the Baltimore company, the articles of incorporation of such company stating its purpose to be to mine said Baltimore location and any other lands that might be leased, located or bought by it, the Vulcan company; but the stock to the shareholders in the Baltimore company was not delivered. Complainant afterwards, in his own name, but claiming to be trustee of the stockholders of the Baltimore company, filed his bill, stating that the Vulcan company had procured a new location to be purchased in the name of H., and caused the same to be transferred to a new company, the defendant, the Minnesota; and that the Vulcan company had been dissolved, practically, and the Minnesota company collusively substituted and operated in its place; and that the Minnesota company was in truth the Vulcan, and praying that it might be decreed to transfer to complainant one-fifth of its stock for the use of the Baltimore company: *Held*, that such contract of H. and his associates was with complainant as the agent and not the trustee of the Baltimore company, and therefore the Baltimore company was a necessary party. *Held*, that the Vulcan company being still in legal existence, and the owner of the Baltimore location, was also a necessary party. *Held*, that the insertion of the clause in the articles of the Vulcan company, looking to the operation of lands other than those bought of the Baltimore company, could not enlarge the rights of the Baltimore company under the agreement, nor was it a fraud upon the Baltimore company, or complainant, in the members of the Vulcan purchasing a new location and forming a new company to work it to the exclusion of the complainant; nor does proof that H., when he bought the location now held by the Minnesota, bought it for the Vulcan company, nor the fact that the Vulcan company declined to take it, but its members formed a new company for the express purpose of excluding the Baltimore company from any benefit which they might have derived from the new location as shareholders in the Vulcan, make out any case of fraud upon the Baltimore company, since it does not deprive them of any rights which they could have demanded under the original agreement. *Titus* v. *Minnesota M. Co.*, 8 Mich. 183. (Manning, C. J., dissented, and Campbell, one of three associates, did not sit.)

49. Credit Mobilier Contract. Ahl and Jones projected and organized a railroad and mining company, in order that Ahl might sell his lands to the company, and Jones build a railroad for it. They owned most of the stock, controlled the corporation absolutely, and co-operated with each other in selling the land and contracting for building the road: *Held*, that the burden was on them to show the fairness of the transaction, and under the facts of the case it was decreed that the sale of the land by Ahl to the company was a fraud in fact and in law. *Ahl's Appeal; Rice's Appeal*, 79 Pa. St. 169.

50. Stock Exchange—Stock admitted on false assertion of compliance with its rules—Liability of Organizers to Stock Purchaser. By the rules of the stock exchange for 1853, the committee will not fix a settling day for the shares in a mining compauy, or permit the same to be inserted in the official list, unless it has been represented to them that the subscription list is full, with the exception of such shares as are reserved for special purposes, and that not less than two-thirds of the scrip have been paid upon. The defendant, one of the directors of the mining company, formed to consist of 100,000 shares of £1 each, fully paid up, having in conjunction with others falsely and fraudulently caused it to be represented to the committee of the stock exchange that 41,711 shares had been allotted, and that £40,911 was in the hands of the company's bankers, having been paid upon the scrip, 40,000 shares being reserved as the price to be paid for certain land, and 19,000 for distribution in the colony, the committee caused a settling day to be appointed, and the shares to be quoted in the official list. The plaintiff, knowing the rule of the stock exchange, and from seeing the shares quoted believing that two-thirds of the scrip had been paid upon, bought on the stock exchange from third persons 200 shares in that belief. It was proved that no more than 19,183 shares

were allotted, and only 7,000 were ever paid upon, and that the defendant knew this at the time of the representation to the stock exchange. The shares turned out to be valueless: *Held*, that an action could be maintained by the plaintiff against the defendant for the false and fraudulent representations made by him. *Bedford* v. *Bagshaw*, 4 H. & N. 537.

51. Fraudulent Entry of Mine on Stock Board. B., the chairman of the Lake Bathurst Australasian Gold Mining Company, by falsely representing to the stock exchange that two-thirds of the shares had been taken and paid upon, procured the stock to be entered in the official list. S., a stranger, knowing the rule, that such stock was not admitted into such list unless two-thirds of the capital had been paid up, and seeing the stock so entered, and relying on the insertion having been procured by honest means, bought some shares from a jobber on the exchange: *Held*, (in the house of lords affirming judgment in the Exchequer chamber) that S. had a right of action against B. for the fraudulent representation. *Bagshaw* v. *Seymour*, 4 C. B. N. S. 873; 32 Law Times, 81.

52. Oil Stocks — Loss to Vendor through Purchaser's delay. Plaintiffs sued defendants for the price of oil stock, alleging that it had been bought on false representations as to the cost of the land; there was evidence that plaintiffs knew the real cost in November, and afterward paid an assessment. Subsequently the project failed. In March plaintiffs tendered the stock and offered to rescind. The court charged, that if the jury found these facts, and any unfavorable circumstances occurred between plaintiffs' knowledge and the tender, which left defendants in a worse condition than if the tender and rescission had been at the time of the discovery of the fraud they should find for the defendant: *Held*, to be correct. *Leaming* v. *Wise*, 73 Pa. St. 173.

53. Broker — Newspaper advertisement. A., in consequence of an advertisement in the newspaper for the sale of certain shares in mines, which were offered at lower prices than the current list of sales of the same shares in the same publication, purchased of B., a share broker, the shares so advertised, which he (A.) believed from the advertisement to be the property of a third person. They turned out to be the property of B., the broker: *Held*, that such a sale was violable on the ground of misrepresentation. *Maturin* v. *Tredinnick*, 9 Law Times, N. S. 82; see S. C. 10 Id. 331.

A. also gave B., the broker, an order to purchase other shares for him. B. sold shares of his own to A.: *Held*, that such a transaction might be set aside. Id.

54. Joint Fraud of Vendor and the organizers of Purchasing Co.— Acquiescence by continued Mining. Lord Audley agreed with P., in consideration of £165,000, to grant to P. a lease of certain mines, as trustee for a joint stock company. The lease was afterward executed, and the company having been formed, entered into possession and worked the mines, and paid part of the purchase-money. The company being sued for an account and balance of purchase-money, filed a cross-bill, setting forth various matters as evidence of misrepresentations, concealment, and other frauds practiced by Lord Audley and P., who had formed the company, and prayed that the consideration might be declared exorbitant and fraudulent, and that the company was entitled to a valid lease of the mines at their true reduced value: *Held*, that the company were not entitled to any relief from the consequence of acts and misrepresentations which proceeded from themselves, or were adopted by them and acquiesced in after full knowledge while they continued to work and exhaust the mines. *Vigers* v. *Pike*, 8 Cl. & Fin. 562; aff'g *Pike* v. *Vigers*, 2 Dru. & W. 1.

55. Joint Buyer colluding with Vendor —Silent Broker—Joint recovery. Parker, who was the owner of a soapstone quarry, conveyed a one-third interest therein to Reding for the sole consideration of his procuring a purchaser for the remaining two-thirds. Parker and Reding then both made statements to the plaintiff that the quarry was worth $30,000; was a great bargain at $15,000, with specific misrepresentations as to the produce of the quarry, but concealing Parker's position entirely; and that the only consideration for the whole mine was the price to be paid by plaintiff for the two-thirds. Plaintiff purchased the two-thirds for $10,000, which was greatly above its value. A brother of Parker was also assisting him in the trade, knowing the conspiracy, receiving $2000 of the consideration money, but personally made no misrepresentations. In an action to recover the purchase-money, it was: *Held*, that there was sufficient evidence against the brother of Parker to justify the refusal of a nonsuit; 2. That the acts and declarations of one of the defendants so conspiring were evidence against all. *Page* v. *Parker*, 43 N. H. 363; S. C. 40 Id. 47.

56. Secret payment by vendor to one of the purchasers - Breach of trust— Mine worth the full price. Four out of five persons who entered into a provisional contract, to purchase a mine, which they agreed to sell for their joint benefit to a

company, were deceived by the fifth, who, assuring them that the vendors would not take less than £85,714, obtained secretly from the latter an agreement that if the contract were perfected and money paid, he should receive thereout a bonus of £20,000 for his pains in effecting the sale. Two of the four having absolute powers from the rest to sell to the intended company, then formed themselves with others into a committee of management; and still ignorant of the surreptitious agreement, issued a prospectus, stating that a contract had been entered into for the purchase by the company of the entire property for £125,000, "including all preliminary expenses and a premium to the parties who incurred the risk and responsibility of the original purchase." The company having been established, the requisite capital paid up, and the provisional contract perfected: *Held*, that the £20,000 transaction was fraudulent and void, not only as against the four original purchasers, but also as against the company, notwithstanding the mine proved cheap at the price (£125,000) at which they became shareholders. It was not enough that the company got the whole of their bargain. They had a right to the best bargain which the two members of the committee of management, had they known the facts, would have been in a position, acting fairly and rightly, to have given them. *Beck* v. *Kantorowickz*, 3 Kay & J. 230.

57. User after discovery—Laches. If a party be induced to purchase mining shares by fraudulent misrepresentations of the seller respecting the property, and after discovering the fraud continues to deal with the property as his own, he cannot afterward recover the consideration from the seller. *Campbell* v. *Fleming*, 1 Ad. & El. 40.

58. Note—Laches. A party cannot resist the payment of a promissory note given in payment for property, on the ground of fraudulent representations, unless within a reasonable time after the discovery of the fraud he offers to return the property, and rescind the contract; provided the property sold is of any value to either party. *Gifford* v. *Carvill*, 29 Cal. 589.

59. Discovery of further Fraud after acquiescence. The right to repudiate a contract on account of fraud, once lost by acquiescence is not revived by the subsequent discovery of another incident in the same fraud (that the outlay on the mine had been only £5000 instead of £35,000 as represented). Per Denman, C. J., Littledale, J., and Patterson, J. *Campbell* v. *Fleming*, 1 Ad. & El. 40.

60. Second Contract under continuing influence. Where a contract is clearly fraudulent by reason of misrepresentation, a second contract annulling the first, and substituting another as to the same premises, made while under the influence of such misrepresentation, is not a condonation of the original fraud. *Davis* v. *Henry*, 4 W. Va. 571.

61. Ratification. Where a contract is void on account of fraud practiced on the party, as in misrepresenting the mineral character of the land sold, it may still be confirmed or ratified without a new contract founded on a new consideration. *Negley* v. *Lindsay*, 67 Pa. St. 217.

62. Pillars—Lease—Cheating by oversizing the measure for weight wagons. Upon bill to redeem a colliery which had been first leased and then mortgaged, plaintiff alleged: 1. That defendant had not left sufficient pillars; and, 2. That he having to pay by the ton made his wagons of a larger size. The court left him to his remedy in damages upon the first item, but as to the oversize of the wagons directed an issue at law. Short case. *Brandling* v. *Owen*, 2 Vern. 462.

63. Sale in fraud of creditors—Consideration—Knowledge. When a debtor has sold a mining claim in fraud of his creditors, as alleged, the sale cannot be set aside for inadequacy of price alone, if such inadequacy of price was not known to the purchaser, and he was otherwise a stranger to the vendor's fraudulent intentions. *Henry* v. *Everts*, 29 Cal. 610.

64. Composition metal sold as copper. A. sold to B. a quantity of metal as copper which A. knew to be not copper, but a composition. A. is liable in an action on the case for his deceit in concealing his knowledge from B. who purchased on the specific representations of A., and was thereby deceived. *Cornelius* v. *Molloy*, 7 Pa. St. 293.

B. By Vendor.

65. Latent defects. The failure to disclose latent defects, as the inability of the soap-stone out of a certain quarry, sold to resist fire (the material being used largely for fire-proof articles): *Held*, not a ground of rescission, nor a defense to a note for purchase-money, but tending to show, at most, a partial failure of consideration. *Page* v. *Parker*, 40 N. H. 47; S. C. 43 Id. 363.

66. Artificial dump—"Show of Oil." A contract of sale induced by representations that vendor in boring for oil had at

the depth of 108 feet struck a vein of asphaltum coal, seven to nine feet thick, and had also in such well a "show of oil," which representations were fortified by pieces of asphaltum coal brought from elsewhere, and scattered about the oil well, and by a bottle containing a "show of oil:" *Held*, unconscionable and voidable until knowledge of the fraud, and ratification after such knowledge. *Davis* v. *Henry*, 4 W. Va. 571.

67. False statement as to price paid, and as to former ownership. Defendant, director of a mining company, was party to a prospectus which falsely represented: 1. The price paid for the mine; 2. The person from whom the mine was purchased, the person referred to being well known as the owner of another and very valuable mine, and the impression being created that such valuable mine was the mine bought by the company: *Held*, that the action for the moneys paid for shares and on calls could be maintained on these facts. *Clarke* v. *Dickson*, 6 C. B. N. S. 453.

68. Puffing — Caveat emptor — False Statement of price. Where a party is "dealing with his own property," he has "a right to 'puff' it in the most extravagant terms; the other party being at liberty to use his own judgment about it." *Tuck* v. *Downing*, 76 Ill. 71.

A false representation by a vendor that his mine had cost $40,000, when he, before any such representation was acted on, exhibited his deed showing a consideration of only $9000, there being no relation of trust or confidence between the parties, will not be regarded as so important or material as to constitute a fraud in legal contemplation, or entitle the vendee to rescind the purchase, or defeat a note given for the consideration. Id.

69. Stock—Caveat emptor. The rule of *caveat emptor* applies as well to sales of stock as of chattels. The vendor is liable only for misrepresentation or fraud. *Renton* v. *Maryott*, 21 N. J. Ch. 123.

70. Fraudulent organization — Sham checks — Pretended consideration. A mining company purchased, through two of its directors, a piece of mineral land in Colorado, for the supposed consideration of $120,000, for which they gave checks which there were no funds to meet and which the vendor at once returned, receiving, in fact, 30,000 shares of stock, $5000 in money, and incumbrances paid to the amount of $6500. Sworn statements were then filed, under the Incorporation Acts, stating the capital stock to be $500,000, in shares of $5 each; and that $400,000 had been paid in; 20,000 shares were then reserved as a working capital, and of the 30,000 shares allotted to the vendor, 20,000 were issued to the director who had advanced the consideration paid to secure this advance. The balance of the 100,000 shares were distributed without any payment therefor, this director receiving several thousand shares in consideration of services; and he was appointed "a committee to regulate the sale of the stock," no stock to be sold till he was reimbursed. Shortly afterward the company — "The Stewart Gold Mining Co."—was enjoined from prosecuting any further business on account of non-payment of a tax of $300 to the commonwealth. Between two and three months after this, in reply to inquiries of a person about the company, this director said that he could "let him have some" of the stock, or "buy him some," and advised him to make such a purchase, remarking that it was one of the best properties in Colorado, and very valuable, and adding, "they are going right to work on it; it is all right; and not saying anything about the capital not having been paid in, nor mentioning the injunction; and said that "'he' would probably get it at a dollar and a half per share;" whereupon this person paid to him $3000 for a certificate of 2000 shares, transferred from a lot of stock which stood in the director's name as "agent." Subsequently, on discovering the existence of the injunction, the purchaser tendered back the stock without delay, and demanded repayment of his money, which was refused. In an action brought by him against the director to recover the money, as having been obtained by false and fraudulent representations: *Held*, that the jury were warranted in finding that the defendant's representations to the plaintiff were material, and were false and fraudulent; and that the defendant acted as principal, and not as agent for others in the sale; 2. Also, that the fact that some months before his purchase, the plaintiff was informed by the treasurer that 80,000 shares, at a dollar and a half per share, would pay for the property put into the company; and that at the time of purchasing he "did not suppose that the property actually cost the company $500,000, or was put in at the par value of the shares," was not sufficient to justify the setting aside of the verdict, on the ground that he had such knowledge of the condition of the company that he could not have been deceived by the defendant's representations. *Bradley* v. *Poole*, 98 Mass. 169.

71. Deed to non-existent Corporation — Misrepresentation as to price paid and locality of Oil Land. B., intending to organize an oil company, executed receipts for shares to various parties; afterward a deed for certain oil land was

executed to "The Middletown Oil Company," there being no such incorporation. The receipts read: "First installment, one share on oil land purchased by B., in St. Clair, on Beaver creek, Smith's ferry, $250." The shares were sold upon misrepresentation of the price paid for the land, and as to its location: *Held*, that the deed was void for want of parties; that B. was liable to each shareholder severally in *assumpsit* for the moneys received, and that the receipts gave the purchasers no such interest in the land as to require a tender of reconveyance before suit brought. *Burns* v. *McCabe*, 72 Pa. St. 309, and *McCabe* v. *Burns*, 66 Pa. St. 356.

72. **Infancy — Purchaser put on his guard—Stock sale.** Complainants owning certain real estate in Detroit of the value of $1600, sold the same to defendant, and received in exchange certain copper stock and defendant's note. Before delivering the stock defendant directed complainants to make inquiries as to its value, and not to rely upon his, defendant's, representations or estimate. The stock proved worthless. The vendor of the realty and the parties who received the stock, were an illiterate German woman only slightly acquainted with the English language, and her daughter aged sixteen years: *Held*, that in such case, where parties stood upon equal terms as to their opportunity of obtaining information concerning the subject-matter of sale, each must rely upon his own judgment and means of knowledge; but the conveyance as to the daughter was set aside upon the ground of infancy as of course. *Beeker* v. *Hastings*, 15 Mich. 47.

73. **Representations of size and width of crevice—Facts and opinions.** Defendant sold to plaintiff the one-forty-eighth of a tract of 556 acres called the Goochland mine in Virginia for $5625 upon his representations that 100 feet on the vein had been developed, which proved to be very rich, much richer than anything yet discovered (1833) in the United States; that the surface was rich in gold; that the formation was 12 feet wide, with veins scattered throughout, and that there was ore from the mine which would undoubtedly give several hundred pennyweights of gold to the hundred pounds, which representations were false: *Held*, that the representation as to the size and width of the crevice was beyond question the representation of a question of fact, and not of opinion, and the court intimate the same opinion of the other representations. *Smith* v. *Richards*, 13 Pet. 39. (Three judges dissenting.)

The mine being sold to parties at a distance, and solely upon the representations of the vendor, the seller is bound to make good the representation; and the representation being false, the sale ought to be rescinded, notwithstanding the fact that the vendor, in one of his letters, had written: "I, however, sell it to you for what it is, gold or snowballs," etc. Id.

74. **Purchase after examining mine—Matters of opinion.** Upon a bill to set aside a purchase of an interest in the "Aqua Frio" and other lodes in Utah, and the cancellation of a note given for the price, on the ground of fraudulent representations of the quality and prospects of the mine, it appeared that the vendor went East to make sales of shares, and on his representations procured capitalists (the complainant among others), to appoint a committee to go and investigate, which committee examined the mine, and reported that the representations were true; the defendant returned with the committee, and made extravagant declarations of the rich prospects, but made no warranty or guaranty: *Held*, that such declarations could only be regarded as the expression of an opinion about a matter of which the committee could judge for themselves, and formed no ground for setting aside the contract. *Tuck* v. *Downing*, 76 Ill. 71.

75. **Purchaser relying on Assays.** Weist, without inspection, bought of Hickcox and Coryell, the owners, certain silver mines upon their representation that the ore would yield from $133 to $145 per ton; the contract to be void if Weist should not approve the report of a selected assayer. After the report, Weist paid a large part of the purchase-money; on working the mines, Weist found the value of the ore only about one third of the assays as represented: *Held*, that Weist was liable for the remainder of the purchase-money, unless the misrepresentation was intentional. *Weist* v. *Grant*, 71 Pa. St. 95; B. & W. L. C. 384.

Weist having bargained for the report of an assayer before being bound by the contract, and having acted on it, and there being no collusion or fraud, he was estopped from alleging misrepresentation in the inception of the contract. Id.

76. **Careless purchaser — Purchase after examination — Opinions — Knowledge of Agent.** Alleged representations of defendant that C. & S. had each paid $5000 for a share, such persons being near neighbors of complainant, and the verification or contradiction of the representations easy and practicable: *Held*, not such representations as could have influenced, the complainant being "a man of business and experience." *Tuck* v. *Downing*, 76 Ill. 71.

Representations which are necessarily expressions of mere matter of opinion as to the future prospects of a mine, which is

equally open to both parties for examination; such representations being accompanied by an actual examination of the mine, and tests of the ore, will not set aside a sale at the instance of the purchaser when the mine has proved, or shows that it may prove unprofitable. Id.

If a purchaser choosing to judge for himself upon the prospects of a mine is deceived in the result of its development, he cannot then be heard to say that he was deceived by the vendor's misrepresentations. The rule of *caveat emptor* applies. Id.

In such case the knowledge of his agent is the purchaser's own knowledge.* Id.

77. Vendor retaining an Interest—No fiduciary relation. Where a party owning a mine or an interest in a mine, sold his interest in certain shares to purchasers retaining the shares unsold, he cannot be considered as a partner or as standing in a relation of trust and confidence to those persons whom he induces to purchase such shares. *Tuck* v. *Downing*, 76 Ill. 71.

78. Concealing Incumbrance — Equitable relief. Where the defendant Jones had fraudulently represented to Bolles, the complainant, that the Mineral Point Mining Co. was seised in fee of a certain tract of mining land; that he had sold said land to the company for $30,000; that the land was of great value for mining purposes, and that he, Jones, had no interest in it, showing a warranty deed to the company, and being joined in his representations by agents of his company, by which representations he induced Bolles, the complainant, to invest for himself and others the sum of $25,000 in stock of said company, when in fact, at the time of such representations Jones held a secret written agreement from the company, securing a large balance of purchase-money and mineral rents to him, the said Jones, which agreement he afterward threatened to enforce by action: *Held*, that the agreement between Jones and the company was void, and Jones was further directed to execute a release to the company, and was enjoined from bringing action against the company upon the said agreement. *Jones* v. *Bolles*, 9 Wall. 364.

Held, further, that upon such showing equity has jurisdiction on account of inadequacy of relief at law. Id.

Held, further, that the company was properly made a party defendant. Id.

* In this case, in resuming the evidence, the testimony of experienced miners is contrasted with that of inexperienced agents, and the implication of the opinion is that the mine was or might be good, but that the purchaser was endeavoring to shirk the well understood and inevitable risk attending the opening of a mine.

C. By Vendee.

79. Suppressio veri—Supposed Case. A., discovering a mine in the land of B. may bargain with B. for the land, without disclosing his discovery. (Per L. C. Arguendo.) *Fox* v. *Mackreth*, 2 Br. Ch. Ca. 420.

80. Purchaser concealing mineral value. A person who knows that there is a mine on the land of another, of which the latter is ignorant, may nevertheless buy it without disclosing his knowledge, and the ignorance of the vendor does not render the transaction fraudulent on the part of the purchaser. *Harris* v. *Tyson*, 24 Pa. St. 347; B. & W. L. C. 351.

The mere fact, therefore, that the vendee of a right to dig up all minerals and mineral substances of value and remove the same, was aware of the existence and value of a deposit of sand chrome on the land, of the value of which the vendor was ignorant, though he knew of its existence, is no ground for impugning the validity of the conveyance. Id.

If the vendee had during the negotiation made willful misstatements of material facts, and thus mislead the vendor, and thus induced him to sell at a lower price than he otherwise would have demanded, the contract would have been a cheat and the conveyance void. Id.

81. Transactions between speculators—Concealment of discovery. Williams, the plaintiff, who was a speculator and dealer in iron lands, had purchased from the United States a certain tract of land, as iron land, having himself discovered a deposit of iron upon the tract. The land had also some value on account of its timber. He subsequently sold the tract to Spurr and others, the defendants, at a price largely in excess of its value for timber, but much less than its real value for iron. Williams then filed his bill to set aside the sale on the ground that the defendants, while representing that they desired the land on account of its timber, had in fact secretly prospected the ground and discovered an exceedingly valuable deposit of iron ore, which fact they concealed from the complainant although both parties had mentioned the land as known to contain iron to some extent; and in fact Williams in the negotiations pending sale, had greatly enhanced its price on account of the richness of the iron deposits: *Held*, that in the absence of any confidential relation between vendor and vendee, no case whatever was presented to justify the setting aside of the conveyance. The price paid was $8000; the real value of the tract was estimated from $60,000 to $200,000. *Williams* v. *Spurr*, 24 Mich. 335.

82. Concealing Mineral Discovery from Vendor by artifice. A purchaser who had discovered salt water, having prevented the agent of the vendor from giving information to his principal, and concealed his discovery by artifice, is guilty of fraud, and the contract should be set aside. *Bowman* v. *Bates*, 2 Bibb (Ky.), 50.

If facts (as to a saline) are truly stated, false inferences or estimates drawn from them are not grounds for annulling contracts; but if the facts from which estimates are to be drawn are concealed, the case comes within the rule against *suppressio veri*. Id.

83. Land "only fit for sheep pasture." One Palmer having discovered a valuable bed of iron ore on a large tract of land belonging to Livingston, wrote to the owner, desiring to purchase, and representing that the land was of no value except for a sheep pasture. Livingston replied by letter to his agent, authorizing him to contract with Palmer for a sale of land. Purporting to act under this authority, the agent conveyed by deed to one Murray: *Held*, that the deed was void by reason of the fraud, as well as the want of authority in the agent. *Livingston* v. *Peru Iron Co.*, 9 Wend. 513; S. C. 2 Paige Ch. 390.

84. Fraudulent purchase — Collusion — Stoppage in Transit. Coal purchased by a debtor upon fraudulent collusion with his creditor for the purpose of having the same seized on execution by the creditor, may be stopped *in transitu* by the vendor; and if the vendor have this right he may recover against a sheriff seizing it *in transitu*. *Pottinger* v. *Heckscher*, 2 Grant Ca. (Pa.) 309.

D. Practice, Parties, Evidence.

85. Form of action. Money paid (for oil stock) upon fraudulent representations, may be recovered either in case or *assumpsit*. *Smith* v. *Bellows*, 77 Pa. St. 441.

86. Plea—Defective description. Defendant pleaded false representations as to mineral character of lands as showing want of consideration. Plea held defective in not giving specific description of the lands, State and county only being mentioned. *Wann* v. *McGoon*, 1 Scam. 74.

87. Pleading—Payments induced by fraudulent representations — Paying off claims. B., having agreed with A. to buy a tract of mining land, belonging to A. but occupied by squatters, and to pay A. so much, not exceeding a certain amount, as should be needful to settle the squatters' claims, and having paid sums to A. on account of this amount, and incurred other expenses relating to the land, sued A. in tort for deceit, and alleged that A. obtained the agreement from him by false statements of the value of and minerals in the tract; that said sums were paid under and in consequence of the agreement thus obtained, and because A. assured him that they were needed and to be used to settle the squatters' claims, when in fact they were neither so needed nor used, but misappropriated by A. to his own use; and that in consequence of said misrepresentations the other expenses were incurred; and he joined a count in contract, alleged to be for the same cause of action, which set forth the agreement and his payment of said sums to A. under it; alleged that he paid them in consequence of the false representations and statements set forth in the first count, and sought to recover them as money had and received by the defendant to the plaintiff's use. At the trial B. gave notice that he did not seek to recover anything from A. by reason of alleged statements of A. touching the value or minerals of the land: *Held*, that, after striking out all such allegations, either count still set forth a good cause of action. *Pease* v. *Brown*; *Brown* v. *Pease*, 104 Mass. 291.

88. Tender — Worthless Title. Consideration money paid for a wholly worthless tax title (the other conditions of a recovery existing) may be recovered without any tender of reconveyance of the title purchased. *Babcock* v. *Case*, 61 Pa. St. 427.

89. Oil Lands—Practice, New York. In action to recover the purchase-money for oil lands upon the ground of fraudulent representations: *Held*, that "under the Code" plaintiff is not confined to the fraudulent statement specifically charged. *Oliver* v. *Bennett*, 65 N. Y. 559.

90. Soapstone quarry—Broker. For action on the case based on fraudulent representations as to a soapstone quarry averring false representation as to quality, market price, profits, available uses, etc., in connection with the use of a third party as part purchaser, who was in fact receiving his share as mere brokerage. *Page* v. *Parker*, 40 N. H. 47; 43 Id. 363.

91. Acts must be stated. Complainants alleged that they conveyed a certain quartz ledge by deed absolute, but that in fact such deed was made in trust to the grantee to pay certain indebtedness, erect new machinery to work the lode, and finally to reconvey a half interest; and that defendants fraudulently suppressed the conditions of the sale, etc.: *Held*, that the complaint must state the acts of fraud, and that fraud could not be charged in general

terms. *Kent* v. *Snyder*, 30 Cal. 666; *S. P. Arnold* v. *Baker*, 6 Nebraska, 134.

92. Sale of Mine—Deed and Sight draft—Injunction—Affirmative defense. Where a complaint sought for a rescission of land, and an injunction, etc., upon the ground that the defendants had agreed to pay cash upon receiving the deed, and to that end gave a sight draft, and that it had not been paid, and the drawers were insolvent, and the indorser admitted these allegations, and sought to avoid them by other matter: *Held*, that as there was an equity confessed, the injunction should be continued. *Carter* v. *Hoke*, 64 N. C. 348.

And a plea by certain of the defendants that they were purchasers for a valuable consideration without notice is to be treated in the same way. The improbability of the truth of such plea on the facts of the case considered. Id.

93. Parties dividing consideration—Practice. The vendor of mineral lands agreed with C. D. and E. to share the profits to arise on his sale to an iron company, and did pay them a part of the proceeds. Upon bill to set aside the sale for misrepresentation as to acreage: *Held*, that C. D. and E. were proper parties, but that they could not be decreed to refund. *Aberaman Iron Works* v. *Wickens*, L. R. 4 Ch. 101, on appeal from L. R. 5 Eq. 485.

94. Rescission. Where the purchaser is induced by the fraudulent representations of the seller to make a purchase of mining stock, he may, within a reasonable time, by restoring the seller to the situation he was in before the sale, rescind the contract and resist the payment of the note given for the property. *Gifford* v. *Carvill*, 29 Cal. 589.

95. Judicial Sale—Parties. The owner of nearly half the shares in a valuable mine in Cornwall becoming bankrupt, his assignee and the other shareholders, without the consent of the creditors, procured suit to be brought against the concern for a small debt, and a sale under a decree of the vice-warden of the Stannaries, at which sale the mine was bought in by the assignee at a price below its value, a new organization formed, and the mine worked as before. The facts being discovered, the assignee was removed, and his successor brought suit praying a transfer of certain shares, and an account of the profits: *Held*, that although twenty years had elapsed, there being no proof of acquiescence, the shares could be still followed as long as traced into hands of parties having knowledge of the original fraud; 2. That each shareholder could be separately sued for shares, or parts of shares, by him held. *Turner* v. *Hill*, 11 Sim. 1.

96. Inadequate price—Stock. The agreement to procure for a contracting party shares of reserved working capital at an inadequate price is not a fraud as between the contracting parties. *Graves* v. *Waite*, 59 N. Y. 156.

97. Fraud of organizers—Subsequent shareholders. A case may happen in which the governing body of a joint stock company (or the partners of a firm), may so unite with a stranger in practicing fraud upon the company for whom they act as to entitle the company to repudiate such acts, and to be relieved against them. But where the old shareholders have made misrepresentations to parties to induce them to become shareholders, the company, as such, has no relief. *Vigers* v. *Pike*, 8 Cl. & Fin. 562; affirming *Pike* v. *Vigers*, 2 Dru. & W. 1.

98. Inadequate consideration as evidence of collusion. Where a coal merchant replenishes his yard with coal purchased on credit, and immediately transfers both coal and yard to his broker at a grossly inadequate price, and absconds, it would be such evidence of concert and collusion as to make the acts and declarations of the one evidence against the other. *Kelsey* v. *Murphy*, 26 Pa. St. 78.

99. Director issuing false prospectus. An action will lie against the director of a mining company for false and fraudulent misrepresentations contained in a prospectus, though without personal communication between the parties. *Clarke* v. *Dickson*, 6 C. B. N. S. 453.

100. Parties—Consideration—Broker—Collusion. Joint action in case for a general verdict in damages sustained against A., the owner of a soapstone quarry. B., a party who was to receive a deed for one-third in consideration of his effecting a sale of the balance, and C., a brother of A., who was to receive $2000 (one-fifth of the purchase-money), upon consummation of the sale; the sale being fraudulent, and assisted by the fraudulent representations and concealments of all the three parties. *Page* v. *Parker*, 40 N. H. 47; 43 Id. 363.

101. Agent of Corporation—Complaint by stockholder. If the agents of an oil company have purchased oil lands at one price and transferred them to the company for a greater price, such fraud gives no cause of action against them to a subsequent purchaser of stock in the company; only the company can complain. *McAleer* v. *McMurray*, 58 Pa. St. 126.

102. Burden of proof. In suits to set aside contracts on the ground of misrepresentation, the burden lies on the plaintiff

of proving that the representations were false, and that he acted on the faith of them. *Jennings* v. *Broughton*, 17 Beav. 234; affirmed 5 De G. M. & G. 126.

103. Declarations of Conspirators. The acts and declarations of one of several parties, acting in concert for their joint benefit in an illegal transaction (fraudulent sale of interest in oil lands), are the acts and declarations of all. *Burns* v. *McCabe*, 72 Pa. St. 309; *McCabe* v. *Burns*, 66 Pa. St. 356.

104. Collusion to Forfeit Lease of way-leave after severance—Equity—Subrogation. Lands were subject to a leave of a way-leave (the privilege of carrying coal from certain collieries across them), at a certain rent, for 63 years, which the lessee had the power of determining. But the land was, during the term, sold separately, subject to the lease of the way-leave, and the rent of the way-leave was sold to another. After some time the purchaser of the land entered into an arrangement with the lessee to put an end to the lease, and entered into a different one, in order to defeat the right of the purchaser of the rent: *Held*, that this was contrary to equity, and the right of the purchaser of the rent was made good out of the new contract. *Wood* v. *Londonderry*, 10 Beav. 465, 16 L. J. Ch. 460.

GIFT.

1. Mining Claims subject of—Bill of Sale. The owner of a mining claim may give away the same by a written bill of sale, and such bill of sale is not to be rejected as evidence because it was a gift. *Meyers* v. *Farquharson*, 46 Cal. 190.

2. Stock. Under the constitution and laws of California, the wife has the capacity to take and hold in her own name and right, by gift from her husband, either real or personal property (mining stock). *Dow* v. *Gould & Curry S. M. Co.*, 31 Cal. 630.

GOLD DUST.

1. Not Cash. Gold dust is not cash, and where a contract called for cash, but the vender consented to and did receive gold dust in lieu thereof at $15.50, the vendor cannot in any action recover the difference between its alleged value, $16 per ounce, and the rate at which he had disposed of it in payment. *Gunter* v. *Sanchez*, 1 Cal. 45.

2. Is Merchandise. Gold dust is constantly fluctuating in value; is an article of traffic like merchandise, and a payment of it is a payment for just so much as the parties agree, and no more. Id.

3. Treated as Coin. Where in an action for money had and received it appeared that defendant received the sums demanded in gold coin and gold dust, all of which he entered in his account book as "cash," a verdict for plaintiff for said sum "in gold coin" will not be set aside as contrary to the evidence. *Wendt* v. *Ross*, 33 Cal. 650.

4. Treated as Money—Interest. Clean gold taken from washings may be treated as money, and interest allowed on it where wrongfully kept by a co-tenant, as upon so much money received. *Huff* v. *McDonald*, 22 Ga. 131.

5. Contract for, or value, not promises to pay Money—Stamps. A writing stating that a certain amount of gold dust is due, without specifying its value, and a mortgage executed to secure the delivery of the same, are not "instruments for the payment of money," under the act of Congress requiring stamps to be affixed to them. *Griffith* v. *Hershfield*, 1 Mont. 66.

6. Profits—Returns. Gold dust is not *profits*, it is only *returns*, until expenses have been paid. *Fletcher* v. *Hawkins*, 2 R. I. 330.

7. Coinage after Theft. The possession of gold coin received at the mint in exchange for gold dust stolen from the mails, is not a possession of the gold dust. *United States* v. *Montgomery*, 3 Sawyer, 544.

8. Shipped for Coinage—Joint property—Garnishment. Plaintiff delivered to defendants gold dust, to be by them forwarded to San Francisco to be there coined and returned. The dust belonged to five persons, all partners in mining, of whom plaintiff and C. were two. While the dust was in the hands of defendants, C. sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants, after this, received coin made of the dust, and a creditor of C. attached the coin by garnishing defendants. Defendants had no notice of the sale to plaintiff until the day after the attachment, when plaintiff demanded C.'s share of the coin: *Held*, that plaintiff was entitled to the coin; that the dust in defendants' hands was in the constructive possession of all the five owners, C. having no exclusive interest in it until it was converted into coin and divided among the owners; that C.'s right in the coin was a chose in action which he could assign by order in favor of a purchaser, and after such order neither C. nor his creditors could claim any right to the money, and that the statute of frauds has no reference to a case like this. *Walling* v. *Miller*, 15 Cal. 38.

9. Donatio causa mortis. Delivery of gold dust in a bag to a person with the ex-

pression by the party in his last sickness on shipboard, that he wished his effects to go to a party named: *Held*, a *donatio causa mortis*, and the gold dust having been converted into money by the administrator, he was held liable in assumpsit. *Michener* v. *Dale*, 23 Pa. St. 60.

10. Deposit with innkeeper. Where several days after his arrival a guest at an inn brought to the inn and deposited with the barkeeper a bag containing $5,500 in gold dust: *Held*, to be a question of fact for the jury, whether such gold dust was brought to the inn by plaintiff in his character of guest, or whether it was deposited in the nature of an ordinary bailment. *Mateer* v. *Brown*, 1 Cal. 231 and 221.

Where between 300 and 400 ounces of gold dust were brought by certain guests to an inn, part at the time of arrival and part ten days after, which, in compliance with printed notice, were deposited with the innkeeper as the property of his guests, and were by him placed in the safe of the hotel, from which safe the gold dust was, as it appeared, stolen by an act of burglary: *Held*, that the landlord was liable as treasurer. *Pinkerton* v. *Woodward*, 33 Cal. 600.

11. Gratuitous Carriage. A merchant of Sacramento was in the habit of having gold dust carried gratuitously on the steamer New World from that place to San Francisco, the owners of the steamer refusing to carry it for hire, or to become liable as common carriers in case of loss: *Held*, where a quantity of gold dust belonging to plaintiffs was stolen from the steamer without any negligence on the part of the master or officers, that the plaintiffs could not recover its value. *Fay* v. *Steamer New World*, 1 Cal. 348.

GRANT.

1. Of the United States. There being no reservation in a grant, the grantee takes all that to which the government was entitled. *Doran* v. *Cent. Pac. R. Co.*, 24 Cal. 245.

2. Implied Power to get minerals. Under a grant of minerals, a power to get them is a necessary incident. *Rowbotham* v. *Wilson*, 8 H. L. Ca. 348; S. C. 3 E. & E. 752, affirming 6 El. & Bl. 593, and 8 Id. 123.

3. Of Iron Ore limited to a certain Furnace, etc. Clement and Edward Grubb owned in common the "Mount Hope estate," which consisted of several tracts of land, and one-sixth of "three certain mine-hills, known as Cornwall ore banks." Clement conveyed to Alfred his half of the "Mount Hope estate," designating the particular tracts, together with the right, etc., "so far as the said Alfred's right under this conveyance in said Mount Hope furnace is concerned, of the said Clement to raise, etc., for the use of said furnace, iron ore out of three certain mine-hills, etc., known as the Cornwall ore banks, but for so long and such time only as such furnace can be carried on, etc., by charcoal:" *Held*, that this conveyance granted to Alfred a limited privilege to take ore, and did not convey the corporeal estate in the mine hills that remained in Clement. *Grubb* v. *Grubb*, 74 Pa. St. 25.

4. Of Profits of Land. A grant of the profits of land, *e. g.*, "net revenue and income, and all the coal mined and to be mined from their coal estates," in certain counties, is a grant of the land itself. *Pennsylvania Co.* v. *Dovey*, 64 Pa. St. 267.

5. Construction—Mines reserved affecting waters granted. By lease dated 1827, D. demised to W. a dwelling-house and fifteen closes of land, and granted all streams of water that might be found in four of those closes called the Clough, the Moorin Clough, the Brow, and the Marleds, excepting out of the demise all timber and other trees, etc., mines and minerals etc., stone, gravel, sand, and clay, etc., and all streams of water except those above granted, then being or thereafter to be found in or upon the premises demised, with power for D., his heirs and assigns, and his and their servants and workmen, from time to time, to enter upon the premises, and to crop, fall, search for, and make marketable all or any of the before-mentioned articles; to make any clay into bricks or tile on the premises, etc., and to divert or alter the course of any river, brook, spring, or water: *Held*, that the wells and all water in the Clough, the Moorin Clough, the Brow, and the Marleds passed by the grant in question, to W.; and that neither D. nor his lessees could work mines so as to cut off the springs in the closes in question. *Whitehead* v. *Parks*, 2 H. & N. 870.

6. Construction—Interest in Land—Trespass. By oral agreement, the owner of certain land gave plaintiffs the right to enter thereon for mining purposes, and the exclusive right to mine in or upon the same; and to take away ores therefrom, for a certain rent in kind: *Held*, that plaintiffs thereby acquired an interest in the land, and might maintain an action of trespass against third persons for mining for and taking ore from said land. *Ganter* v. *Atkinson*, 35 Wisc. 48.

7. Exclusive—"May be found." The phrase "that may be found by any person or persons, or contained in any part" of the

premises, in a grant of minerals, shows the grant to be exclusive of the grantor and of all other persons. *Massot* v. *Moses*, 3 S. Car. 168.

8. Privilege of common use—Building stone. The proprietors of the township of Worcester, in 1733, voted "that 100 acres of the poorest land on Mill Stone Hill be left common for the use of the town for building stones." The land intended was a vast quarry: *Held*, that the resolution did not amount to the grant of the land itself, nor did it establish a right of common, and a subsequent grant of the premises to a purchaser was valid. *Worcester* v. *Green*, 2 Pick. (Mass.) 425.

GUARDIAN AND WARD.

Investment by Guardian. Where a guardian had invested a portion of his ward's funds in the Lehigh Navigation Co., chartered for purposes of mining and carrying coal, and at the time of the investment solvent and paying regular dividends: *Held*, such an investment as did not charge the guardian with liability upon subsequent depreciation of the bonds of the company. *Twaddell's Appeal*, 5 Pa. St. 15.

HIGHWAYS.

1. Ownership of minerals. The proprietor of land over which a turnpike road passes retains his exclusive right to all mines, springs, and quarries. *Kelly* v. *Donahoe*, 2 Metc. Ky. 482.

2. Streets—Fee-simple—Coal. Where the fee of streets is vested in the trustees of a town, by statute and the assent of the original proprietor, they own a bed of coal underlying the streets. *Hawesville* v. *Hawes*, 6 Bush (Ky.), 233.

3. Coal under streets — Statutory dedication. A dedication of streets and alleys to a town by the filing of a town plat, which proceeding by statute vests the fee-simple of streets and alleys in the municipality carries with it the minerals including an underlying coal bed; and the town may recover against the original proprietor for coal mined under such streets and alleys after the dedication, and it seems it might work the mines, and make the coal available by lease or otherwise. *Des Moines* v. *Hall*, 24 Iowa, 235. (Cole, J., dissented.)

But where a similar dedication was made upon lands known to contain minerals, of the streets and alleys containing a clause of limitation "for street purposes and those only," it was *held*, that the minerals were reserved to the owner. *Dubuque* v. *Benson*, 23 Iowa, 248.

4. Measure of Damages — Trover — Coal. Coal having been severed from the freehold, in constructing a lateral railway, it became the property of the owner of the freehold, and trover lay against the owner of the railroad for selling it. *Lyon* v. *Gonnly*, 53 Pa. St. 261.

The general principle is that damages in trover are to be assessed as of the time of conversion; in this case it was at the sale of the coal. The severance of the coal was rightful because necessary. The wrong consisted in the sale. Id.

5. No Prescription. When a chartered turnpike company runs its road over ground used as a highway for more than twenty years, that fact does not give them a right to quarry stone from the road. *Kelly* v. *Donahoe*, 2 Met. (Ky.) 482.

6. Use of Stone. A turnpike company having the right under its charter to make such excavations, fills, etc., as its grade may render necessary, may in the construction of the road take stone from one part of its road-bed to another, and from one man's land to another man's land where crossed by its road, but they have no right to quarry stone from their road-bed for repairs. *Kelly* v. *Donahoe*, 2 Met. (Ky.) 482.

7. Right of Way — Stone. A gift of the right of way (the right to open a public street) is not a gift of the rock and other materials within the boundaries of the way. *Smith* v. *City of Rome*, 19 Ga. 89.

8. Grading — Use of Stone. Where a quarry, or bluff, of stone existed within the lines of a way given for the purpose of opening a street: *Held*, that the city might lawfully grade down the bluff, but had no right to the rock broken in so doing for the purpose of macadamizing the street. Such rock belongs to the owner of the fee. Id.

8. Right of Highway Company to Stone. An incorporated turnpike company have the right to dig stone, clay and gravel within the limits of the road for its improvement and repair, and are not thereby subject to an action by the owner of the land. *Stokely* v. *Robbstown Br. Co.*, 5 Watts, 546.

10. Compensation for Stone—English Statute. Surveyors having broken a new way over plaintiff's land, in order to carry refuse quarry stone for repairs, as allowed by statute, in a case where an old, but circuitous road existed before, and having, after the damage done, and after an action brought against them, paid money into court by way of amends: *Held*, under 13 Geo. 3, c. 78, s. 27, that the sufficiency of such amends could not be questioned at *nisi prius*, the statute having referred the

quantum of amends, if not agreed upon, to the decision of justices of the peace. *Boyfield* v. *Porter*, 13 East. 200.

11. Custom to take Stone—Prescription—Sea-shore. A surveyor of highways cannot justify a trespass under a prescriptive right, or a custom, to take stones from the waste, whether adjoining the sea-shore between high and low water mark, or otherwise, for the purpose of repairing the highways of the parish. *Padwick* v. *Knight*, 7 Ex. 854.

12. Over mining claim under U. S. Act of 1866. A highway cannot, under the mining act of Congress of 1866, be laid out over mining claims on the public domain without making compensation to the miner. *Robertson* v. *Smith*, 1 Mont. 410.

13. Taxation. The proviso in the twenty-seventh section of the 5 & 6 Will. IV, C. 50, which extends the liability to highway rates to "such woods, mines, etc., as have heretofore been usually rated to the highways," is not limited to the identical mines before actually rated, but applies to mines of the same class and description as those usually rated in the parish before the act passed, though opened and worked for the first time since the passing of the act. *Reg* v. *Saunders*, 24 L. J. C. C. 57.

HOMESTEAD.

License—Husband and Wife. A license to remove mineral from land occupied as a homestead, when its enjoyment for the uses of a homestead is not thereby impaired, may be given by the husband without the assent of the wife. *Harkness* v. *Burton*, 39 Iowa, 101.

HUSBAND AND WIFE.

1. Mine operated by Married Woman. A verdict in an interpleader for machinery used at a colliery being found for a married woman, the jury finding specially that she carried on the business for her own benefit, and not for her husband's, the court refused to set aside the verdict. *Bird* v. *Crabb*, 7 H. & N. 995; 30 L. J. Ex. 318.

2. Pretended transfer to wife. Although (in Oregon) a man may convey land to his wife, the sale of a mining claim by husband to wife by a deed which is not recorded, the claim being still worked by the husband, must be presumed fraudulent as against creditors, although there is no direct proof of fraud. *Elfelt* v. *Hinch*, 5 Or. 255.

The right of a married woman to the proceeds of a mining claim is lost by her allowing her husband to use and dispose of the claim. Id.

3. Conveyance to Married Woman—Ignorance of Trust. One Goraline, holding the title to certain gold claims in trust for the owners (defendant and others), at their suggestion executed a conveyance to plaintiff, Belinda R. Bonesteel, without consideration from her and without her knowledge, and the deed was never delivered to her. She, afterward, supposing the property to be that of her husband, bought in her name, joined with her husband in conveying the same to a stranger, and a large part of the proceeds were received by her. She had no knowledge of defendant's interest therein: *Held*, that she could not be considered as a trustee for defendant. *Bonesteel* v. *Bonesteel*, 30 Wisc. 516.

And, on the other hand, the defendant having received from the husband of plaintiff a part of said proceeds as an advance upon his, defendant's, share therein, gave his note for the amount received, payable to plaintiff. The court held that such note was without consideration and void. Id.

4. Assent—Estoppel—Homestead. A wife, with full knowledge of the facts, cannot stand by and see the expenditure of money upon mining ground without objection, and afterward be heard to assert that a license to work the same, is invalid by reason of its being upon the homestead land, and her assent necessary to give any rights in such land. *Harkness* v. *Burton*, 39 Iowa, 101.

5. Power of Attorney—Stock. A sale of mining stock, the separate property of a married woman, under power of attorney, in which her husband did not join, is void; and if made prior to the Act of April 3, 1863, was not validated by that act. *Dow* v. *Gould & Curry S. M. Co.*, 31 Cal. 630.

6. Mining Stock—Divorce. A share of mining stock, held by a husband prior to the Act of March 7, 1865, does not rest upon divorce in the wife without order of court to that effect. The constitutionality of the act not discussed. *Darrenberger* v. *Haupt*, 10 Nev. 43.

7. Lease not signed by wife. A lease of mines in lands of the husband, but made out in the names of both husband and wife, (the wife's signature intended to cover dower), and signed, in fact, by the husband, but which his wife, on request, refuses to sign, is not binding upon the husband nor the lessee. It is not an executed instrument. *Tatham* v. *Lewis*, 65 Pa. St. 65.

8. Decree—Right of Husband to Oil wells. A decree made against the husband, owning only marital rights in the land of

the wife, is not binding against the wife or her lessee. *Cady* v. *Gale*, 6 W. Va. 505.

As to whether the husband or wife, the wife being the owner of the legal title, and the husband having his marital rights therein, is entitled to the proceeds of oil land during the life of the wife. See *Cady* v. *Gale*, 5 W. Va. 505; S. C. Id. 547; *Gale* v. *Oil Run Co.*, 6 Id. 200 and 525.

INCORPOREAL HEREDITAMENT.

1. Right to mine. The right to raise ore is an incorporeal hereditament granted for a valuable consideration, and is not a license revocable at the will of the parties. *Grubb* v. *Guilford*, 4 Watts. 223.

2. Deed — Adverse possession. The right to enter and dig for ores is an incorporeal hereditament, and can only be acquired by deed, or by an adverse enjoyment for a sufficient length of time to furnish a presumption of a grant; but in all cases, to raise a presumption of a grant, the possession must be adverse. *Desloge* v. *Pearce*, 38 Mo. 588.

INDIANS.

1. Right to mine. Indians have a right to mine gold found on their reservations. *Georgia* v. *Canatoo*, cited 17 Cal. 209, and note to 3 Kent, 378.

2. Spanish Grant. By the laws of Spain, an Indian could acquire as full title to a mine as any other Spanish subject. *Chouteau* v. *Molony*, 16 How. 220.

INFANT.

1. Account against Trustee. Account decreed against a trustee to carry on collieries for infants, who had engaged the trust property in an adventure, and afterward renounced it as an investment under the trust, and declared it to be on his own account, though no part of the trust money actually laid out. *Wilkinson* v. *Stafford*, 1 Ves. Jr. 32.

Trustee in such case is not accountable for a losing adventure, if without fraud or negligence on his part, but he cannot renounce a profitable adventure against the interest of the *cestui que trust*. Id.

2. Prospecting contract with Infant upheld—Outfit. An infant, in consideration of an outfit to enable him to go to California, agreed, with the assent of his father, to give the party furnishing the outfit one-third of all the avails of his labor during his absence, which he afterward paid over accordingly in good faith. The amount so paid was forty-two ounces of gold dust. Afterward he sued the plaintiff for the proceeds of the sale of the gold dust less the value of the outfit furnished. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, it was held that he could not rescind the agreement and recover. *Breed* v. *Judd*, 1 Gray, 455.

3. Mines let by Widow. Where the widow had, under the directions of a court of chancery, executed a lease as guardian of the infant heir of unopened mines underlying the estate: *Held*, that the lease was intended for the benefit of the infant alone, and that the widow was not entitled in respect of dower to any benefit from the rents and profits of the mines and minerals opened and raised since the decease of her intestate: *aliter* as to the surface used in getting the minerals. *Dickin* v. *Hamer*, 1 Drew & Sm. 284.

INJUNCTION.

A. The Right.
B. Practice.

A. The Right.

1. Mining Cases distinguished from common cases for the writ. Injunctions to prevent persons from working a gold mine, to which the plaintiff claims title, are not put upon the same footing with injunctions to stay executions on judgments at law, where the legal rights of the parties have been adjudicated, *McBrayer* v. *Hardin*, 7 Ired. Eq. (N. C.) 1.

In cases of the former class, where it appears that if the defendants' allegations be true, the injunction can do them no harm, but if the plaintiffs' allegations be true, he may sustain an irreparable injury, the injunction should be continued to the hearing, that the facts may be investigated. Id.

2. Jurisdiction to protect mines. The general rule is that a court of equity takes no jurisdiction in cases of mere trespass, not even by granting a temporary injunction. There is an established exception, however, in the cases of mines, timber and the like, in which cases injunctions will be granted to restrain the continued commission of acts by which the substance of the estate is destroyed or carried off. But when the plaintiff, seeking an injunction in such cases, claims to be the legal owner of the property, he must show that he has established his legal title by the judgment of a court of law; or that he is prosecuting his suit at law, and that the injury which he will sustain by the acts of the defendant before he can obtain judgment, will be irrep-

arable; and in the latter case, the court, in continuing the injunction, must make such order as will insure the speedy determination of the suit at law. *Irwin* v. *Davidson*, 3 Ired. Eq. (N. Car.) 311.

3. Jurisdiction — Waste and Trespass. The jurisdiction of chancery to restrain by injunction and to compel an account, in cases of the destruction or taking away of the substance of the estate, is no longer restricted to waste, but is extended to trespass. *Thomas* v. *Oakley*, 18 Ves. Jr. 184.

4. Jurisdiction — Adverse Title. The jurisdiction of a court of equity to restrain the destruction of the estate by mining, where a defendant is in adverse possession under claim of title, considered. *Haigh* v. *Jaggar*, 33 Eng. Ch. R. 231; 2 Coll. 231; S. C. on law side 16 M. & W. 524.

5. Jurisdiction — Title — Trespass. The jurisdiction of a court of equity to restrain trespass in the case of the working of mines is fully established, whether the title be brought in issue or not; but where the title is denied, the court will look more closely into the character of the trespass. *Moore* v. *Ferrell*, 1 Ga. 7.

6. Mining Trespass. An injunction will be granted to restrain a trespass in order to quiet the possession, or when there is danger of irreparable mischief, or where the value of the inheritance is put in jeopardy by a continuance of the mischief, but in ordinary trespasses, or where the remedy at law is adequate, equity refuses to interfere. *Bracken* v. *Preston*, 1 Pinney, (Wisc.) 584. (1845.)

Trespass in digging or mining on the land of another is within the cognizance of a court of equity when committed by a mere wrong-doer, or where a party exceeds a limited authority. Id.

7. Reasons supporting writ against continuous lode mining. A writ of injunction *pendente lite* will lie to restrain trespass in removing auriferous quartz from a mine where the injury threatens to be continuous and irreparable. *Merced M. Co.* v. *Fremont*, 7 Cal. 317.

It comports more with justice to both parties to restrain the trespass than to leave the plaintiff to his remedy at law. Id.

The impossibility of any accurate estimate of the damage done, in case of extraction of valuable ores, is to be considered as a reason for the issuance of the preventive remedy, by injunction. Id.

8. Protection of Mines of precious metals. The reasons for giving to courts of equity jurisdiction to restrain trespass apply nowhere with such great force as where mines of the precious metals abound. The impossibility of proving at law the amount of gold taken, stated. *Moore* v. *Ferrell*, 1 Ga. 7.

9. Gold Mine. The working of a gold mine is the taking away the substance of the State. *United States* v. *Parrott*, 1 McAll, C. C. 271.

10. Gold Mining as a Trespass. The removal of gold from a mine is emphatically a destruction of the entire substance of the estate, and comes within that class of trespasses in which injunctions are now universally granted. *Merced M. Co.* v. *Fremont*, 7 Cal. 317.

11. Emma Mine Case. Bill for injunction: Complainant averred the discovery, and the location of discovery claim, and the location of claim No. 1 on the St. Louis lode by one Brain in 1865, and of No. 2 by one Nichols, compliance with the mining laws, working, etc, viz.:

That complainant in 1868 was working claim No. 1, expended large sums, and disclosed a rich vein; that during that time he let a contract to Woodman on the lode (in what capacity does not appear in the report), and that Woodman, though knowing the claim to belong to Brain, pretended to make a discovery and location of his own on the lode. The bill further averred that complainant was the owner of title of Brain and Nichols, but not stating how or when he became such owner. Defendant's answer showed the decease of Brain, and a probate court sale of Brain's interest (without notice to the heirs), and the purchase of the same by the plaintiff upon a speculating contract for $1,000, and a twelfth interest in case of successful suit, etc., from the assignee at the probate sale; averred that the contract made between plaintiff and Woodman related to other property, long since abandoned, and denied the identity of the property sued for; and alleged that defendant had discovered and located the Emma lode in 1868; that plaintiff made no claim for the premises until 1870, when defendants had developed their great value: *Held*, no case for injunction, because: 1. The bill did not make a sufficiently specific case, not showing how title acquired; 2. All the equities of the bill were denied, and the facts not only denied, but evidently in great doubt; 3. The complainant was guilty of laches; 4. Taking the bill and answer together, it showed no case addressed to the discretion of the court, nor admitting of equitable interference. *Lyon* v. *Woodman*, 3 Leg. Gaz. 81.

12. Irreparable Damage — Title. Injunction may issue to stay irreparable mischief or waste, in cases of disputed title.

United States v. *Parrott*, 1 McAll., C. C. 271.

13. Irreparable Damage by working Colliery. Waste to restrain trespass in mining upon the land of a stranger will be granted to prevent the irreparable damage which would be the consequence, and because mining is a species of trade. *Flamang's case*, cited in 6 Ves. jr., 147; 7 Id. 308; 8 Id. 89.

This case is commonly cited as the first case in which injunction to restrain trespass, as distinguished from waste, was granted. See *Livingston* v. *Livingston*, 6 Johns. Ch. 499.

14. Trespass — Irreparable Injury — Damages. An injunction will not be granted in aid of an action of trespass (cutting a ditch), unless it appears that the injury will be irreparable, and cannot be compensated in damages. *Waldron* v. *Marsh*, 5 Cal. 119.

It is not sufficient that the affidavit should allege that the injury will be irreparable, it must be shown to the court how and why it would be so, otherwise the extraordinary remedy of injunction will not be allowed, especially where no action has ever determined the plaintiff's right. Id.

15. Irreparable Mischief. An injunction ought not to be granted except for the prevention of great and irreparable mischief. *Lyon* v. *Woodman*, 3 Leg. Gaz. 81.

16. Continuing Trespass—Irreparable mischief must be alleged. Upon the allegation of tenants in fee that the defendants, confederating together, entered upon their land, cut down large quantities of wood, quarried large quantities of limestone, are continuing to cut down wood and quarry stone, and design to remove the same, that they have instituted actions for the said trespasses, which are now depending, an injunction will not be granted to restrain further acts of trespass or waste. *Hamilton* v. *Ely* (1846), 4 Gill (Md.), 34.

In such a case, to authorize an injunction, the allegation that the trespass was to the destruction of the inheritance, or the mischief irreparable is essential; and the facts must be stated, to show that the apprehension of further acts of trespass was well founded, to satisfy the conscience of the court. Id.

17. Preservation of Property. When the title to a mining claim is in controversy, an injunction may be granted to preserve the property pending the litigation. *Hess* v. *Winder*, 34 Cal. 270.

18. Saving the Estate, pending contest. Parties claiming ownership, and having for several years been in possession, (by their tenants), of coal mines and lands in Schuylkill county, applied to the supreme court in Philadelphia for an injunction to restrain acts of waste and trespass threatened by parties asserting right as lessees of other parties claiming title adversely to the plaintiffs: *Held*, that injunction was the proper remedy, although the defendants were out of possession; and that where the subject of dispute may be destroyed, the court will interfere to prevent such destruction until the title be ascertained. *Munson* v. *Tryon*, 6 Phila. 395.

19. Irreparable Injury—Suit at Law. Mines, quarries and timber are protected by injunction upon the ground that injuries to and depredations upon them are, or may cause irreparable injuries, and with a view to prevent multiplicity of suits; nor is it necessary that plaintiff's right should first be established in an action at law, the evidence in the case for the injunction showing a clear title in the plaintiff, and only a sham title set up by the trespassing defendant. *West Point Iron Co.* v. *Reymert*, 45 N. Y. 703.

20. Trespass not irreparable—Canal Commissioners—Taking stone. An injunction is not granted to restrain a trespass where the injury is not irreparable in damages, but is susceptible of perfect pecuniary satisfaction by remedies at law. *Jerome* v. *Ross*, 7 Johns. Ch. 315.

Where by statute the canal commissioners were authorized to enter upon any lands, and take such stone, etc., as might be needed in the construction of the canals of the state, but without any specific provision for compensation, and parties who had contracted to furnish stone for a certain dam and lock on the canal, were breaking stone from a ledge on complainant's land, for which trespass he had already recovered two judgments before a justice of the peace, but without thereby inducing the defendants to desist, the court refused an injunction. Id.

21. Removal of ore. The removal of ore already extracted may be enjoined as well as the further extraction of it. *U. S.* v. *Parrott*, 1 McAll. C. C. 271.

22. Digging lead ore on Public Domain. Digging lead ore from the lead mines upon the public lands is such waste as entitles the United States to an injunction. *U. S.* v. *Gear*, 3 How. 132.

23. Trespasser taking ore—Clear title. Injunction against a trespasser to prevent his taking ore ought to issue in favor of a party in possession under a clear title without requiring him to bring any action at law. *Anderson* v. *Harvey*, 10 Gratt. (Va.) 386; See sec. 19, supra.

24. Destructive trespass — Iron ore. The taking of iron ore from land of little or no value, except for such iron ore, is a trespass which goes to the destruction of the estate. *Anderson* v. *Harvey*, 10 Gratt. (Va.) 386.

25. Naked trespass — No Injunction before injury complete. The court will not interfere by injunction to restrain the commission of naked trespasses, where there is no waste committed. *Nevada Co.* v. *Kidd*, 37 Cal. 283.

It will not restrain the diversion of water by injunction until the party complaining is in a condition to use it. While the dam and canal of the party claiming the water are in process of construction, but are not yet in a condition to appropriate the water, the use of the water by other parties is no injury, and affords no ground for relief, legal or equitable. Id.

26. Both trespassers. To justify an injunction not only must defendant be in the wrong, but the plaintiff must be in the right. It should not be granted where both are trespassers on the rights of a third party. *Lyon* v. *Woodman*, 3 Leg. Gaz. 81.

27. Against Trespass — Insolvency. It has long been settled that where a mere trespasser digs into and works a mine to the injury of the owner, an injunction will be granted; and more particularly is this true when the trespasser is insolvent. *Lockwood* v. *Lunsford*, 56 Mo. 68.

28. Disregard of distinction between waste and trespass. There has been for years an increasing disposition on the part of courts of equity to disregard the distinction between waste and trespass amounting to waste, and to restrain the latter as well as the former, by injunction. *Munson* v. *Tryon*, 6 Phila. 395. (1867.)

29. Waste—Sub-tenant—Plaintiff indemnified. The court will not interfere to restrain the waste of a sub-tenant at the instance of his immediate landlord, if it appear that the latter has obtained an indemnity against the claims of the head landlord. *Keogh* v. *Collins*, Hayes & Jones (Irish), 805.

30. Threats of future working. When defendants had entered upon ground to which they had no title as parcel of lands to which they had title and had searched for minerals, and in their answer asserted claim to the premises, but disavowed an intention of present working: *Held*, that they threatened a wrong under this state of facts, so as to give the court jurisdiction to restrain by injunction. *Hext* v. *Gill*, Law R. 7; Ch. App. 699; S. C. 3 Moak, 574.

31. Against Encroaching Colliery. One who begins to get coal in his own ground, and works into his neighbor's coal, will be restrained by injunction. *Mitchell* v. *Dors*, 6 Ves. Jr. 147.

32. Colliery — Reluctance to stay work. "The court grants injunction to stay working of a colliery with great reluctance, from the great inconvenience it occasions; and never will do it but where there is a breach of an express covenant or an uncontroverted mischief." (Per Lord Hardwicke,) Anon. 1754. 1 Amb. 209.

33. Mine in Operation. There is a distinction between enjoining a mine in operation and restraining the opening of a new one. *Grey* v. *Northumberland*, 13 Ves. Jr. 236; S. C. 17; Id. 281.

34. To prevent Instroke. For case of injunction granted to prevent parties who had contracted to sink a deep shaft on coal lands, for the benefit of such coal lands, from using it to operate lands owned by other persons, see *Leavers* v. *Cleary*, 75 Ill. 349.

35. To restrain Working—Discretion. The exercise of the power of a court to restrain, by injunction, the working of a mine, rests in the discretion of the court, and from the nature of things the extent to which the jurisdiction may be exercised cannot be defined. *Lyon* v. *Woodman*, 3 Leg. Gaz. 81 (*Emma Mine case*).

An injunction to restrain the working of a mine may be granted or refused in the exercise of a sound discretion, governed by the nature of the case; it cannot be demanded as a matter of right, nor can the jurisdiction to grant it be limited by any adjudged case or defined line. Id.

36. Discretion—Injury to Defendant. The operations of large mining companies should not be arrested by injunction without notice, except in very plain cases, or where there is a pressing necessity for immediate action. There is a discretion which the court must exercise in every case. *Capner* v. *Flemington M. Co.*, 2 Green's Ch. 467.

37. Damage and Drainage to be Considered. The possibility of destruction of a coal mine in event of injunction, is to be considered, and the expense of drainage while idle. *Clavering* v. *Clavering*, 2 Peere Wm. 388; S. C., Mosely, 219; Sel. Ch. Ca. 79.

38. Abandonment — Relief after vein Prospected by others—Angle in vein—License. Defendants by a change in the course of the vein of lead ore, upon which they were working as licensees, or claiming to be licensees, came upon ground cov-

ered by an older license, under which no work had been done for several years. The defendants having struck rich mineral, the holders of the old license sought an injunction: *Held*, that the old license had not been abandoned, and that defendants were rightly enjoined. *Anderson* v. *Simpson*, 21 Iowa, 399; see opinion of Dillon, J., dissenting, p. 405.

39. Benefit to Defendant — No Injury to Plaintiff. Defendants, who without right cut an air course through plaintiffs' coal for the benefit of their own mines, may be restrained from using it, although its further use entails no further damage upon the plaintiffs. *Powell* v. *Aikin*, 4 Kay & J. 343.

And access may be allowed to defendants' mine to allow plaintiffs to block it up. Id.

40. Technical right — Oppressive Action. Defendant to bill for injunction and for account, being tenant of a copyhold farm, had dug out the loose stone within about eighteen inches of the surface and sold it. He answered, avowing custom of all persons occupying the lands to do the same, and that the taking of the same was for the benefit of the land. The stone had no especial value as stone. The surface soil was replaced. The court awarded an injunction and payment of the amount received for the stone, the defendant declining to resist a suit to test his right at law, and for this reason only, holding that it was not a case where equitable relief should have been sought. *Cuddon* v. *Morley*, 7 Hare, 202.

41. Delay—Expenditures. Where the lord of a manor, who claims against the tenants the right of property in the mines within the manor, has stood by for a long period and allowed the tenants, without objection, to work the mines and expend large sums of money upon their mining operations, the court will not assist him by making a decree for an injunction or account against the tenants, but will leave him to his legal remedy. *Parrot* v. *Palmer*, 3 M. & K. 632.

42. Acquiescence — Practice — Notice. Acquiescence for some time in the wrong complained of is sufficient to defeat an *ex parte* injunction; but after notice it must amount to a waiver of the terms of contract to prevent the injunction. *Mexborough* v. *Bower*, 7 Beav. 127.

43. Against disturbance by estopped Owner. A party by whose encouragement expenditures (coal breaker) have been made, to such an extent as to be incapable of reimbursement except by enjoyment, will be enjoined from disturbing the possession; he is estopped because he would wrong the party by withdrawing his consent. *Big Mountain Co.'s Appeal*, 54 Pa. St. 361.

When the complainant has such a right, and the defendant is thus estopped, the defendant may be enjoined from prosecuting an ejectment for the premises; and the fact that complainant would have a defense to the ejectment is no bar to relief in equity, because ejectment would not affirmatively assert the complainant's right short of three verdicts. Id.

44. Preliminary — Laches. If the plaintiffs permit the defendants to remain in possession of a mining claim several months without interference, working it as their own and expending large sums of money in developing it, a court of equity will require a very clear and strong showing to induce it to grant or sustain a preliminary injunction to stop the work. *Real del Monte C. G. & S. M. Co.* v. *Pond G. & S. M. Co.*, 23 Cal. 82.

45. Plaintiff's standing—Speculative purchase from ousted claimant. The inadequacy of price paid by a plaintiff, seeking an injunction, and the fact of his purchasing while the mine was in the adverse possession of other parties, considered as reasons for refusing injunctive relief addressed to the discretion of the court, and injunction refused accordingly. *Lyon* v. *Woodman*, (*Emma Mine*) 3 Leg. Gaz. 81.

46. Weakness of plaintiff's equity—Collusion with Tenants. Injunction granted to prevent the threatened opening and working of coal mines, based, among other things, upon the smallness of the consideration paid by the defendants for the title asserted by them; 2. The fact of their deed expressly excluding warranty of title; and, 3. Alleged tampering with tenants of coal operators in possession. *Munson* v. *Tryon*, 6 Phila. 395.

47. Wrong already committed. Where upon trial, on bill for injunction to restrain the issue of county bonds to a coal and railroad company, it appeared that the bonds had been, in fact, issued before the preliminary writ had been served: *Held*, that no relief could be had by the writ of injunction. *Menard* v. *Hood*, 68 Ill. 122.

48. Injury already complete—Ditch—Placer. Where a mining claim had been worked before suit in such a way by washing the earth from under the plaintiffs' ditch, that, according to the testimony, it must result in the ruin of the ditch from the work already done: *Held*, that further work on a valuable claim ought not to be enjoined, the result necessarily being injury to the defendants without benefit to the plaintiff. *Clark* v. *Willett*, 35 Cal. 534.

49. Injury remediable at law—Insolvency. Where the bill charges a mere trespass, where the injury is not irreparable and destructive to the complainant's estate, but is susceptible of perfect pecuniary compensation, for which the party may obtain adequate satisfaction at law, and no charge of insolvency in the defendants, an injunction ought not to be granted. *Hamilton* v. *Ely*, 4 Gill (Md.) 34.

50. Insolvency. When the title to the property is in dispute, the question, whether the defendants are solvent and able to respond in damages, forms an important element in passing upon an application for an injunction pending the litigation. *Real del Monte G. & S. M. Co.* v. *Pond G. & S. M. Co.*, 23 Cal. 82.

51. Damages ascertainable. The fact that the value of ore taken by trespass could be readily estimated, does not deprive a court of equity of its right to interfere by injunction. *Anderson* v. *Harvey*, 10 Gratt. 386.

52. Disputed Title. An injunction to stay the working of a mine may be granted notwithstanding a question of title is involved. But the fact of title being involved will add to the caution of the court in granting it. It is not necessary for a plaintiff to establish his title by a suit at law where it is not doubtful and not in dispute. But if disputed and in doubt, a court of equity will not settle it for him. He must show a *prima facie* case, free from reasonable doubt, and a case free from the imputation of laches. *Emma Mine case*, 3 Leg. Gaz. 81.

53. Obscure Grant — Oil — Expenditures. Where the wording of a deed is not absolutely clear, and the rights of the party claiming under it are disputed, a preliminary injunction will not be granted to restrain a person acting in violation of alleged rights, unless is is plain that irreparable injury is likely to be suffered. And where the defendant is laying out his own money in such a way that the complainant, if his construction of the deed be true, can ultimately get the benefit of it all, and where the defendant had not received from his outlay any return as large as the outlay itself, the injury will not be regarded as irreparable: *So held*, upon a bill to prevent the owner of an upper tract on Oil Creek, Pa. from sinking an oil well, filed by a party who owned a tract of land immediately below, and who before the method of boring for oil had been discovered, and when it was skimmed in small quantities off the stream, had procured from the owner of the upper tract an inartificially drawn grant or license of the oil, or the right to get it, and which might be construed as going only to such oil as might be found on the surface. *French* v. *Brewer*, 3 Wall. jr., 346.

54. To protect minerals in solution. Perpetual injunction granted to restrain the tenant of a farm, in part of which was a pool through which ran a stream from the mountains, depositing in its passage mineral substances, from taking and carrying away from and out of the bed and bottom of the pool, or any part thereof, any soil, oxide of iron, ochre, shine, deposit, or other mineral substances, and from puddling, loosening, disturbing, and floating, and from causing to be puddled, loosened, disturbed, or floated off, any soil, oxide of iron, ochre, shine, deposit, or mineral substances, already deposited, or thereafter to be deposited upon the beds of the said pool, the right of the plaintiffs to the several mineral substances having been established by a verdict in an action at law. *Thomas* v. *Jones*, 1 Y. & C. (Ch.) 510.*

55. Quarries. If chancery will restrain by injunction trespass committed in mining ore or coal, it will give the same relief against quarrying stone. No distinction on the question of comparative value can be made. *Thomas* v. *Oakley*, 18 Ves. jr., 184.

56. To protect Lessee—Writ expires with term. A party claiming the right to work lead mines as a lessee may be protected against a trespasser by injunction, but the decree should not be made perpetual after the expiration of the lease, although the lease contain a general covenant for renewal. *Boyle* v. *Laird*, 2 Wisc. 316.

If the interest of a complainant has expired after suit brought against a party who was in fact a trespasser, the bill should be dismissed without costs. Id.

57. Between different setts on same vein—General principles—Past injury—Standing by. In a dispute as to their rights between parties working under different leases on the same coal veins, no injunction can be granted in advance of the settlement of their rights at law, except to prevent irreparable mischief or injury. *Mammoth Vein Coal Co.'s Appeal*, 54 Pa. St. 183.

A preliminary injunction is a restrictive or prohibitory process to compel the party to maintain his status merely until the matters in dispute shall be determined; only granted [in addition to cases of the invasion of unquestioned rights,] for the prevention of irreparable mischief, which cannot be repaired under any standard of compensation. Id.

*The jurisdiction of chancery is here applied to an interesting subject-matter, but the opinion decides no point.

Where defendants had run a gangway in such a direction as to cut off plaintiffs from coal which they otherwise might have taken it is a past transaction, and not to be redressed by preventive process. Id.

It was in proof that defendants knew of the direction and extent of plaintiff's work, which they allowed to be continued without objection: even if this fact were only doubtful it would be sufficient to defeat an injunction for they should have been on their guard to prevent the expenditure of money on what they meant should not be realized upon by the parties expending it. Id.

58. After Lease expired. Where the complainant, lessee of a lead mine, had procured a temporary injunction to restrain the defendants from working his premises, but his lease had expired before the hearing, it was held error to decree upon the hearing a perpetual injunction without the addition of the new parties in interest as complainants. *Laird* v. *Boyle*, 2 Wisc. 433.

59. Against Tenant in default. Mining cannot be waste under a lease given for the express purpose of mining, and if the tenant continues to mine without payment of royalty the lessor cannot have the writ of estrepement; his remedy must be in some other form. Payment of rent is not a condition upon which the tenant's right to mine depends, the lease reserving no right of re-entry or forfeiture in any such sense as to make the mining illegal if he fail to pay rent. *Heil* v. *Strong*, 44 Pa. St. 264.

60. Against Tenant quarrying stone. The lands of A., on which there was an open quarry of limestone, were demised for the term of three lives renewable forever, reserving to the lessor all royalties. Upon the facts lessee was enjoined from raising the limestone for sale. *Purcell* v. *Nash*, 2 Jones, 116; S. C. 1 Jones, 626.

61. Life Tenant exhausting mine. Though a court might restrain unskillful mining and wanton injury to the inheritance by a tenant for life, yet not such mining as is subject to no other objection than its liability to exhaust the mine. *Irwin* v. *Covode*, 24 Pa. St. 162.

Even in a case of possible wrong to the remainder-man, estrepement is not the remedy. Id.

62. Licensee. A licensee cannot enjoin a subsequent lessee of the same minerals, the license not being exclusive, and defendant not interfering with the actual possession of the licensee. *Carr* v. *Benson*, L. R. 3 Ch. App. 524.

63. Protecting Tunnel — Easement. If, by the local customs, the owner of one mining claim has a right to construct a tunnel through an adjoining claim, in order to enable him to work his own claim, a court of equity may enjoin any interference with that right. *Bliss* v. *Kingdom*, 46 Cal. 651.

64. Abuse of Privilege. Injunction issued to restrain the unlimited taking of stone by a defendant who had a restricted right to take stone for certain uses in connection with certain lands. *Thomas* v. *Oakley*, 18 Ves. Jr. 184.

65. Against railroad. A railroad company organized for the benefit of coal mines, and not within any of the statutes authorizing the condemnation of lands for railroads connecting with coal mines, should be enjoined from constructing its road across private property. *Edgewood R. R. Co.'s Appeal*, 79 Pa. St. 257.

66. Acquiescence in Location of Railroad — Lessee mining under road-bed. A railroad was constructed over certain lands without legal proceedings to condemn it, but without objection from the owners. Afterward proceedings to assess damages were commenced but compromised. After the road was built, but before the release, coal veins undercropping the road-bed were let by the owner of the land: *Held*, that the title of the railroad company was by the original occupation without objection; that the release was only a discharge of the damages to the owners, and that the lessee of the coal took his lease subject to the right of way, and the coal company were enjoined from mining under the road. *Lawrence's Appeal*, 78 Pa. St. 365.

67. Working under road-bed. For instance of injunction to restrain working of mine under a railroad, see *Caledonian R. Co.* v. *Belhaven*, 3 Macq. 56.

68. Protecting lateral support—Buildings. A court of equity has power to restrain a land owner from excavating or removing soil from his land adjoining the land of another, if the effect of such excavation and removal will be to cause the land of his neighbor, by reason of the withdrawal of his lateral support, to fall or subside. *Farrand* v. *Marshall*, 21 Barb. 409; 19 Id. 380.

The doctrine of granting relief, under such circumstances, is confined to those cases in which the plaintiff has not, by building or otherwise, increased the lateral pressure upon the adjoining soil. If he has himself erected buildings upon the margin of his own land, he is regarded as himself at fault, and therefore not entitled to recover. Id.

69. Buildings—Encroachment of sea—Action to support injunction. On application for injunction to restrain the taking of stone from the sea shore between tides,

where the damage seemed to be not so much the value of the stone, but the fact that the sea would encroach on the land from which the stone was removed, and endanger the house of plaintiffs; although both sides claimed title and it was purely a question of law between them, the court upon consideration of the greater inconvenience suffered by the plaintiff, gave the injunction with *leave* to bring his action, but refused to say that he must do so. *Clowes* v. *Beck*, 13 Beav. 347; 20 L. J. Ch. 505.

70. Lateral support—Additional weight of buildings. Where houses of the plaintiffs were injured by mining operations of the defendant, in adjoining land which would have caused the soil to subside without the additional weight of the houses, decree made for perpetual injunction and for compensation. *Hunt* v. *Peake*, Johnson, (Eng.) 705.

71. In favor of water rights. Upon the bill of the prior appropriator of water for mining purposes against parties interfering with his prior appropriation, the granting of injunctive relief will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether defendants are able to respond in damages and other considerations which ordinarily govern a court of equity in the exercise of preventive process. *Atchison* v. *Peterson*, 20 Wall. 507; B. & W. L. C. 730, affirming S. C. 1 Mont. 561.

72. Protecting water right—Worked-out claims—Benefits and hardships not considered. The owner of water claiming it of right (as found by the referee) is entitled to enjoin parties who have no title to it, from using it, although his own mines are nearly worked out, and although to enjoin its use would work more hardship to the defendant than benefit to the plaintiff. Such considerations are of no weight against an express finding of the right in the case. *Fabian* v. *Collins*, 2 Mont. 510.

73. Water ditch — Slight damage. When complainants were prior appropriators of the waters of a gulch to a certain number of inches for mining purposes, by a ditch leading from it at a certain point, above which point defendants mined and muddied the water flowing into complainants' ditch, and rendered the flow of sand into the ditch somewhat greater, but causing no great amount of additional labor or expense to keep it clear: *Held*, that an injunction was properly refused. *Atchison* v. *Peterson*, 20 Wall. 507; B. & W. L. C. 730, affirming S. C., 1 Mont. 561.

In such case the injury to the complainant is inappreciable compared to the damage which would result to the defendants from the indefinite suspension of work upon their mining claims. Id.

74. Dam to stop tailings. It is not "an abuse of discretion" for a court to refuse to enjoin parties from building a dam upon their mining ground to prevent tailings from injuring their property. *Nelson* v. *O'Neal*, 1 Mont. 284.

75. Diversion of water by threatened subsidence. By mining operations the defendant had sunk not only the level of a stream supplying the plaintiff's mill, but also that of the adjoining land. The plaintiff filed a bill for an injunction; but it did not appear that there had been as yet any diminution of water to the mill: *Held*, that the bill ought not to be dismissed; and on the defendants' undertaking not to work the minerals so as to obstruct, etc., the water and the supply thereof along the water-course, it was retained, with liberty to apply. The court, however, intimated that in default of the undertaking being given, an injunction would be granted. *Elwell* v. *Crowther*, 31 Beav. 163.

76. Continuing diversion. No equitable remedy can be had for a mere *past* diversion of a water-course; but when the injury is continuing, relief may appropriately be sought in equity. *Tuolumne W. Co.* v. *Chapman*, 8 Cal. 392.

77. Diversion must be continued — Complaint. Where the complaint alleged that the defendants had dug a mining ditch above one previously constructed by defendants, and had thereby diverted the water of the stream from plaintiffs' ditch, but did not aver that the injury was continuing, or threatened to be continued, or likely to be continued: *Held*, that it was sufficient for the recovery of damages, but not to sustain an injunction. *Coker* v. *Simpson*, 7 Cal. 340.

The writ of injunction, though remedial, must be based on some equitable circumstances. Id.

78. Flooding Mine from a river — Dip. A bill averred that a mine which the defendant threatened to work could not be worked without letting in a river and flooding defendant's mine, and through that the plaintiff's mine, which lay on the dip of the coal seam below the defendant's mine, and prayed an injunction. Demurrer to the bill overruled, the case being distinguished from the ordinary instance of the lower mine on the dip, having no protection from the water produced in mines from the working in ordinary cases—1874. *Crompton* v. *Lea*, L. R., 19 Eq. 115.

79. Pollution of stream—Damage to defendant considered—Damages must be relied on if possible. An injunction is

always a high exercise of power to be very cautiously exerted; but where large and expensive works are sought to be stopped for something incident to a lawful employment and not on account of direct or willful encroachment, as in this case, of a water company against a mining company for incidental pollution of a stream, it should clearly appear that it is a case for equitable intervention; that there is no adequate remedy at law, and that irreparable injury will ensue. *New Boston Coal Co.* v. *Pottsville Water Co.*, 54 Pa. St. 164.

A preliminary injunction for nuisance in fouling water must stand or fall on the merits it possessed at the granting of the injunction; and the evidence not being clear that the pollution had actually occurred at that time, the court refused to make it perpetual and dissolved it. Id.

In such a case as presented there must be a clear showing on the question of inability to be compensated for the wrong. Id.

80. Mandatory Will—Repair of Dam. Instance of mandatory order in chancery compelling the repair of mill-dams for stamp mills supplied by water from old adits. *Falmouth* v. *Innys*, Mosely, 87.

81. Lowering dam, mandatory. Where defendants erected a dam which overflowed plaintiffs' placer claim with the water of the mill-pond: *Held*, a nuisance, and that the proper decree should order a reduction of the dam such number of feet as would remove the overflow, with a perpetual injunction to restrain the raising of the dam above such point. *Ramsay* v. *Chandler*, 3 Cal. 90.

82. Prohibitory in form but mandatory in effect. Tenant of a coal mine who had worked the same contrary to his covenants, and opened a communication with another mine, enjoined from "draining any other mines, or permitting the same to be drained by means of the demised colliery, and from permitting any water to flow" through the communication made "into the demised colliery," the effect intended being to compel the defendants to close the communication. *Mexborough* v. *Bower*, 7 Beav. 127.

83. Mandatory effect. The form of a mandatory writ in respect to repairing canals used by a colliery avoided, but the effect obtained by the wording of the order. *Lane* v. *Newdigate*, 10 Ves. Jr. 193.

84. Mandatory to compel removal of debris. If a party who has condemned land for private purposes as a railroad from his mine, cause debris from his mine to be deposited on the land through which his right of way is exercised, he may be compelled to remove it. *Lance's Appeal*, 55 Pa. St. 17.

85. To compel defendant to bulkhead tunnel—Tapping underground current. Where defendants, by means of a tunnel run into the mountain at a lower level than complainant's tunnel, wrongfully intercept water appropriated by complainant and flowing in its tunnel, a preliminary injunction will be granted, restraining the continuance of such diversion, even though an obedience to the injunction should render it necessary for defendants to build a bulkhead or dam across their own tunnel. *Cole S. M. Co.* v. *Virginia & G. H. W. Co.*, 1 Sawyer C. C. 470 and 686.

86. Mandatory writ to compel trespassing colliery to stop up openings—With costs of inspection. The proprietors of a coal mine had so worked their mine by opening cuttings to draw off the water therein that they had caused the neighboring and adjoining mine of the plaintiffs to be flooded, and from such openings the defendants had also abstracted coal from their neighbor's mine, and sold the same for their own benefit.

The bill, therefore, prayed that the defendants, their agents, etc., might be restrained from further digging any coals or carrying any workings into or under said lands. That they might also be restrained from making any cruts, or openings, or channels, or pipes, or from doing any other acts to conduct water from any of the upper seams within their mines into the lower seams so as to send such water through such lower seams into the plaintiff's mines; that defendants might also be ordered to stop up the openings and communications made by them from their mines into the plaintiff's mines, and to prevent by sure and sufficient barriers the water conducted by such cruts, or openings, or channels, or pipes, into the lower seams from passing through such lower seams into plaintiff's mines. The bill also prayed for an injunction to restrain the defendants from getting more coal from said colliery; and for an account and compensation: *Held*, that it was a clear case for an injunction, according to the prayer of the bill, and for an account, and also for the cost of "ascertaining the opening in the defendant's mine which had caused the injurious flow of water." (Per V. C.) *Plant* v. *Stott*, 21 Law Times, N. S. 106.

87. Affirmative Act—Successors. The successors in interest in a coal mine cannot be compelled to fill up an aperture between mines not made by themselves. *Powell* v. *Aiken*, 4 Kay & J. 343.

88. Injunction changing possession. A judge at chambers has no power by *ex*

parte order to induct defendants into possession of mining ground held by complainants, although after general verdict for the defendants. *Brennan* v. *Gaston*, 17 Cal. 375.

89. Contempt—Void Writ. Proceedings for contempt against parties refusing to comply with such order partake of the invalidity of the order itself. Id.

90. Possession is Property. Possession of the subject-matter of controversy is property, and cannot be disposed of, except in due course of law. Id.

91. Title—Possession—Surrender of possession. To justify the interference of equity, the complainant must in general be in possession or have established his right at law, or brought an action to recover possession, or his exclusive right must be admitted by defendant, and the court will, in all such cases, proceed with great caution. *Bracken* v. *Preston*, 1 Pinney, 584.

Although a defendant to a bill for injunction does not show a legal right to possession, yet as a court of equity has no direct jurisdiction to try title (except in certain difficult and complicated cases affording some peculiar ground for equitable interference), it will not decree that the defendant surrender possession. Id.

92. Stockholders against Trustees. The board of trustees of a mining corporation denying the corporate ownership, and asserting title in their own right, and working the lode for their own benefit, may be enjoined at the suit of one or more stockholders; and in such case evidence of title in the corporation and the entry by defendants as the trustees of such corporation will support a finding in favor of the plaintiff, as to the ownership. *Parrott* v. *Byers*, 40 Cal. 614.

93. Stolen stock—Special case. A mining company having found a portion of its ground covered by the claim of another company whose stock was held only at a nominal value, bought up the entire amount of such stock; afterward such stock was lost, or, as averred by complainant, stolen, and came into the hands of parties who proceeded to control the corporation by representing such stock, and to act adversely to the company which had bought up the stock. Defendants filed no answer: *Held*, that the complaint presented a *prima facie* case for relief in the discretion of the court, the exercise of which discretion in the court below should not be disturbed. *Sierra Nevada M. Co.* v. *Sears*, 10 Nev. 317. (Beatty, J. dissenting.)

94. Assessments—Selling stock. The trustees of a mining corporation will not be enjoined from selling stock for unpaid assessments, in cases where the assessment is levied for the purpose of paying the proper and legal expenses of the company, if the assessment does not exceed the amount allowed by law. *Sullivan* v. *Trinfo G. & S. M. Co.*, 29 Cal. 585.

95. Mortgaged Mine. Capner sold his farm to a mining company by articles in which the payment of certain installments of purchase-money was secured by a clause to the effect that he should have all the remedies of a mortgagee. In other clauses the fact of the sale being for mining purposes appeared. The vendor sued to foreclose, and prayed for an injunction meanwhile. Injunction refused, the carrying on of a mine upon premises purchased and occupied for mining purposes not being waste. *Capner* v. *Flemington M. Co.*, 2 Gr. Ch. (N. J.) 467.

96. To Restrain Sale till title settled. Where a purchaser of mining lands, machinery and slaves, gave a mortgage on the property to secure purchase-money, and on account of difficulties arising in the title to portions of the property, mines and slaves, it was agreed, in writing, that on certain conditions as to interest and a sum down, that payment of the residue should be postponed until certain suits were settled: *Held*, that equity ought to restrain the sale while the title was in doubt as long as the conditions were complied with. *High Shoals M. Co.* v. *Grier*, 4 Jones' Eq. (N. C.) 132.

97. Smelting works—Nuisance. H. sold land to persons who were described in the conveyance as copper-smelters and copartners, and as purchasing for the purposes of the partnership; and who, between the contract and the conveyance, nearly completed smelting-works on the lands. H. subsequently sold neighboring land to the plaintiff, who bought with full notice of the existence of the copper works. The plaintiff recovered judgment at law, with substantial damages for injury done to his land by the smoke of the works, and then filed his bill for an injunction. Wood, V. C., held that the plaintiffs' having come to the nuisance did not disentitle him to equitable relief; and that H's having sold the site of the works with full knowledge that such works would be erected on it did not disentitle him, or those claiming under him, to complain of any nuisance which the works might occasion, and his honor granted an interlocutory injunction: *Held*, on appeal, that the injunction had been rightly granted. *Tipping* v. *St. Helen's Smelting Co.*, L. R., 1 Ch. App., 66; see case at law between same parties, 4 B. & S., 608, 616; 5 Id. 935; 35 L. J. Q. B. 66.

98. Salt Well—Facts doubtful, and inspection impossible. A motion was made for an injunction to restrain the defendants from proceeding with a shaft and other works, by which the plaintiff was apprehensive that his brine pit and apparatus for the manufacture of salt would be irremediably injured. The evidence of the plaintiff and that of the defendants was altogether conflicting, and an inspection of the defendant's shaft was impracticable, in consequence of being filled with brine. The court refused an injunction, and directed that the costs of the defendants should be costs in the cause; but that the question whether the plaintiff's costs ought to be costs in the cause should stand over till the hearing. *McCurdy* v. *Noak*, 17 L. J., Ch. 165.

99. Injunction after verdict—Protecting orchard. Plaintiff had taken up and for eight years had occupied, under the possessory act of California, a tract of two hundred and twelve acres, a part of which he had planted as an orchard. Defendants entered and located a mining claim within the tract, and washed away the fruit trees. Defendants claimed the right to occupy for mining purposes, tendering to plaintiff what they considered the value of the fruit trees. Plaintiff obtained a temporary injunction, and afterward damages in trespass, but the court refused to grant a perpetual injunction: *Held*, on appeal, that the verdict in trespass was conclusive of the rights of the parties, and the plaintiff was entitled to a perpetual injunction. *Daubenspeck* v. *Grear*, 18 Cal. 443.

100. Cestui que trust — Injunction pending trial of right. Where A., one of several *cestuis que trust* filed his complaint under the code praying for the recovery of land and damages, and also an injunction to restrain the defendants from mining said land: *Held*, that as he must necessarily fail in sustaining his demand for the land, on account of not being the legal owner, he was not entitled to an injunction. *Gillett* v. *Treganza*, 13 Wisc. 472.

The holder of the legal title (trustee) may have a temporary injunction, pending the trial of an action of ejectment or of waste, or the final hearing of a bill praying for a perpetual injunction; or the equitable owner may have like relief, either under the general powers of a court of equity or under the code. Id.

101. Fraudulent Re-entry. Where upon sale of a quarry, with agreement by vendee to supply vendor with marble therefrom, reserving right of entry to take the marble himself in case the vendee failed to supply it, the vendor had entered upon a pretense of failure which did not exist: *Held*, that the vendor was rightfully enjoined from preventing complainant resuming possession for any cause theretofore existing, but that such decree should leave intact his right of entry for any breach which might afterward exist. *Rutland Marble Co.* v. *Ripley*, 10 Wall. 339.

102. Patent to Quarter Section containing lode. Perpetual injunction granted to restrain defendant holding a patent of the United States upon a quarter section entered and patented as agricultural land upon which in fact a lode location, under the mining act of 1866, existed at the time of the entry and patent, from asserting any title to the lode, and from in any manner interfering with the plaintiff in working the same, upon the assumption that such patent conveyed no title against the mining locator. *Gold Hill Q. M. Co.* v. *Ish*, 5 Oregon, 104.

103. Partner—Negotiable paper. Injunction granted *ex parte* to restrain the negotiation of a bill of exchange accepted by a partner in a colliery in the firm name for his private debt. *Hood* v. *Aston*, 1 Russ. 412.

104. Answer—Deed—Several minerals in same Ore—Iron, Zinc, Franklinite. Complainants were the undisputed owners of all the Franklinite and iron ores upon a certain tract when they were found separate from the zinc, and claimed to own all such ores, whether separate from the zinc or not. Defendants were the undisputed owners of all the zinc and ores other than Franklinite or iron, and claimed to own the Franklinite and iron ores when they did not exist separate and distinct from zinc ores. It appeared that the ores or minerals were so combined as to render it often difficult to decide which metal preponderated in quantity or value in a given specimen, and so as to render it difficult if not impossible to mine either one without at the same time taking the other. Upon motion to dissolve injunction: *Held*, 1. That the dispute was not about facts, but was a question of legal construction, and of the proper interpretation of the grants of the mining rights; 2. That the matters in controversy were not of such a nature that a denial by the answer would entitle the defendants to a dissolution of the injunction as a matter of course. *Boston Franklinite Co.* v. *N. J. Zinc Co.*, 13 N. J. Ch. 216.

105. Possession. In the matter of restraining threatened irreparable injury by mining, it is a matter of indifference whether the plaintiff is in or out of possession. *More* v. *Massini*, 32 Cal. 590; *Chapman* v. *Toy Long*, 4 Sawyer, 33.

An injunction will be allowed to restrain the working of a placer claim located by

complainants under the United States mining acts, although prior to such location, and, at the time of the commencement of the suit the premises were, and continued in the possession of other parties, those parties being aliens, (Chinese) who have no right since the passage of the mining acts to appropriate the public domain. *Chapman* v. *Toy Long*, 4 Sawyer, 35.

Possession need not be recovered in an action at law prior to the granting of an injunction to restrain the removal of the gold from a placer claim. An injunction is now allowed in all cases of trespass upon mines, upon the ground that they are, or may be, an irreparable damage to this species of property. *Id.*

106. Patented premises. When premises containing gold are held under patent from the United States, an injunction lies to prevent miners from excavating ditches, digging up the soil and flooding a portion of the premises for the purpose of extracting the gold. *Henshaw* v. *Clark*, 14 Cal. 160.

107. Mining, an irreparable damage. Such injuries are calculated to destroy the entire value of the land for all useful purposes; they are irreparable. Id.

108. Waste and trespass. The technical distinction between waste and a mere trespass has been long disregarded by courts of equity, and the rule now is, that wherever a trespass is attended with irreparable mischief or a multiplicity of suits or vexatious litigation, an injunction will be allowed the same as if it were a case of waste. *Chapman* v. *Toy Long*, 4 Saw. 28.

109. Technical, distinguished from destructive, Trespasses. The construction of a ditch across rocky, barren and uncultivated land is not an irreparable injury. The distinction between technical trespass and trespass going to the extent of irreparable injury, is the foundation of the jurisdiction of equity in the latter class of cases, and trespass in the former class of cases will not be enjoined, although the plaintiff's legal right to the land may not be denied, the defendants being solvent and able to respond in damages. *Thorn* v. *Sweeney*, 12 Nev. 251.

110. Mineral springs — Trade-mark. The owner of a peculiar product of nature like natural mineral water, who has applied to it a conventional name, by which it has become generally known, is entitled to be protected in the exclusive use of such name as his trade-mark in the sale of the article. *Congress & Empire Spring Co.* v. *High Rock Spring Co.*, 45 N. Y. 291; *Dunbar* v. *Glenn*, 43 Wisc. 118.

A defendant owning a mineral spring, alleged to have exactly the same properties as the mineral spring of plaintiff, twelve hundred feet distant, enjoined from the use of term "Bethesda mineral water," or useing the trade-mark "Bethesda" under which name duly entered in the United States patent-office, and used as a brand on the barrels of plaintiff, plaintiff had introduced the water from her spring into the market, and thereby acquired a reputation, giving commercial value to the waters of the spring owned by her. *Dunbar* v. *Glenn*, 43 Wisc. 118.

Where the plaintiffs and purchasers of the spring, and all the interests of the original proprietors who invented and used the word "Congress" as a trade-mark, they are entitled to relief by injunction against sellers of mineral water attempting to appropriate such word as descriptive of the water sold by them. *Congress & Empire Spring Co.* v. *High Rock Congress Spring Co.*, 45 N. Y. 291.

111. Making Brick. Lessee for years without impeachment of waste, enjoined from converting the soil into brick, at the suit of a remainder-man, upon the ground of its being a destruction of the inheritance, but allowed to carry off the brick already made. *Bishop of London* v. *Web*, 1 Peere. Wms. 527.

B. Practice.

112. Equity Jurisdiction having once attached — Accounting — Accruing damages. Defendants' well having struck oil before the hearing, which, from its situation, decreased the flow of complainants' well, an accounting was had, based upon the yield of the respective wells: *Held*, that the jurisdiction of the court extended beyond the writ of injunction, and a decree for the damages was ordered. *Allison & Evan's Appeal*, 77 Pa. St. 221.

A court of equity will decree an account of waste at the same time with an injunction, and make such decree as will settle the entire controversy. Id.

113. Inequitable motives not aided. Where a party bought lands on the bank of a stream with the sole purpose of forcing their re-purchase at a great advance by the proprietor of a costly quartz mill above, a necessary consequence of the operations of such mill being that large quantities of mill-tailings were continually deposited by the stream on the lands below, so purchased by complainant: *Held*, that complainant's motive in purchasing, might be inquired into, and that instead of granting an injunction to restrain such injury which would sacrifice valuable property, the court would leave complainant to his reme-

dy in damages. *Edwards* v. *Allouez, M. Co.*, 6 Central Law J. 189, Dillon, J. Sup. Ct. Mich. 1878.

114. Parties. Tenant for life having made a lease of coal mines amounting to a forfeiture cannot join the remainder-man in a bill for injunction. *Wentworth* v. *Turner*, 3 Ves. Jr. 3.

115. Non-resident Defendants. The residence of one of several tortfeasors without the jurisdiction of the court, cannot be alleged to prevent the exercise of the authority of the court upon the property; and his name may be dropped by amendment (he not appearing and not being served) without prejudice to a motion for injunction. *Cole S. M. Co.* v. *Virginia W. Co.*, 1 Saw. C. C. 470 and 686.

In an action to restrain the diversion of water by tortfeasors, one of the tortfeasors, who resides out of the jurisdiction of the court may be omitted, and (not having been served) the court will allow an amendment by dropping his name, without prejudice to a motion for injunction. Id.

Non-resident owners or claimants out of the jurisdiction of the court, working a mine by their agents: *Held*, not necessary parties defendant to a bill for injunction. *United States* v. *Parrott*, 1 McAll. C. C. 271.

116. Temporary, to prevent inundation. On a bill for an injunction to protect the plaintiffs' coal mines from injury by the water flowing to them from the defendants' colliery, the court, on motion, granted an injunction restraining the defendants from working their coal mines in any places which might injure or endanger the plaintiffs' mines, until answer or further order, but gave no directions for the trial of the right in a court of law. The parties went into evidence, and the cause was brought to a hearing, when the court refused, until the plaintiffs had established their right at law to make the injunction perpetual, but retained the bill for a year, giving the plaintiffs liberty to bring such action as they might be advised, continuing the injunction in the meantime. The defendant's mine overlaid that of plaintiff, and danger of inundation was alleged. The temporary writ was allowed on the facts of the particular case, in the discretion of the chancellor, without deciding any point of law or fact. *Duke of Beaufort* v. *Morris*, 6 Hare, 340.

117. Temporary writ pending question of jurisdiction. Where proper averments are made in a bill as to jurisdiction, they impart a *prima facie* jurisdiction to the court, and enable it to do justice between the parties in cases of irremediable mischief, (the working of a gold mine) by the issue of a temporary injunction until the plea to the jurisdiction is disposed of; the plea does not oust the jurisdiction, but it ought to be disposed of speedily. *Fremont* v. *Merced M. Co.*, 1 McAll. 267.

118. Requisites for bill—Case for interlocutory writ, pending ejectment. Where a bill was brought alleging a continuing trespass by mining copper ore, showing that the complainants had been disseized, and praying an injunction pending an action for forcible entry and detainer, and for an account of mineral exsected, and for decree that defendants surrender possession and the complainants be quieted in their title: and it appeared that the defendants were in possession under claim of right: *Held*, that the bill did not state a case entitling them to relief; that ejectment was the proper remedy with a preliminary injunction on a proper bill showing the pendency of such action to try title, and that after recovery therein the plaintiffs could obtain satisfaction by an action for mesne profits. *Bracken* v. *Preston*, 1 Pinney, 584.

119. Interlocutory, at Chambers—Appeal. The order of a district judge at chambers granting an injunction *ex parte*, is virtually the act of the court and may be enforced in the same way: or may be appealed from without preceding such appeal by a motion to dissolve. *Sullivan* v. *Triunfo G. & S. M. Co.*, 33 Cal. 385.

120. Not granted before answer. The court will not grant an injunction to stay waste in digging mines till the answer is come in or the defendant has made default in not putting in his answer. *Louther* v. *Stamper*, 2 Atk. 496.

121. Mandatory writ before hearing—Diversion of underground stream. Plaintiff in excavating a tunnel to its mining claim on the public lands of the United States, struck a subterranean flow of water which it appropriated and enjoyed for several years. Defendants ran a tunnel from a distant point into the mountain, to a point directly under and some thirty feet below the point where the plaintiff obtained said water, whereupon the water was diverted from plaintiff's tunnel into the tunnel of defendants, and by them appropriated to their own use: *Held*, that such diversion was wrongful and that plaintiff was entitled to an injunction. *A preliminary and mandatory writ was granted. Cole M. Co.* v. *Virginia W. Co.*, 1 Saw. 470, 686.

122. Irreparable injury, how stated. The mere statement that injury is irreparable by reason of defendants taking ores, and the impossibility of ascertaining the

amount and value thereof, is not a sufficient statement of irreparable injury. "The facts should be stated from which the court could learn that the taking and selling the ores would be such injury." *Leitham* v. *Cusick*, 1 Utah, 242.

123. Pending trial at law. Lord of the manor restrained from opening mine on copyhold lands pending trial of the question at law of his right so to do. *Grey* v. *Northumberland*, 13 Ves. Jr. 236; S. C., 17 Id. 281.

124. Proceedings in aid to settle title required. To entitle a party to injunctive relief, the restraining of defendants in possession from operating a mining claim, the plaintiff's title must be shown to be clear and undisputed, or it must appear that steps have been taken to establish the title at law, or valid and satisfactory reasons be shown for not doing so. It would be gross injustice to allow a temporary injunction, when upon the face of the papers it appears that a perpetual injunction could never be granted. *Old Telegraph M. Co.* v. *Central Smelting Co.*, 1 Utah, 331.

As no perpetual injunction could be sustained on a bill to restrain the working of a mining claim without establishing the title at law, no temporary injunction should be allowed to restrain such working in the absence of any suit to try title, or of excuse for not bringing one. Id.

125. Judicial notice of suits affecting the mine. In applications for injunction a judge may take judicial notice of the files of his own court showing suits involving the legal title to the property. *Lyon* v. *Woodman*, 3 Leg. Gaz. 81.

And the failure to diligently prosecute such suits is a ground for refusing an injunction. Id.

126. Before Title established. A court of equity will rarely restrain, by injunction, the working of mines until the title is established at law. *N. J. Zinc Co.* v. *N. J. Franklinite Co.*, and *Boston Fr. Co.* v. *N. J. Zinc Co.*, 13 N. J. Ch. 323; S. C. 14 Id. 308.

127. Suit at law. Chancery has jurisdiction to preserve the subject-matter by injunction, pending proceedings to try the right thereto, and it is not indispensable that there should be a particular form of suit, or that it should be in a court of law, if the proper steps are being taken to decide title: *e. g.*, by proceedings under a special act of congress. *U. S.* v. *Parrott*, 1 McAll. C. C. 271.

128. Issues of law. A court of equity (upon bill to restrain working of a gold mine), will not try the legal rights of parties to real estate. *Irwin* v. *Davidson*, 3 Ired. Eq. (N. C.) 311.

129. Title in dispute — Practice. Courts of equity will not usually grant a perpetual injunction, in a case where the title to the premises is put in issue, and where, from the evidence, the title is in doubt; but will only grant a temporary injunction to restrain the parties until the title can be settled at law. But the chancellor may hear evidence on this point, notwithstanding. *Lockwood* v. *Lunsford*, 56 Mo. 68.

130. Title disputed. The rule that an injunction will not issue where the denial of title by the defendant is positive, is not inflexible. *Merced M. Co.* v. *Fremont*, 7 Cal. 317.

The allegation in complainant's bill that defendants justify under an adverse claim to the mine will not in any sense prejudice the plaintiff's right to an injunction. Id.

131. Title admitted by demurrer. There is no occasion that the plaintiff should first establish his title at law, before he can obtain the injunction when the averment of his right in the complaint is admitted by demurrer. *Tuolumne W. Co.* v. *Chapman*, 8 Cal. 392.

132. Injunction where plaintiff prevents fair trial. Whether after a verdict at law, in an action of trespass, the court will grant an injunction against future trespass in favor of parties who refused at the trial to produce documents necessary to a fair decision, *quære*. *Field* v. *Beaumont*, 1 Swanst. 204.

133. Injury to workings considered—Speedy trial. The local means of working coal mines, the damages arising from delay in opening them, or the loss of the opportunity of working them in connection with contiguous mines, are to be considered upon the question of injunction. *Grey* v. *Northumberland*, 17 Ves. Jr. 281; S. C. 13 Id. 236.

And an injunction upon these considerations ought not to be continued unless a speedy trial of the issue at law be insured. Id.

134. General Relief, Prayer. General relief should not be granted on a bill praying only the issuance of an injunction. *Boyle* v. *Laird*, 2 Wis. 316.

135. Prayer. A decree of injunction cannot be rightfully extended beyond the prayer of the bill. *Leitham* v. *Cusick*, 1 Utah, 243.

136. Effect of Answer. Where the answer to a bill for injunction (to restrain the working of a mine) fully and fairly de-

nies both the title and possession of complainant, no testimony being taken, and the case standing on the pleadings alone, the injunction should be dissolved until good reason appear for continuing it. "But no reason appears to make this an exceptive case" (it being an ordinary case of alleged taking of ore by mining out of a mine claimed in fee by complainant.) *Magnet M. Co.* v. *Page*, 9 Nev. 348.

There are exceptions to the rule that the court will not decree an injunction where the material averments of the bill are traversed by the answer, but no special reason for exception appears in this case (the case being to restrain waste by mining, but no particulars appearing in the report.) *Lady Bryan G. & S. M. Co.* v. *Lady Bryan M. Co.* 4 Nev. 415.

137. Practice — Answer. Upon a hearing in case of waste upon bill and answer alone, the denial of the commission of waste made in the answer is to be taken as true. *Reed* v. *Reed*, 16 N. J. Ch. 248.

138. Denial of Equities — Affidavits. Where the answer to bill for injunction (to restrain mining upon a quartz ledge claimed by both parties) denies all the equities of the bill, and the bill is not supported by affidavits, the injunction must be dissolved. *Real del Monte G. & S. M. Co.* v. *Pond G. & S. M. Co.*, 23 Cal. 82.

139. Equities denied — Answer unsupported. Upon bill for injunction to restrain the working of a ledge of silver ore, where the answer denied all the material averments of the bill, and the bill was wholly unsupported by affidavits or other evidence, and the case submitted for hearing, on the pleadings: *Held*, that the refusal to dissolve the injunction was error. *Johnson* v. *Wide West M. Co.*, 22 Cal. 479.

The entire equity of the bill in such a case being denied by the answer, and there being no support to the bill, the injunction should be dissolved. Id; *Burnett* v. *Whitesides*, 13 Cal. 156.

140. Denial of Equities. Where the answer denies directly and positively, upon personal knowledge, the allegations of the bill, it "denies the equity of the bill," and acting upon it as evidence, the injunction will be dissolved by the court, in the absence of extraordinary circumstances. *U. S.* v. *Parrott*, 1 McAll. C. C. 271.

141. Denial of Fraud. Where fraud, forgery and ante-dating are distinctly alleged in the bill, and the only denial of them is on "information and belief" it is not a "denial of the equity of the bill," and cannot arrest the issue of an injunction, or authorize a dissolution of it if one has been granted. Id.

142. Answer — Information and belief.—The court will not dissolve a preliminary injunction upon a denial of the equities of the bill upon information and belief; nor upon affirmative allegations of new matter meeting the equities of the bill made only upon information and belief. *Cole S. M. Co.* v. *Virginia Co.*, 1 Sawyer, 686.

143. Matters in avoidance. On a motion to dissolve an injunction, matters set up by way of avoidance in the answer responsive to the bill should be deemed, on such motion, equivalent to an affidavit by the defendant. Such matters, on the final hearing, must be proved by the defendant. *United States* v. *Parrott*, 1 McAll. C. C. 271.

144. Answer—Affidavits. As to the effect of answer and affidavits in general and special injunctions, see *Maden* v. *Veevers*, 5 Beav. 503.

145. Affidavits. Neither bill nor answer can be supported by affidavits as to title. So held on motion to enjoin working the New Almaden quicksilver mine. *United States* v. *Parrott*, 1 McAll. C. C. 271.

The admissibility of affidavits on the question of waste considered. Id.

146. Waste—Affidavits. It seems affidavits may be read by the plaintiff in contradiction of an answer that acts of waste were not done or threatened. *Norway* v. *Rowe*, 19 Ves. Jr. 144.

147. Waste—Practice. It has become almost a matter of course to grant an injunction to stay waste. *Smith* v. *City of Rome*, 19 Ga. 89.

148. Incidental account for waste. An account for waste done is incidental to relief by injunction against future waste, and is directed on the principle of preventing multiplicity of suits. *Ackerman* v. *Van Houten*, 4 Halst. N. J. Ch. 476.

149. Account, when incident. Distinction between the cases in which the right to an account is incident to the injunction and the cases where it is independent of such relief, with especial reference to the case of mines and timber. *Parrott* v. *Palmer*, 3 Myl. & K. 632.

150. Accounting. Upon a bill going only for an injunction to restrain part owners from interfering with lessees' salt works, an accounting cannot be ordered. *Stuart* v. *White*, 25 Gratt. (Va.) 300; *Mitchell* v. *McCall*. Id.

But in connection with another bill between owners in the same court, the order to account may be made in both cases. Id.

151. With Account—Plaintiff disseized. No injunction will be allowed in cases of trespass with an account, where the complainants (being disseized) cannot maintain an action for mesne profits. *Bracken* v. *Preston*, 1 Pinney, 584.

152. Practice — Copyhold — Answer—Title. Preliminary injunction granted to restrain the working of mines recently opened upon bill charging the lands to be copyhold, although the answer denied such averment, and asserted positively that they were freehold, and therefore belonging to the defendant; the court refusing, upon the special facts stated, to direct plaintiff to bring his action, the bill setting forth facts in support of the complainant's claim not denied by the answer. *Greenwich Hospital* v. *Blackett*, 12 Jurist, 151.

153. Nonsuit — New trial. A dissolution of a preliminary injunction should be granted upon a nonsuit as a matter of course; but if the cause is remanded for a new trial the complainant is entitled to a renewal of the injunction. *Harris* v. *McGregor*, 29 Cal. 124.

154. Notice—Extent of order of dissolution. An injunction granted at chambers without notice may be dissolved without notice. *Leitham* v. *Cusick*, 1 Utah, 242.

But the order of dissolution can go no further than to undo the original order; it cannot, before notice, order the reinstatement of parties dispossessed under the original order. Id.

155. Insolvency. Where irreparable injury or inadequate relief at law is alleged, insolvency of the defendant need not be superadded. *Sierra Nevada M. Co.* v. *Sears*, 10 Nev. 317.

156. Gold Mine — Insolvency — Effect of Answer. Upon answer distinctly denying the equities of a bill, an injunction will be denied. But an injunction granted on a bill based upon title in the complainant, the great value of the land as a gold mine, and the irreparable injury by defendants digging the gold, and the insolvency of the defendants, will not be dissolved upon an answer setting up an affirmative title in the defendants, and denying no allegation of the bill except title and insolvency. *Moore* v. *Ferrell*, 1 Ga. 7.

157. Insolvency — Laches. In view of the injury to a mine by suspending operations and the ruin of the machinery, and in consideration of five years delay in bringing action, the insolvency of a defendant sought to be enjoined becomes immaterial. *Irwin* v. *Davidson*, 3 Ired. Eq. (N. C.) 311.

158. Water—Insolvency, etc. An injunction to restrain the diversion of water ought not to be granted unless equitable circumstances, beyond the mere allegation of irreparable injury, be shown—as insolvency, impediments to a judgment at law, or to adequate legal relief, or the threatened destruction of the property, or the like. *Burnett* v. *Whitesides*, 13 Cal. 156.

159. Trivial damage — Insolvency — Discretion. Upon bill for injunction to restrain miners from undermining the improvements on a milk ranch, where the court in its discretion refused the writ, the damage threatened being trivial: *Held*, not such abuse of discretion as to be interfered with, although insolvency of the defendants was alleged in the bill, it being denied in the answer. *Slade* v. *Sullivan*, 17 Cal. 103.

160. After new trial granted. If, in an action to try the right to a mining claim, a preliminary injunction is granted on plaintiff's motion, and on appeal to the supreme court a judgment in favor of plaintiff is reversed and a new trial granted, this granting of a new trial does not entitle the defendant to a dissolution or modification of the injunction. *Hess* v. *Winder*, 34 Cal. 270.

161. After recovery in trespass — Practice—Cal. In an action for a trespass upon a mining claim, where the complaint avers that the defendants are working upon and extracting the minerals from the claim, and prays for a perpetual injunction, and the answer admits the entry and work, but takes issue upon the title; if a jury to whom the issue of title is submitted find in favor of the plaintiffs, it is the duty of the court to decree the equitable relief sought, and enjoin defendants from future trespasses. *McLaughlin* v. *Kelly*, 22 Cal. 211.

The complaint charged that the defendants had wrongfully entered upon a tract of mining ground (described by metes and bounds) owned by the plaintiff, and had extracted therefrom gold-bearing earth of the value of $1000; and that they threatened to continue their wrongful acts, and prayed for damages in the sum of $1000, and for a perpetual injunction. The answer set up title in defendants to a specific portion of the tract claimed by plaintiffs, and denied that they had worked upon any other portion than that to which they thus asserted title. Id.

162. Practice in connection with trespass suit, Cal. Plaintiffs sued for damages by reason of alleged trespasses upon a certain portion of quartz mining claims, averred in the complaint to be the property and in the possession of the plaint-

iffs, and alleging further the insolvency of defendants, asking an injunction against further trespasses, which was granted. The defendants denied all the allegations of the complaint, and averred ownership. The jury found generally for the defendants but the court below refused to dissolve the injunction: *Held*, 1. That the action amounted to an action of trespass, with an injunction in aid; 2. That the action having failed, the injunction should go with it; 3. That an ancillary writ should abate with the suit which it supported, plaintiffs having failed to prove that which would have been necessary to maintain their suit; although the action need not be considered as deciding the question of title, nor as debarring plaintiff from proceeding for original relief for irreparable injury going to the destruction of the inheritance. *Brennan* v. *Gaston*, 17 Cal. 372.

168. Damages — California practice. A claim for damages for trespass committed and a prayer for injunction to prevent further waste may be joined in the same complaint. *More* v. *Massini*, 32 Cal. 590.

164. Receiver. Defendants being enjoined from working a mine, it does not follow that a receiver should be appointed to take charge of it; such appointment must depend upon circumstances. *United States* v. *Parroti*, 1 McAll., C. C. 271.

165. Definite decree — Railroad bridge. In injunction against mining "in such manner as to affect the stability of the Victoria bridge, or the railway, or other works of the plaintiffs in the bill mentioned," is not too indefinite. The distance within which the works of the mine could approach could not be determined *a priori*, and the defendant is bound at his peril to observe the rule as expressed in the writ. *North Eastern Railroad Co.* v. *Elliott*, 30 L. J. Ch. 160.

166. Construction of decree as to quantity of water. A decree enjoining the owners of a mining claim situated on a creek below a dam at the head of a ditch, from diverting any water from, or in any manner interfering with the waters of the creek that rise above the dam, does not prevent the owners of the mining claim from using the waters of the creek which may flow down the same after the ditch is supplied. *American Co.* v. *Bradford*, 27 Cal. 360.

167. Working under canal — Statutory limit. By a canal act mines and minerals were reserved to the owners of the land with the right to get such minerals, but not so as to injure navigation; by subsequent sections owners were prohibited from working within ten yards of the canal without the consent of the proprietors of the canal, who might either consent or compensate the owner for the minerals within that distance: *Held*, that the owners should be enjoined from working at any distance from the canal in cases where actual injury to the canal would result, upon paying compensation the same as if the minerals were within the limit of ten yards. *Midland Railway Co.* v. *Checkley*, Law Rep. 4 Eq. 24.

168. Diversion of water—Pleading. A complaint alleging that plaintiffs had for a long time conveyed water from a stream for mining purposes by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in peaceable possession thereof when defendants wrongfully diverted the same, and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction. *Tuolumne Water Co.* v. *Chapman*, 8 Cal. 392.

The allegation in the complaint that defendants wrongfully claim some pretended and fictitious right to the use of the water does not prejudice the right of the plaintiff to the injunction. Id.

169. Ditch Right absolute — Conditional relief. If a party owns a ditch and the right of way from the same to conduct water for mining purposes, and has acquired such right by priority of location, the court should not, in an action to enjoin another party from washing away the ground over which it passes, limit the plaintiff's right by imposing conditions, *e. g.*, by allowing the defendant to wash away the ditch provided he builds a flume or other aqueduct in place of the ditch of sufficient capacity to carry the water, and give bond to pay the damages sustained thereby. *Gregory* v. *Nelson*, 41 Cal. 279.

170. Appearance—Practice. A court of chancery, where the sole object of a bill filed is to obtain an injunction, will not allow that object to be resisted without holding the defendant to a general appearance in the action. *Thornborough* v. *Savage M. Co.* 1 Pac. Law Mag. 267; U. S. Cir. Ct., Baldwin, J.

171. Contempt—Writ modified—Mandamus. When an injunction granted on an *ex parte* application was modified on motion of defendant, without notice to plaintiff, on defendant's giving bond: *Held*, that subsequent acts of defendant, in violation of the original injunction, were not in contempt. *Fremont* v. *Merced Mining Co.*, 9 Cal. 19.

The remedy of the plaintiff, if there was error in the order modifying the injunction,

is by appeal, but he cannot have a mandamus to compel the issuance of attachment for contempt. Id.

172. Writ against mine in another county. The court of chancery, in a county where the parties are found within the jurisdiction of the court, may grant an injunction to prevent the opening or working of mines situate in another county, and enforce the writ through the defendants personally. *Munson* v. *Tryon*, 6 Phila. 395.

173. Injunction against plaintiffs—Utah practice. Where plaintiffs alleged ownership of a lode claim, and prayed an injunction to restrain defendants' working, and the defendants' answer not only denied plaintiffs' allegations, but stated that the plaintiffs were working the lode and property of the defendants: *Held*, that under the practice act of Utah, the court had power to enjoin the plaintiffs from working. *Smith* v. *Richardson*, 1 Utah, 245.

174. Interference with Injunction pending appeal. Plaintiffs obtained a preliminary injunction restraining defendants from obstructing a road leading to plaintiffs' mine. Upon the answer being filed the injunction was dissolved. Plaintiffs being about to appeal from the order dissolving the injunction, the judge below thereupon made an order that, upon such appeal being perfected by filing a bond, etc., as required by him, the order granting the injunction should be revived and continue in force. Plaintiffs perfect the appeal, and apply to the supreme court for an injunction pending the appeal, on the ground that defendants are disregarding said reviving order, and obstructing to the ruin of plaintiffs: *Held*, that the application must be denied, if the court had the power to grant it; that the remedy of plaintiff under the reviving order was ample to protect him until the appeal could be heard, or the injunction be dissolved by some competent authority. *Eldridge* v. *Wright*, 15 Cal. 89.

175. Interference of Supreme Court. Instance of reversal of decree of the lower court refusing an interlocutory injunction reversed by the supreme court, the court below being ordered to issue the writ. *Whitman M. Co.* v. *Baker*, 3 Nev. 386.

176. Defendant entering by collusion with tenant. Defendant asserting title, but admitting that he obtained possession through plaintiff's tenant without plaintiff's knowledge, enjoined upon the ground of the mode of his entry. Anon. case cited in *Norway* v. *Rowe*, 19 Ves. Jr. 144.

177. Misnomer of immaterial party. In an action for an injunction to stay waste, or the asserting of a hostile title by the defendants, and for an accounting, where the relief granted is limited to the injunction prayed for, the fact that a party, only necessary to that branch of the case which relates to the accounting, was sued by a wrong name (Washingson *Gold* Q. M. Co. instead of Washington Q. M. Co.), does not operate to the prejudice of the defendant, and is immaterial. *Parrott* v. *Byers*, 40 Cal. 614.

178. Costs, discretionary. Upon case of perpetual injunction against mining with verdict for damages: *Held*, that the allowance of costs was discretionary with the court. *Esmond* v. *Chew*, 17 Cal. 337.

INJUNCTION BOND.

1. Measure of damages—New discovery after writ—Interest—Counsel fees. Debt upon injunction bond conditioned for payment of "such damages as they may sustain by reason of the issuing of the said injunction, and also all such costs and damages as may be awarded in case the said injunction shall be dissolved," etc. The injunction was granted to restrain parties from mining on a certain lot, and some time after its dissolution, a new discovery was made, and a large quantity of lead ore was raised out of the premises described in the writ, but from a deposit unknown at the time of its issuance, at a distance of 80 or 100 yards from the original workings, and not shown to be connected therewith: *Held*, that no damage for loss of profits or time could be assessed with reference to such deposit which was unknown, and, therefore, unavailable to plaintiff during the time the injunction was in force. *Held*, that plaintiff could not recover more than legal interest upon the amount of money which he might have raised from mineral which could have been mined during the time the writ was in force, upon a showing that the money was worth to him more than such legal interest: *Held*, that plaintiff could not recover counsel fees. *Gear* v. *Shaw*, 1 Pinney, 609.

2. Measure of damages, coal railroad. Morgan sold to Negley "certain coal, with incline and railroad," with privilege to shift the railroad on Morgan's land. Negley commenced the road, but at Morgan's suit was restrained by an injunction which was afterward dissolved. Negley, without constructing the road, sold to another, and brought suit on the injunction bond. *Held*, that the difference between the cost of constructing the road when the injunction was laid and when it was dissolved, was speculative and consequential, and improperly submitted to the jury. Had

the property continued in the hands of Negley, and he had finished the road at an increased cost, it would have been a proper subject for damages. *Morgan* v. *Negley*, 53 Pa. St. 153.

3. Account — Fraud. An injunction bond is designed to form the remedy for damages occasioned by a writ procured by false or fraudulent suggestions, and the injured party must resort to the bond; he cannot make such damages an item of accounting against a co-tenant. *Hall* v. *Fisher*, 20 Barb. 442.

4. Counsel fees. In suit upon an injunction bond given in support of a writ to prevent the working of mining ground, fees paid to counsel for services rendered in the trial of title are not recoverable. The recovery is restricted to the services of counsel in procuring the dissolution of the injunction. *Campbell* v. *Metcalf*, 1 Mont. 378.

The same in like suit where the diversion of water had been enjoined. *Allport* v. *Kelly*, 2 Mont. 343.

INSOLVENCY.

1. Suspended mine. Application for an injunction and receiver under "Act to prevent fraud by incorporated companies," on the ground of defendant's insolvency, refused on the allegation that the mine had suspended working, etc., as not sufficient proof of insolvency, the answer showing a sufficient excuse for such suspension. *Goodheart* v. *Raritan Co.*, 4 Halst. 73. (8 N. J. Ch.)

2. Averment of, when not necessary. When the injury goes to the destruction of the substance of the estate (quarrying and taking away asphaltum) no allegation of insolvency is necessary to sustain an injunction. *More* v. *Massini*, 32 Cal. 190.

INSPECTION.

1. Jurisdiction. Before granting an order for the inspection of a mine the court must be satisfied that the application is made in good faith, and in granting it will pay due regard to the convenience of the party affected. But a court of equity has the power to make and enforce an order of this kind, and where the facts to be determined cannot be discovered except by inspection of a mine in the possession of the defendant, and accessible only by a deep shaft and machinery, it would be a denial of justice to refuse it. *Thornborough* v. *Savage M. Co.*, 1 Pac. Law Mag. 267. (Baldwin, J.)

2. Power to order. The court may make an order for the inspection of mines. *Ennor* v. *Barwell*, 1 De G. F. & J. 529; *Lonsdale* v. *Curwen*, 3 Bligh. (O. S.) 171.

3. On interlocutory hearing. It is not the practice of the court to make an order upon an interlocutory hearing going to the breaking of the soil for purposes of inspection. *Ennor* v. *Barwell*, 1 De G. F. & J. 529.

4. Survey and plan. And for a survey and plan of the workings. *Att'y Gen.* v. *Chambers*, 12 Beav. 159.

5. View—Witnesses—Use of means of access. Where the question at issue was the identity of the lode claimed by plaintiff with the lode claimed by the defendant, which could only be determined by inspection of underground developments of the mine in possession of the defendants: *Held*, that it was a proper case for an order of inspection, and the order was made allowing a view and survey of the mine by the complainant, with his attendants and witnesses not to exceed nine in number, during a period of five successive days, the defendant being commanded to furnish all means of ingress and egress and means of traversing the mine in their possession. *Thornborough* v. *Savage M. Co.* (Baldwin, J.); 1 Pac. Law Mag. 267.

6. Entry allowed to build support. Surface owners, by provision in decree, allowed to enter mines for the purpose of making supports to maintain buildings. *Dugdale* v. *Robertson*, 3 Kay & J. 695.

7. Ancillary power to remove obstructions. Plaintiff, the owner of a mine adjacent to a mine worked by the defendants, believing that defendants had worked beyond the boundary, applied to them for leave to inspect their workings. After some delay permission was granted, when at the boundary between the plaintiff's and defendants' minerals, a newly erected wall was found which stopped further inspection. This wall the defendant refused to allow to be interfered with. On application to a judge at chambers, an order was made for the government inspector to examine the wall and report on the practicability of an inspection behind it, and he reported that it could be done, whereupon the judge made an order that plaintiff, by his witnesses, workmen and agents, should be at liberty to inspect the defendants' mine at and behind the wall on certain terms: *Held*, that under sec. 58 of the Com. Law Procedure Act of 1855, giving to courts of law the power to order inspection, there was as ancillary thereto the power to order the removal of obstructions. *Bennett* v. *Griffiths*, 30 L. J. Q. B. 98.

8. To avoid injury to adjoining works. Instance of inspection allowed of a colliery and admission of the opposite party to see whether the operations in that colliery threatened injury to the works of the opposite side. *Adshead* v. *Needham*, cited in *Bennitt* v. *Whitehouse*, 28 Beav. 119.

9. Approach through other Mines. An order for inspection may be made, although the mine to be examined is so worked that it cannot be approached except through other ground not in controversy, belonging to the defendants. *Lewis* v. *Marsh*, 8 Hare, 97.

10. Idem — To examine supports. A lease of a coal mine failed to reserve the right of inspection, but contained a covenant to leave certain supports. The mine was worked through the adjoining coal works belonging to the lessees. Upon a bill to restrain working so as to destroy the supports: *Held*, that an order of inspection might be made, notwithstanding the necessity the complainant and his viewers would be under of going through workings belonging to the defendants. Id.

11. Working over Boundary. The owner of a mine sought relief against the owner of an adjoining mine for an alleged trespass in working into the plaintiff's mine: *Held*, that the plaintiff, upon making out a *prima facie* case, was entitled to an interlocutory order for the inspection of defendant's mine; that the denial by the defendant of the trespass was not sufficient ground for refusing the order, and that it did not depend upon the balance of testimony. *Bennitt* v. *Whitehouse*, 28 Beav. 119.

12. Practice—Barrier Case. In a case such as the alleged breaking down of barriers between adjoining collieries to allow an inspection either by plaintiffs or by competent persons employed by them, is a course constantly taken to enable the court to do justice. *Whaley* v. *Brancker*, 10 Law Times, N. S. 155.

But an adverse inspection will not be granted before the defendant has had time to answer the complainant's affidavits. Id.

13. Practice—Breaking the Soil. Record of an order of court for the inspection of a coal mine, and to make excavations to learn the geological formation and to cut down a bank so as to let out a reservoir, to see whether its natural drainage caused the percolation complained of. Upon which order the court on motion to vary the same: *Held*, that an order for the breaking of the soil, upon an interlocutory application, was not according to the course of practice; and the other matters in the order were admitted to be rightfully allowed. *Ennor* v. *Barwell*, 1 DeG. F. & J. 529.

14. From time to time. Record of an order allowing repeated inspection of mines, on notice, with parties and viewers, and allowing removal of instructions. *Walker* v. *Fletcher*, 3 Bligh, (O. S.) 178.

15. Form—To ascertain extent of working. Record of an order for inspection to see how far defendants had worked toward or under the sea to get the coal under the sea bed belonging to the crown. *Attorney-general* v. *Chambers*, 12 Beav. 159.

16. Form of Order — Removal of earth. Record of an order of court in a case of mines compelling defendants to remove earth and open air courses, "so as to enable the viewers to make a perfect and complete report of the workings." *Lonsdale* v. *Curwen*, 3 Bligh (O. S.), 171.

17. Form of order. For form of order for inspection and survey of a mine, see *Thornborough* v. *Savage M. Co.*, 1 Pac. Law Mag. 267.

18. "Mine inspectors" — Pennsylvania practice. The act of May 3, 1870, provided for the appointment of inspectors of mines "by the court," at the first term of the court in each year—the act to be in force after its passage: *Held*, that where a term had been held before the passage of the act, the inspectors should be appointed at the first term during the year after the approval of the act. *Com.* v. *Conyngham*, 66 Pa. St. 99.

19. Expenses of view, including excavations, allowed as costs with interest. A bill in equity, alleging that the defendants had made subterranean excavations leading from a shaft on their land, under the plaintiffs' adjoining land and had taken ore therefrom, prayed that the plaintiffs, by officers appointed by the court, might have access to the shaft and the excavations therefrom, and might be authorized to make such surveys and explorations, and do all such acts as in the premises were proper to be done. The court passed an order appointing viewers, with power to employ engineers and workmen, enter the shaft, examine the excavations, clear the same so far as necessary to ascertain what ore had been taken from the plaintiffs' land, and do all acts that might be reasonably necessary to effect the purposes of the order, the plaintiffs to advance the money necessary for the expenses of the view. The viewers used a shaft and made excavations on and under the plaintiffs' land, for the purpose of reaching the drifts wrongfully dug by the defendants. After a decree for the plaintiffs: *Held*, that it was proper to allow

in the costs the expenses of the view, including the excavations, and a sum for the use of the shaft on the plaintiffs' land, if such excavations were reasonable, though not absolutely necessary for the view; and that interest to the date of the final decree on the sums advanced by the plaintiffs in payment of said expenses might be also included in the costs. *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80.

20. By Jury—Liquors. Where the jury, while viewing the mine, were treated to liquors at defendant's cost, the verdict was set aside. *Sacramento M. Co.* v. *Showers*, 6 Nev. 291.

But verdict sustained in like case where the liquor was furnished by the successful party's agent or surveyor. *Schissler* v. *Cheshire*, 7 Nev. 427.

21. Of Documents. Complainant in equity entitled to production of documents in possession of defendants, showing complainant's right to coal dues. *Smith* v. *Beaufort*, 1 Hare, 507.

The same as to title of tenant in common of coal mines. *Maden* v. *Veevers*, 7 Beav. 489.

22. Of books and accounts—Directors of company operating in another jurisdiction. A., B., and C. were members and three of the directors of a mining company, and also lessees in trust for the company, of mines in Nova Scotia, under a lease, by which a portion of the profits was reserved to the lessor. The lessor's executors filed a bill against A., B., and C. for an account of the profits of the mines, and required them to set forth a list of all accounts, etc., relating to the mines in the possession of them or their agents. The defendants set forth a list of all the accounts in the possession of themselves and of the secretary of the company in London, adding that there were other accounts in the possession of the company's agent in America; that the defendants had no power to inspect or use the accounts of the company, except when sitting as the board of directors, or by an order of the board, and that they had not the permission of the board to use the accounts for the purposes of the suit, and they believed that the directors declined to allow them to use the same, or to give them any further information which might enable the plaintiffs to prosecute the suit: *Held*, that the answer was insufficient, as it did not state that the defendants had, as they lawfully might, applied to the agent in America for a list of the accounts in his possession. *Taylor* v. *Rundell*, 11 Sim. 391; 1 Cr. & Ph. 104; 13 L. J. Ch. 20; 11 C. B. N. S. 683.

INSTROKE.

Right to so work. In the absence of express contract, a lessee of a mine is entitled to work the minerals by "instroke." *Whalley* v. *Ramage*, 10 Weekly Rep. (Eng.) 315.

INSURANCE.

Petroleum. A barrel of petroleum cannot be kept as current merchandise in an insured store when the policy forbids him to "keep or have" such product on the premises. *Birmingham Ins. Co.* v. *Kroegher*, 83 Pa. St. 64.

INTEREST.

1. On Royalty. Interest may be allowed on rent reserved in kind; salt from salt works. *Brooke* v. *Wilcox*, 11 Grat. (Va.) 411.

2. Against tenant in common. Interest is to be paid upon the rents found to be due from the tenant in common in possession to his co-tenants. *Early* v. *Friend*, 16 Grat. (Va.) 21.

3. Usurpation of trust. Interest allowed on annual profits of a colliery worked by a party in usurpation of a trust, such annual profits being treated the same as if they were installments of consideration money received on a sale of the mine. *Wightwick* v. *Lord*, 6 H. L. Ca. 217; affirming *Same* ads. *Same*, 4 De G. M. & G. 803.

4. Agent's contract—Lex Loci. A contract between a mining agent and his employers, such employers residing in New York where the contract was made, but the mines situate in Montana, where the services are to be performed, bears interest according to the law of Montana, but requires demand of payment to be made in New York. *Isaacs* v. *McAndrew*, 1 Mont. 437.

INVENTOR'S PATENTS.

1. Cases of Inventor's patents relating to mining and milling. The Blake crusher patent considered. *Blake* v. *Robertson*, *Robertson* v. *Blake*, 94 U. S. 728.

2. Screen and breaker. Where a patentee had invented a machine for breaking coal, and combined it with an apparatus for screening which he did not invent, and took a patent for the combination only; afterward took a patent for the breaker, and then surrendered both patents, and took one for the breaker alone: *Held*, that his describing and not claiming the breaking apparatus in his first patent, and the surrender and cancellation of the second, did not deprive him of his right to a patent for the breaking apparatus. *Battin* v. *Taggart*, 17 How. 80.

3. Pans. Belknap's patent for a certain combination used in amalgamating pans construed. *Coolidge* v. *McCone*, 2 Sawyer, C. C. 571.

4. Slag. The patent to Anthony Hill for improvement in mode of extracting iron from slag, and including use of lime for such purpose: *Held*, void for want of novelty. *Hill* v. *Thompson*, 8 Taunt, 375.

5. Hydraulics. Case of interference between the "Fisher" and "Allenwood" patents on improved hydraulic apparatus. *Fisher* v. *Craig*, 3 Sawyer, 70.

6. Measure of damages. Consideration of the question of measure of damages for infringement of the patent of Zenas Wheeler for machines used in amalgamating gold and silver. *Birdsall* v. *Coolidge*, 93 U. S. 64.

IRON.

1. Quality—Delivery. A contract to deliver iron made in a certain place "Center county metal," in consideration of a sound price paid, is complied with by a delivery of iron made in that place which the contracting party believed to be good, although upon trial it was found to be positively bad. *Kirk* v. *Nice*, 2 Watts, 367.

2. Forge—Manufacturing. It is no breach of a covenant which prohibits the erection of a forge or furnace for the manufacturing of iron, or the erection of any building for any such purpose, to erect buildings in which forges for the purpose of heating iron, and moulding and working it into different kinds of articles to be used in the construction of locomotive engines, are intended to be used. *Rogers* v. *Danforth*, 9 N. J. Eq. 289.

A forge or furnace for the manufacturing of iron, has a definition comprehended and understood alike by scientific men and mechanics acquainted with the business; and in such cases the definition will control in the construction of the covenant. Id.

IRRIGATION.

1. Act of 1866. The Act of Congress of July, 1866, granting the right of way over the public lands to ditch and canal owners construed, and the custom of appropriation stated. *Hobart* v. *Ford*, 6 Nev. 77; *Barnes* v. *Sabron*, 10 Nev. 217; *Basey* v. *Gallagher*, 20 Wall. 671; S. C. 1 Mont. 457; *Van Sickle* v. *Haines*, 7 Nev. 249.

2. Natural want—Climate. Water for irrigation is not a natural want in the same sense that water for quenching thirst is; but water for irrigation may be diverted by any riparian proprietor so long as he does not materially affect the value or quantity of the water to the injury of the lower proprietors. *Union M. Co.* v. *Ferris*, 2 Sawyer, 176 and 450.

Where the diversion of water for irrigation is allowed, the right must extend only to a reasonable use; and surplus water must be returned to the same stream from which it was taken; and must cease at the close of the season during which it is needed. Id.

Dictum. The party using a ditch for irrigation must return the surplus water to the same stream before it leaves his land. Id.

The relation of the climate, etc., of Nevada, to the matter of water considered. Id.

3. Prescription—User for irrigation purposes. Plaintiff sued for diversion of the water of a rivulet, defendant having "digged two pits deep and wide, and made two ponds, partly in and near the said course." Defendant pleaded that the water springs were in his own land, and "that the two pits have been there time out of mind for the use of water for the meadows and cattle, and for other purposes, etc.: *Held*, that such plea of prescription for the purposes mentioned was good, but that defendant could not enlarge the pits, and that the allegation of "other purposes" was too general to support the plea of prescription. *Brown* v. *Best*, 1 Wilson, 174.

4. As a means of husbandry—Limited use. The owner of land adjoining an ancient brook of running water, may lawfully divert the water for "the purposes of husbandry, as watering his cattle or irrigating the close; and he may do this either by dipping water from the brook and pouring it upon his land, or by making small sluices for the same purpose;" and if the land of the lower owner becomes less productive by such deprivation of the water, it is *damnum absque injuria*. *Weston* v. *Alden*, 8 Mass. 136.

5. Dam—Evaporation—Return of surplus. Every man through whose land water passes may use it for watering his cattle or irrigating his land, but he must use it in this latter way so as to do the least possible injury to his neighbor who has the same right. If he stop its flow by a dam, turn it upon his land so that a great deal of it is lost by absorption and evaporation, and do not return the surplus to the natural channel, an action lies in favor of a lower proprietor who is thus deprived of the privileges which belong to him. The case of *Weston* v. *Alden*, 8 Mass. 136, distinguished. *Anthony* v. *Lapham*, 5 Pick. 175.

6. Domestic, distinguished from irrigation, purposes. Where a spring of water rises upon the land of one owner, and from it runs a stream to and upon the

land of another, the owner of the land upon which is the spring has a right to use so much of the water as is necessary for his family and his cattle, but he has no right to use it for irrigating his meadow, if thereby he deprives the lower proprietor of a reasonable use of the water in its natural channel, although the waters of the stream are not more than sufficient for the domestic uses of the upper proprietor, for his cattle, and for the irrigation of his land. *Arnold* v. *Foot*, 12 Wend. 329.

7. **Water for farm purposes polluted by mines.** Where the lower proprietor had a right by deed from the then upper proprietor to erect a dam on the land of the latter, in order to convey a portion of the water through an artificial channel for, as expressed in the grant, the purpose of watering his meadows, but had actually used it for above twenty-five years for watering horses and cattle as well as for irrigating his land, it was held that such use for above twenty-one years entitled him to it of right, and that he might maintain suit against one claiming under the former upper proprietor for polluting the stream, by impure water pumped from mines, so as to render it unfit for his cattle. *Wheatley* v. *Chrisman*, 24 Pa. 298.

8. **Appropriation recognized by custom and statute.** By the Act of Congress of July 26, 1866 (Rev. Stat., s. 2339), which provides "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same," the customary law with respect to the use of water, which had grown up among occupants of the public land under the peculiar necessities of their condition, is recognized as valid. *Basey* v. *Gallagher*, 20 Wall. 671.

In the Pacific States and territories a right to running waters on the public lands of the United States for purposes of irrigation may be acquired by prior appropriation, as against parties not having the title of the government. The right exercised within reasonable limits, having reference to the condition of the country and the necessities of the community, is entitled to protection. *Lobdell* v. *Simpson*, 2 Nev. 274; *supra*, sec. 1.

9. **Apropriation—Montana.** The right of appropriation for such purpose, recognized; construction of the Montana statute on irrigation. *Thorp* v. *Woolman*, 1 Mont. 168; see *Thorp* v. *Freed*, Id. 652.

10. **Priority—Statutory law contracts local customs.** In constructing section 9 of the act of Congress, approved July, 26, 1866 (Rev. Stat. U. S., s. 2339), recognizing the validity of the local customs, laws, and the decisions of courts in relation to the appropriation of water for mining and irrigation purposes: *Held*, that the union of the three conditions referred to in said section in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom, and a statutory regulation, the letter, as of superior authority must necessarily prevail. *Basey* v. *Gallagher*, 20 Wall. 671; *Barnes* v. *Sabron*, 10 Nev. 229.

11. **Prior appropriation.** The first appropriator of the water of a stream flowing over the public lands, has the right to insist that the water thereof shall, during the irrigating season, be subject to his reasonable use and enjoyment, to the full extent of his original appropriation and beneficial use. In subordination to such rights subsequent appropriators may take the remainder of the water flowing in such stream. *Barnes* v. *Sabron*, 10 Nev. 229.

A right to running water on the public lands of the United States for purposes of irrigation, can be acquired by prior appropriation as against parties not having the goverment title. Id.

12. **Reasonable use—Ditch capacity.** The first appropriator is entitled to only so much water as is necessary to irrigate his land, and is bound to make a reasonable use of it. What amounts to a reasonable use depends upon the circumstances of each case, but a party who constructs ditches carrying a greater quantity should not be confined to the amount of water used by him the first and second years after his appropriation, nor his rights regulated by the number of acres he then cultivated; the object in view at the time of his diversion of the water is to be considered in conection with the actual extent of his appropriation by such ditches. *Barnes* v. *Sabron*, 10 Nev. 229.

If the capacity of his ditches is greater than is necessary to irrigate his farming land he must be restricted to the quantity needed for the purposes of irrigation, for watering his stock, and for domestic purposes; but if the capacity of his ditches is not more than sufficient for those purposes, then, no change having been made in the ditches since constructed, and no question of the right of enlargement being involved, he must be restricted to the capacity of his ditches at their smallest point. Id.

13. **Reasonable use—Size of stream—Perceptible diminution.** Cases for a nuisance in diverting a stream of water. The

evidence was, that defendant being the owner of certain land upon a stream, conveyed a part lying farthest down the stream to plaintiff, without a special reservation of the right to the water; he then opened ditches on his land and turned the water into them for the purpose of irrigation. The reasonableness of the detention of the water by the upper proprietor, must depend upon the circumstance of each case, and is to be judged of by the jury. In judging of the proper use of water, the size and capacity of the stream rightly enters into the inquiry. The distinction taken between a stream so large as to be properly designated a creek or river, and a mere rivulet used for the purposes of irrigation, is perfectly well founded. In the one case of course a much larger quantity may be absorbed without perceptible diminution or actual injury than in the other. In the use of it, some evaporation and decrease of it, and some variation in its weight and velocity, must necessarily take place. In such case the maxim is *de minimis non curat lex.* But whenever so much of the volume of water is obstructed as to be plainly perceptible in its practical uses below—whenever the channels which before were filled, exhibit the loss of the accustomed fluid—an injury is committed for which an action may be sustained, though it may not have been actually used by the lower proprietor. *Miller* v. *Miller*, 9 Pa. St. 74; See *Elliot* v. *Fitchburg R. R. Co.*, 10 Cush. 191.

14. No distinction between mining and irrigating use. No distinction is made in the states and territories of the public domain on the Pacific slope by the custom of miners or settlers, or by the courts, in the rights of the first appropriator as regards the use made of the water, provided the use be a beneficial one. *Barnes* v. *Sabron*, 10 Nev. 231; *Basey* v. *Gallagher*, 20 Wall. 671.

The same as between miner and mill-man. *Ortman* v. *Dixon*, 13 Cal. 34.

15. License—Irrigating ditch a way of necessity. A right to carry an irrigating ditch over the land of another may be created by license without deed. *Yunker* v. *Nichols*, 1 Colorado, 551.

A right of way of necessity exists in Colorado to carry an irrigating ditch across the land of another to the land intended to be cultivated. Id.

16. License.—A parol license to erect a dam to run a grist mill, made by the owner of a ditch, the result of which erection is to retard or prevent the flow of water into such ditch, is irrevocable by the ditch owner after the expenditure of money in good faith under such license. *Lee* v. *McLeod*, 12 Nev. 280.

17. Possession.—Irrigation of land considered as evidence in proof of possession of the land irrigated. *Courtney* v. *Turner*, 12 Nev. 345.

18. Conveyance.—Construction of conveyance of the right to take water for irrigation purposes, in Massachusetts. *Chafin* v. *Chafin*, 4 Gray, 280.

19. Division of water by intervals of time.—If the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person may not only appropriate a part or the whole of the residue, and acquire a right thereto as perfect as the first appropriator, but may also acquire a right to the quantity of water used by the first appropriator at such times as not needed or used by him. If A. has appropriated the water during certain days in the week, or during a certain number of days in the month, B. may appropriate it and become entitled to its use on the other days of the week or month. *Barnes* v. *Sabron*, 10 Nev. 217.

"An agriculturist might appropriate the waters of a stream for irrigation during the dry season, and a miner might appropriate them for his purposes during the remainder of the year. And so may several persons appropriate the waters for use during any different periods. There is no difference in principle between appropriations of waters, measured by time, and those measured by volume." *Smith* v. *O'Hara*, 43 Cal. 376.

20. Effect of patent. Where a person diverted and appropriated the waters of a creek on public land from its natural channel, and afterwards the land on which its natural channel was situated, was patented to another: *Held*, that the former acquired no right against the government; and that the patent carried all the right of the government, which was absolute and unincumbered by any diversion or appropriation, to the patentee. *Van Sickle* v. *Haines*, 7 Nev. 249.

21. Patent, subject to vested water rights. A patent of the United States, issued subsequent to the Act of Congress of 1870 (Rev. Stat., sec. 2,340), grants the land subject to such vested and accrued water rights as were previously acquired by other parties under sec. 9 of the Act of 1866 (R. S., sec. 2339). *Barnes* v. *Sabron*, 10 Nev. 229.

22. Eminent domain—Nevada Statute. The Act of March 5, 1869 (2 Comp. Laws, 415) applies only to cases where persons are desirous of constructing a ditch or flume over the lands of another, and to provide for a right of entry upon such lands for the purpose of surveying such ditch or flume, and to declare how such lands might be

condemned where the same could not be obtained by the consent of the owner. *Barnes* v. *Sabron*, 10 Nev. 232.

23. False assertion of irrigation privileges treated as material misrepresentations—Practice. In an action to recover damages for alleged false and fraudulent representations in the sale of land, the plaintiff, among other things, alleged that the defendant represented that all waters of Thomas Creek "belonged to him, to use and appropriate as his own, at all times for irrigation upon said ranch," and that the right and title thereto was in him.

It was averred that said representations about said water and the use thereof were false and fraudulent, and were made by defendant with intent to deceive plaintiff and induce him to purchase said ranch. The defendant, in his answer, denied that he ever made any such representations, and, among other things, alleged that no water, water rights, or privileges of any kind were mentioned in his deed to plaintiff. "Nor were they appurtenances of said ranch" or land: *Held* that the plaintiff, under the pleadings was not required to offer any proof that the waters of Thomas Creek did not belong to, or were not appurtenant to the Geller ranch. *Banta* v. *Savage*, 12 Nev. 152.

24. Idem—Question of fact. The defendant had also stated that there was "water enough to flood the ranch in two hours:" *Held*, that whether this was a mere expression of opinion, or was a statement of a fact calculated and intended to deceive and mislead the plaintiff, should have been left to the finding of the jury. Id.

25. Diversions, to injury of mill below. Plaintiffs were owners of a meadow through which ran an ancient water-course. About seven years before suit, for the purpose of irrigating their meadow, they erected a dam and placed a gate, by the use of which they flooded their meadow at pleasure. Defendants were owners of a ditch below on the same stream; the effect of the use of the dam and gate was that during the time it took to fill the dam to the head required for plaintiff's use, the water was cut off from a grist-mill, resulting in a stoppage of the mill during the greater part of the day. The defendants had entered and taken away the gate: *Held*, that defendants were justified in so doing. The plaintiff's appropriation of water against the ancient right not being based on prescription, and amounting to more than an enjoyment of the natural benefits of the stream. *Colburn* v. *Richards*, 13 Mass. 420.

26. Natural water-course — Sinking stream. A stream in Nevada supplied at seasons from springs, but mostly from the melting snow on the mountains, having no regularity as to quantity of water from season to season, and at certain places at certain seasons having sinks, where the water disappears beneath the surface, but having a distinct channel, with bed and banks, is a natural water-course, a "flowing stream of water," a water-course as distinguished from water flowing through ravines only in times of freshet; and it need not appear that it is water flowing continuously. *Barnes* v. *Sabron*, 10 Nev. 217.

27. Springs. The appropriation by ditch for irrigating purposes, of water from a spring, does not prevent the owner of the land on which the spring is situated from so using his own land as to cut off the supply from the irrigating ditch. The distinction between streams and percolations stated. *Hanson* v. *McCue*, 42 Cal. 304.

See APPROPRIATION, DITCHES, WATER.

JOINT STOCK COMPANIES.

1. Members are partners. Member of a joint stock mining company whose regulations do not otherwise provide are partners, and cannot sue each other at law upon an unsettled account, nor can an assignee of a claim of certain members against the company pursue any remedy not given to the assignors. *Bullard* v. *Kinney*, 10 Cal. 60.

2. Construction—Power to lease the mines for a long term. A company was incorporated in the first place for the working, preparation and sale of porcelain clay, with power, if it should be deemed expedient, after the original business had become developed, to combine "mining operations" with the original business. By the company's deed it was provided that it should be competent for any extraordinary general meeting, by a majority of two-thirds in number of the shareholders, to empower and require the directors to bind the company, and every shareholder thereof, to any act, deed, matter, or thing whatsoever, which the company, by virtue of its corporate capacity, or otherwise, or all the shareholders together, would be enabled to make, do, or execute, if the consent of every shareholder were given thereto. Also that the directors should have power to make contracts, and in case it should be doubtful whether it was in the competence of the directors to conclude any contract, the same might be submitted to an extraordinary general meeting, and if sanctioned, should be binding upon every shareholder, whether under incapacity or not, in like manner as if every shareholder were *sui juris*, and had consented. The

company obtained leases of land for ninety-nine years, commenced business in 1852, and paid one dividend, and no other, the undertaking not turning out successful: *Held*, that after a period of nine years of unsuccessful working a majority of two-thirds of the shareholders in general meeting were empowered under the above clauses, to authorize the directors to make a valid mining lease for twenty-one years of the whole of the works, and buildings of the company. *Featherstonhaugh* v. *Lee Moor P. C. Co.*, L. R. 1 Eq. 318.

8. When right to certificate complete. A person who has subscribed for shares in a joint stock company, completely registered under statute 7 and 8 Vic. c. 110, is not entitled to certificates under sec. 51, till he has executed the deed of settlement, or a deed referring thereto. *Wilkinson* v. *Anglo-Californian G. M. Co.*, 18 Q. B. 727.

4. Subscription—Meetings. A subscription to shares is but an act or declaration of the subscriber to become a partner, and is executory only. *Hedge and Horn's Appeal*, 63 Pa. St. 273.

The meeting of some of the subscribers to organize their company, and enter into the actual relation of members to it, binds none but those who meet. Id.

5. Premature assessment—Notice of meeting. Where the articles of a joint stock association provided for an assessment, upon this, among other conditions, that the proceeds of sale of two hundred non-assessable shares should have been first expended, a notice given while fifty of such shares still remained unsold, calling for a meeting for the purpose of levying such assessment, was premature and invalid, and is not aided by the fact that between the time of the notice and the time of the meeting such fifty shares had been sold as required by the conditions in the articles of association. *Westcott* v. *Minnesota M. Co.*, 23 Mich. 145.

A verbal notice of such meeting as against shareholders who did not appear is of no validity when the articles called for a notice in writing. Id.

6. Proof of directorship—Pass-book. A company was projected for the working of mines in Belgium. A prospectus was printed, describing the objects of the association, naming A. B. C. and D. as directors, and Messrs. Martin, Stone & Co. as the bankers of the company, and stating that "the deposits would be returned in full, without any deduction for preliminary expenses, in the event of the non-prosecution of the adventure. In an action by an allottee of five hundred shares, to recover back, on the abandonment of the project, the £250 paid by him thereon to Martin, Stone & Co., the plaintiff, in order to show D. to have been a director, proved that he was seen ten or twelve times at the offices of the company, and twice in the directors' room; that he took some of the prospectuses for the purpose of circulating among his acquaintance; and that his name appeared with the others at the head of the company's account with the bankers. The plaintiff also put in the bankers' pass-book, containing entries of receipts of cash on account of the company, but there was nothing to identify any part of it as the £250 paid in by the plaintiff. The pass-book was received as being evidence because proved to have been seen in the hands of C., one of the defendants: *Held*, that the pass-book was no evidence against D., there being no proof of the account having been opened in his name, with his consent, or subsequent acquiescence; and that there was no evidence to go to the jury that D. was a director at the time that the plaintiff paid the £250 to Martin, Stone & Co. *Drouet* v. *Taylor*, 16 C. B. 671.

7. Directors borrowing money. By the deed of settlement of a mining company the capital of the company was to be £50,000, and it was provided that the affairs and business of the company should be under the sole and entire control of the directors. The deed empowered the directors, if they thought it desirable, to create new shares by vote at a special general meeting. The capital having been expended: *Held*, that the directors had no power, under the terms of this deed, to borrow money on the credit of the company, for the necessary purpose of working the mines. *Burmester* v. *Norris*, 6 Exch. 796.

See PARTNERSHIP.

JUDICIAL SALE.

1. Right of shareholder to redeem. Where the property of a corporation has been sold under an execution, and no steps are taken by the corporate authorities to redeem the property within the period limited by law, a stockholder may interpose and redeem the property for the benefit of the corporation, and holds it liable for the money advanced for that purpose, and by so doing he becomes the equitable assignee of the certificate of sale, and is subrogated to all the rights of the original purchaser at the sheriff's sale. *Wright* v. *Oroville M. Co.*, 40 Cal. 20.

2. Working claim pending redemption. Where, after a sheriff's sale of mining claims had been had and a certificate of sale issued, the defendant agreed with the plaintiff, the purchaser, to work the mine

during the period allowed for redemption, and pay the gross proceeds to the purchaser, who should pay all expenses, and pay wages, whether the mine yielded a profit or not: *Held*, that the net proceeds of working being $7000, in gold dust, after paying all expenses, was the sole property of the purchaser, without regard to the amount of judgment, or the fact that the judgment had been partially set aside upon appeal to the supreme court, or to any mistake of law under which the contract might have been entered into. Whether the judgment was satisfied, or whether the defendant still owned the claims, not decided. *Johnson* v. *Lamping*, 34 Cal. 293.

See LAND, s. 28.

KING'S PREROGATIVE.

1. Government — Ownership distinguished from King's prerogative. The right to mines of gold and silver found in the lands of private persons, was a personal prerogative of the British crown, and not based upon any right incident to sovereignty; such a right is not incident to the government of the United States, or of the State, but the capacity to own land and all that it contains is possessed by both. *Boggs* v. *Merced M. Co.*, 14 Cal. 281; B. & W. L. C. 131.

2. Common law. By the common law, the right to mines of precious metals was not an incident of sovereignty, but a personal prerogative of the king, which could be alienated at pleasure. *Moore* v. *Smaw*, 17 Cal. 200; B. & W. L. C. 52.

3. Spain and Mexico. By the law of Spain the mines were the property of the crown, as part of the royal patrimony. The Mexican law on this subject was derived from the Spanish law, differing from it only in the particulars occasioned by the change in the form of government following the separation of Mexico from the Spanish authority. Id.

See SOVEREIGNTY, ROYAL MINES.

LABOR.

1. District Rules—Conditions subsequent. The rules and customs of miners that require locators to do a certain amount of work upon their claims are conditions subsequent, and the law presumes that such locators forfeit their rights to possess and mine the same by a failure to comply therewith, although no penalty is specified in such rules and customs. *King* v. *Edwards*, 1 Mont. 235.

2. Rules requiring useless labor. All mining rules and customs must be reasonable. Those which compel persons to perform labor in the district to represent their mining ground, which cannot be profitably worked without running a bed rock flume to it from another district, are unreasonable. *King* v. *Edwards*, 1 Mont. 236.

3. Location—Claim. Under the mining laws of White Pine district, as amended in 1867, it requires only two days' work to hold a "location" for a year; and such location means an entire mining claim irrespective of the number of locators or feet. *Leet* v. *John Dare S. M. Co.*, 6 Nev. 218.

4. "Within one Year." Where the law requires a certain amount of labor to be performed "within one year," the locator has until the year expires to perform such labor. And a party who enters upon his claim after the other acts of location are performed, but before the expiration of such year, is a trespasser. *Atkins* v. *Hendree*, 1 Ida. 108; *Chapman* v. *Toy Long*, 4 Sawyer, 35.

5. Claims of co-tenants. Where a mine is owned by tenants in common, "it is a physical impossibility to work on the interest" of one co-tenant alone. *Oro Fino Co.* v. *Cullen*, 1 Ida. 133.

6. By Tunnel. Going on a lode to work it, or even work done in proximity having direct relation to the claim for the purpose of extracting or preparing to extract minerals from it, as for example, starting a tunnel at a considerable distance to cut the claim, would be a possession of the claim within the rules determining possession. *English* v. *Johnson*, 17 Cal. 108; B. & W. L. C. 172.

7. Work off claim. Work done outside of a mining claim in order to hold it, must have some direct relation to the claim, or be in reasonable proximity to it. *McGarrity* v. *Byington*, 12 Cal. 427.

8. Time lost and labor on drain. Where the regulations of a mining district required that every claim should be worked two days in every ten: *Held*, that the efforts of the owners of a mining claim to procure machinery for working the claim should by fair intendment be considered as work done on the claim. *Packer* v. *Heaton*, 9 Cal. 569.

Held further, that working upon adjoining land in constructing a drain to enable the owners to work the claim, was work done upon the claim within the true meaning of the rule. Id.

9. Vested Right. The right of property once attached to a mining claim, in the absence of local regulation, does not depend upon mere diligence in working it.

The right vests with the taking, and is not like a ditch right which does not vest absolutely until the completion of the ditch. *McGarrity* v. *Byington*, 12 Cal. 427.

10. Annual labor — Placer claims.* Parties locating placer claims under the United States mining laws, on a certain date, February, 1876, "have until next February to make the required expenditure upon it for the first year." *Chapman* v. *Toy Long*, 4 Saw. 35.

A location completes the right of the appropriator of a mining claim, and it is not necessary for him to complete any part of the annual labor to perfect his right to extract the minerals. Id.

LACHES.

1. Applicable to case of mines. The defense of *laches* applies with peculiar force to a bill seeking to set aside a sale or lease of mineral property. *Ernest* v. *Vivian*, 33 L. J. Ch. 513.

2. Hazard of mining—Forfeiture of shares—Irregularities. The peculiar and hazardous nature of mining transactions, its fluctuations and uncertain profits, considered as sufficient in connection with over nine years' delay unaccounted for, to force the presumption of an acquiescence in the forfeiture of shares in a mining concern, although such forfeiture was irregular, and many acts of misconduct in the management of the concern among both directors and shareholders had occurred in the meantime. *Prendergast* v. *Turton*, 1 Younge & C. Ch. Ca. 98.

3. Peculiar hazard of mines—Parties standing by to see the result of an adventure have no standing in equity. The case of mines has always been considered by a court of equity as a peculiar one. The property is of a very precarious description, fluctuating continually, sudden emergencies arising which require an instant supply of capital, and in which the faithful performance of engagements is absolutely necessary for the prosperity and even the existence of the concern. And, therefore, where parties under these circumstances stand by and watch the progress of the adventure to see whether it is prosperous or the contrary, determining that they will intervene only in case the mine should turn out prosperous, but determining to hold off if a different state of things should exist, courts of equity have said that those are parties who are to receive no encouragement; that if they come to the court for relief, its doors shall be closed against them; that their conduct being inequitable, they have no right to equitable relief. *Clarke* v. *Hart*, H. L. Cas. 655; *Hart* v. *Clarke*, 19 Beav. 349; 6 Deg. M. & G. 232.

4. Opening mines aids the implication of. The opening of a coal mine by the purchaser of the lands in question considered in connection with lapse of time as good reason to impute laches to the owner, and to sustain an irregular sale to the purchaser. *Rigney* v. *Small*, 60 Ill. 416.

5. Fraud — Delay — Variable value. In suits to rescind contracts for fraud, particularly where the subject is of variable value, it is the duty of the plaintiff to put forward his complaint at the earliest possible period. *Jennings* v. *Broughton*, 5 De G. M. & G. 126, affirming 17 Beav. 234.

6. Undue delay—Fraud. Where there has been fraud the vendee may rescind and recover back the price paid, but the tender should be in a reasonable time after the discovery of the fraud; by undue delay the contract would be affirmed. In this case (fraudulent sale of oil stock), four months was held to be undue delay. *Leaming* v. *Wise*, 73 Pa. St. 173.

What is undue delay, in case of rescission, where the facts are undisputed, is a question for the court. Id.

7. Delay after knowledge of fraud. The vendee (of ditch property) cannot hold possession for a long period after discovery of fraud and then rescind on that ground. *Blen* v. *Bear River & A. W. & M. Co.*, 20 Cal. 602.

8. Barring relief against fraud. Plaintiffs filed a bill alleging that they and defendants were associated in the formation of the Keystone Zinc Company. That defendants purchased lands and sold them to the corporation at an increased price, concealing the price paid, whereby a trust arose, etc. Plaintiffs had delayed suit over four years after knowledge of the facts: *Held*, that their laches barred the suit. *Evan's Appeal*, 81 Pa. St. 278.

Like delay held a bar to relief against acts of the corporators subsequent to the sale. Id.

9. Delay and Expenditures. Complainants having notice of the intention of defendant to open a sough to drain coal mines delayed for two years, during which time defendants laid out over £2000 in preparing to drain and open their mines. The ground of injunction was alleged danger of damage to plaintiffs' canal. Injunction re-

* Section 2324 of U. S. Revised Statutes is recited in the opinion as requiring a certain amount of labor upon all mining claims located after May 10, 1872, without notice of the wording of the entire section, which seems to leave it in doubt as to whether it does not refer exclusively to lode claims.

fused on the ground of laches. *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. Jr. 515.

10. Standing by—Long delay. Tenant for life with an ill-defined power of letting the minerals under the estate, let a long lease in 1840, and died the same year. The remainder-man became of age and went into possession in 1846, at which time he knew of the lease, and refused at the time to take the rents, objecting that there had been no power to make it, and also alleging fraud in obtaining it. But no active steps were taken until 1860: *Held*, that on the mere ground of laches alone the bill must be dismissed, but without prejudice to proceedings at law. *Ernest* v. *Vivian*, 33 L. J. Ch. 513.

11. Injunction. The delay of two years in bringing suit for injunction to restrain the working of a mine, is a fact seriously affecting the claim for an injunction. *Emma Mine Case*, 3 Leg. Gaz. 81.

12. Prevents remedy by injunction. To stop the working of a coal mine is a serious injury; and when it has been allowed to be worked for eight years, the expenditure is an equitable ground to prevent the hasty interference of the court. Injunction refused. *Field* v. *Beaumont*, 1 Swanst. 204.

13. Vendor's laches operates against his vendee. Where an alleged invalid or fraudulent lease of mines has been outstanding, and the mines worked under it with the tolerance of the owner, such owner's vendee takes the land affected by his vendor's laches. The computation of time does not begin as to computing laches from the vendee's purchase, but from the time of his vendor's knowledge. *Ernest* v. *Vivian*, 33 L. J. Ch. 513.

14. Unconscionable conduct—Barring relief. When a party has allowed mines to be worked for a period of thirty years without any remonstrance or action on his part, it is a case which "will not allow the mention of an injunction." *Parrott* v. *Palmer*, 3 Myl. & K. 632.

The unconscionable character of the claim of a plaintiff in such a case, in view of the uncertainty of mining adventures stated, injunction refused and defendants not required to file an account for any period prior to the filing of the bill. Id.

15. Rescission—Purchasing other mine—Departure from prospectus—Practice. Smith received a prospectus issued by the defendant, stating that they had agreed to purchase certain silver property in Nevada, and on the faith of it took shares on the second of August, 1865. On December 30, he received word that this property had been found worthless by the party sent out to examine it, but that the company had determined to purchase other mining property instead, accompanied by the statement from the directors that they would shortly issue a detailed report; which report he received on January 19, 1866. The original prospectus had been issued in good faith, the directors believing the first mentioned mine to be valuable. On February 6, 1866, he filed a bill to be relieved from his shares. On May 28, a winding-up order was made, whereupon he applied to have his name removed from the list of contributories: *Held*, that he was not guilty of laches, as he had a right to wait for detailed information concerning the change in the projects of the company; 2. That he was entitled to have his name removed from the list of contributories, although since the filing of the bill the order for winding-up had been made. *In re Reese River M. Co., Smith's case*, L. R. 4 H. L. 64; L. R. 2 Ch. App. 604, reversing S. C. 36 L. J. Ch. 385.

16. Statutes of Limitation applied in equity. A., by a voluntary settlement conveyed two shares in certain mines to trustees for ninety-nine years, if A. should so long live, in trust for A.'s brother-in-law, B., during the said term if he should so long live, with remainder as to one share in trust for A.'s sister, C., and as to the other share in trust for D., the son of B. and C., to hold to them respectively for the residue of the said term, if they should so long respectively live. Upon the death of B., in the lifetime of A., C. and D. entered into possession of their respective shares. A. afterward, by a deed of gift executed in 1826, conveyed all his remaining interest in the premises to D., and died in 1830. After A.'s death, C. continued by mistake in possession of the share which had been settled upon her until her death in 1835. In 1839, D., upon examination of the deed of 1826, which was in his possession, found out the mistake, and he immediately filed his bill against the executors of C. for an account of the rents and profits received by her since the death of A.: *Held*, that inasmuch as D. had been guilty of laches in not finding out the mistake earlier, by the means which were in his power, he was entitled to an account only for the period allowed by analogy to the statute of limitations, which in this case was six years before the filing of the bill, and an additional period during which he was abroad. *Denys* v. *Shuckburgh*, 4 Y. & C. 42.

17. Excluded Partner — Renewed Lease. Managing partners of a mining partnership at will, gave notice of dissolution to the rest, and intimated their intention, after the dissolution, to apply for a

new lease for their own exclusive benefit, and did so and obtained a lease, and carried on business with uniform success without any outlay beyond what the produce of the mines was more than sufficient to meet. The excluded partners continually asserted their right, which, however, was always denied by the others, to participate in the profits, but took no active steps to enforce it for nine years: *Held*, that they were precluded by laches from obtaining any relief either in respect of the profits after the dissolution, or in the matter of the other partners having bid at the sales of the partnership effects at the dissolution, notice having at the time been given of their intention to do so. *Clegg* v. *Edmondson*, 8 De G. M. & G., 787.

18. No Rescission after dividends received, change of company and long working. A party induced by fraud to purchase mining shares, cannot rescind after receiving dividends, after the mine has been worked three years and its nature changed from a cost-book to a joint-stock company, and the company is being wound up, after all chance of profit is over. There can be no rescission where, in consequence of his own acts he cannot restore the article in the same condition as when he received it. There must be a special action for damages. *Clarke* v. *Dickson*, 1 El. Bl. & El. 148.

19. Account against life tenant. After long delay in taking proceedings against tenant for life committing waste, the court endeavors to deal liberally with him, and will charge interest from as late a period as the circumstances can suggest. *Bagot* v. *Bagot*, 32 Beav. 509.

20. Account. The right to an account, even in the case of mines, may be lost by laches. *Parrott* v. *Palmer*, 3 Myl. & K. 632.

21. In statu quo—Result of risk—Successful adventure. The grantor in a deed who has sold on account of his unwillingness to pay assessments or take the risk of developing the mining ground conveyed, which mining ground upon the expenditure of the grantee is afterwards developed into a mine of enormous value by the discovery of a bonanza, cannot be heard afterwards to allege in equity, as late as two years after his transfer, a mistake in the deed as to the number of feet granted. And although his grantees have made immense sums out of the proceeds of the mine, it is not a case where the parties can be placed *in statu quo*, within the proper meaning of the term—a property of then unknown or little value having become, since the grant, by reason of the mining expenditures of the grantee, a mine of known and very great value. *Kinney* v. *Con. Virginia M. Co.*, 4 Saw. 447.

LAND.

1. Land includes minerals. The right and title to lands includes a right to all the mines and minerals therein, unless separated from the lands by positive grant or exception. *Georgia* v. *Canatoo*, cited in 17 Cal. 209, and note to 3 Kent. 378.

2. Peculiar incidents of mines—Partnership. A mine being in the nature of a trade, many things are to be taken into consideration which are not taken into account in the matter of landed estate: *e. g.*, as to mesne profits, and where there are various interests in it a partnership relation ensues. *Rose* v. *Nixon*, cited 2 Jac. & W. 555; 1 Id. 302.

3. Prima Facie entirety of ownership. *Prima facie*, the owner of land is entitled to the surface itself, and all below it *ex jure naturæ;* those who seek to derogate from that right must do so by virtue of some grant or conveyance. *Rowbotham* v. *Wilson*, 8 H. L. Ca. 348; S. C. 3 E. & E. 752; affirming 6 El. & Bl. 593, and 8 Id. 123.

4. Real estate—Conveyance. A gold mine is real estate, and an interest therein, other than an estate at will, or for a term not exceeding one year, can be transferred only by an instrument in writing. A verbal sale is not good. *Melton* v. *Lambard*, 51 Cal. 258.

5. Claims real estate—Descent—Administrator. The statutes regulating the descent and distribution of realty are applicable to quartz claims; they are real estate. An administrator cannot maintain ejectment for their possession. *Carhart* v. *Montana M. Co.*, 1 Mont. 245.

Mining claims are real estate within the meaning of the practice act prescribing the venue in civil actions. *Watts* v. *White*, 13 Cal. 321.

6. Taxable as real estate. Mineral lands held liable to school tax as real estate under act of May 8, 1854. *Conyngham School Dist.* App. 77 Pa. St. 265.

7. Conveyance. Where mining claims are treated as real estate, title can only pass by deed, devise or descent, and upon decease of the claimant they go to the heir. *Hardenbergh* v. *Bacon*, 33 Cal. 356.

8. Deed of mining privileges. A deed of a mine with mining privileges is not a mere license to take ore or the grant of an easement, but the conveyance of parcel of the freehold. *N. J. Zinc Co.* v. *N. J. Franklinite Co.*, 13 N. J. Ch. 323; 14 Id. 308.

9. Demise of minerals analogous to sale of land. A demise of minerals for the term of twenty-one years for a sum in gross, but payable in annual installments, with power to take the entirety of the minerals: *Held*, a sale of the realty rather than a lease, and that the installments should go to the heir, and not to the executor. *In re Smith*, L. R. 10; Ch. App. 79.

10. Award—Land comprehends buildings—Surface damage—Forest of Dean. The 68th section of the 1st and 2d Vict. c. 43, for regulating the working of mines in the Forest of Dean, provides that every free miner entitled to any gale within any inclosed lands, shall pay to the owner of such lands, compensation for surface damage occasioned by opening or working any gale therein or thereon, which compensation shall be determined by the gaveller or deputy gaveller; and if not paid within ten days after making an award by him, and a copy thereof served on the party required to pay the same, the amount may be recovered by action. The declaration in an action under that section, alleged that the deputy gaveller awarded that the amount of compensation for surface damage done to the inclosed lands of the plaintiffs, by the working of a gale therein or thereon by the defendant, was £60. The plea set out the award, by which the deputy gaveller, after reciting that application had been made to him to determine the compensation for surface damage to lands and buildings of the plaintiffs, alleged to be inclosed lands, awarded that the amount of compensation for surface damage to said lands and buildings, by reason of the working thereon and thereunder by the defendant, was £60; but as to whether the said lands and buildings were inclosed lands within the statute, he made no award: *Held*, that the award was good, although the deputy gaveller had not found that the lands were inclosed. 2. That assuming "surface damage" to mean damage on the surface, the award was not bad, because the deputy gaveller had found that the damage was occasioned by working under the lands, for by such working there might be damage on the surface. 3. That as the word "lands" comprehends buildings, the declaration was good, although it appeared by the award that the compensation was in respect of the land and buildings. *Allaway* v. *Wagstaff*, 4 H. & N. 307.

11. Old mining leases in proof of tenure. Evidence that the lord, for more than a century past, had leased the coal and limestone under copyhold lands in certain parts of the manor, and had received rent for the same, and that the lessees of the lord, and not the tenant, had taken the coal and limestone, goes to explain the nature of the tenure, and in aid of other evidence, may be taken to show that the freehold is in the lord, and not in the tenants. *Brown* v. *Rawlins*, 7 East. 409.

12. Severance. There may be a severance of the title in the surface, used for agricultural purposes, and the underlying minerals. *Stewart* v. *Chadwick*, 8 Iowa, 463.

13. Ore rights severed. Ore rights, when severed from the surface, are real estate. *Hartford Ore Co.* v. *Miller*, *Same* ads. *Same*, 41 Conn. 112.

14. Collieries—Devise of, as estate. Testator having both freehold and leasehold, property in collieries which were principally leasehold: *Held*, to pass under a general devise applicable to freehold as parcel of the testator's estate, it being collected from the whole will, that they should pass under such devise. *Lowther* v. *Cavendish*, 1 Eden, 99.

15. Stone under river. The title of a person owning lands bounded by a stream of water extends to the center thread of the stream, and he may maintain replevin for rock or gravel taken therefrom by a trespasser; and the navigability in fact of the stream above tide water does not affect the title of the riparian owner. *Braxon* v. *Bressler*, 64 Ill. 488.

16. Quarries—Trading concern. The co-owners of certain quarry land and agricultural land worked such quarry land from year to year and sold the proceeds, and during some years the profits were invested in other quarries and in agricultural lands, and during some years divided among the owners. The quarries were worked, and the farming land let under the management of one owner: *Held*, that the trade was ancillary to the land; that the shares were therefore not personalty, but passed to the heir. *Steward* v. *Blakeway*, L. R. 6 Eq. 479.

17. Turf and peat. Turf and peat are a part of the soil, and not a part of the accruing profits of the soil. *Wilkinson* v. *Haygarth*, 12 Q. B. 837.

18. Produce treated as realty. When royalties had been received from coal taken under glebe lands without right to receive such royalties: *Ordered*, that the amount be laid out "for the permanent benefit and improvement of the vicarage." *Bartlett* v. *Phillips*, 4 De G. & J. 414.

19. Annual profits as consideration money—Colliery. The annual profits of a colliery which was worked out, instead of being sold at a certain date, as it should have been, by an executor who without right

worked it instead of selling it, treated the same as if they were annual installments of consideration money. *Wightwick* v. *Lord*, 6 H. L. Ca. 217, aff'g *Same* ads. *Same*, 4 De G. M. & G. 803.

20. Brick rents—Income. Rents and royalties from brick fields made under a power: *Held*, income and not capital. *Cowley* v. *Wellesley*, 35 Beav. 638.

21. Shares—Goods and effects. The court will not grant a writ of prohibition to restrain the Lord Mayor's court from proceeding upon an attachment of shares in a mining company working on the cost-book principle, upon the suggestion that such shares are not "goods and effects." *Tredinnick* v. *Oliver*, 5 H. & N. 780.

22. Cost-book — Shares— Interest in land. Shares in mining companies conducted on the cost-book principle: *Held*, not an interest in land—the mines being vested in trustees for the purposes of the undertaking generally, and not in trust for the individual shareholders; and the interest of the shareholders being limited to the profits derived from working the mines. *Hayter* v. *Tucker*, 4 Kay & J. 243.

23. Cost-book shares. A contract for the sale of shares in a cost-book mine is not necessarily a contract for an interest in land, within section 4 of the statute of frauds. *Walker* v. *Bartlett*, 18 C. B. 844; 17 Id. 446.

24. Customary allotments are freehold. Where by virtue of a custom certain persons called free-miners were at liberty to apply to the gaveller of the hundred of St. Briavels to allot them a particular spot of land of the crown for a coal-pit; and when the spot was agreed upon, the gaveller cut a turf, and having cut so many notches in a stick as there were to be partners in the intended work, and also one for the king and one for the gaveller, that the stick was fastened down with pegs on the spot where the turf had been pared off, and the turf laid down again, after which that spot was considered appropriated; when coal was found, a money payment was made to the king in lieu of his share of the coal. A share in a coal-pit so appropriated was held to be a freehold. *Doe* v. *Pearce*, 2 Peake, N. P. C. 242.*

25. Water right. A water right in Montana is real estate. *Barkley* v. *Tieleke*, 2 Mont. 59.

26. Eminent domain. The owner of a stratum of coal is an owner of land; and an underground right of way through his vein may be condemned. *Brown* v. *Corey*, 43 Pa. St. 495.

27. Registry. The registry act of 6 Anne, c. 2 (Ir.), applies to an easement to enter and carry away limestone. *Listowell* v. *Gibbings*, 9 Irish C. L. 223.

28. Judicial sale without notice of mineral value. The sheriff levied on coal land and reservations of defendant in such parcels as, as he alleged, impaired their value on sale, and did not properly advertise the same as coal land: *Held*, matters addressed to the discretion of the court below, on proper motion, and not matters of error. *Donaldson* v. *Bank of Danville*, 20 Pa. St. 245.

* For mention of jury of miners, see this case.

LAND-OFFICE DECISIONS.*

1. Abandonment. A party who abandons a mining-claim may remove his machinery therefrom, and all ore extracted from the mine. Landowner, Vol. 3, p. 50.*

The filing of an abandonment of surface ground in conflict does not terminate the contest initiated by an adverse claimant, but the judgment of the court having jurisdiction must be had upon all the questions involved in the controversy before patent can issue for the portion of the claim not in dispute. 3 Id. 196.

2. Abstract of title. An adverse claimant should file, with the other papers constituting his adverse claim, either an abstract of title, with copy of the original notice of location, and the deeds of conveyance tracing his right of possession from the original locators of the adverse claim. Copp, 232.

Where an abstract of title is filed by an adverse claimant, it should be properly attested by the seal of the recorder. Id.

An omission to file an abstract of title should be treated as an irregularity only, and not as a defect that vitiates an adverse claim. Id. 173.

The evidence on file, in an application of patent, must show that the applicant has the record title of the premises described in his application. Id. 204, 340.

Full and complete copies of the respective conveyances are unnecessary under the rules. A complete abstract only is required. Landowner, 178.

3. Adverse claim. Any member of a mining company may file an adverse claim

* The references are to "Copp's Mining Decisions," or Rulings of the Department of the Interior, and to "The Landowner," a publication of the same editor, Henry N. Copp, Esq., Washington, D. C., to whose courtesy the compiler is indebted for the syllabi under this heading.

on behalf of his company, where he has the proper authority. Copp, 19.

Adverse claimants must file a separate and distinct claim against each application, which it is alleged conflicts with the premises owned by such adverse claimant. Id. 202.

The papers in an adverse claim once filed cannot be withdrawn, but become part of the record. Landowner, 51.

An adverse claim filed after the expiration of the time prescribed by statute cannot be considered, and no extension of time can be given for filing adverse claims. Copp, 156, 194.

An adverse claim must be made out in proper form and filed in the proper local office during the period of publication of the application, for patent to be effective. Landowner, 25; 2 Id. 114; 3 Id. 18.

It is the duty of the adverse claimant to commence suit in proper form within the required time, and if he trusts the uncertain medium of the United States mail he must abide the consequences, should delay ensue through misfortune or accident. Should the failure to commence suit be the result of the unadvised or the corrupt and dishonest action of his attorney, the Interior Department cannot redress the wrong. 4 Landowner, 34.

An adverse claimant should state the nature of his claim, where and how it originated, whether by purpose or location, and other material or essential particulars, and must show an interest in the ground sought to be patented, or an authority for appearing on behalf of those interested. Copp, 76, 80, 81.

An adverse claimant should set forth in detail the facts upon which he bases his adverse claim. A statement in general terms embodying conclusions of law, without stating the fact specifically, will not be considered as evidence. Id. 197.

The natnre, extent and boundaries of an adverse claim must be fully set forth, in order to stay proceedings on the application and have an adjudication in the courts. 2 Landowner, 178.

An adverse claimant must show that his is a valid subsisting mining claim, and that he is acting in good faith. Id.

An adverse claimant should show a compliance with the local laws in recording his claim, and in regard to expenditures, and should file a copy of the original notice of his location, and show the nature or extent of the conflict alleged. Copp, 197.

Any state of facts which shows that the person alleging the same has a better right to the premises sought to be patented, or any portion thereof, than the applicant, is the proper subject-matter of an adverse claim, and when properly set forth, should be treated as such. 2 Landowner, 68.

An adverse claimant must positively alelge ownership. 1 Id. 146.

An instrument setting forth an adverse claim should be so drafted as to inform the applicant that a portion of the mining claim which he was seeking to obtain a patent for did not belong to him, but did belong to the adverse claimant; and it is intended that this should be done with such precision as to fairly advise him of the "nature, boundaries and extent" of the adverse claim, so that the applicant might prepare himself to establish on the trial before the courts, his own, and defeat the adverse claim. Copp, 170.

If an adverse claimant alleges that he is the owner of the claim, it is good pleading, and sufficient to notify the applicant for patent of what is claimed. Id.

An allegation of parties to a suit that they compose the company is sufficient, and they are not required to prove that they are the original locators, or the identical parties who presented the adverse claim. Id.

A protest or adverse claim must be accompanied by a survey, made and certified by a United States deputy mineral surveyor, together with a certificate, or sworn statement, by the surveyor "as to the approximate value of the labor performed or improvements made upon the claim of the adverse party." Id. 337.

An actual survey must be made of the entire adverse claim. An adverse claimant is not permitted to color a portion of the applicant's survey, and treat it as his entire adverse claim. 1 Landowner, 98.

The jurat to the adverse claim required by the act of May 10, 1872, must be made by the party, and cannot be made by an attorney. Copp, 169.

Where several parties unite in an adverse claim, the jurat is sufficient if made by one of the parties. Id.

The jurat to the adverse claim must be made by the party, and cannot be made by an attorney—except where the party is an incorporated company, when the protest may be verified by the oath of its president or other executive officer, or by an attorney whose authority must be satisfactorily shown. 1 Landowner, 132; 2 Id. 178.

Suit or action should be commenced by the adverse claimant, in order to entitle him to a stay of proceedings. The act of 1872 expressly requires it to be done within thirty days from the filing of the adverse claim. Id. 6.

When the applicant for a patent before the Interior Department, who becomes the defendant in a suit commenced by an adverse claimant in a court of competent jurisdiction, waives his claim, confesses judgment, and thus acknowledges the superior

right of the plaintiff to the tract in dispute, he has done all that can be required of him in thus ending the controversy, and should be no longer deprived of a patent for the premises to which he has shown himself legally entitled. 3 Id. 194.

The filing of an abandonment of surface-ground in conflict does not terminate the contest initiated by an adverse claimant, but the judgment of the court having jurisdiction must be had upon all the questions involved in the controversy before patent can issue for the portion of the claim not in dispute. 3 Id. 196.

A case having once been suspended and carried to the courts for adjudication, and having been there dismissed for want of attention and prosecution on the part of an adverse claimant, cannot be stayed a second time for such purpose, but must proceed on the application for patent. Copp, 23.

An adverse claimant, asking for a suspension of proceedings in the general land-office, on the ground that a motion for a new trial had been granted in a court of justice, must show that such motion had been granted without conditions. Id. 149.

Where a party fails to assert an adverse claim in the manner and within the time provided by law, the general land-office cannot take cognizance of a judgment rendered in his favor in a suit commenced after the expiration of the period prescribed by the statute. Patent will issue in favor of the applicant, and the adverse claimant's remedy is in a court of equity. 4 Landowner, 2.

A construction of the mining laws which would suspend the disposal of the mineral lands, and prevent the government from obtaining its price therefor until hypothetical controversies can be finally adjusted in the courts, cannot prevail. Copp, 96.

Where an adverse claimant alleged in his sworn statement "that sufficient work and all acts and things were done according to the acts of Congress, the mining laws of the district, and customs of miners to hold and possess the same:" *Held*, that the statement was defective, as the facts should have been stated specifically and in detail. Id. 197.

The holder of patented ground need not assert an adverse claim to an application that crosses his ground, for his claim will be excepted from the patent issued on such subsequent application. 2 Landowner, 115.

An adverse claim presented by a party having no interest in the land, but "simply that justice may be done," will not be considered. Copp, 80.

Where an adverse claimant has not fully complied with the law and the instructions thereunder, he fails to make out a case which will authorize a suspension of proceedings. Id. 195.

A conflicting survey, already patented, cannot, as an adverse claim, delay an application for a patent, but the ground in conflict will be excluded from the subsequent patent. 2 Landowner, 114.

A stipulation wherein it is set forth that "the said action, by consent of the parties thereto, is hereby dismissed. The clerk of said court is hereby authorized to forthwith enter in his register such dismissal," filed in court by an adverse claimant, signed by authorized counsel, is a waiver of the adverse claim. Id.

Where an adverse claimant failed to commence suit within the time prescribed by the general land-office, his adverse claim was considered waived, and the applicant was allowed to proceed with his application for patent. Copp, 145.

The failure of an adverse claimant to prosecute his claim with reasonable diligence is held to be a waiver of such adverse claim. Where it is shown that a cause has been continued from term to term in court at the instance of the adverse claimant, the applicant for patent for a mining claim will be allowed to make entry as though no adverse claim had been filed. 3 Landowner, 98.

In cases where adverse claimants or their attorneys fail to file at the local office evidence that suit has been commenced in court, the local officers are bound to treat the adverse claim as waived. 2 Id. 82.

Where one of several co-tenants made out a *prima facie* adverse showing to an application for patent, and his co-tenant subsequently withdrew this adverse claim: *Held*, that their withdrawal did not prejudice the rights of the adverse claimant. Copp, 158.

An adverse claimant who dismisses his suit, commenced within the period allowed, cannot delay an application for patent by commencing a second suit after the expiration of such time. 1 Landowner, 66.

4. Affidavit. An affidavit made by the president of a mining company in his official capacity, will be sufficient without a certified copy of the record of his election. Copp, 173.

An incorporated mining company may verify an application or an adverse claim through its officers or agents. 1 Landowner, 132.

A notary public may administer oaths in any state or territory, and a certificate under his official seal is sufficient evidence of his being a notary. Copp, 174.

Affidavits taken without notice to the opposing party, and with no opportunity of cross-examination, will not be considered

in rendering a decision in contests in regard to character of land. 3 Landowner, 67.

An affidavit must be verified before an officer authorized to administer oaths in the land district where the claim is situated. 1 Id. 34.

Under section 2335, an officer authorized to administer oaths within the land district, may administer the same without the district, but within his jurisdiction, where that jurisdiction extends within the land district where the claims are situated. 3 Id. 195.

An adverse claim should be verified before some officer authorized to administer oaths, "within the land district where the claim may be situated." 1 Landowner, 34; Copp, 158, 160.

Papers sworn to before any person purporting to act as deputy for the register or receiver, cannot be received as evidence. 2 Landowner, 162.

Ex parte affidavits may be received in applications under the mining statute, but the officer receiving such testimony should be satisfied of its truth and the credibility of the witness. Copp, 16.

5. Agent. It is competent for the agent or attorney of an incorporated mining company to swear to an adverse claim for such company. 1 Landowner, 132.

6. Agricultural Lands. The Secretary of the Interior is authorized to designate as agricultural only such land as is shown to be properly and clearly agricultural. Proof that no paying mines have been discovered thereon is not sufficient. 1 Landowner, 18, 114.

The non-mineral affidavit required in agricultural entries may be made by an agent, upon filing his authority to act in the premises, and furnishing proof that his principal is not personally acquainted with the land. Copp, 222.

An agricultural entry may be suspended to await developments under a mining location. 1 Landowner, 180.

Where an agricultural entry was allowed after due notice, and no opposition was made, the case will not be reopened unless the mineral affiants show they have the possessory right to an actual mining claim upon the land so entered, or that fraud was resorted to by the agricultural claimant in giving the required notices, and in what specific forty-acre subdivision their mining location exists. Copp, 125.

Where land is of little, if any, value for agricultural purposes, but is essential to the proper development of mining claims, it should be disposed of only under the mining act. 2 Landowner, 146.

Where lands containing valuable mineral deposits have been included in an agricultural entry, said entry will be canceled at any time prior to the issuance of patent, upon satisfactory evidence of the existence of such valuable deposits. Copp, 233.

Where valuable deposits of minerals are discovered upon a tract after the same has been entered as agricultural, but before patent has issued, the parties claiming the mine may make application for patent for the same, and the agricultural entry will be canceled to that portion of the land embraced by said mining claim. Id. 163.

Where mineral deposits are discovered on agricultural lands after patent has issued to an agricultural claimant, they pass with the patent. Id. 208, 233.

7. Agricultural College scrip—Cannot be received in payment for mining claims. Copp, 157.

8. Alaska Territory. No application for patent for mining lands in Alaska Territory can be received at the General Land-office—said Territory not having been organized into a surveying district. Copp, 215.

9. Alien. A foreigner may make a mining location and dispose of it, provided he becomes a citizen before disposing of the mine. Proof that a party was not a citizen before disposing of his claim must be affirmatively shown. 1 Landowner, 178.

Locators and intermediate owners other than applicants, will not be presumed aliens in the absence of allegation or objection prior to issuance of patent. 2 Id. 2.

Aliens cannot hold a mining claim prior to issuance of patent therefor. An assignor can transfer no greater interest to his assignee than he himself possesses, and the purchaser from aliens of an unpatented mine acquires no title thereto. 3 Id. 18.

The portion of a mining claim sold to an alien cannot be patented while such owner is an alien; but on his declaration to become a citizen, his right dates back to his purchase, and he may thereupon secure United States patent for his claim. 3 Id. 69.

10. Amendment. When an adverse claim has been filed, it cannot be amended so as to embrace a larger portion of the premises than that described in the original adverse claim. Copp, 156.

11. Annual Labor. Upon all claims located after May 10, 1872, not less than $100 shall be expended in labor or improvements during each year, and that year shall commence from the date of the location of the claim. Copp, 142.

A claimant of a location, to entitle him to the possession of his location, must make the annual expenditure upon his claim each and every year after January 1, 1875, until

patent shall have been issued therefor. Copp, 135; 1 Landowner, 34.

The first annual expenditure on mines located prior to May 10, 1872, should have been made prior to January 1, 1875, and notice to delinquent co-owners of such mines could not be legally given until after the latter date. 3 Id. 66.

On claims located prior to May 10, 1872, the annual expenditure must be made before the 1st of January of each year. On all other lode claims the annual expenditure may be made at any time during the year before its expiration. A claim properly located March 1, 1877, may be relocated March 1, 1878, if the required work has not been done prior thereto. 4 Id. 66.

12. Annual labor on placer claims. Annual expenditures are required only upon vein or lode claims, leaving placer claims subject to the operation of the local laws, rules, regulations and customs. 1 Landowner, 18.

13. Appeal. An appeal brings up all proceedings had prior to the order appealed from, and all exceptions must be presented at the hearing of such appeal, or in default, they will be considered waived. Mining Decisions, 181.

A written statement of the points of exception to the commissioner's decision is required on appeal to the secretary of the interior. Copp, 217.

No new or additional evidence can be submitted on appeal to the secretary of the interior. Id. 136.

A party having no interest in a mining application, but standing in the relation of *amicus curiæ* (friend of the court) has no right of appeal from any decision in the case. 3 Landowner, 194; 4 Id. 3.

An appeal may be taken from the action of the surveyor-general in approving a survey to the commissioner of the general land-office. 1 Id. 133.

14. Application for patent. An application for patent under the mining act, is such an appropriation of the premises embraced therein as takes them out of the operation of the local laws; and until such application is set aside upon a failure to comply with the requirements of the general land-office in the completion of title, it cannot be considered waived or forfeited. 2 Landowner, 66.

The examination of an application for patent under the mining laws, should proceed beyond the papers filed in the case, and into those general records of the general land-office which evidence the final disposition made of the public domain; and if it is found that any part of the premises applied for have been previously disposed of, an express exception thereof should be inserted in the subsequent patent. 1 Id. 82.

A filing of an application for patent with the register is equivalent to "filing with the register and receiver," within the spirit and meaning of the act of May 10, 1872. Mining Decisions, 169.

Where a placer claim is situate upon surveyed lands and conforms to the legal subdivisions thereof, no survey or plat thereof will be required with the application for patent. In such case proof of improvements may be made by affidavit of parties who are familiar with the claim, and can testify to the necessary facts. Mining Decisions, 235.

Where two applications conflict, a compromise may be made by the respective claimants, and the surveyor-general will order a survey of the compromise lines agreed upon. 1 Landowner, 83.

Where suit is commenced after the filing of an application for patent by a party who subsequently filed an adverse claim, in regular form, the application will remain suspended until the case is decided in court or otherwise settled. 1 Landowner 135.

Each application is an entirety, and rests upon its own merits. It is contrary to the spirit and letter of the law to permit one person or association of persons to file one protest against several applications for patents for separate and distinct lodes. Mining Decisions, 202.

Where papers have once been filed with the register and receiver, they become a part of the record, and can neither be withdrawn nor returned, but must be transmitted to the general land-office. 1 Landowner, 66.

Application for patent rejected because: 1. The notice was published without the knowledge of the register; 2. The notice was not published in a newspaper designated as published nearest the claim; 3. The record title was found defective; 4. A previous application had been made for the same premises, which was withdrawn pending a suit in court, commenced by the adverse claimant. 1 Id. 50.

An application for patent will be rejected when the survey does not accurately define the boundaries of the claim. Mining Decisions, 340.

An application will be rejected where the claim was not located in accordance with law. Copp, 209.

The application for patent must be sworn to by the party to it. 1 Landowner, 66.

An application for patent for a mining claim, signed by one joint owner for himself and his co-claimants, should be recognized as the application of all the owners, in the absence of alleged or apparent fraud, as also the acts of attorneys, performed in the legitimate prosecution and adjudication of

cases, as the acts of the claimants themselves. 3 Id. 196.

Where several parties own separate and distinct portions of a claim, application for patent may be made by either, for that portion of the claim owned by him; but where several parties own undivided interests in a mining claim, all should join in an application for patent. Copp, 159.

Applicants for patent should not suffer by the neglect of duty of any officer. 2 Landowner, 2.

The objection that applicants did not have title at the date of application is insufficient, unless such fact is clearly shown. Contracts for conveyance, made before application, are sufficient, if full title was acquired before patent issued. Id.

Persons having no possessory rights, under local laws and regulations, and who have not made the improvements required by the mining statute, are not authorized to apply for patents. Copp, 19.

Where a purchaser, after the commencement of proceedings to obtain a patent, but before entry at the local office, files in the general land-office a deed from an applicant to himself, the register and receiver will be instructed to have the certificates and receipts made out in his name. Id. 162.

Where an association of persons, unincorporated, apply for a patent, the published notice, certificate, and all the papers, should give the names of all the applicants. Id. 223.

A person or association may purchase as many placer locations as the local law permits, and embrace them all in one application for a patent. 1 Landowner, 134.

Where several placer mines have been surveyed by the United States under the local laws, there is nothing to prevent the patenting of the several tracts in the same neighborhood as a single entry, though not contiguous; but this will not authorize the joint entry of parcels or claims situated at wide distances from each other, in different land or mining districts. Copp, 35.

Two or more lodes cannot be embraced in one application for patent, except for placer claims embracing two or more lodes within their boundaries. 2 Landowner, 82.

Where a miner included in his application a legal subdivision of land, not embraced in his original mineral location, and which he did not claim to be mineral land, he was restricted in view of adverse interests to the land included in the original location, and the remaining portion of the land was held to be agricultural. Copp, 191.

An application for patent for a mining claim should show in material particulars compliance with the local and United States laws. 3 Landowner, 162.

In mining applications, the time or order of presenting the required proof of compliance with law, is of less importance than the proof itself. Id.

Where several locators on legal sub-divisions convey their interest to one person, such person may apply for a patent to the extent of his purchase, on filing copies of the original notices of location and an abstract of title showing the record title to be in the name of the applicant. Copp, 157.

15. Attorney. A corrupt or a dishonest attorney on a proper showing, will be debarred from practice before the several executive departments of the government. 4 Landowner, 2.

16. Borax. Valuable deposits of borax may be entered as placers. Copp, 194.

17. Cement claims. Auriferous cement claims must be applied for as placers. Copp, 78.

18. Cinnabar. Cinnabar claims cannot be entered as placers. Copp, 60.

19. Citizenship. No distinction is made by the mining laws in the matter of location, occupation and appropriation of mining claims, between the rights and privileges of a citizen and those of a person who has declared his intention to become a citizen. Landowner, 98.

Where a party filed his declaration of intention to become a citizen of the United States after the date of his location of a mining claim, but prior to the date of his application for patent, it was held that he was qualified to make entry, apply for and receive patent. Id.

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. Id.

Proof is not required that the original locators were citizens, except in those cases where they are the applicants for patent. It will not be presumed that they were not citizens, in the absence of any allegation or objection before the issuing of patent to that effect. After patent has actually issued, it is too late to make this objection. 2 Id.

Proof of citizenship is not required of the original locators or intermediate owners, but of the applicants for patent or adverse claimants only. 1 Id. 98.

In the matter of citizenship, the mining law is complied with if citizenship be properly alleged and the fact be not controverted. 2 Id. 68.

It is sufficient to allege citizenship or declaration of citizenship, though the commissioner of the general land-office may prescribe the form of the required affidavit in this matter. 3 Id. 68.

Applicants for patent must file affidavit showing when and where born. If naturalized, or intention declared, the date, place, and court must be named. Id.

20. Claim. The term "claim," as used in the mining law, is held to mean that portion of the vein or lode, and adjoining surface, to which the claimant has the right of possession by virtue of a compliance with the laws of the United States and the local customs or rules of miners not in conflict therewith. Copp, 142.

The four classes of claims contemplated by the mining laws are: 1. Lode claims; 2. Placer claims; 3. Mill sites; 4. Lode claims and mill sites. 1 Landowner, 2.

21. Comstock Lode. The surface of the lode is usually allowed with claims on the Comstock lode. The surface of the lode may be estimated, inasmuch as the walls of this lode have not been definitely ascertained. 2 Landowner, 146.

In patents for claims on the Comstock lode, a clause will be inserted that such claim shall be subject to the condition specified in the third section of the Sutro Tunnel Act (approved July 25, 1866), "and the grantee herein shall contribute and pay to the owners of the tunnel, constructed pursuant to said act, for drainage or other benefits derived from said tunnel or its branches, the same rate of charges as has been or may hereafter be named in agreement between such owners and companies representing a majority of the estimated value of said Comstock lode, at the time of the passage of said act, as provided in said third section." Copp, 162.

22. Continuance. Where it is shown that cause has been continued from term to term in court at the instance of the adverse claimant, the applicant for patent for a mining claim will be allowed to make entry as though no adverse claim had been filed. 3 Landowner, 98.

23. Co-owners. An unincorporated association of citizens owning separate and distinct interests in a placer mine may unite their means, and expend the five hundred dollars required by the mining laws at one point, and thereafter secure patent from the United States. 2 Landowner, 114.

24. Co-owners—Forfeiture. Where a party has proceeded against co-owners, he should file with his application for patent a copy of the original notice of location; an abstract of all conveyances, a copy of the notice published to delinquent co-owners—which notice should embrace the names of all delinquents—to which must be attached the affidavit of the publishers of the paper that the attached notice was published for the period of ninety consecutive days, giving dates; the affidavit of the claimants who have made the required expenditures, corroborated by the sworn statement of two disinterested witnesses, showing the improvements made upon the claim, and the time when such improvements were made, and the sworn statement of the claimants as to whether or not either of the parties whose names appear in such published notice contributed his proportion of the required expenditure either during the ninety days notice by publication or the succeeding ninety days. 4 Landowner, 50.

25. Copper. Valuable deposits of copper can only be applied for as lode or vein claims. Copp, 60.

26. Corporations. Where incorporated companies apply for patents, they must file a copy of their certificate of incorporation or charter with the application. Copp, 223.

27. Cross lodes. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or minerals contained within the space of intersection. 3 Landowner, 66.

The ore at the space of intersection of two lodes belongs to the first location, whether patented first or second. The second location has the right of way through the intersection. 2 Id. 178.

28. Department of the Interior. In cases of contests in disposing of mineral lands, matters of form are to be decided by the department of the interior. The merits of the case must be decided by the courts. 3 Landowner, 162.

29. Deputy. Papers sworn to before any person purporting to act as deputy for the register or receiver, cannot be received as evidence. 2 Landowner, 162.

30. Description. An application will be rejected where the description of the premises is erroneous or insufficient. Copp, 204.

31. Diagram. The plat posted on the claim as required by the statute must be a copy of the plat filed with the application for patent. 1 Landowner, 178.

32. Diamonds. Diamond producing lands may be entered and patented under the mining laws. Copp, 140.

33. Easements. Easements are protected by the fifth section of the act of July 26, 1866, and an objection to issue of patent founded upon an easement will not be considered an "adverse claim," where the contestant makes no claim to the mining ground. Copp, 42.

34. Equity. An action in equity to restrain applicants for patent for a mining

claim from further prosecution of their application, is not such an action as can be taken notice of by the general land-office. 1 Landowner, 162.

35. Executor's deed. Where an applicant for a patent for a mine claims the title through a deed signed by a party as executor of the estate of a person deceased, he should file a certified copy of the letters testamentary, with copy of the will attached. If other letters testamentary have been revoked, certificate of the clerk of the probate court, showing date of such revocation, and evidence showing authority to convey the mining interest of the deceased person, must also be filed. 3 Landowner, 18.

36. Expenditures. On all lodes located prior to May 10, 1872, there must be an annual expenditure of not less than $10 in labor or improvements for each 100 feet so claimed along the lode. Copp, 136.

Where several individual locations, made prior to May 10, 1872, upon the same lode, are held in common by one or more persons, the entire expenditure necessary to hold all the claims so held in common on such lode may be made upon any one claim thereon. Id.

Expenditures made upon any one claim or lode, however great, can in no way be made to apply to other lodes claimed by the same party. Id.

Expenditures may be made from the surface or in running a tunnel for the purpose of developing a lode, and where a tunnel is run for the development of a lode or vein, it will be considered as work done upon such lode or vein. 1 Landowner, 34.

Where an application embraces two or more separate and distinct tracts of placer mining ground (not contiguous) the required amount of expenditures (viz.: $500) should be expended upon each tract, and a copy of the diagram and notice posted on each tract. Id.

The mining laws do not require an expenditure of $500 upon each "location" of a placer claim embraced in an application for patent, where the locations are contiguous and embrace one claim. Id.

37. Fees. The local land-officers have no authority of law to receive and place on file any adverse claim to a mining application until the legal fees for such filing have been paid in full by the adverse claimants. 3 Landowner, 36, 163.

An adverse claim, in other respects in due form, received by mail before the expiration of publication of notice, but on which the fees for filing were not paid until after the expiration of such publication, will be treated simply as a protest for the purpose of showing from the record that the applicant has failed to comply with the mining act. Id.

38. Fire-clay. Valuable deposits of fire-clay may be patented under the mining laws. Copp, 209.

39. Foreign corporations. Foreign corporations cannot assert an adverse claim to unpatented ground. Id. 43.

A foreign corporation purchasing a patent issued to citizens, is entitled to all the rights and privileges enuring to the patentees. 2 Landowner, 115.

40. Forfeiture. Adverse claimants are not required to show affirmatively that they have complied with all the local usages and customs; if they have failed to comply with such usages, and a forfeiture is denounced for such failure, it is a matter of defense. Copp, 170.

41. Hearings. The notice of the hearing should be prepared by the local officers, and signed by them. The testimony should be by questions and answers, and refer to every ten-acre tract. 2 Landowner, 98.

In any case where there is a contest, or where the non-mineral character of the land is not entirely clear and satisfactory, the local land-officers will not permit an entry until the testimony has been reviewed in the general land-office. Copp, 94.

In contests between mineral and agricultural claimants, where proper notice was given by agricultural claimants, the general land-office will not re-open the case unless the mineral affiants show fraud in pre-emption, or that they have an actual mining claim on the land. Id. 143.

In contests to determine the character of land, any person who has knowledge thereof, whether he has an interest therein or not, is permitted to appear and testify in behalf of the surveyor's return. 2 Landowner, 146.

Where land has been returned as agricultural land, duly entered as such and payment made, and subsequently it is alleged to be mineral, the burden of proof is upon the mineral claimants. Copp, 77.

Where land which was excluded from survey and sale prior to July 26, 1866, has been since returned by the surveyor-general as mineral land, the burden of proof is upon the agricultural claimant to show that it is properly and clearly agricultural land. The burden of proof is always on the party who seeks to disprove the return of the surveyor-general. 3 Landowner, 130.

42. Highway. A public highway cannot be an adverse claim. Copp, 76.

43. Indian Territory or Reservation. Mineral lands in the Indian territory, or within Indian reservations, are not open to exploration or purchase. Copp, 208.

44. Iron. Iron lands are patented under the mining laws. Where the iron is found in lodes or veins, or in rock in place, the proceedings to obtain patents are the same as in case of veins or lodes bearing the precious metals. Where the iron is not found in rock in place, the proceedings are the same as in case of placer claims. 1 Landowner, 34.

45. Judgment-roll. The decision of a court of competent jurisdiction, that an adverse claimant to certain mineral lands in dispute, has no right, title or interest therein, is final as to his right thereto. Such adverse claimant is estopped from alleging that the land so claimed as mineral land is of a different character. 3 Landowner, 2.

The mere fact of an adverse claimant obtaining judgment in court in his favor does not necessarily entitle him to a patent upon filing a certified copy of the judgment-roll and the certificate of the surveyor-general, and paying fees and price of land. 2 Id. 2.

46. Jurisdiction. In mining cases consent cannot give jurisdiction. Substantial compliance with the statute is required. 2 Landowner, 2.

47. Kaoline. Public lands containing valuable deposits of kaoline may be patented under the mining acts. 2 Landowner, 66.

48. Land District. Applications for claims lying partly in two land districts should be filed in the district where the principal workings are situated, and the plat and notices should be posted near such workings. A copy of the plat and notice should be posted in both land-offices. 2 Landowner, 130.

49. Land-office. The general land-office will neither supervise nor disregard the decisions of the courts in cases of conflicting claims to the possession of mining property which may have been submitted to them. Copp, 19.

50. Land-office rules. The regulations issued by the commissioner, requiring the filing of plat and field-notes and an abstract of title, do not have the force of law, and were never intended to act as a bar where an applicant in good faith has done all that was in his power to comply with them. Copp, 19.

51. Lien. Lien on mining claims is strengthened and protected by patent. Copp, 45.

An opposition by lienholders to issue of patent will not be entertained, as the lienholders are fully protected under the provisions of the thirteenth section of the act of July 9, 1870. Id.

52. Limestone. Public lands more valuable on account of limestone and marble than for agriculture may be patented under the mining acts of Congress. 2 Landowner, 66.

53. Local Laws. The miners of the district, State or Territory, are authorized to regulate the width of a location; provided, that the width shall not exceed six hundred feet, nor be limited to less than fifty feet. Copp, 201.

Where parties claim under a location made under local mining regulations, their title cannot have an inception prior to date of a notice of location in which their names or those of their grantors appear. Id. 224.

Where local mining regulations permit locations in excess of the maximum fixed by congressional acts, they will be restricted accordingly. Id. 164.

In regard to locations made prior to the passage of Territorial or State laws regulating mining claims, and prior to the passage of the mining acts of Congress, the land-officers will require proof that the claim is in accordance with the local customs or regulations of the miners of the district in which such claim is situated. Id. 32.

In the absence of State or Territorial enactments regulating the occupancy and possession of mining claims, miners may alter or amend the laws of the district, but this action will not affect claims already located, as a claim must conform to the laws in force at the date of its location. Id. 59.

In the absence of local district laws, applicants are required to show compliance with the mining acts of Congress in force at the date of their locations. Id. 200.

54. Location. A location being illegal and void, the subsequent proceedings, even if in due form, would be invalid. Copp, 190.

Locators of mining claims have the exclusive right of possession to the surface embraced in their claims, and to the timber growing thereon, on compliance with the United States and local laws. 2 Landowner, 114.

Claims located prior to May 10, 1872, will be governed, as to extent, by the laws, customs, and rules then in force. Copp, 235.

All mines located prior to February 28, 1877, date of the ratification of the treaty, in the Black Hills, Dakota, should be re-recorded. 4 Landowner, 18.

Where the given name of a party executing a deed differs from his name as found on the location notice, identity of persons must be shown. 1 Id. 178.

Where parties show that they were not discoverers, only 200 feet to each locator could be taken under the act of July 26, 1866. Id. 135.

55. Location—Certificate. Locations made under the act of May 10, 1872, must be accurately described. 1 Landowner, 135.

A location notice which, after naming the locators and their interests to the extent of 1,000 feet, concludes as follows:

"We claim 500 feet easterly and 500 feet westerly. Situate about 200 feet easterly from the Sacramento"—is not void for uncertainty in the Ophir mining district, Utah, if location was made prior to May 10, 1872. 1 Landowner, 162.

Miners' location notices should not be held to technical accuracy, but are sufficient if they put an honest inquirer in the way of finding the lode. 2 Id. 2.

Parol evidence is admissible to define what tract is embraced in a location. Id.

56. Lodes. No claim located after May 10, 1872, can, under any circumstances, exceed six hundred feet in width; whether a location made after that date can equal six hundred feet in width, depends upon the local regulations, or State or Territorial laws in force in the mining district in which it is located. The surface right shall not be limited to less than fifty feet in width, unless adverse claims existing on May 10, 1872, render such lateral limitation necessary. Copp, 201.

There is no provision of law to prevent parties from locating other claims upon the same lode, outside of the first location made on the vein or lode, provided that no one location shall exceed fifteen hundred feet in length. Id. 207.

In establishing a system for the sale of mineral lands, Congress intended to allow the first patentee to follow his vein, though it may lead him under "adjoining lands;" and it was intended that such "adjoining land" should be sold subject to this right, and this right does not create a "controversy" or "opposing claim," nor an "adverse claim" to the possession of him who enters the adjoining land for mining purposes. Id. 101.

Applicants for patent for placer mines must present proof that no known veins (other than the ones named in the application) exists within the claim applied for. Copp, 222.

There is no law authorizing the sale of quartz claims by legal subdivisions. 3 Landowner, 18.

57. Marble. Public lands more valuable on account of deposits of limestone and marble than for agriculture, may be patented under the mining acts. 2 Landowner, 66.

58. Mexican Grant. The land department should not withhold indefinitely from sale land considered as "public," awaiting the application of a Mexican grantee to purchase under the act of July 23, 1866. 4 Landowner, 3.

59. Mica. The question, can land containing valuable deposits of mica, enuring, if agricultural, to the Union Pacific Railroad, be patented under the mining law? was answered:

Lands containing valuable deposits of mica may be patented under the mining law of May 10, 1872.

All minerals, except coal and iron, are excepted from the grants to railroads. 2 Landowner, 131.

60. Mill sites. Mill sites may be located under the mining laws, and should be recorded. 2 Landowner, 114.

Mill sites must be non-mineral in character. 4 Id. 3.

Mill sites pass to a railroad, if located on a railroad section after the grant to the railroad took effect. Copp, 142.

An applicant for a mill site, on which a lode exists claimed by other parties, may file an abandonment of the lode claim, and will receive a patent for balance of the mill site. 1 Landowner, 82.

Where a mill site is applied for in connection with a lode claim, the $500 expenditure is not required to be upon the mill site, but upon the lode claim only. 1 Id. 2.

The $500 expenditure must be shown upon the plat and field-notes of a mill site where application is made for patent therefor, not in connection with a lode. Id.

61. Mineral land. Land in a mineral belt, near which valuable mines are being worked, and on which prospecting shows favorably, etc., should be treated as mineral land. 2 Landowner, 180.

Land adjudged to be agricultural, cannot be entered under the mining laws, unless discoveries or developments, showing that the tract is more valuable for mining than agricultural purposes, have been made since the prior hearing. Copp, 150.

Where land has been returned as agricultural in character on the township plat, but the township is afterwards withdrawn as mineral land, the burden of proof is shifted upon the agricultural claimant to show the non-mineral character of the tracts he claims. 4 Landowner, 19.

62. Mining district. Where a mining claim is situated outside of a regularly constituted mining district, affidavit of the fact should be made, and secondary evidence of possessory title will be received. Copp, 147.

The mining regulations of the different mining districts remain intact and in full force, with regard to the size of locations where they do not permit locations in excess of the limits fixed by Congress. Where

the local laws provide that placer locations shall not exceed one hundred square feet to each individual, no more than that amount can be located. Id. 164.

68. New trial. After a case has been decided adversely to the adverse claimant, who moves for a new trial, such new trial must be granted unconditionally to warrant a further suspension of the application for patent. Copp, 149.

64. Notice. Upon each separate tract embraced in an application for patent, must be posted copies of the notice and diagram. 1 Landowner, 134.

The affidavit of continuous posting of the plat and notice on the claim must be made by one of the parties owning the mine at the date of entry at the local office. 1 Id. 178.

Proof of posting notice and diagram on the claim should be specific as to when the period of such posting commenced. It is too late after patent has issued to object to the proof because it is not thus specific. 2 Id. 2.

That notice and diagram were posted on the claim five days after publication was commenced, and thereafter for the full time, was an irregularity only, and not fatal. 2 Id. 2.

Where the evidence on behalf of the applicant is clear and specific as to the conspicuous posting of notice and diagram on the claim for the period required by law, such evidence will be deemed satisfactory, even though allegations to the contrary are made by the protestants. 3 Id. 36, 163.

Where the applicant for patent cannot procure the affidavit of the parties who posted the notice and diagram of location on a lode, the testimony of two credible persons who are cognizant of the necessary facts will be received. Copp, 233.

The question to be considered in case of a somewhat indefinite notice is this: Was or could anybody be misled by the notice? 3 Landowner, 162.

Where a diagram and notice have been drawn in a manner calculated to deceive, and parties have been injuriously affected thereby, the general land-office will open the case for investigation, or reject the claim and require proceedings thereon *de novo*. Copp, 75.

Where the published notice does not properly describe the *locus* of a claim, as the same is set forth in the application and diagram, proceedings should be commenced *de novo*. Id. 69.

65. Parties. Every person affected by a decision should be heard. Copp, 17.

Protestants may be considered as parties to the contest, for the purpose of showing from the record that the claimants have not complied with the requirements of the act. 1 Landowner, 34.

Where parties appear as friends of the court (*amici curiæ*), the law should be more liberally construed in favor of the applicants for patent than if there were adverse claimants in the case. 2 Id. 5.

66. Patent. Where valuable mineral deposits are found in such quantity and quality as to render the land sought to be patented more valuable on this account than for purposes of agriculture, the tracts containing such valuable mineral deposits may be patented under the mining statute. Copp, 316.

If land does not contain valuable mineral deposits in quantity and quality sufficient to render the land more valuable on this account than for purposes of agriculture, it can not be patented, under the mining statute, except in the cases of mill-sites, which must be non-mineral in character. Id.

The mining act of May 10, 1872, divides the mineral-producing lands into two classes, viz: first, where the mineral matter is found in rock in place; and the second includes placers and all forms of deposit not found in rock in place. Only such lands as come under the second classification can be patented as placer claims. Land-office Report, 1874, p. 52.

Patents for lode mining claims convey: 1. The surface ground embraced by the exterior boundaries of the survey; 2. The right to follow the vein named in the patent to the number of feet patented, although it may depart from the land embraced in the survey of the surface and enter the land adjoining. The lode may be followed to any depth; 3. All other veins, lodes or ledges, throughout their entire depths, the tops or apexes of which lie inside such surface lines extended downward vertically, although such other veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface location; provided, that their right of possession to such outside parts of such other veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as aforesaid, through the end planes of their locations so continued in their own direction, that such planes will intersect such exterior parts of such veins, lodes or ledges; provided, also, that the other veins were not adversely claimed May 10, 1872. Copp, 154, 201.

No title to a mining claim can be acquired under an agricultural land patent. 2 Landowner, 82.

A party who entered land under the homestead laws, and received a patent therefor, acquired no title to known mines therein. The owners of such mines may make

application for patent the same as though no homestead entry had been allowed covering their claims. 4 Id. 17.

Patents for mining claims are issued to the parties named in the register's certificate of entry. Copp, 162.

A clerical error in the register's final certificate of entry, in an owner's name, as Butterfield instead of Butterwood, does not affect the validity of a patent issued under the correct name of Butterwood. 2 Landowner, 2.

The mining laws do not restrict a party to one patent, but give the right to secure title to as many claims as he may be entitled to under local laws, and upon which the necessary amount has been expended in labor and improvements. Copp, 145.

A patent will be delivered, under some circumstances, to parties who satisfactorily show that they have the possessory title to a lode, even though such patent was made out in the name of others. Id. 85.

When a party becomes a purchaser after the date of entry, an indorsement should be made upon the duplicate receipt by the applicant, assigning all his rights, whereupon patent will issue to such purchaser. Id. 146, 162.

Where the duplicate receipt for a mineral entry has been lost, a patent will issue on filing satisfactory proof of the loss, and the authority of the applicant to receive such patent. Id. 30.

Where a patent has wrongfully issued, the patentees may, in a proceeding in equity, be made trustees for the rightful owners of the mine. Id. 23.

In all patents granted in mineral regions a clause or condition is inserted expressly protecting and reserving acquired water rights, and making the patent subject thereto. Id. 82.

Where a patent issues for a lode which crosses a lode already patented, the surface ground in conflict is excepted from the second patent. 2 Landowner, 178.

A patent was issued to the Bullion Company, on the Comstock lode, Nevada, in which a reservation was inserted reciting the fact that the surface ground described is the estimated area of the lode, and that only the actual surface ground embraced within the walls of the lode is intended to be conveyed. 2 Id. 5.

In all patents for mining claims situated within the exterior boundaries of a townsite, a clause is inserted "excepting and excluding all town property rights upon the surface, and all houses, buildings, structures, lots, blocks, streets, alleys or other municipal improvements not belonging to the grantee herein, and all rights necessary or proper to the occupation, possession and enjoyment of the same." Copp, 207.

It is no objection to the issuance of a patent for a lode claim that an application has been made for a town-site, embracing within its limits the lode claim. 2 Landowner, 146.

In placer patents is the following clause: "That should any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposit, be claimed or known to exist within the above described premises at the date hereof, the same is expressly excepted and excluded from these presents." In placer patents, under section 2333, R. S., the word "other" is inserted after the word "any." 2 Id. 82.

67. Patents irregularly or fraudulently issued. A patent for mineral lands improperly issued will be set aside. Copp, 153.

If a patent be issued for lands under an agricultural claim while a valid mining claim, under local laws, existed on the premises, and the parties were engaged in mining at the time of the agricultural entry, the general land-office will, on satisfactory proof of the fact, afford the miner all the aid in its power to set aside the patent and enable him to acquire title. Id. 212.

Where a patent has been obtained by artifice or fraud upon a record regular upon its face, the general land-office will ask the department of justice, that the party injured be permitted to use the name of the United States in the prosecution of proper proceedings in the courts. Id. 213.

In a subsequent patent it is proper to recite the fact that a prior patent had inadvertently and erroneously issued for part or all of the premises. 2 Landowner, 2.

The fact that the patentees and vendors of a patented mine have still an interest in seeing that their patent is unclouded, is sufficient to support their application to set aside a conflicting patent. Id.

Where a mine has been erroneously patented to a railroad company, and the company does not relinquish the land when called upon, a patent will be granted for the mining claim as though no prior patent had been issued. 1 Id. 2.

Where there are no adverse interests, a patent for a mine will not be disturbed, notwithstanding irregularities in issuing it. 2 Id. 2.

The general land-office may issue a second patent for the purpose of correcting a mistake or inadvertence. Copp, 213.

Parties returning to the general land-office patents misdescribing their claims, should indorse thereon a relinquishment, with a certificate from the county recorder, that the relinquishment has been recorded. In case of conveyances to third parties,

their relinquishments must be secured and a duly certified abstract of conveyance must be furnished. 2 Landowner, 98; Copp, 41.

68. Petroleum. Petroleum claims may be patented under the mining act of May 10, 1872. 1 Landowner, 179.

69. Placers. The size of placer claims located prior to July 9, 1870, is regulated and controlled by the local laws then in force. Subsequent to July 9, 1870, and prior to May 10, 1872, no location of a placer claim can exceed 160 acres. After the passage of the act of May 10, 1872, no location made by an individual can exceed 20 acres, and no location made by an association can exceed 160 acres. 1 Landowner, 134.

The location of a placer mine, made after May 10, 1872, upon surveyed land, should embrace legal subdivisions of the public lands, where the same can be done without interference with the rights of other *bona fide* mineral, agricultural or other claimants in the same tract. Copp, 200.

Where placer mining claims are situated upon unsurveyed land, or where by reason of some other *bona fide* claimant a legal subdivision of surveyed land cannot be embraced in an application for patent, a survey must be made of the premises in accordance with the instructions of the general land-office. Id.

Placer mining claims located on surveyed lands after May 10, 1872, must conform as nearly as practicable with the public surveys. Id.

Three hundred and twenty-seven or more acres of placer land may be embraced in one application for patent. Copp, 211.

70. Plat. The $500 expenditure must be shown upon the plat, and field-notes of each of the four classes of claims contemplated by the mining statutes. 1 Landowner, 2.

71. Porterfield Warrant. Title to land, in a certain case, did not pass with the patenting of an improper location of a Porterfield warrant; for a mining claim was situated thereon at date of location, and the land was not subject to location with said warrant.

Rightful owners of this mining claim will be allowed to secure patent for their mine upon compliance with the mining law. 2 Landowner, 130; 3 Id. 83.

72. Publication. Publication of notice must be made in only one newspaper, for the period of sixty days. 1 Landowner, 50.

In estimating the sixty days of publication of notice, the first day must be excluded. Id. 66.

Publication in a weekly newspaper for nine successive weeks (nine insertions) is not a publication "for the period of sixty days." Id. 34.

Notices must be published ten consecutive weeks in weekly newspapers, and in daily newspapers sixty days must elapse between the first and last insertions. 2 Landowner, 130.

Where the register designates the daily issue of a newspaper for publication of notice of a mining application for patent, it is not a compliance with law to change to the weekly edition of the same paper without authority of the register. 3 Id. 18.

The law is explicit to the effect that notices of mining applications must be published in a newspaper, to be designated by the register, as published nearest the mining claim. The register has no discretion except where two or more papers of repute are published equidistant, or nearly so, from the mining premises sought to be patented. 3 Id 163.

Application for patent under the act of May 10, 1872, rejected because: 1. The notice was published without the knowledge of the register; 2. The notice was not published in a newspaper designated as published nearest the claim. 1 Id. 50.

Notice may be printed in a newspaper published nearest the claim, notwithstanding part of the newspaper is printed in another city or state. 3 Id. 196.

An error in the description of a claim, making the published notice inconsistent with itself, should put an adverse claimant on his guard, and will not be deemed fatal unless it is capable of misleading. 2 Id. 114.

The published notice must agree in description with the application, and if it does not, the law is not complied with. Copp, 51.

73. Purchase-money. Where a decision is rendered by which a claim erroneously entered is reduced in size, the purchase money will be refunded only to the extent necessary to make the payment meet the requirement of the law. Copp, 32.

74. Railroads. Mineral lands do not pass to the Central Pacific Railroad Company by virtue of its grant, but the timber upon the mineral land within the ten-mile limits is granted to the road, except so much of it as is necessary to support the improvements of mine owners thereon. 1 Landowner, 134.

75. Record. A lode located under the act passed by the Colorado legislature February 9, 1866, was located prior to July 26, 1866, if discovered prior thereto and the local laws were fully complied with, notwithstanding the record thereof was not

made until subsequent to the passage of the act of Congress of July 26, 1866. 1 Landowner, 83.

76. Re-location. When a patent is applied for on a re-located mine, the applicant must show by *prima facie* evidence that it is subject to such re-location under territorial or State laws, where such laws exist. Copp, 188.

Where a party claims a lode by virtue of re-location, he should furnish proof that such re-location was made in accordance with local laws or regulations. Id. 225.

Claims located since the tenth of May, 1872, become liable to re-location in case the required amount of labor and improvements has not been expended thereon within one year from the date of such location, and yearly thereafter. Id. 142.

Mines located prior to May 10, 1872, upon which the required amount had been expended and improvements made at any time since May 10, 1872, and prior to January 1, 1875, were not subject to relocation at the latter date. 1 Id. 138.

A re-locator of an abandoned claim may continue work on the old shafts, tunnels, etc., or commence new ones. 3 Id. 50.

Where a party applies for a patent for a re-located mine he must prove the expenditure of $500 on the mine by himself or his grantors, notwithstanding that such amount may have been expended by those who abandoned the mine. 1 Id. 179.

Re-locators should file with applications for patent copy of original notice of location, abstract of title to the re-locators, re-location notice and abstract of transfers under the re-location. 3 Id. 37.

Re-locators of abandoned mines should file with applications for patents clear, full, and positive proof as to the abandonment of prior locations. Id.

A purchaser from an alien may re-locate the claim, and thereby acquire a possessory title upon compliance with the local and congressional laws. 3 Id. 18.

77. Rock in place. The term "rock in place," as used in the mining statutes, is held to include every class of claims that can be applied for as a vein, lode or ledge. Copp, 46.

78. Salt springs. The policy of the government has been uniform since the inauguration of the public land system to reserve from sale salt springs and the adjacent land. 2 Landowner, 179; 3 Id. 196.

The proviso in the enabling act admitting Colorado as a State, relative to salt springs, "provided that no salt springs or lands, the right whereof is now vested in any individual or individuals, or which shall hereafter be confirmed or adjudged to an individual or individuals, shall, by this act, be granted to said state," refers to private claims protected by treaty stipulation. Id.

In this case there was no valuable deposit of salt shown to exist upon the tracts which are only valuable on account of the salt springs. The filings and applications of all parties were accordingly rejected. Id.

The existence of a salt spring on a tract of land withdraws it from the operations of the homestead and pre-emption laws. A hearing for the purpose of proving the agricultural character of such land is not allowed. 2 Id. 131.

Land containing valuable deposits of salt may be patented under the mining laws. 1 Id. 19.

79. School sections. Sections sixteen and thirty-six do not pass to the State when they are mineral in character. Copp, 30, 105.

The title to school sections vests in the State upon survey thereof if their mineral character is unknown at that date. 4 Landowner, 18.

80. Sioux Half-breed scrip. Sioux half-breed scrip cannot be located on mineral lands, and titles thereto cannot be secured, except on compliance with the mining acts of Congress. 2 Landowner, 178.

81. Slate. Valuable deposits of slate may be entered under the mining acts. 1 Landowner, 132.

82. State selections. Mineral lands cannot be included in State selections. Copp, 40.

83. Suit. The only question before the court in mining application contests is the right of possession to the premises in dispute. 2 Landowner, 5.

The mere fact of an adverse claimant obtaining judgment in court in his favor does not necessarily entitle him to a patent upon filing a certified copy of the judgment-roll and the certificate of the surveyor-general, and paying fees and price of land. 2 Id. 2.

Suit must be brought by the adverse claimant against the appellant for patent. The pendency of a suit commenced by the applicant against the adverse claimant does not excuse compliance with this requirement. A suit decided by the district and supreme courts of a State on the right of possession is one which has been finally adjudicated in the courts of competent jurisdiction, and an appeal to the supreme court of the United States should not further stay proceedings before the department. 2 Id. 5.

An adverse claimant who dismisses his suit, commenced within the period allowed, cannot delay an application for patent by commencing a second suit after the expiration of such time. 1 Id. 66.

The decision of a court of competent jurisdiction that an adverse claimant to certain

mineral lands in dispute has no right, title or interest therein, is final as to his rights thereto. 3 Id. 2.

Where a suit is decided in favor of the applicant for patent, a copy of the decree of the court in the case should be filed with the register and receiver, together with a certificate of the clerk of the court that no suit is pending against said applicant brought by the adverse claimant bringing into question the title to said property. Copp, 232.

84. Sulphur springs.* The general land-office does not regard sulphur springs as saline or mineral, so as to come within the prohibition of the statutes against including mineral and saline lands in pre-emption entry or scrip location. Copp, 22.

85. Surface ground. Lode-claims in Montana located under the Territorial act of Dec. 26, 1864, are entitled to fifty feet in width of surface ground on each side of the lode, in addition to the width of the lode. 3 Landowner, 67.

A mining-claim, so far as the surface ground is concerned, must conform to the location notice and record. 1 Id. 146.

Where it appears that a greater width of surface ground is embraced in an application for patent than the local laws permit, the width of the claim must be diminished to conform to the local laws before entry. Copp, 195.

86. Survey. The survey should show the exterior boundaries of the claim and the width should not exceed the amount of ground allowed by local laws and customs. Copp, 223.

The end lines of a mining-survey must be parallel. Courses and distances must give way when in conflict with fixed objects. 3 Landowner, 82.

An application for patent virtually withdraws a mining-claim from market, and no other survey of the same tract should be approved by the surveyor-general until the first application is disposed of. 1 Id. 133.

The field-work of such other survey may be made at any time by a U. S. deputy-surveyor. Id.

A survey under the mining-act does not withdraw the land embraced thereby from sale or subsequent survey unless followed by an application for patent. 4 Id. 34.

Parties desiring survey of a claim already surveyed should file with the surveyor-general the register's certificate that no application is pending under the prior survey. 4 Id. 35.

Where any material error occurs in the survey of a mining claim, the applicant should commence *de novo* by filing with the local land-officers a correct plat and field notes, and publish a notice accurately describing the claim. Copp, 193.

Placer claims embracing five-acre lots must be surveyed to secure patents therefor. Id. 229.

87. Surveyor-general. The surveyor-general has no authority to determine mining conflicts. He must survey claims as originally lotated, and interested parties must protect their rights by filing adverse claims. 1 Landowner, 133.

88. Sutro tunnel. No patent can issue for premises lying within the limits of the Sutro tunnel grant, unless said premises come within the exceptions provided for in the second section of the Sutro tunnel act, approved July 25, 1866. Copp, 162.

In cases of applications for patent for mines on the Comstock lode, Nevada, hearings may be had to determine whether the mines in question have been benefited or drained by the Sutro tunnel; but the commissioner of the general land-office will not attempt to interfere with the right of mine owners to exercise control and ownership over their mines so long as they comply with the requirements of law. 3 Landowner, 114.

89. Timber. Surveyed timber lands may be purchased as other public lands under the pre-emption laws, or by commutation under the homestead laws. The pre-emption or homestead claimant may cut sufficient timber for the erection of his building, but not for other purposes, and other cutting is regarded as a penal offense. It is held that the United States, as owner of the lands, has all the legal means of protecting the timber which individuals enjoy in like cases. The act of Congress of March 2, 1831, as construed by the supreme court, makes the depredating on such timber a criminal offense, punishable with fine and imprisonment. When reliable information reaches the registers and receivers that spoliation of public timber is committed, their instructions require the special agents to investigate the matter, to seize all timber found to have been cut without authority on the public lands, to sell the same to the highest bidder at public auction, and deposit the proceeds in the treasury. They are to bring the offense committed to the attention of the proper officers, that the perpetrator may be arrested and held to answer as usual in criminal cases. Land-office Report, 1873, p. 13; 1874, p. 6.

90. Town sites. No title can be acquired to any known mineral or valid mining claim under a town-site patent. 1 Landowner, 51; 3 Id. 131.

*Deposits of sulphur have been patented by the general land-office under the mining laws.

It is no objection to the issuance of a patent for a lode claim that an application has been made for a town site, embracing within its limits the lode claim. 2 Id. 146.

Application for patent or entries for mining claims situate within the exterior boundaries of town sites, will be received where applicants show by satisfactory proof possession, or right of possession thereto, under local and congressional enactments. Copp, 207.

91. Tunnels. There is no authority of law for a tunnel location 3,000 by 1,500 feet. A proper location is the width of the tunnel itself for 3,000 feet. 3 Landowner, 130.

The "line of a tunnel" is the width thereof and no more, and this line is required to be marked on the surface by stakes or monuments placed along the same from the face or point of commencement to the terminus of the tunnel line. Copp, 144.

There is no provision of law for patenting tunnel locations, but lodes discovered in running a tunnel may be patented in like manner as other lodes. Id. 193.

The right is granted to tunnel owners to fifteen hundred feet of each blind lode, not previously known to exist, which may be discovered in their tunnel. Id. 144.

When a lode is struck or discovered for the first time by running a tunnel, the tunnel owners have the option of recording their claim of fifteen hundred feet all on one side of the point of discovery or intersection, or partly upon one and partly upon the other side thereof. Id.

Tunnel owners cannot record a lode discovered by them in running a tunnel which will absorb the actual or constructive possession of other parties on a lode which had been discovered and claimed outside the line of the tunnel before the discovery thereof in the tunnel. Id.

Prospecting for blind lodes is prohibited upon the line of a located tunnel while the tunnel is in progress, but other parties are in no way debarred from prospecting for blind lodes or running tunnels, so long as they keep without the line of such tunnel. Id.

Work done on a tunnel, run to develop a particular lode, is considered as done on the lode. The required expenditures may be made from the surface, or in running a tunnel for the purpose of developing a lode. 1 Landowner, 34.

No specified amount is required to be expended to retain the ownership of a tunnel location, but locators are required to use reasonable diligence, and failure to prosecute work for six months will be considered as an abandonment. Copp, 215.

92. Umber. Deposits of umber may be patented under the mining act of May 10, 1872. 1 Landowner, 179.

93. Waiver. A party desiring to withdraw his opposition to an application for patent should file a written statement to that effect with the local officers. 1 Landowner, 66.

When the applicant for a patent before the Interior Department, who becomes the defendant in a suit commenced by an adverse claimant in a court of competent jurisdiction, waives his claim, confesses judgment, and thus acknowledges the superior right of the plaintiff to the tract in dispute, he has done all that can be required of him in thus ending the controversy, and should be no longer deprived of a patent for the premises to which he has shown himself legally entitled. 3 Id. 194.

94. Water rights. In disposing of public lands upon which water rights have vested and accrued by priority of possession, and which, at the time of such disposal, are recognized and acknowledged by local customs, laws and decisions of the courts, the United States will maintain and protect such rights. Copp, 24.

95. Witnesses. The law provides no compulsory process to secure the attendance of witnesses before registers and receivers. Copp, 16.

No witness should be excluded because he is a party to or interested in the issue tried. Id.

See SEVERANCE.

LARCENY.

1. Larceny of ore. The severance and asportation of ore must be so separated as not to constitute one continuous act, to constitute the crime of larceny. *State* v. *Berryman*, 8 Nev. 270; *People* v. *Williams*, 35 Cal. 676.

The time between the act of severance and the act of asportation need not be "at least one day," but there must be such an intervention of time as will constitute them several transactions. Id.

2. Ore—No implied severance. An indictment charging that the defendant "did unlawfully and feloniously take, steal and carry away from the mining claim of the B. M. Co., * * * fifty-two pounds of gold-bearing quartz rock, the personal property of said B. M. Co., of the value of four hundred dollars," does not sufficiently imply a severance from the realty. *People* v. *Williams*, 35 Cal. 672.

3. Indictment. Indictment against six persons for entering a black-lead mine, and carrying away the lead, not quashed on motion, because quashing is matter of discretion. *Rex* v. *Johnson*, 1 Wilson, 325.

4. Nugget of Gold—Realty. Burt had a lease or license to rock for gold on the land of the owner for a certain rent. The other defendants worked with him. One of them found a nugget of gold upon the land on the top of a rock pile, not a part of the proceeds of the rocker. The finder and his associates appropriated the nugget, and did not account for it. Upon being indicted for larceny, it was *held*, that a nugget of gold separated from the vein by natural means, and found loose on the surface was parcel of the realty, and that the taking and carrying away being one continued act, it did not amount to a larceny, but only a trespass. *State* v. *Burt*, 64 N. C. 619.

5. Statutory larceny — Shaft worked into many mines—Practice. The defendant (prisoner) was the lessee of a coal mine with a shaft through which he had worked from 1842 till 1848, and had mined into and taken coal as charged in the indictment from lands of more than thirty different proprietors, and by his workmen had taken £10,000 worth of the coal of other persons. The prisoner was indicted under 7 and 8 Geo. 4, c. 10, s. 37, for stealing from mines: *Held*, that though the defendant did not himself pick or remove the coal he was liable criminally for the acts of his innocent agents; 2. That all the coal being taken through one shaft it was parcel of one transaction; 3. That the prosecutor could not be compelled to elect on which charge he would go to the jury; 4. That for convenience the judge would direct the jury to confine their attention to one particular charge, but that the prosecutor was entitled to give evidence in support of all the counts in the indictment; 5. That proof of such other charges might be relied on to show the felonious intent. Per Erle, J., in trial on the circuit. *Reg.* v. *Bleasdale*, 2 Car. & K. 765.

6. Larceny as bailees — Conversion of receipts for oil in store. B. was the owner of several hundred barrels of oil in the pipes or tanks of the Union Pipe Line, for which he had two accepted orders on said company. B. delivered these orders to the firm of H. & B., oil dealers, and took from them a receipt, the terms of which were, that the oil was to be held for storage at five cents a barrel per month. At the time of the delivery of the accepted orders to H. & B., the oil was in the tanks or pipes of the Pipe Line, and undistinguishable from the other oil therein. H. & B. deposited the orders to the credit of their general account with the Pipe Line, and thereafter deposited and drew until they became embarrassed, and, to meet their engagements, continued to draw on their balances on the books of the company until they failed. B. demanded the oil, and H. & B. were unable to deliver it: *Held*, that the delivery of the accepted orders was a delivery of the oil, and constituted a bailment, and the defendants having converted the oil to their own use, the conversion was fraudulent, and they were guilty of larceny as bailees. *Hutchison* v. *Com.*, 82 Pa. 472. (Mercur, J., dissented.)

7. Kitting—Among tributers. Defendants were indicted for the offense of what in Cornwall is termed "kitting," which is the removal of ore in a mine from one tributer's pitch of ore to another, so as to diminish the value of the one and increase the value of the other. The indictment charged that A. and B., "being persons employed in a certain mine....called Carn Brea mine,....copper ore,....the property of....the adventurers in the said mine called Carn Brea mine, then and there being found, then and there feloniously did take and remove," etc.: *Held*, that the indictment did not show the ore to have been in the mine when stolen, under 2 and 3 Vic., c. 58, s. 10; *Reg.* v. *Trevenner*, 2 Mood & Rob. 476.

8. Taking ore from fellow-miners' heaps. It is not larceny for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced by them, to remove from the heaps of other miners ore produced by them, and add it to their own in order to increase their wages, the ore remaining still in the possession of the owner. *Rex* v. *Webb*, 1 Moody, C. C. 431.

LEASE.

1. Definition. The legal meaning of a lease for years is a contract for the possession and profits of land for a determinate period with the recompense of rent; and this rent may be in kind (lead.) *U. S.* v. *Gratiot*, 14 Pet. 526; S. C. 1 McLean, 459.

2. "Land and mines." A lease of land and mines will cover both opened and unopened mines. *Saunders's case*. 5 Co. R. 12.

3. What amounts to—Operative words—In form of license — Question left to Jury. A parol agreement that a person should enter on the land of another, dig ore, erect buildings, etc., and pay fifty cents per ton for all ore exsected amounts to a lease. The form of words used is of no consequence; it is not necessary that the word "lease" should be used. Whatever is equivalent will be equally available whether the words assume the form of a license, covenant or agreement, if the other requisites of a lease are present. The evidence in this case as to the letting being very loose and general, it was held proper

to leave the question to the jury as to whether it constituted a lease at will, or from year to year, under instructions from the court as to what constituted a lease from year to year; and what constituted a license.* *Moore* v. *Miller*, 8 Pa. St. 272.

4. Of land generally. A lease of land (without mentioning mines) will entitle the lessee to work open but not unopened mines. If there be open mines, a lease of land with the mines therein, will not extend to unopened mines; but if there be no open mines, a lease of land together with all mines therein, will enable the lessee to open new mines. *Clegg* v. *Rowland*, Law R. 2 Eq. 160.

5. Right of tenant in general. Tenant for life or years may work an opened mine. *Saunders's case*, 5 Co. R. 12.

But may not open a new mine. Id.

6. General demise. A general demise of land without reservation carries the minerals under the land. *Raine* v. *Alderson*, 1 Arnold, 329.

7. What amounts to. An instrument conveying premises for the purpose of mining coal "so long as there is coal to mine thereon," and providing for the payment of "bank rents" thereon, and with a forfeiting clause in case of non-compliance with the terms of the instrument is a lease. *Gartside* v. *Outley*, 58 Ill. 210.

8. General terms cover open mines. A general lease of ground carries open mines and quarries, but not unopened mines or quarries. *Owings* v. *Emery*, 6 Gill. Md. 260.

9. Right to mine—The estate of lessee. A lease of the right to mine coal in the land of the lessor is the grant of an interest in the land and not a mere license to take the coal. *Harlan* v. *Lehigh Co.*, 35 Pa. St. 287.

10. Distinguished from agricultural lease. What is termed a mineral lease is really a sale out and out of a portion of the land. *Dicta* therefore applicable to agricultural leases are not always applicable to leases of minerals. *Gowan* v. *Christie*, 5 Mosk, 114, L. R. 2 Sc. App. 273.

A lease of land for farming purposes does not give the tenant a right to work even an open quarry. *Freer* v. *Stotenbur*, 2 Abb. App. (N. Y.), reversing 36 Barb. 641.

11. Outstanding surface lease. An outstanding lease of the surface does not conflict with a subsequent lease or license to quarry stone. *Owings* v. *Emery*, 6 Gill (Md.), 260.*

12. Surface rights implied. A lease which gives the right to take out all the coal beneath a certain surface, confers also the right to make all necessary openings to reach the coal. *Trout* v. *McDonald*, 83 Pa. St. 144.

13. Mine opened without right—Assignee. An assignee of a lease from a tenant who has wrongfully opened a new mine, may not work the same. *Saunders's case*, 5 Coke R. 12.

An exception in the assignment of a term by lessee, of the benefits, etc., of a mine opened during his term is void, the tenant having no interest therein to have or take. Id.

14. Several openings—Description—Eviction—Recoupment. Where it was a disputed point as to how much was leased, the demise being of a "coal bank and the appurtenances thereunro belonging," and the lessor had had undisputed possession of one coal opening, if one only had been leased, the entry of the lessors, or others under them, upon other parts of the tract, would not be an eviction, and the lessee would be bound to pay for the coal taken by him from that opening. *Tiley* v. *Moyers*, 43 Pa. St. 404.

But if the grant was co-extensive with the coal veins of the whole tract, and the lessors, without interrupting the lessees' actual mining operations, entered and took coal from the tract demised, they were guilty of a breach of the implied covenant for quiet possession, and the lessee could set off the damages resulting therefrom against the claim for rent accrued under the lease. Id.

Such an eviction, however, would not suspend the rent, where it has not been reserved as an equivalent for the possession of the tract, but for the coal actually taken therefrom. Id.

15. Power to let under general terms. A power to let leases will be construed to include the power to let a lease of opened mines under the words "manors, lands and tenements." *Campbell* v. *Leach*, Amb. 740; *Leach* v. *Campbell*, Id.

16. Lease forbidding waste. Where there was a conveyance to trustees of land, together with the mines thereunder, and a power to grant leases for fourteen years

*In *Moore* v. *Miller* a distinction was argued between a mining lease and a lease for farming, etc., with reference to annual seasons in opposition to the presumption of a lease "from year to year," but the point was not decided.

*This case does not mention the distinction that although a general lease gives no right to open a new quarry, yet the substance of the unopened quarry is covered by the demise, and it goes into the occupation of the tenant.

without mentioning mines, but containing a clause against waste: *Held*, that the trustees had no power to grant leases of unopened mines. *Clegg* v. *Rowland*, Law R. 2 Eq. 160.

17. Two leases—Mines and miners' houses. Where there were two leases, one of coal mines, and the second of the miners' houses on a certain tract, the last of which, by its express terms, was made part and parcel of the first, the two leases constitute but one entire demise. *Spencer* v. *Kunkel*, 2 Grant (Pa.), 406.

18. Leases of two mines worked together. "Two mines of the same lessors, contiguous one to the other, were leased by separate instruments to one lessee. One stipulation in each lease was that the lessee was not bound to mine more coal than could be taken away by cars furnished by a railroad company named. It was no excuse for not working one mine, that the cars furnished were not sufficient to take away the coal mined in the other."* *Powell* v. *Burroughes*, 54 Pa. St. 329.

19. Demise of two parcels—Stamps. A demise of a slate pit and of a stone quarry at another place by the same indenture, though for terms commencing at different dates, on account of an outstanding lease of one of the parcels: *Held*, one transaction, and liable to only one stamp duty. *Boase* v. *Jackson*, 6 Moore, 480.

20. Engine working two mines—Rent—Apportionment. The lessee of Ewanrigg colliery took a lease of the Ellenborough colliery adjoining, from the plaintiff, by which latter lease he was entitled to get the coal from the latter mine at a certain rent, with liberty to bring the coal got in the first mine to the surface by way of outstroke through the second, the Ellenborough colliery, on payment of one and one-half pence per ton for outstrokes, water-course rent, and shaft rent. No rent was to be paid from any coal got from the latter colliery, which should be used by any engine employed in working or carrying on the second mine: *Held*, that no rent was payable for coal used in working the engine of the second mine when employed in bringing up the coal from the first mine, such engine being at the same time used in draining the second mine, because: 1. Of the difficulty in saying what amount of coal was used for raising coal, and what amount for raising water from the other mine; and, 2. The coal consumed for raising might fairly be construed as paid for in the rent reserved for raising through the second mine. *Senhouse* v. *Harris*, 5 Law Times, N. S. 635.

21. Second lease, discharge of prior. The acceptance of a new lease (of salt works) extinguishes all prospective liabilities of the lessees as assignees of a prior lease. *Preston* v. *McCall*, 7 Grat. (Va.) 121.

22. Executory agreement distinguished from lease. By an instrument bearing date of the second of February, 1838, M. T. D. agreed for himself, his executors, and administrators, to let and grant a lease to G. R. M. and others of "the coal, iron mine, stone and fire clay," under certain lands, at certain specified royalties, for the term of seventy years from the date of the agreement, and it was provided "that so much royalties as will amount to the sum of £50 a year be worked or paid for during the term, which rent is to commence in a year from the time the pit is sunk through the four-foot coal, with power to work the said minerals, and to deposit rubbish and make a wharf, as is usually granted in leases of a similar nature, and by W. T. D. (the lessor's brother), nevertheless, if at any time during the term, the said G. R. M. and others should think fit, from the quality of the coal being unsound, or from faults, on giving six months' notice, to abandon and quit the same, as if this agreement had never been entered into, and we hereby bind ourselves to commence sinking a pit before the twenty-fourth of June next; and the said M. T. D. engages that he has not incumbered the said estate to prevent him entering into a lease on the above terms and agreement, which lease is to contain the usual covenants, and as entered into by his brother; and the said M. T. D. engages to sign a lease upon the said terms as soon as it can be prepared:" *Held*, that this did not amount to a lease, but was a mere agreement for a future demise. *Doe* v. *Powell*, 8 Scott. N. R. 687; 7 M. & G. 980.

Whether an instrument is to be construed as a lease or an agreement, depends upon the intention of the parties, to be collected from the instrument itself, and the nature of the subject-matter, without reference to any extrinsic circumstances or subsequent acts of the parties. Id.

23. Lessee may work through foreign ground. A provision in the lease of a coal-bank that the lessee shall be treated as having abandoned his lease if he shall suffer the bank by any fault of his to lie idle for a year when it would yield coal, does not apply if he be actually taking coal out of the bank by any means of access to the coal deposit, even by drift from land belonging

*This is the syllabus of the reporter. The language of the court is not clear. The idea seems to be that the lessee crowded one mine and neglected the other, necessitating, by his own act, a failure of cars to supply the second mine.

to the lessee. *Tiley* v. *Moyers*, 25 Pa. St. 397.

24. From one of several co-tenants. Where the defendants, who were lessees in possession of one twenty-fourth of an ore bed had accounted to their lessor for all the ore dug by them: it was *Held*, that this did not discharge them from their liability to account to the other tenants in common, the lessor being entitled to one twenty-fourth of the profits of the ore so dug, and the other tenants in common to twenty-three twenty-fourths. *Barnum* v. *Landon*, 25 Conn. 138.

Whether in such case the defendants or their lessor would be the party to account to the other tenants in common must depend on the question of fact as to which of them was in possession, receiving the rents and profits. Id.

25. Void Lease—Corporate knowledge—Receipt of royalty. When the president of a mining corporation, without authority from the corporation, leased the mine to a party, who entered and paid royalty from time to time, but this royalty was entered by the superintendent upon the books of the company as money for ores sold: *Held*, that the lease being made without authority was void; and that the receipt of royalty in the manner stated could not be considered a ratification, because it showed that the rent or royalty was not received with a knowledge of its rental character: *Held, further*, that the knowledge of three of the board of trustees, being less than a majority, of the facts in regard to the party claiming as tenant, could not be considered the knowledge of the company; and the court intimate that knowledge by all the trustees not communicated to them as a board would not be the knowledge of the company or of the trustees as a board. *Yellow Jacket S. M. Co.* v. *Stevenson*, 5 Nev. 232.

26. Surrender implied by later lease. A later lease acted on implies a surrender of a former lease. *Campbell* v. *Leach*, Amb. 740; *Leach* v. *Campbell*, Id.

27. In form of license. Whatever words are sufficient to explain an intent between parties that one party should divest himself of the property, and the other come into it for a determinate time, whether they run in the form of a license, covenant, or agreement, will in construction of law amount to a lease, as effectually as if the most proper and technical words were made use of for that purpose. *Watson* v. *O'Hern*, 6 Watts, 362.

28. Distinguished from license. An instrument using the terms "hath demised, leased and let....the right to mine and take away coal from the Salem vein...." is a lease and not a license. A right to use a mine necessarily implies a right to possess it. The instrument is not impaired as a lease by the use of the words "right to mine," etc.; a grant of use and possession in consideration of something to be rendered is that which constitutes a lease of the thing to be possessed. *Offerman* v. *Starr*, 2 Pa. St. 395.

29. License—Fixed rent—Liquidated damages. Cowan, by writing, granted to Johnston and others, as partners, the privilege to take clay from his land for twenty years at twelve cents per ton; to pay $150 at the end of every six months, although they should not then have taken away so much clay as would amount to that sum: *Held*, that the writing was an agreement to pay for the privilege of taking clay, whether exercised or not; 2. That the contract was a mere license; 3. That the sums to be paid, if the minimum quantity was not taken out were liquidated damages. *Johnston* v. *Cowan*, 59 Pa. 275.

30. Use and occupation—Former recovery. In an action for use and occupation, a judgment in a former action for use and occupation between the same parties, given in favor of the plaintiff, is evidence of the defendant having occupied, but not conclusive; and the jury ought to take into their consideration all the circumstances under which that judgment was obtained. *Jones* v. *Reynolds*, 7 Car. & P. 335.

31. Construction—Prospector—Estate at will. A. and B. executed an instrument by which the right was granted to B. to enter upon the lands of A. to prospect for coal and other minerals, and, if found in sufficient quantities to satisfy B., the latter was given the privilege of mining and removing the same, he paying a certain price per ton to A., and the right was granted to B. to erect all necessary buildings for mining purposes on said land; but the right was reserved to B. to abandon the agreement and remove such buildings at his pleasure: *Held*, that the instrument amounted to a lease, creating an estate at will. (Buskirk, J., and Pettit, J., dissenting.) *Knight* v. *Indiana C. & I. Co.*, 47 Ind. 105; 17 Amer. R. 692.

32. Construction—Mine and farm demised—Eviction. Where an article of agreement, in the reciting part, referred to land described in a lease from one Ledyard to the parties of the first part, and recited that the parties of the first part were desirous to lease to the party of the second part the right of mining for and excavating coal on said premises, etc., and in the

operative part of said agreement the demise was of the farming lands described and mentioned in said lease from Ledyard, together with the right to mine, dig, extract and carry away coal from the said premises described in Ledyard's lease, together with the enjoyment and occupation of so much of the surface of said lands as might be necessary to carry on the mining for coal on said premises: *Held*, that the right to the farming land was as definite and certain as the right to mine for coal, and that if the grantor in said agreement prevented the grantee from using the farming land it would amount to an eviction, and in an action by the grantor against the grantee for a breach of the covenants in such agreement, a plea setting up that the grantor had prevented the grantee from using such farming lands was a good plea, and it was error to sustain a demurrer to it. *Walker* v. *Tucker*, 70 Ill. 528.

33. Unavoidable accident — Faults. A coal lease provided that lessee should get a certain quantity of coal, unless prevented by unavoidable accident. After working some time, great quantities of water came in by faults in the mine, notwithstanding which the stipulated quantity of coals might have been got but at a greater expense than they could possibly repay. Upon suit by lessor: *Held*, that it was not a case of unavoidable accident within the meaning of the exception. *Morris* v. *Smith*, 3 Doug. 279.

34. Inevitable accident — Construction—Commencement of term. A lease of a mine of rock-salt was contracted for August 29, 1851. In September, 1851, work which had been commenced was discontinued on account of an influx of brine into shafts which the lessees were endeavoring to sink. In November, 1852, a lease was executed according to the original contract, calling for a term to expire in twenty-one years from the twenty-fifth of June, 1851. The lease contained a covenant to produce 2000 tons of rock salt per annum, but provided against the contingency of a failure, by inevitable accident, of the supply of rock-salt, etc., during the continuance of the term: *Held*, that the term did not begin until November, 1852, and that the influx of brine was not an accident during the continuance of the term. *Jervis* v. *Tomkinson*, 1 H. & N. 195; 26 L. J. Ex. 41.

35. Continued injury—Accord—Injunction. Acceptance of compensation for past injuries, by violation of terms of a coal lease, does not prevent an injunction to prevent a continued violation. *Mexborough* v. *Bower*, 7 Beav. 127.

36. Encroaching tenant—Abandoned lease. Where defendant had taken a lease of two quarry lots, but worked on only one of them; and after the expiration of the lease continued to work the same lot, paying rent apportioned upon it alone, though without change or renewal of the lease: *Held*, that he could not be considered as a tenant with regard to the second lot, which he had finally encroached upon. *Ackerman* v. *Van Houten*, 4 Halst. N. J. Ch. 476.

37. Lessee mining out of bounds of sett—Practice—Trespass. Under a lease authorizing the defendant to mine coal south of a designated line, the lessors in covenant on the lease were not entitled to recover for coal mined north of such line, and that the plaintiffs were in possession of the land north of the said line was not material. For coal mined beyond the leased premises, the defendant might be liable in trespass. *Lyon* v. *Miller*, 24 Pa. St. 392.

38. Slate — Tenant working beyond sett—Right to finish quarrying a section exposed—Measure of damages. J., one of the defendants, having a lease of, and occupying a certain portion of the orator's slate quarry for a term of years, paying as rent thereof a stipulated price per square for all the slate quarried and manufactured therefrom, without obtaining the consent of the orator, occupied a certain other portion of said quarry adjacent to said leased premises, for several years, and quarried and manufactured slate therefrom, paying the orator therefor the same price per square as stipulated in said lease, and paid for those taken from the leased premises: *Held*, that such use and occupation of said portion of the quarry outside of said leased premises, under the circumstances of this case, did not constitute a tenancy from year to year, and that the only interest J. acquired outside of said leased premises was the right to take out the slate from a section of the quarry, which, with the knowledge and acquiescence of the parties, he had been to the expense of uncovering, and that he was not entitled, as a matter of right, to six months' notice to quit, but to a reasonable time to quarry and manufacture the slate he had so uncovered; 2. J. having agreed to quit the portion of the quarry in dispute on the first day of July, 1864, thereby waived all claim for further time to work that part of the quarry, and all claim for the possession of it after that date; 3. That the defendants must account for all slates quarried and manufactured by them outside of said leased premises since the first day of July, 1864, at what they were worth at the respective times when the same were taken from the quarry. *Sheldon* v. *Davey*, 42 Vt. 634.

39. Forfeiture — Abandonment — Re-entry. After the condition of a lease of a mine had been broken, the lessee abandoned possession, and the lessor, by his tenants, entered and occupied the surface of the ground, and made a written lease of a part of the mine; his agent sent notice to parties who had in former years worked the mine, that the lessor had entered for breach of condition and to determine the lease, and for fourteen years no one had worked the mine under a lease: *Held*, that these facts would authorize a finding that the lessor had entered for breach of condition and determined the lease. *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80.

40. Forfeiture of lease by failure to mine—Abandonment. By a lease of the right of digging ore, the lessee paying half yearly a specified sum for each ton of ore, the lessee covenanted to occupy and improve the ore bed in a proper manner, and take therefrom, from year to year, such quantities of ore as should be considered as improving the same in a good, husband-like and thorough manner, and to pay for each ton of ore the sum specified; and it was further agreed by and between the parties, their heirs and assigns, that, if the rent should be in arrears three months, or if the lessee should neglect to improve the ore-bed in the manner above described, the lessor might re-enter and be in as of his former estate: *Held*, that failure by the lessee for sixteen months to work the mine at a time when it would have been profitable to work it, was a breach of condition, for which the assignee of the reversion might enter and determine the lease. Id.

41. Forfeiture from assignment not favored. A court will not assume a transaction amounting to an equitable assignment, under a coal lease, which forbids an assignment, to be such an assignment as would amount to a breach, without giving the lessee an opportunity of trying the question in an issue. *Bowser* v. *Colby*, 1 Hare, 109.

42. Forfeiture from breach of condition not favored—Construction. A provision in a coal lease that the lessee "shall carry on the digging of said coal in such a manner as to do no injury to the surface of said land, and not to spoil the coal itself, and in order to carry this provision into full effect, parties of the first part reserve the power and full right to themselves to send from time to time an expert into the coal-pit," is not a condition for breach of which the lessors may enter, but a covenant sounding in damages. *McKnight* v. *Kreutz*, 51 Pa. St. 232; S. C. 53; Id. 319.

Conditions working forfeitures are not favored, and to make a provision so operate, it must be manifested by a clear expression of intention. Id.

Where in a coal lease certain causes of forfeiture are specified, it is not to be inferred that any other causes of forfeiture remain. Id.

43. Forcible re-entry upon forfeiture — Ejectment — Laches — Abandonment. The lease of a coal mine provided that if the payments of rents, etc., were not made in the manner stipulated, the lessors should have full power to "dissolve, terminate, and annul" the lease: *Held*, *obiter*, that on the lessee's default, putting in another tenant by breaking in the door at night was "not the way" to enforce the forfeiture. *Kreutz* v. *McKnight*, 53 Pa. St. 319; S. C., 51 Pa. St. 232.

Lessee being out of possession, it was held that he could not recover possession in ejectment without showing performance, or an offer of performance, of his covenants. Id.

In case of a lease for only four years, where the tenant having been dispossessed, he did not bring suit for two years and a half, such delay was to abandon the term altogether, and obviated the necessity for a demand of rent and a formal declaration of forfeiture. Id.

44. Re-entry — Right of action for taking ore. A lease which has been forfeited constitutes no objection to an action for injuries by taking ore while such lease was outstanding, brought by the lessor, who before suit has re-entered—but such fact goes to the measure of damages. *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80.

45. Entry by mining. The entry of a lessor upon premises held by tenant at will, without the assent of the tenant, by quarrying and carrying away stone, is an entry sufficient to determine the estate at will, and to allow a statute of limitations to run in favor of the person theretofore occupying as tenant. *Doe* v. *Bennett*, 9 M. & W. 642; S. C., 7 Id. 225.

46. Entry under agreement—License. A. agreed with B. to take a lease of B.'s iron ore at N. for forty years, at a certain rent, engaging to work the several veins of iron-stone, limestone, etc., in certain stipulated proportions, and B. agreed to grant such lease: *Held*, that by this agreement B. took not a mere license, but a right constituting a hereditament within statute 11, G. II, c. 19, s. 14, in respect of which A. might sue him for use and occupation. *Jones* v. *Reynolds*, 4 Ad. & E. 805.

47. Penalty—Oil lease—Construction—Measure of damages. A covenant in an oil lease, to commence operations within twelve months, or "thereafter pay to the

party of the first part $25 per annum until work is commenced:" *Held*, a penalty, and not liquidated damages, allowing the damages to be apportioned to the loss actually sustained. *Bell* v. *Truit*, 9 Bush (Ky.), 257.

And it not appearing from the evidence that the lessor would in any reasonable probability have been benefited by a compliance with the undertaking to commence boring for oil, no more than nominal damages ought to be allowed. Id.

48. Quiet enjoyment—Eviction—Eminent domain. Every lease implies a covenant for quiet enjoyment. But it extends only to possession, and its breach arises only from eviction by means of title. *Schuylkill Co.* v. *Schmoele*, 57 Pa. St. 271.

A lease does not protect against entry and ouster by a tort feasor; nor even against the assertion of the right of eminent domain. Id.

49. Eviction. When minerals and surface are leased together, an eviction from a part of the surface demised will justify a refusal to carry out the covenants as to working the minerals. *Walker* v. *Tucker*, 70 Ill. 527.

50. Eviction — Appurtenance — Railroad. The destruction of a railroad appurtenant to a furnace demised is an eviction of the tenant which will bar an action for rent of the premises; but if such railroad has been abandoned by the tenant, while such destruction may amount to a trespass it is not an eviction. *Peck* v. *Hiler*, 24 Barb. 178; 31 Id. 117.

51. Eviction—Railroad. An interruption of the use of a privilege (railroad in connection with a furnace) by the landlord is an eviction, and will suspend the rent. *Peck* v. *Hiler*, 24 Barb. 178.

52. Rent—Eviction—Recoupment. An eviction such as will suspend rent is an actual expulsion of the lessee out of all or some part of the demised premises; the rent already accrued and over due is not forfeited by the eviction, but in an action for such rent, the tenant may defalk the damages caused by it. *Tiley* v. *Moyers*, 43 Pa. St. 404.

53. Construction, as to estate and term. A deed, granting a piece of land for the purpose of being explored for minerals, wherein the rent is made payable quarterly, and a forfeiture is created by a non-user for a year, but with a right in the lessees to discontinue their operations at any time, nothing more being said as to the duration of the lease, was held to convey an estate from year to year, and not an estate determinable at will. *Patton* v. *Axley*, 5 Jones, L. (N. C.) 440.

54. Construction—Condition precedent—Time—Election to surrender. A. became a tenant to B. of a colliery, and also of some farm land, at distinct rents. The lease contained very numerous covenants as to the payment of the rents, and as to the management of such property. The term created was for forty-two years, but the tenant was to have liberty to put an end to the term, on giving eighteen months' notice before the expiration of the first eight years, or of any subsequent three years. The proviso which gave the tenant this liberty, after describing the giving of the notice, contained these words: "Then, and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed), this lease, and every clause and thing therein contained, shall, at the expiration of the first eight years, and thereafter, at the expiration of any such third year, cease, determine, and be utterly void. * * * But nevertheless, without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." The court of Exchequer had held that this proviso did not make the performance of the covenants a condition precedent. The lords were equally divided, and so the judgment of the Exchequer Chamber was affirmed. *Grey* v. *Friar*, 4 H. L. Cas. 565, affirming *Friar* v. *Grey*, 5 Ex. 584.

There had been a previous action on the same lease in the Queen's Bench, in which performance of the covenants had been declared to be a condition precedent, *Friar* v. *Grey*, 15 Q. B. 891; but that judgment was reversed in the Exchequer Chamber upon a contrary holding. *Grey* v. *Friar*, 15 Q. B. 901.

55. Construction of series of working leases of underlying coal beds—Faults—Parol modifications—Covenant for "consent in writing"—Agent—Practice. A company who were the owners of four veins of coal, known as P., Q., R., and S. veins, leased the P. vein to D. & Co., in 1842, the lessees to take out 8000 tons per annum, at a stipulated price per ton. In 1846 they leased to A. & Co., to whom the lease of 1842 had been transferred, the Q. vein on the same terms, the quantity from the two veins being increased to 15,000 tons per annum. In 1847, the same owners leased to H. & H., who had become the holders of the former two leases, the R. and S. veins, which latter had never been opened, the lessees stipulating to take 50,000 tons from the four veins, if they could be made to yield that quantity. The lessors stipulated to pay for driving the gangways through

dirt faults and through rock and slate faults, they being "first consulted, and approving by their consent in writing," and also to make a fair allowance for railroad iron and spikes for the railroads in the main drifts, and for running the slope and doing other work necessary to open the veins, "to be deducted from the rent hereinbefore agreed to be paid." The lessees took possession and expended large sums in opening the R. and S. veins, the R. vein yielding but a small amount of coal, and the S. vein none. A portion of rent for the coal mined was paid in cash, a part in houses built for the lessors, and a part remained unpaid. The lessees brought covenant on the lease of 1847 to recover the amount expended in opening the R. and S. veins, and for running gangways through dirt, rock, and slate faults: *Held*,

1. That the agreement of 1847 was a lease of the R. and S. veins, and that there was no merger in it of the former leases, demising the P. and Q. veins respectively.

2. That for the purposes of fixing the aggregate production and regulating the times of paying of the rent, the four veins were united, and the former leases so far changed.

3. That the expression "said veins" in the lease of 1847 is to be taken to refer to the R. and S. veins, the subject-matter of the lease. Such detail covenants are to be referred to the premises, unless a different intention be clearly indicated by the language used.

4. The acts and declarations of the parties under an agreement are to be taken as a guide to their understanding and intentions in giving a construction to the writing.

5. The diversity of the rents to be paid under the leases is a strong reason against the assumption that a merger was intended.

6. That the payments for the opening and improvements constructed for and upon the R. and S. veins were to be reimbursed to the lessees out of the rents accruing from those veins; and this failing, it could not be charged against the rent of the P. and Q. veins, or against the owner personally.

7. No implied covenant arises upon this mining lease, that sufficient coal would be found to reimburse the lessees for the cost of opening the veins.

8. That for driving dirt, slate and rock faults in the R. and S. veins, stipulated for in section 11 of the lease of 1847, the owners were liable generally, irrespective of the accruing rents.

9. Where a lease required the assent of the company in writing to the prosecution of the work in such faults, a verbal waiver by the company's agent of such written assent would be such a parol modification of the covenant as would make the whole a parol agreement, and an action of covenant could not be maintained thereon.

10. Where a plaintiff sues on a covenant which has been modified by parol in a point essential to the defendant's liability, the written contract will be treated as abandoned, or used only to mark the terms and extent of the new stipulations.

11. Where the lease required the written assent of the company, the parol assent of their agent would not make them liable in covenant, though it might in *assumpsit*.

12. Evidence of the work done in the faults of the veins was not admissible under the lease, where the written consent of the company to its performance had not been obtained. *Lehigh C. & N. Co.* v. *Harlan*, 27 Pa. St. 429.

56. Construction—Covenant by lessee to purchase—Evidence. An agreement indorsed on a mining lease that "the parties of the second part shall, at the expiration of two years from the date hereof, pay unto the said B. the sum of $10,000, in lieu of the ten per cent. agreed upon in said lease, then the said B. shall make a good and lawful deed of conveyance for the above described premises in the within lease," construed to be upon its face an absolute contract by the lessee to pay and purchase at the end of two years, and in the absence of fraud or misrepresentation, it was *held*, that parol evidence was inadmissible to explain it. *Suffern* v. *Butler*, 21 N. J. Ch. 410.

57. Construction — Sales at pit's mouth—Royalty. A lessee of a mine of cannel coal covenanted to pay besides an annual rent and a fixed royalty, "also one-half part or share of all such sum and sums of money, as all or any of the cannel to be gotten should sell for at the pit's mouth," over and above a certain price. In covenant upon the lease: *Held*, that the lessee was not liable on his covenant for any part of the money produced by the sale of the coals elsewhere than at the pit's mouth. And that evidence of the lessees having accounted with the lessor and paid him the share of money produced by the sale of the coal elsewhere, was not admissible to explain the intention of the parties. *Clifton* v. *Walmesley*, 5 Term R. 564.

The same construction of the same lease adhered to upon different pleadings. *Gerrard* v. *Clifton*, 7 Term R. 676.

58. Construction of covenant to sink for coal. It is a defense to a covenant, or an award upon a covenant, "to sink for coal as far as could and ought to be accomplished by persons acquainted with the nature of collieries," to erect fire engines for getting the coals, etc.; that defendants sunk for coal as far as could and ought to

be accomplished, etc.; and had found by due and sufficient experiments that there were no mines of coal under the land that could or ought to be worked by any person acquainted with the nature of collieries, or as in such cases it was usual or customary to work, or as would have defrayed the expenses of working. *Hanson* v. *Boothman*, 13 East. 22.

And the plaintiff was allowed, if he saw fit, to take issue on the sufficiency of the experiments. Id.

The rule that no person is bound to do impossibilities, applied. Id.

59. Construction of "fairly wrought" —Colliery. A demise of coal mines for thirty years, yielding 400 pounds for every acre of coal, etc., by annual payments of not less than 200 pounds: provided, that in case the whole of the coals, so far as the same could be fairly wrought, should have been worked out and gotten, at any time prior to the expiration of the term, and that the said coal so fairly wrought should have been wholly paid for, then that the annual payment of 200 pounds should cease and be no longer payable: *Held*, that the question whether the coal could be fairly wrought did not depend upon whether it could be worked at a profit or not, or whether any such coal as that demised was worth working, but assuming that coal of the same description as that demised could be properly worked, whether, according to the usage of miners, the coal in question could be worked without extraordinary difficulty or expense. *Griffiths* v. *Rigby*, 1 H. & N. 237.

60. Construction — Lessee compelled to quarry. A tract of land was demised for a term of years, "with the quarry thereon, and the privilege of getting out stone in the same; also the privilege of getting out stone in any part of said tract, and to use and occupy said tract in any manner that the lessees may choose, and for all purposes necessary and convenient for carrying on the quarrying business." The lease also provided that the lessees should have the use of a certain wharf belonging to the lessor, for the purpose of hewing stones thereon, and of shipping them, and that the rent of the land should be seven per cent. of the value of the stone quarried and sold: *Held*, that the lessees were not at liberty to work the quarry or not, as they pleased, but were bound to improve it in a reasonable manner during the term of the lease. *Brainerd* v. *Arnold*, 27 Conn. 617.

61. Construction — Surface injury. Provisions in a coal lease for protection of certain portions of the surface used *arguendo* as authorizing the destruction of parts of the surface not specially mentioned in such connection. *Taylor* v. *Shafto*, 8 B. & S. 228; *Shafto* v. *Johnson*, Id. 252.

62. Crown grant—Construction—Cape Breton Island. A lease granted by the Crown, of all mines in the Province of Nova Scotia: *Held*, to include mines in the island of Cape Breton, one league distant, and a county of the Province of Nova Scotia. *Taylor* v. *Att'y-Gen.*, 8 Sim. 413.

63. Construction—Power of trustees to make. After a settlement of personal property, the *feme covert* became seised of a freehold, containing mines, which the former had attempted to work by lessees, but the mines had never been effectually operated. The settlement contained a covenant that all future acquired real estate should be settled upon the same trusts and under the same powers, or as near thereto as the nature of the property would admit of: *Held*, that the settlement of such after-acquired realty should be drawn so as to give the trustees power to grant mining leases. *Scott* v. *Steward*, 27 Beav. 367.

64. Construction — Phosphates. A grant for a term of years of the exclusive right to search for, take, sell and dispose of, to the grantee's use, all phosphates found during the term in a designated tract of land, is a demise of the beds or veins of phosphates contained in the land. *Massot* v. *Moses*, 3 S. Car. 168; 16 Amer. R. 697.

65. Phosphates—Construction—Exclusive grant. A., being seised in fee of a tract of land, in consideration of $2,000, granted to B. the right and privilege of entering in or upon, by himself or his agents, all or any part of said tract "for the purpose of searching for minerals and fossil substances, conducting mining operations to any extent," he may deem advisable, and for working, removing, selling and appropriating "to his own use, for the term of ten years from," etc., "all * * * phosphates that may be found by any person or persons, or contained in any part" of said tract; provided, that B. shall not, at any one time during said term, "engage in working over one-third part" of said tract; such one-third part to be selected by him as often as he may desire. The deed also granted the right to cut timber and construct roads and machinery to remove and work the phosphates: *Held*, that this was a demise of the phosphate beds for the term of ten years, with the exclusive right of raising, selling, disposing of and manufacturing all phosphates found during the term, and that B. had the right to divide his interest and convey part of it to others. The expression "that may be found by any person or persons, or contained in any part" of the land, distinguishes this case from *Lord Mount-*

joy's case, and shows an intent to convey an exclusive right, and not one in common merely with the grantor; and this construction is aided by the fact that the consideration was an entire sum demandable at the delivery of the deed, and intended as compensation for the right granted. *Massot* v. *Moses*, 3 S. Car. 168; 16 Amer. R. 697.

66. Agreement to lease, without present power. A party undertaking to lease mines, having no authority at the time so to do, but afterwards acquiring the requisite power, is bound then to fulfill his contract. *Carne* v. *Mitchell*, 15 L. J. ch. 287.

But such contract cannot be enforced against a limitation imposed upon the power. Id.

67. Property identified by parol evidence—Latent ambiguity. By deed of April 1, 1861, A. leased certain coal property to B., until December 31, 1864; and by deed of November 11, 1861, indorsed on the first and declared to be a part of it, he leased other adjoining coal property to B. for the same time. By contract of September 4, 1864, A. and B. agreed to renew the lease of April 1, 1861, for five years, from the first of January, 1865. A question arising whether the lease of the property mentioned in the deed of November 11, 1861, was renewed as being part of the lease of April 1, 1861: *Held*, a case of latent ambiguity, and parol evidence admissible to prove what was the intention of the parties. *Midlothian C. M. Co.* v. *Finney*, 18 Grat. 304.

68. Use and occupation—Prospecting holes not possession. If a down be let by an instrument not under seal, for the purpose of digging copper ore, an action for use and occupation may be maintained if the defendant has ever taken possession; and if he has once taken possession he is liable for all subsequent rent until the determination of the tenancy, whether he has continued to work the minerals or not. *Jones* v. *Reynolds*, 7 Car. & P. 335.

But if the defendant merely caused holes to be dug on the down, and had them filled up immediately, with a view merely to ascertain what sort of a bargain he was about to make or had made, that would not be a taking of possession. Id.

69. Time, of the essence. In contracts for the lease of working mines, time, though not named, is, from the fluctuating nature of the property, considered as of the essence of the contract, and the intended lessee may therefore fix a reasonable time for completion; and on the lessor's default, may rescind the contract. *Macbryde* v. *Weekes*, 22 Beav. 533.

70. Rescission—Abstract of title—Time. A. agreed to grant a lease to B. After considerable delay on the part of A., B. gave A. notice that unless he completed within a month, he would rescind the contract. The day before the expiration of the time thus limited, A. forwarded to B. the drafts, but he furnished no abstract nor showed that he was in a situation to complete. B. rescinded the contract: *Held*, that it was effectual, and the court dismissed A.'s bill for specific performance with costs. *Macbryde* v. *Weekes*, 22 Beav. 533.

71. Bill to set aside—Laches—Innocent assigns. Bill to set aside lease as void for want of power in the lessor and (2) voidable on account of fraud, dismissed on account of laches, the court holding, *further*, that the defendants being innocent purchasers without notice, that was a defense which must be sustained to the proceedings in chancery. *Ernest* v. *Vivian*, 33 L. J. Ch. 513.

72. Special clause not to limit grant—Surface use. A special clause in a lease granting the right to mine and the use of *surface necessary to conduct the mining*, is not to be taken as limiting a general demise of the land in the granting clause of the instrument. *Walker* v. *Tucker*, 70 Ill. 527.

73. Alteration of Lease — Practice. Upon bill filed by the assignee of a mining lease to correct a misdescription of the premises, it was insisted by the lessor that there had been a material alteration improperly made in the terms of the instrument; but it was: *Held*, that even if that were true, it not appearing that the complainant was chargeable with any complicity with such alteration, the bill should not have been dismissed on demurrer. *Rose Clare Lead Co.* v. *Madden*, 54 Ill. 261.

74. "Usual covenants." An agreement for a mining lease to contain "all usual and customary mining clauses" does not entitle the lessor to a covenant against assignment. *Hodgkinson* v. *Crowe*, L. R., 19 Eq. 591.

Nor to a clause of forfeiture in case of bankruptcy or compromise with creditors. Id.

And upon appeal it was held, reversing the decision of the vice-chancellor upon this point, that the lessor was not entitled to a *proviso* giving a general right of entry on breach of any of the covenants of the lessee or otherwise than on non-payment of rent. S. C., L. R. 10 Ch. App. 622.

75. Usual covenants — Right of surrender. Lessees of way-leaves entered into a negotiation for a new lease. A corres-

pondence ensued, in the course of which the lessor offered to grant a new lease, at a certain rent, which offer was accepted by the lessees. The original lease contained a clause, usual, if not universal, in the leases of the neighborhood, giving the lessees the option of determining the lease on notice. The correspondence respecting the new lease was silent as to the insertion of such a clause, but one of the earliest letters alluded to the proposed lease as a renewal of the former: *Held*, that the lessees might have understood that such a clause was intended to be inserted in the new lease without putting a perverse or absurd construction on the correspondence, and that, whether such understanding was correct or incorrect, or was confined or not confined to the lessees, they ought not to be ordered to accept the lease without such a clause. *Ricketts* v. *Bell*, 1 DeG. & S. 335.

76. Unlawful covenant — Consideration. The release of a claim for damages upon alleged breach of an unlawful covenant, reserved against a coal lessee, is not a valid consideration for a new contract. *Crawford* v. *Wick*, 18 Ohio St. 190.

77. Statute of frauds—Valid and invalid lease. A parol contract for a new or supplemental lease between a landlord and his tenant, in possession under a former and subsisting lease, is within the statute of frauds; and the continued possession of the tenant does not take the parol contract out of the operation of the statute, where the continued possession of the tenant is as well referable to the first lease as to the second parol lease. *Crawford* v. *Wick*, 18 Ohio St. 190.

78. Oral lease—Statute of frauds—Holding over. An oral lease of mines for a longer period than one year is void; but where the term for which the oral agreement was made does not appear, it will not be assumed that it was for more than a year. *Ganter* v. *Atkinson*, 35 Wisc. 48.

It seems that if the lessees in such oral lease continue to work the land after the expiration of a year, they would be regarded, in an action against third persons for trespassing on the land, as tenants from year to year. Id.

79. Lessees enjoined and still held to their covenant—Forfeiture. The lessees of a coal mine, under covenants to pay royalty in installments, in advance, upon 120,000 tons of coal, whether raised or not, to do dead work, etc., with a right of entry for breach, were enjoined from work under writ of estrepement, at the suit of a third party. The lessors then gave notice of forfeiture for breach of covenants. The lessees prayed an injunction, alleging the estrepement against them as an excuse for non-payment of rent, etc.; but the court held that they were still liable under their lease, that the writ of estrepement did not work an eviction, and refused the prayer of the bill. *Schuylkill Co.* v. *Schmœle*, 57 Pa. St. 271.

80. Note and Judgment—Release of covenant. The bill of exchange given by one of three persons, who had covenanted to pay a sum certain for a demise of coal mines, though reduced to judgment, is not a bar to suit against all, upon the covenant, there being no averment that the bill was accepted as payment or satisfaction of the covenant. *Drake* v. *Mitchell*, 3 East, 251.

81. Parol evidence to qualify working covenant. In an action of covenant upon a lease, under seal, it was inadmissible to prove that when the lease was preparing the quantity of coal to be mined, under the lease, was omitted, at the request of the defendant, and that he "then undertook and promised to mine as much as he could dispose of." *Lyon* v. *Miller*, 24 Pa. St. 392.

82. Joint and several covenants. In an indenture of lease of a colliery, the two lessees covenanted, jointly and severally, with the lessor, in manner following, viz., etc.; then followed a series of covenants in respect to the working of the colliery, wherein the lessees covenanted, jointly and severally; and then came a covenant that the moneys appearing to be due should be accounted for and paid by the lessees, their executors, etc. (not saying and each of them): *Held*, this, as well as the former covenants, were several as well as joint, by reason of the introductory words. *Northumberland* v. *Errington*, 5 Term R. 522.

83. Quiet enjoyment—flooding. A covenant for quiet enjoyment contained in the lease of a mine is broken by the act of the lessor in working another mine into it and drowning the mine which he had let with such covenant. *Shaw* v. *Stenton*, 2 H. & N. 858.

84. Covenant to repair running with the land. The declaration alleged that F., being seised in fee of an estate by indenture, granted to the defendant license to dig, work, and search for china clay, and to raise, get and dispose of the same to his own use, to hold and exercise the same liberties for the term of 21 years; and the defendant covenanted with F. and his assigns that he would pay compensation to F. and his assigns, and his lessees and tenants, for all inclosed lands that he might injure, and also that the defendant or his assigns would deliver up the works in repair at the expiration of the term; that after the mak-

ing of the indenture F. conveyed all his estate to the plaintiff, and alleged as a breach that the defendant, at the expiration of the time, did not deliver up the works in repair. At the trial it was proved that the injury to the inclosed lands was before the assignment to the plaintiff: *Held*, that the covenant to deliver up the works in repair ran with the interest of the owner of the fee expectant upon the determination of the term in the incorporeal right to enter and take the clay, and that therefore the plaintiff, the alienee of the land, could sue upon it. *Martyn* v. *Williams*, 1 H. & N. 817.

85. No injunction to prevent breach of oppressive covenant. A lease of mines contained a covenant that if the lessor should at any time before the expiration or determination of the lease, give notice in writing to the lessee of his desire to take all or any part of the machinery, stock in trade, implements, etc., in or about the mines, then the lessee would, at the expiration of the lease, deliver the articles specified in the notice to the lessor, on his paying the value of them, such value to be ascertained in the manner therein mentioned: *Held*, that the covenant was so injurious and oppressive to the lessee that the court ought not to enforce it, or to grant an injunction to prevent a breach of it. *Talbot* v. *Ford*, 13 Sim. 173.

86. Covenant to supply lessor with lime. Where a lessee covenanted that he would at all times and seasons of burning lime, supply the lessor and his tenants with lime, at a stipulated price, for the improvement of their land and repair of their houses: *Held*, that this was an implied covenant; that he would also burn lime at all such seasons, and that it was not a good defense to plead that there was no lime burned on the premises out of which the lessor could be supplied. *Shrewsbury* v. *Gould*, 2 B. & Ald. 487.

87. Covenant to sink shaft—Influx of brine—Flooding. A covenant to use all reasonable diligence to sink a shaft to the salt rock in a lease of a rock-salt mine known to be flooded with brine: *Held*, to require the lessees to sink the shaft deeper than it was, although it might be an unreasonable application of time and labor. *Jervis* v. *Tomkinson*, 1 H. & N. 195; 26 L. J. Ex. 41.

And upon a covenant to work a mine known to be in such condition in a prudent and workmanlike manner, the lessees were bound to work "in some way, in as prudent and proper way as they could under the circumstances." And this though the jury found that the defendants, the lessees, could not have worked the mine by any reasonable application of labor, diligence, skill, money or other means, and that they were prevented from working it by the influx of brine. An abandonment of the works altogether was a breach of such covenant. Id.

88. Covenant for perpetual renewal. A. granted a lease and covenanted that he would always, at any time when requested by the lessees, etc., demise the premises for a term of thirty-one years, in which new lease were to be contained the same rents, covenants, articles, clauses, promises and agreements: *Held*, that this amounted to a covenant for a perpetual renewal. *Copper M. Co.* v. *Beach*, 13 Beav. 478.

A testator covenanted for a perpetual renewal of a lease: *Held*, that the proper form of the lease to be granted by the trustees was a demise for the new term, reciting the original covenant by the testator. Id.

89. Covenant to commence work—Forfeiture. A clause in an oil lease to commence operations by a day certain, is of the essence of the covenant, so far as to give an action for damages after the expiration of the lease; but is not a condition the breach of which forfeits the lease. *Barker* v. *Dale* 3 Pgh. 190.

90. Fraud—Covenant to mine without delay. A covenant to mine without delay which is broken *by a fraudulent delay*, allows of the interposition of a court of chancery. *Green* v. *Sparrow*, 3 Swanst. 408.

91. Construction — Standing Idle — Forfeiture. The lease of a coal bank provided that the lessee should put the same in good working order for the rent of the first year, and thereafter pay a royalty upon each bushel of coal; and that if the mine should stand idle, by the default of the lessee, when it would yield coal, for the term of one year, the lease should be treated as abandoned: *Held*, that this clause of forfeiture had no reference to the first year of the term. *Moyers* v. *Tiley*, 32 Pa. St. 267.

92. Covenant for forfeiture—Receipt of rent. A lease of mines providing that it shall *become void to all intents and purposes* upon tenant ceasing to work for two years, does not become *ipso facto* void upon cesser of work for that period. The provision only makes the lease void at the landlord's option. *Doe* v. *Bancks*, 4 B. & Ald. 401.

The receipt of rent by the landlord after such cesser to work does not create a tenancy from year to year. Id.

Nor does the receipt of rent after the first cesser estop the landlord from entry upon any subsequent cesser. Id.

93. Custom — Covenants — Workings. A general covenant to work a coal mine

according to a certain local custom or the custom of other collieries, is to be limited by the special covenants in the same lease. *Shafto* v. *Johnson*, 8 B. & S. 252; *Randolph* v. *Harden*, 44 Iowa, 328.

94. Continuous work. The defendant agreed to grant the plaintiff a coal lease for twenty-one years; the only rent reserved was dependent on the quantity raised, and was made payable quarterly. The court *Held*, on the construction of the contract, that the plaintiff was bound to commence working immediately and to proceed continuously. *Sharp* v. *Wright*, 28 Beav. 150.

95. Workmanlike manner. Upon a covenant to work in "a proper and workmanlike manner," the court will not take either extreme of meaning which may be contended for upon those words, but will look to the lease to see how far the landlord has protected himself by the special terms of the contract. *Lewis* v. *Fothergill*, L. R., 5 Ch. App. 103.

96. Coal pillars—Lease allowing surface injury. In 1840, a bed of coal, called the High Hazle Bed, was demised, with working powers, to persons from whom the defendants took by assignment. The lessees were to pay a minimum rent of £200, as for 2 a. 1 r. 16 p., and a further yearly rent at the rate of £85 per acre for coal actually got beyond the 2 a. 1 r. 16 p., including all ribs and pillars left in working the said coal, *except* the pillars for the support of the shafts, the pillars between the deep and counter level, the pillars all around the estate, and the pillars under the homestead and farm buildings. These pillars of specified dimensions, the lessees bound themselves to leave "during the whole of the term," and they also covenanted to work the mines "according to the best of their judgment, skill and discretion in a good and workmanlike manner." In 1857, the assignee of the lessor conveyed part of the land within which the mine lay to persons from whom the plaintiffs took with notice reserving to the grantor the High Hazle Bed, except a small portion specified, and "the mines, veins and beds of coal, fire clay, and other clay, stone and other minerals lying under the said bed called the High Hazle Bed," with powers to the grantor, his heirs and assigns, and their tenants and lessees, to be exercised "from and after the expiration of the term," for carrying on the works of the mine, and getting and carrying away the said fire-clay, etc., so reserved; and also reserving to the grantor the coal rent under the lease of 1840, with the necessary powers. Provision was made for rent for land used or occupied by the grantor for the purposes of the mine, and for compensation for buildings required or removed for that purpose, and for surface damage to the land; but it was specially provided that the grantor, his heirs or assigns, tenants or lessees, should not be liable for any damage caused to buildings which should thereafter be erected on the land conveyed, by the sinking of the land through mining operations, in getting the "coal, clay, stone, and other minerals, hereby excepted and removed." The pillars specified in the lease of 1840 were left; and the defendants worked according to the usual course of mining in the district; but their workings caused a subsidence, which injured the land of the plaintiffs and buildings erected since 1857. The land would have subsided without the buildings: *Held* (by Martin and Cleasby, B. B. Bramwell, B., doubting) that, it appearing by the lease of 1840 to be the intention of the parties that all the coal should be removed except the specified pillars, and the defendants having worked the mine in a proper manner, they were not liable for the injury. By Bramwell, B., that so far as concerned the houses, the proviso in the conveyance of 1857 protected the defendants from liability, notwithstanding that the lease under which they held was antecedent to that deed. *Eadon* v. *Jeffcock*, L. R., 7 Ex. 379.

97. Pillars—Lease of coal subject to lease of Alum diggings on surface. A lease of alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached: *Held*, that the coal pillars could not be removed. *Glasgow (Earl of)* v. *Hurlet Alum Co.*, 3 H. L. Ca. 25; 8 Eng. L. & E. 13.

98. Power to win without leaving pillars—Compensation—Pleading. Defendants were sued for mining under plaintiff's land without leaving proper supports, whereby plaintiff's buildings were undermined and fell. Plea, a lease from the plaintiff's grantor, prior to plaintiff's purchase, demising the minerals for thirty-eight years, with full power to get the minerals, and with special covenants as to compensation for damages done to buildings erected or to be erected, or to crops, with the option of repairing such buildings, etc. Conclusion, that defendants were assignees of such lease, and were always ready to perform the covenant. On demurrer, it

was *held*, that the plea was good; for that the terms of the lease were sufficient to show by implication that it was intended that the lessees of the mine should have the right to work the mine so as to undermine the surface, subject only to the paying damages according to the covenants. *Smith* v. *Darby*, L. R., 7 Q. B. 716.

99. Coal broken and left—Trover—Measure of damages—Necessary access. The Lykens Co. leased coal mines to the Franklin Co. with "the right to mine, carry away and dispose of," the coal. The lessee, having mined coal which remained in the mine just as it fell from the breast, made an assignment for creditors: *Held*, that the coal so mined was personal property and passed to the assignee, and trover would lie for it against the lessor preventing its removal; provided, its removal did not essentially injure the rights of the lessor. *Lykens Valley Coal Co.* v. *Dock, assignee*, 62 Pa. St. 232.

But if the coal could not be removed without material injury to the Lykens Co., the lessee's right of property was not complete; on account of his covenant to mine in the most approved method and leave the mines in good order, which question was left to the jury. Id.

As damages the court allowed the value of the coal in the run, and refused to allow the rent to be deducted, as the rent was wholly disconnected from the taking of the coal, and would be "set off," which is not allowed in trover. Id.

A railroad being laid in the mines for moving coal to the breaker, the assignee had the right to use it to remove the coal. *Necessitas facit licitum quod alias non est licitum.* Id.

100. Collier's cottages incident to lease. An indenture of settlement contained a power for the tenant for life to lease for lives certain hereditaments, to any person willing to build houses thereon. Also a power to lease for sixty-three years the coal mines under the lands, with all such powers, authorities, accommodations, liberties and privileges as shall be necessary or are usually contained in leases of collieries or mines in the county, place, or neighborhood where the collieries intended to be demised are or shall be situate, for seeking, winning, working, drawing, taking and carrying away the coals, so as the lessees be not made dispunishable for waste by any express words therein contained. On execution of this power the tenant for life granted a lease, which contained a power for the lessee "to erect, build and construct, and set up in and upon the said mines, lands, and premises, all such engine-houses, machine-offices, counting-houses, warehouses, store-rooms, workshops, workmen's cottages, huts, etc., erections, buildings, and accommodations, as shall be *bona fide* necessary or proper for or in the due prosecution of and carrying on of the said works." There was also a power to dig and use stones, slate, brick-earth, and materials in any part of the land which should be required for the collieries, or for any buildings thereby authorized to be made in the exercise of any power thereby granted. Ejectment having been brought to recover possession of the coal mines, on the ground that the lease was not a due execution of the power, the jury found that a power to build cottages in places convenient with reference to the works was both necessary and usual in leases of collieries in the neighborhood: *Held*, that the lease was not in excess of the power; 2. That the lease was not void on the ground that the power to build was in violation of the provision in the settlement that the lessees should be made dispunishable for waste. *Morris* v. *Rhydydefed C. Co.*, 3 H. & N. 885.

101. Iron works—Construction of lease as to the time of notice of surrender. By an agreement for the lease of certain iron works and mines, between the plaintiff and the defendants, the plaintiff was to grant a lease of the works and mines for twenty-one years, with the usual and customary clauses. The lessees were to pay in each year royalties at so much per ton, and sufficient dead rent to make up £500 for each of the first two years, and £1,500 for each successive year of the lease, but, if necessary, deductions were to be made, so that not more than an average rent should be paid of £500 per annum for the first two years, and £1,500 per annum for the remainder of the term. The lessees were also to pay a rent of one-third of the profits, for the use of the plant, not exceeding £7,000 per annum. The lessees were to commence operations within three months, and for the first three months no royalties or dead rent were to be payable. If within the second three months the lessees did not pay royalties, or a sum in anticipation of royalties, to the amount of £125, or if the lessees should at any time cease to carry on the works with due diligence, the lessor was to be at liberty to put an end to the tenancy by a month's notice, without prejudice to his claim for rent. The lessees were to be at liberty "at any time to determine the agreement, or the lease thereby agreed to be granted, on giving to the lessor six months' notice, in writing, of their intention so to do." The defendants entered into possession of the mines and works on the nineteenth of August, 1861, under the agreement. No lease was ever granted. The rent of £125 for the second quarter was

paid by the lessees, and subsequently a further sum of £250 for the six months ending the nineteenth of August, 1862. On the tenth of August, 1863, the defendants gave notice of their intention to determine the agreement and the tenancy on the tenth of February, 1864, being a six months' notice. On the twenty-first of November, 1863, the defendants paid to the plaintiff the sum of £500, in respect of rent for the year ending the nineteenth of August, 1863: *Held*, *dubitante* Williams, J., that regard being had to the various provisions of the agreement and the nature of the property demised, it was competent to B. to put an end to the agreement, by a six months' notice, to expire at any time, without regard to the ordinary rule for determining a tenancy from year to year, at the expiration of a current year; and that A. was only entitled to recover the proportion of the dead rent accruing between the nineteenth of August, 1863, and the thirteenth of February, 1864. *Bridges* v. *Potts*, 17 C. B. N. S. 314; 33 L. J. C. P. 338.

102. Working colliery—Workmanlike manner—Irreparable damage. The owner of a piece of land agreed to demise the seams of coal under the land to the owners of an adjoining colliery at a royalty on each ton of coal worked, and at a dead rent of £500 if the royalties did not amount to so much, the dead rent not to be charged for the first three years if the necessary steps were *bona fide* taken with ordinary dispatch to win and work the coal. The lease was to contain a covenant by the lessee for working the coal in a proper and workmanlike manner. The lessees proceeded to work the coal by instroke or headings from their adjoining colliery, which was situated to the rise of the seams agreed to be demised; the lessor alleged that the lessees ought to sink a pit and work the coal from the deep, and filed a bill to restrain them from working from the adjoining colliery, and to compel payment of the dead rent, on the ground that they had not taken the necessary steps to win and work the coal: *Held*, that under the circumstances, working the coal by instroke was working in a proper and workmanlike manner, and, that if the lessor had intended to compel the lessee to sink a pit it should have been provided for in the agreement; 2. That as the lessees were actually working the coal, irremediable damage would not be presumed. *Lewis* v. *Fothergill*, L. R., 5 Ch. App. 103.

103. Instroke—Lease in excess of power—Measure of damages. A tenant for life with certain powers of leasing, demised the seams and veins of coal under a piece of land for twenty-one years, and for sixty years if the tenant for life has power so to do, with liberty for the lessee to search for, dig, raise, and sell the coal, and to make any pits or works, and to take surface land, paying for the damage; and the lessee covenanted to work the mines in a proper and workmanlike manner, and to deliver up at the end of the term the works, seams and veins of coal in good repair and condition, so that the said coal works might be continued. The lessees worked the demised coal by instroke from an adjoining colliery, situate to the rise of the coal in the demised land, and did not sink a pit so as to work the demised coal from the deep.

They kept no barrier between the two collieries, so that water and air passed from their other colliery through the demised colliery into the lower colliery. They also continued to work the demised coal after the expiration of the lease for twenty-one years, claiming to be entitled for sixty years; which claim was, after much litigation, decided to be invalid against the reversioner: *Held*, that under the circumstances, working by instroke was working in a proper and workmanlike manner, and that the lessees were not bound to sink a separate pit for the demised coal. That the value of the coal raised by the lessees after the expiration of the twenty-one years' lease, was to be paid for by them, at its fair market value, as if they were purchasers, all expenses of hewing and raising being allowed. That under the terms of the lease the lessees were not liable to damages for not working the coal continuously. That the lessees were not bound to keep up a barrier so as to prevent air and water from flowing through the lessor's mine, and were not liable to pay for way-leave or air-leave. That the lessees were liable for any damage done beyond the removal of coal by working the mine since the determination of the twenty-one years' lease, and must also pay for way-leave, or for the passage of coal through the lessor's mine since the determination of the lease. *Jegon* v. *Vivian*, L. R., 6 Ch. App. 742.

104. Expiring when coal gotten—Descent. It seems that under a grant or lease of the liberty and privilege of getting all the coal under particular closes, till all the coal should be gotten, running to the grantees and their "executors," an interest passes to the executors of the survivor, provided the deed operates under the statute of uses. *Haigh* v. *Jagger*, 16 M. & W. 524.

105. Faults—Relief. Complainant, lessee of a colliery, under covenant to work, and rendering royalty at so much per wey, the colliery becoming not worth working by reason of faults, and complainant having suffered two judgments for annual defaults,

and offering to pay for all coal that could be got: *Decree*, that he be relieved against future rent and the covenant to work the colliery upon making such payment. *Smith* v. *Morris*, 2 Bro. Ch. Ca. 311 and note.

106. Workable seams—Coal and fire-clay. When a lease demised "all coal seams workable as coal seams," and the same lease demised the fire-clay in the same works, and it appeared that a certain seam was workable at a profit when both the coal and fire-clay found together therein was extracted: *Held*, that this phrase must be construed with reference to all the clauses in the lease, and in such connection, upon the facts, the seam was a coal seam workable at a profit. *Carr* v. *Benson*, L. R., 3 Ch. App. 524.

Nor will the words "workable as coal seams," restrict other parts of the demise referring in terms to fire-clay. Id.

107. Quarry—Rubbish—Obstructions. A covenant to not "obstruct," is not violated by deposit of strippings which only "impede" or render "a little more inconvenient" the access to the stone yet in place in a quarry. *Keeler* v. *Green*, 21 N. J. Ch. 27.

108. Quarry, etc.—Construction—Outstanding mortgage in ejectment. A defendant in ejectment cannot set up an outstanding mortgage of the plaintiff to a stranger, either to show that the plaintiff has no legal title, or to show that his actual title is different from that alleged. A tract of land was demised for a term of years, "together with the quarry or quarries thereon, and the privilege of getting out stone in the same; also the privilege of getting out stone in any part of said tract, and to use and occupy said land in any manner that the lessees may choose, and for all purposes necessary and convenient for carrying on the quarrying business." The lease also provided that the lessees should have the use of a certain wharf for the purpose of having stone thereon, and of shipping them, and that the rent should be seven per cent. of the value of the stone quarried and sold: *Held*, that the lessees were not restricted in the use of the demised premises to the quarrying of stone. *Burr* v. *Spencer*, 26 Conn. 159.

See further construction of same lease. *Brainerd* v. *Arnold*, 27 Conn. 617.

109. Quarry lease — Construction — Practice. A lease of a stone quarry in consideration that the lessee shall pay to lessor a certain price per perch for all stone taken out of it, is a contract on the part of the lessee that he will work the quarry, and upon his failure so to do, the lessor may maintain covenant on the contract and recover damages. And one verdict and judgment on such contract pending the lease is not a bar to another when the term is further advanced. *Watson* v. *O'Hern*, 6 Watts, 362.

110. Iron works—"Mixing" ores. A lessee of furnaces, iron-works and iron-stone mines, covenanted to work the furnaces effectually, unless prevented by inevitable accident or want of materials, or unless the iron-stone should be insufficient in quantity or quality, or would not, by itself or *with a proper mixture* or process, make good common pig-iron: *Held*, that the *mixture* intended was not necessarily of ingredients procurable in the demised premises. *Foley* v. *Addenbrooke*, 13 M. & W. 173.

111. Smelting works—Covenant running. Where a lease for twenty-one years of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor and the owners of the other two-thirds, for pulling down an old smelting mill and building another of larger dimensions, and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it: *Held*, that such covenant was to be implied; 2. That the lessor of the one-third might sue upon it with respect to his interest; 3. That such covenant tended to the support of the thing demised and ran with the land and the assignee of the reversion might therefore sue on it. *Sampson* v. *Easterby*, 9 B. & C. 505; S. C., 1 Cr. & Jerv. 105.

112. No implied warranty of mineral—Relief in equity. In a mining lease there is no implied warranty that the land contains the mineral called for as royalty, or which the lessee covenants to take out. Although a contract may be construed to involve a warranty where none is in terms expressed, where our common sense of justice requires it, and it be essential to complete the definition of the relation plainly intended to be established between the parties, yet its terms must be clearly deducible, from the nature of the transaction, taken in connection with the instrument. In this case certain coal veins, by name, had been leased; lessees covenanted to mine at least 50,000 tons each year; they alleged, in an action of covenant brought by them, that the supposed mines were found to contain no coal: *Held*, that if the parties to a coal lease were under a mutual mistake as to the existence of coal veins in the land demised, the proper remedy of the lessee is by a proceeding to rescind the contract; he cannot have relief in an action in affirmance of it. *Harlan* v. *Lehigh Co.*, 35 Pa. St. 287.

118. Covenant to mine a certain quantity—Rent—Settlements. The lessee of a coal mine stipulated to pay a rent for coal exsected, and also to mine a certain number of tons annually: *Held*, that the covenant for rent was distinct from the covenant to mine a certain quantity, and that settlements for coal taken out were no discharge of a breach in the covenant for quantity. *Powell* v. *Burroughs*, 54 Pa. St. 329.

114. Covenant to raise certain amount of mineral. A covenant to raise not less than 1,000 nor more than 2,000 tons of pipe-clay, each year, in a lease reserving a rent at a sum certain per ton, not necessarily construed to be a covenant to raise such minimum number of tons, or pay damages, whether the clay be under the land or not, where from the whole instrument it can be gathered that it was the intention that such covenant should not take effect unless there was clay to that amount in the land demised. *Clifford* v. *Watts*, L. R., 5 C. P. 577.

115. Covenant to raise mineral not existing. Covenant to raise a given quantity of pipe-clay construed with reference to covenants as to rent, and with regard to the subject-matter, and *held*, not applicable if the given quantity of clay did not exist in the premises. The entire lease is set forth in the case. *Clifford* v. *Watts*, L. R., 5 C. P. 577.

Marquis of *Bute* v. *Thompson*, 13 M. & W. 487, distinguished. Id.

116. Exhausted mine. Where a lessee of coal mines covenants by the terms of his lease to work the same during the continuance of his lease in a good and workmanlike manner, he is liable for a breach of his covenant, notwithstanding it may be beyond his power to perform it; but if the coal mines become exhausted, that will excuse him from any further performance. *Walker* v. *Tucker*, 70 Ill. 527.

117. Mine exhausted under covenant to raise tons certain. The declaration alleged that the plaintiff being the lessee of a coal mine, underlet his interest in the same to the defendants, who covenanted to raise and work 13,000 tons of coal in each year, and pay at the rate of 8 pence per ton royalty for the same, or pay that amount of money namely, £433 6 shillings 8 pence, as fixed rent, whether the coals should be wrought or not, and also 9 pence for each ton over and above that quantity to whatsoever extent the same might be wrought. Breach, that the defendants had not raised 13,000 tons in each year, and paid at the rate of 8 pence per ton for the same, or paid £433 6 shillings 8 pence as fixed rent. The defendant after setting out the indenture on oyer, pleaded that by the fair and proper working and getting of the coal, the same before, and at the commencement of the said half year, was greatly exhausted, and a small portion thereof only, being less than a fourth part of such 13,000 tons was left, and remaining to be worked and raised: *Held*, on demurrer, that this was an absolute covenant by the defendants, that they would raise 13,000 tons of coal yearly; or if not, that they would pay the fixed rent, and that there was no implied condition that there existed coals to the amount of 13,000 tons yearly, capable of being worked. *Marquis of Bute* v. *Thompson*, 13 M. & W. 487; S. C., 14 L. J. Exch. 95.

118. Minimum rent—Exhausted mine. Coal mines were demised at a certain royalty per ton upon the coal which might be got, and also at the rent of £300 a year, or so much thereof as, with the royalty, should amount to that sum, such rent of £300 to be a minimum rent for the coal demised. And the lessee covenanted to pay the rents, and to work the mine: *Held*, that a court of equity would not restrain an action by the lessor for the minimum rent, although the coal proved to be not worth the expense of working; but that if the lessor were to sue upon the lessee's covenant to work the mine, the court would interfere. *Ridgway* v. *Sneyd*, 1 Kay, 627.

119. Exhausted coal mine—Covenant—Pleading. A. demised a coal mine to B. at £60 per acre for the coal gotten, and B. covenanted to work not less than two acres annually, or pay the rent for that quantity, "whether the same should be got or not." There was a proviso for cesser if all the coal was exhausted. At the end of the term the lessee, alleging that there was a deficiency in the coal, and that, from "inevitable causes," it was impossible to get two acres annually, and that during the term he had paid for more than he had got, sought to recover back the excess. A demurrer was allowed on the ground that the covenant was absolute, and the lessee was bound to pay whether he got the quantity or not, and that there was no allegation of an actual exhaustion of the coal. *Mellers* v. *Devonshire*, 16 Beav. 252; S. C., 22 L. J., Ch. 310.

120. Exhausted mine—Covenant for rent. The plaintiff was lessee of a coal mine at the rent of £300 a year, and subject to a royalty of 10 shillings for every wey of coals raised in each year above 600, that being the quantity considered to be paid for by £300 a year, and the plaintiff was authorized to determine the lease on the coal being worked out. The plaintiff worked the mine for several years, and

when it was nearly exhausted, he was prevented by accidents and defects in it, from continuing to work it, except at a ruinous expense. The court refused to restrain the defendants from suing for the rent of £300 a year, although the plaintiff offered to pay him 10 shillings per wey for all remaining coal. *Phillips* v. *Jones*, 9 Sim. 519.

121. Exhausted mine — Tenant relieved. Tenant of a coal-field, though never previously worked, entitled to be liberated, on the ground of sterility. The coal being so exhausted that no area remained "of the least value for working," and the landlord held liable in the expense of a judicial survey, he not having been satisfied with less expensive evidence of the exhaustion of the coal. *Murdoch* v. *Fullerton*, 7 Sess. Ca. 404 (Scotch) cited 5 Moak, 414; L. R., 2 Sc. App. 273.

122. Coal lease — No warranty of quality—Parol evidence. Plaintiff, by written contract, gave to defendant the exclusive privilege of mining coal, boring for oil, etc., on a certain tract, at a royalty of 1 cent per bushel on coal, the defendants to pay $500 by a date certain whether sufficient coal to pay such amount had been then mined or not; if not then mined, such sum to be taken in royalty on coal to be mined: *Held*, that such payment was to be paid absolutely, and that allegations in the answer that the belief of there being good merchantable coal was the inducement to the contract; that plaintiff *agreed* and *promised* that it was good merchantable coal, and that it was not good and merchantable, etc., were mere nullities, by which it was attempted to evade a written contract. *Fort Scott C. & M. Co.* v. *Sweeney*, 15 Kansas, 244.

123. No warranty of minerals. At common law, the mere fact of "unworkability to profit" affords no ground for reducing or throwing up a lease of minerals which are in their nature subject to many vicissitudes. There is in such a case no legal warranty on which the lessee can rely. *Gowan* v. *Christie*, 5 Moak, 114; L. R., 2 Sc. App. 273.

124. Barren mine. When the thing let turns out to be a nonentity, the lessee is not bound.

Per the Lord Chancellor: In such a case it is perfectly reasonable that the lease should be subject to reduction.

Per Lord Chelmsford: Where there is a total destruction or exhaustion of the subject-matter of a lease, the lessee is entitled to abandon it. *Gowan* v. *Christie*, 5 Moak, 114; L. R., 2 Sc. App. 273.

The lessee of a mine, although entitled to rely on the existence of the subject-matter, takes all risk of its failure, either as to quantity or value, unless either is expressly warranted. Id.

125. Covenant compelling exhaustion without regard to surface. Although it is an established rule that where there is a severance of the minerals and the surface, the owner of each must use his own with reference to the other, upon the maxim *sic utere tuo ut alienum non lædas*, still the terms of a lease of a seam of coal may be such as by necessary implication to allow the lessee to get all the minerals without leaving support for the surface. *Eadon* v. *Jeffcock*, L. R., 7 Ex. 379; *Shafto* v. *Johnson*, 8 B. & S. 252.

And by the terms of his lease he may be bound so to work the mines as to obtain therefrom the largest quantity of coal that can be gotten consistently with the safety of the mines, without regard to the safety of any dwelling-house erected after the date of his lease. *Taylor* v. *Shafto*, 8 B. & S. 251.

126. Covenant to work undiscovered mines — Workmanlike manner. By an indenture of lease the plaintiff demised to the defendant all mines and beds of coal, etc., which then had been, or thereafter during the demise should be discovered or opened under the lands belonging to Dyffryn House, at the yearly rent of £20, to be paid whether any coal should be worked or not, together with 7d. per ton for every ton of coal, etc., raised. And the defendant covenanted that he would at all times during the demise work the said mines in a proper and workmanlike manner. Breach, that the defendant did not work the said mines in a proper and workmanlike manner, but, on the contrary, permitted the mines to lie, and the same were wholly ungotten. Plea, that the said mines were never at any time before the said demise worked or gotten, nor did he, the defendant, at any time since or during the demise, work or get the mines. *Held*, on demurrer, that inasmuch as it appeared by the pleadings that the mines had not been worked at all, the defendant was not liable on this covenant for not working them in a workmanlike manner, the subject-matter of demise being not all the mines under the lands specified, but only such as either had been or should be discovered or opened. *Quarrington* v. *Arthur*, 10 M. & W. 335.

127. The oil well intended found not within the lines — Mutual mistake. Dwight and Ashton leased a tract of oil land to Mays, with one oil well partly bored thereon; Mays agreed to sink this well deeper, and to pay the lessors a royalty of one-fourth of the oil obtained from it. It was the understanding of both par-

ties to the lease that this well was situated upon the tract leased; it afterwards appeared that it was not within the lines of this lease, whereupon the lessees offered to deliver possession of the premises leased, and refused to pay a royalty. In a bill filed by the lessors for an account of profits, the court below ordered an account: *Held*, that it was a case of mutual mistake, against which equity will relieve, and that the bill should have been dismissed. *Mays* v. *Dwight*, 82 Pa. St. 462.

128. Oil contract — Estate—Flowing well—Departure from strict terms of contract—Forfeiture. An agreement to lease land for a term of years with the exclusive right to bore for and collect oil, giving one-fourth to the lessor: *Held*, to pass a corporeal interest. *Chicago Oil Co.* v. *U. S. Petroleum Co.*, 57 Pa. St. 83.

The taking by lessee of his share of the oil was no waste, but a rightful act, unless the lease was forfeited by its own terms. Id.

Where under such contract the parties met with unexpected success, and the oil flowed out in immense quantities, compelling a mutual departure from the strict terms in which royalty was to have been paid, a small deficiency in the sum which ought to have been paid, not the result of bad faith, ought not to work a forfeiture. Id.

129. Surface to oil well. The right of possession of a reasonable amount of surface ground is necessarily implied in the lease of an oil well. *Karus* v. *Tanner*, 66 Pa. St. 297.

130. Oil found under lease of salt well —Confusion of liquids. Two persons leased land for the purpose of boring salt wells and manufacturing salt, rendering a royalty of every twelfth barrel manufactured. After a time oil rose with the salt water, which, though at first suffered to run to waste, was afterwards collected and sold. In Trover, therefore, it was *held*: 1. That the lease was in effect a grant of the crude salt in the land for a twelfth part of the manufactured article; 2. That, as the salt only was granted, the lessor retained all the rest of the contents of the land, including the oil, as exclusively after the lease as before; 3. That as the lessees could not raise the brine without the petroleum, the severance of the oil as an incident inevitable to the grant of the right to take salt water was lawful, as was their possession of it, after it was raised to the surface. (See Trover.) *Kier* v. *Peterson*, 41 Pa. St. 357; reversing *Peterson* v. *Kier*, 2 Pgh. 191.

131. Rock-salt works flooded by brine —Covenant for quantity. To an absolute covenant in a lease of a rock-salt mine, to get 2,000 tons of rock-salt in each year, or pay for the deficiency, it is no defense that the lessee was prevented by an influx of brine, etc., for the covenant being absolute, it was immaterial whether the salt could be got easily or with difficulty, or whether it existed at all. *Jervis* v. *Tomkinson*, 1 H. & N. 195; 26 L. J. Ex. 41.

132. Salt works—Special covenants as to fixtures—Option. By indenture of lease, the lessor demised to the lessees certain lands, on which the lessees covenanted to erect salt works, and at the end of their term to leave at the disposal of the lessors, all the fixed materials, of what nature or kind soever, that should be in or about the said works, or in anyway relating thereto, "save and except all the salt pans and other movable articles made use of at all and any of the said works." Afterwards the defendants, the representatives of the original lessees, surrendered their term in the premises, and took a fresh lease thereof, thereby covenanting, "as to the salt pans, and other articles," made use of in the said works, that they should, at the end of the term, be at liberty to take and carry them away, making good such damages to the freehold as might be consequential upon their removal, but with an option to the lessors of purchasing the salt pans and movable articles. On the 13th December, 1861, they underlet the premises, in violation of the terms of the lease, whereupon, on the 23d of June, 1862, the plaintiffs demanded re-possession, and on the 7th of July, 1862, brought ejectment. Between the 18th of January and the 17th of March, 1863, on which latter day they confessed judgment, the defendants removed and sold a quantity of the fixtures: *Held*, that there was nothing in the covenant to restrain them from removing trade fixtures, and that they were entitled to a reasonable time for removing them, dating from the day on which the plaintiffs demanded re-possession. *Sumner* v. *Bromilow*, 34 L. J. Q. B., 130; 11 Jur., N. S., 481.

133. Salt well — Covenant to put in running order — No implied capacity. A covenant in a lease for a salt well to put the well in complete running order does not imply a covenant that the well shall be of any particular productive capacity, nor sufficient in quantity or quality for the profitable use of the works. *Clark* v. *Babcock*, 23 Mich. 164.

134. Sleeping rent with work covenant. A lessee of coal mines under a lease reserving a sleeping rent with a covenant to work the mines "uninterruptedly, efficiently and regularly," is under no obligation to work the mines beyond the amount of the sleeping rent reserved.

Wheatley v. *Westminster Brymbo C. Co.*, L. R., 9 Eq. 538.

135. Rent — Screened coal — Screen then in use. Where a mining lease provided that the lessees should pay a certain sum per bushel "for all screened coal" that the lessees should remove from the demised premises, and at the time of the lease there was but one screen in use at the mine leased, and but one screen in common use in other mines in the same locality, and afterwards the lessees placed over the screen then in use in said mine, another or second screen, with larger meshes or spaces between the bars: *Held*, that the parties must be held to have contracted with reference to the state of things existing at the time the lease was made; that the words "screened coal" meant such coal as passed over the single screen then in use; and that the lessees must pay the price stipulated for all coal that passed over the lower as well as the upper screen. *Williams* v. *Summers*, 45 Ind. 532.

136. Rent—"Consideration money." In a mining lease, besides an annual surface rent, certain sums, payable half-yearly, described as "further consideration money," and depending upon the rate of working the mines, were reserved to the lessor, his heirs and assigns: *Held*, that these sums were not purchase-money passing to the administrator, but in the nature of rent and passed to the heir as incident to the reversion. *Barre* v. *Lea*, 33 L. J. Ch. 437.

137. Election between rent and royalty. The lessees of a mine covenanted to pay 40 cents a load for the ore to be taken out, but were at liberty to substitute an annual sum at their election, such substitution to be made at the end of the first year; but in case they did not so elect they covenanted to exsect annually and pay for 800 loads. No substitution was in fact made: *Held*, that their covenant to take out and pay for such number of loads at the price stated became positive, absolute and indefeasible. *Fisher* v. *Milliken*, 8 Pa. St. 111.

138. Rent or royalty, in the alternative. A lease contained a covenant to raise a certain quantity of iron-stone in each quarter of a year, and pay certain royalties upon it, or else to pay a certain fixed quarterly rent to the landlord: *Held*, that the landlord, having declared in respect of breaches of both the above covenants, and money having been paid into court and accepted in satisfaction of the latter, was entitled to nominal damages only, in respect of the former. *Foley* v. *Addenbrooke*, 13 M. & W. 173.

139. Royalty on "all coals sold." A. demised a colliery to B., and B. covenanted to pay as rent "one-third part of the money that should arise, be made, received or produced from the sale of the coals," and covenanted to keep "true accounts of all coal daily raised, and to make and deliver true copies thereof to A:" *Held*, that taking the two covenants together, the rent was to be calculated on the amount of coals sold, and not on the amount of money actually received. *Edwards* v. *Rees*, 7 Carr & P. 340.

140. Distress—Salt royalty—Practice. Upon a lease of salt works for a rent reserved in salt, to wit, two-thirds of the produce, the lessee covenanting to manufacture at least 60,000 bushels per annum, so as to produce a royalty of 40,000 bushels: *Held*, that the rent to be distrained for or recovered must be governed by the amount actually manufactured; and for a failure to manufacture 60,000 bushels, the action must be for damages, and not for a rent of 40,000 bushels of salt. *Preston* v. *McCall*, 7 Grat. (Va.) 121.

141. Distress for royalty—Term from year to year—"Brick mine." The proprietor of a house and of a marl-pit and "brick mine" (so called throughout the case), demised the house, by unwritten agreement, to D., from a day named, and it was at the same time agreed between them, without writing, that D. should take the marl pit and the brick mine, and should pay quarterly, at the usual quarter days, 8d. per solid yard for all the marl that he got, and 1s. 8d. per thousand for all the bricks that he made. D. took the marl and made bricks accordingly, and paid the stipulated sums for a time; but they afterwards fell into arrears: *Held*, that the agreement for the marl-pit and "brick mine" was a demise of the land from year to year, at a rent capable of being ascertained with certainty, and for which, therefore, the lessor might distrain. *Daniel* v. *Gracie*, 6 Q. B. 145.

142. Contract to deliver the ore and receive clean metal. A party digging lead ore under a contract to deliver the ore to the proprietor, receiving a certain amount of lead in return, or in cash at his election, has no right to sell the ore, and if sold it may be recovered from a third party. *Granby M. & S. Co.* v. *Turley*, 61 Mo. 375.

143. Ore settlements not conclusive. Settlements between lessor and tenant of mines of amounts of ore got and tonnage paid, are not conclusive when shown to be erroneous or made in ignorance, and such error may be shown in an action on the covenants of the lease, and need not first be re-

formed in equity. *Perry* v. *Attwood*, 6 El. & Bl. 691; 25 L. J. Q. B. 408.

144. Acquiescence in settlements—Colliery accounts. The lessors of mines having access which they did not avail themselves of, accepted lessee's statements of account till the end of term. About six months after the last settlement the mine was flooded. Lessor after this accident disputed the accounts: *Held*, that his acquiescence raised a presumption in favor of the correctness of the settlements. *Wyoming C. Co.* v. *Price*, 81 Pa. St. 156.

Mode of keeping account in colliery, Pennsylvania, by numbering the chambers or breasts, etc., stated. Id.

145. Account. The right to an account in equity under a lease of mines is clearly settled. *Wright* v. *Pitt*, L. R., 12 Eq. 408.

146. Acceptance of title—Possession. Taking possession of a mine by an intended lessee is not an acceptance of the title. *Haywood* v. *Cope*, 25 Beav. 140.

147. Custom—Lessor's title—Compromise—Cestui que trust. The plaintiff granted a lease or license to mine under certain lands to two persons, as trustees for a mining company. The company repudiated the lease and alleged that they were entitled to mine under the custom of the district, independently of the lease, and proceeded to mine accordingly. The applicability of the custom to the particular lands was disputed by the plaintiff. The plaintiff filed his bill against the surviving trustee and the managing committee of the company, praying that the lease might be declared binding, not only at law on the trustee, but also in equity on the partners in the company, and that the trustee-at-law and the other defendants in equity were bound by the covenants in the lease; the bill also prayed an account, and that the trustee or the company might be ordered to pay to the plaintiff the royalty to which he was entitled under the lease, and an injunction to restrain the working of the mine except in accordance with the lease: *Held*, that the lease must be treated as binding in equity on the company: 1. Because made in settlement of a doubtful claim with knowledge of the facts; 2. Because they are as tenants estopped from denying their landlord's title. *Wright* v. *Pitt*, L. R., 12 Eq. 408.

148. Cannot dispute lessor's title. The tenant of a mine cannot set up any outstanding title or government proprietorship against his lessor. *Wilson* v. *Smith*, 5 Yerger (Tenn.) 379.

149. Disputing title—Canal bed between two demised parcels. Hancock conveyed to Price, two lots opposite each other on the two sides of the North Branch canal. The canal bed had become the property of the commonwealth in fee, as decided. A coal bed underlay the lots and extended under the canal. The defendants operating a colliery adjoining one of the lots agreed with Price to take the coal under his land at an agreed royalty, and in so doing mined coal under the canal: *Held*, that the relation of landlord and tenant did not prevent defendants from denying title in Price to the intervening coal under the canal bed. *Wyoming C. Co.* v. *Price*, 81 Pa. St. 156.

150. Valuation of machinery—Intervening bankruptcy—Possession. Where a colliery with all the machinery and implements necessary for working it, was leased for years with a proviso for re-entry by the landlord on non-payment of rent, and a covenant on the part of the lessee at the expiration or other sooner determination of the demise, to deliver up the machinery and implements conformable to an inventory annexed to the lease, of which a re-valuation was to be made three months before the expiration of the demise, and the landlord recovered judgment in ejectment, in Trinity term, for a forfeiture in not paying rent, but did not execute the writ of possession until the eighth of November, and the tenant committed an act of bankruptcy next day: *Held*, that the landlord was entitled to take possession of all the machinery and implements (some of which had been brought on the premises by the tenant during the term), though no previous valuation had been made; 2. That the possession of the machinery and implements by the tenant was only qualified, and did not come within the meaning of 21 J. 1, c. 19, so as to bar the landlord's right of entry on the eighth of November; 3. That the tenant's use of the machinery and implements in the interval between the judgment in ejectment and the execution of the writ of possession, did not give him the "possession, order, or disposition" thereof, with the consent of the true owner, within the meaning of the statute, so as to pass the property to his assignees. *Storer* v. *Hunter*, 5 D. & R. 240; 3 B. & C. 368.

151. Fixtures—Covenant for valuation defeated by lessee. By lease, the lessor demised to the lessee a colliery and all the engines, machinery and other implements, effects, or things then lying on or about the colliery, or used or employed therewith, and mentioned in a certain inventory and valuation then made, *habendum* for twenty-one years, at a certain rent therein mentioned. The lease contained a proviso for re-entry, in case the rent should be in arrear for the space of thirty days; and, also, a proviso

that on the expiration, or other sooner determination of the demise, the lessee should leave and yield up to the lessor all engines, machines, effects and things belonging to and used in the said colliery, and that an inventory and valuation should, three months previous thereto, be made and taken by two indifferent persons to be appointed by the parties respectively, or by an umpire, and such inventory should be compared with the then present inventory and valuation, and that the difference in the value of the engines, etc., should be paid by the landlord or tenant to the other, according as it was greater or less at the time of the letting. The tenant entered and occupied the colliery, machinery, etc., and failing in the payment of the rent, the lease became forfeited, and the landlord recovered a judgment in ejectment, in Trinity term, 1818, but did not execute his writ of possession until the ninth of November, 1819. On the following day the tenant committed an act of bankruptcy. The lease having become forfeited by the act of the tenant, no inventory or valuation of the machines and other effects and things belonging to the collieries, was made three months before the determination of the demise: *Held*, however, as the tenant by his own act had determined the lease, and had thereby rendered it impracticable for the landlord to have a valuation made three months before the determination of the demise, that the latter was entitled, without any such valuation having been made, to resume the possession of the fixtures, machinery, and other effects used in the colliery, upon the determination of the demise by such forfeiture; and that he was entitled to resume such possession even of new machinery, erected by the tenant during the term. *Storer* v. *Hunter* 3 B. & C. 368; 5 Dow & Ry. 240.

152. Right of removal of machinery in connection with flooding resulting therefrom—Injunction refused. The lessee of a mine covenanted by his lease, at the end of the term, if the lessor should require it, to leave him all the engines, machinery, things, and materials which should have been used in and about the working of the mine, upon receiving twelve months' notice from the lessor, and being paid for the same according to a valuation. In a subsequent part of the lease it was provided that it should be lawful for the lessee, at any time or times during the term, or within twelve months after its expiration, to remove all the machinery, engines, things, or materials which should be erected or brought by him upon the premises, unless the lessor should be minded to purchase the same, which he should have liberty to do upon giving the notice therein before-mentioned, and upon paying the price estimated. The deed also contained a covenant by the lessee not to do any act which might occasion or tend to produce the drowning of the mine. Fourteen years before the expiration of the term, the lessee became insolvent, and assigned everything he had brought upon the premises to trustees, who gave notice to the lessor of their intention to remove the same unless he should be minded to purchase. To a bill by the lessor averring that such removal would occasion or tend to produce the drowning of the mine, and praying for an injunction to restrain the same until the end of the term, and until the plaintiff had the opportunity of exercising his option to purchase, a demurrer was allowed, the court being of opinion that according to the true construction of the lease, the lessee was to be at liberty to remove all the property in question unless the lessor gave notice of his intention to purchase, and paid for the same. *Rolleston* v. *New*, 4 Kay & J. 640.

153. Lessee taking partner. A lessee of mines taking a partner and working them does not give such partner an interest in the land. *Burdon* v. *Barkus*, 4 DeG. F. & J. 42; *Briles* v. *Pace*, 13 Iredell L. (N. C.) 279.

154. Assignment. An agreement to take an assignment of a (mining) lease followed by possession on the part of the equitable assignee, is not sufficient to give the lessor any right to sue such equitable assignee in equity on the covenants of the lease. *Cox* v. *Bishop*, 8 DeG. M. & G. 815; *Walters* v. *Northern C. M. Co.*, 5 Id. 629.

155. Assignment, no release. The rule that an assignment does not release the original tenant from his covenants applied, notwithstanding the lessor had changed some of the covenants of the original instrument and made substantially a new contract with the assignees. *Fisher* v. *Milliken*, 8 Pa. St. 111.

156. Liability of assignees — Salt works. Assignees of a lease of salt works are not liable upon prior contracts of their assignors to pay or deliver salt from their works. *Preston* v. *McCall*, 7 Grat. (Va.) 121.

An obligation by an assignee of a lease of salt works to assume and pay "all the contracts, debts and liabilities relating to the salt-making business" obviously includes the accounting to the lessor for his royalties out of the salt then on hand. Id.

157. Not affected by prior agreement—Special case. A son took possession of a coal vein under a parol agreement with his father (who owned a tract on

which another and larger vein was opened) that he should have the smaller vein if he opened it. A lease was afterwards made by the father to the son and others, by which the lessor "demised, let and to mine let," all the tract of land referred to known as No. 49, and the coal bed thereon and now opened: *Held*, that after the lease the son with his co-lessees was in possession as tenant and not as owner. *Turner* v. *Reynolds*, 23 Pa. St. 199.

158. Covenant to save assignor harmless—Construction. Where in an assignment of a coal lease the assignee covenanted that he would so long as he "should be in possession or receipt of the rents, produce and profits of the premises" pay to the lessors the rents, galeages and way-leaves, reserved by the original lease, and at all times keep the assignor harmless and indemnified: *Held*, that the covenant to save harmless was not restricted to the time during which such assignee was in receipt of the rents, profits, etc., mentioned in the first covenant; 2. That a joint plea to a declaration charging a breach of the covenant to save harmless, as well as a breach of the first covenant, stating that defendant was not then in receipt of the rents, profits, etc., raised an immaterial issue and entitled the plaintiff to a judgment *non obstante veredicto*. *Crossfield* v. *Morrison*, 7 C. B. 286.

159. Renewal — Assignment — Deceased partner. The administratrix of a deceased partner, who was one of a firm of lessees working a coal mine, assigned all the interest of her intestate to or for the use of the parties entitled to her estate: *Held*, that this did not deprive her of her right to claim as part of her intestate's estate an interest in a renewed lease which the other partners had taken after his decease. *Clegg* v. *Fishwick*, 1 Mac. & Gor. 294.

160. Sale—Covenant of renewal. One S., the owner of certain land upon which there was a quarry, leased the right to quarry and remove stone therefrom for twenty-five years, and agreed to renew the said lease for the term of twelve years, the consideration for such renewal to be determined by appraisers. Prior to the expiration of the twenty-five years, S. sold a portion of such land to the plaintiff, excepting and reserving the rights of the owners of said lease: *Held*, that upon the expiration of the twenty-five years, the right to renew the lease in so far as it related to the stone upon the land sold to the plaintiff, was in him, and not in S., and that a renewal of the lease by S. did not affect the plaintiff's land. *Norton* v. *Snyder*, 2 Hun. N. Y.) 82.

161. Renewed lease—Deceased partner. A. & B. worked mines in partnership. The lease of the mines expired in 1845, and they continued to work them as tenants from year to year. In November, 1847, A. died, and B. continued to work the mines only sufficiently to keep them going. At Lady-day, 1851, B. obtained a new lease of the greater part of the mines, upon certain terms. On the 24th of November, 1851, E., who claimed an interest under A.'s will, filed a bill against C. (A.'s executrix) and B., for the administration of A.'s estate, and that the mine might be worked under the direction of the court. Answers were put in, but nothing further was done in the suit. B. continued to work the mine until December, 1853, when he died intestate, and C. took out letters of administration. On the 1st of June, 1854, E. sold his interest under A.'s will to X., who on the 17th of the same month instituted a suit to establish an interest on behalf of A.'s intestate in the mine after A.'s death: *Held*, that the interest of A. in the mine did not cease on his death, but was still continuing. *Clements* v. *Hall*, 2 DeG. & J. 173; 27 L. J. Ch. 349, reversing S. C., 24 Beav. 333.

162. Sheriff's sale — Trade fixtures. The sheriff's sale of a quartz mill does not divest the tenant's title to trade fixtures. *Hayes* v. *New York Mining Company*, 2 Colorado, 273.

163. Sheriff's sale — Taxes — Fixtures —Covenants running with land. After a sheriff's sale of a quartz mill in the occupation of a tenant and before the making of the sheriff's deed (during the nine months allowed for redemption), the tenant entered into an obligation conditioned: 1. To pay the taxes on the premises; 2. To leave his trade fixtures in the mill at the expiration of the term; 3. To perfect the title to an engine, parcel of such fixtures. The land was not redeemed and the sheriff's deed issued: *Held*, that by the operation of such obligation the fixtures became parcel of the realty; 2. That they passed to the sheriff's vendee; 3. That all of said conditions or covenants ran with the land, and passed to the grantees in the sheriff's deed. *Hayes* v. *New York Mining Company*, 2 Colorado, 273.

164. Chattel real—Oil well—Levy. A lease of an oil well is a chattel real, and should be levied upon in the same manner as real estate, and is good though not made in view of the premises. The sheriff is not required to make manual caption of the derrick, engines, etc. *Titusville N. I. Works' Appeal*, 77 Pa. St. 103.

165. Appurtenances. The lease of a coal bank will carry with it the drifts, platforms and hoppers, used in working it, as

appurtenant, but the principal thing granted is the right to mine coal, and not the drift or passage to the mine. *Tiley* v. *Moyers*, 25 Pa. St. 397.

166. Railroad as appurtenance. When it is obvious from the construction of an entire lease that the use of a railroad in connection with a furnace was intended to go to the lessee, the fact that such use was granted in the form of a covenant does not exclude its enjoyment as a part of the demise. *Peck* v. *Hiler*, 24 Barb. 178; 31 Id. 117.

167. Tort of lessees. Lessors are not liable for the wrongful acts of the lessees of their mines not done by their authority or command. *Little Schuylkill Co.* v. *Richards*, 57 Pa. St. 142.

168. Notice to Quit. The statutory notice required to determine a tenancy applied to a lease of mines. *Patton* v. *Axley*, 5 Jones Law (N. C.), 440.

169. Manure from the horses in the mines for farming the surface—Outstroke—Construction. An indenture of lease, by which certain coal mines in the North of England were demised for the term of forty-two years, contained the following covenant by the lessees: "And also, that they, the said lessees, their executors, etc., or their servants or workmen, should and would, once in every month, or oftener, during the said term, at their own expense, draw to bank at some of the pits or shafts of the said collieries or coal mines thereby demised" (provided that the same should be pits or shafts from which the coals of the thereby demised collieries should not be worked by an outstroke, *i. e.*, by means of pits or shafts upon the surface of the adjoining mines), "and lay in some convenient place in that behalf, upon the said lands and premises of the said lessors, for the said lessors, their heirs or assigns, all the manure, compost, and dung, to be made and bred by the horses employed under ground in working the said demised collieries, and should spend and bestow so much thereof, and of all such dung, compost, manure, etc., as should be made, bred, or arise in, under or upon the said estate, lands, and premises of the said lessors, or any part thereof, as might be necessary for that purpose, in dressing and manuring any lands or grounds which they, the said lessees, their executors, etc., or any of them, might during the said term thereby granted, occupy as tenants to the said lessors, or either of them, their or either of their heirs or assigns." The lease contained various clauses which spoke of the pits or shafts to be sunk on the demised premises, but did not contain any express covenant by which the lessees were either bound to sink a pit or to work the mines; and it was also doubtful whether the lessees were empowered to work the demised mines by "outstroke:" *Held*, that no covenant could be implied from the preceding covenant, which imposed upon the lessees, upon the mines being worked, and manure being made within them, the obligation of sinking a pit or shaft upon the demised lands, although they might be liable for a breach of covenant in working the mines by outstroke. *James* v. *Cochrane*, 7 Ex. 170; 8 Id. 556.

170. Lease to president—Hinderance to creditors. A lease of iron works by a corporation to its president and the assignment of such lease to secure personal creditors of the president considered as a hinderance to creditors of the corporation and as raising a case for equitable relief. *Conro* v. *Port Henry Iron Co.*, 12 Barb. 27.

171. Recoupment of damages for bad mining. In assumpsit by a lessee against his lessor, it appeared that the subject of the lease was a coal mine, and the lessor, under a provision in the lease, had re-entered for non-payment of rent and because the mine was not being worked to his satisfaction. The lessee sued to recover for certain mining tools, horses and other property used in the mine and belonging to him which had been taken by the lessor when he re-entered, and also for his labor in erecting a blacksmith shop and other buildings: *Held*, that defendant, the lessor, could recoup in this suit such damages as he had sustained by reason of the mine having been unskilfully worked by the lessee, in violation of the covenants of the lease, it being regarded that the subject-matter of the plaintiff's claim arose out of the lease.

Nor would this right of recoupment, as against the plaintiff, who was the sole lessee, be affected by the fact that after taking the lease, he had associated others with him in working the mine, as he was liable under his covenants for injury to the property, whether occasioned by himself or by those connected with him in the business. *Williams* v. *Schmidt*, 54 Ill. 206.

172. Reversioner's action for failure to leave support. By a mining lease, the lessees covenanted, amongst other things, that they would, "from time to time and at all times during the said term, work the said pits, mines and shafts in workmanlike manner, and *leave pillars of the said stone of sufficient strength to support the roofs of the said mines*, and get and clear the said stone in the usual and best way in which the same is done in other works of a like character in Clayton." It also contained cov-

enants to pay for surface damage, and, at the expiration of the term, to fill up the pits and shafts, and restore the surface to a state fit for agricultural purposes: *Held*, that the lessees were liable to the reversioner for damage done to the surface of the land by its cracking and subsiding in consequence of the want of sufficient pillars of stone being left to support the roofs of the mines, notwithstanding they might have worked the mines in an usual and a workmanlike manner. *Hodgson* v. *Moulson*, 18 C. B. N. S. 330.

178. Right of action for minerals taken. The lessor, not the lessee (of ground leased for farming purposes only), has the right of action for stone quarried and taken from the leased ground during the term, by a stranger. *Freer* v. *Stotenbur*, 2 Abb. App. (N. Y.), reversing 36 Barb. 641.

And this, although the lessee had a license to take stone indorsed on his lease of the farm at the time of its delivery. Id.

174. Timber. General words, though mentioning timber in a lease of lands with mines, etc., will not give the lessee the right to fell timber for use in or about the mines. *Darcy* v. *Askwith*, Hob. 234; S. C. Hutt. 19.

175. Pleading — Wages of the coal weigher. A declaration in covenant stated that it was agreed between the plaintiff as lessor and the defendants as lessees of certain coal mines that the plaintiff should, when he thought fit, employ a fit and proper person at each machine for weighing the coals, who should weigh the same and keep the accounts, and that his wages should be paid by the defendants, but that in case such person should not duly attend at the machine, and duly keep the necessary accounts, the defendants were authorized to discharge him. It then averred that the plaintiff appointed J. H., being a fit and proper person, and alleged as a breach that the defendants refused to pay him his wages. The defendants pleaded that J. H. was not a fit and proper person, that he had not duly attended to the machine, and had not duly kept the necessary accounts; a verdict having been found for the defendants: *Held*, that the plaintiff was not entitled to judgment *non obstante veredicto;* the appointment of a fit and proper person being a condition precedent to the defendant's liability to pay his wages. *Lawton* v. *Sutton*, 11 L. J. Ex. 314.

176. Pleading — Keeping accounts — Opening settlements. To a declaration on a covenant in a lease of mines alleging nonpayment of certain sums due for fixed and tonnage rents, and not keeping books of accounts, the defendants pleaded that for eight years ending March, 1854, the defendants did keep such books containing an account of all ore gotten, and that such account was submitted for examination to the plaintiff, and that the plaintiff and defendants in each of those years stated an account concerning all the ore got by the defendants during the preceding year, and the tonnage rent payable in respect of the same; and that in each of said accounts a certain sum was agreed upon between the plaintiff and defendants to be the balance due, which sum was paid by the defendants to the plaintiff and accepted by him in full satisfaction and discharge of the tonnage rent payable by the defendants during the said period. Replication, that the said accountings were not true and correct accountings according to the intent and meaning of the deed, but were erroneous in this; that divers tons of ore which ought to have been included in the account, and divers quantities of tonnage rent payable in respect thereof, were, by mistake and ignorance of the facts on the part of the plantiff, omitted from the said accounts, and that the balances were erroneously agreed to be the balances due from the defendant to the plaintiff under the deed: *Held*, that the plea afforded no answer to the action, and that if it afforded a *prima facie* defense, it was answered by the replication. *Perry* v. *Attwood*, 25 L. J. Q. B. 408; 6 El. & Bl. 691.

177. Wisconsin mining statute—Special contract. The statute of Wisconsin governing the rights of miners applies only where there is no special contract or lease fixing the rights of the parties. *Sobey* v. *Thomas*, 39 Wis. 317.

178. Statute of frauds—North Carolina. By statute of North Carolina, of 1844, all leases of mines of gold and other enumerated minerals must be in writing, without regard to the length of term. *Hargrave* v. *King*, 5 Ired. Eq. (N. C.) 430; *Briles* v. *Pace*, 13 Ired. Law (N. C.), 279.

A transfer of such lease must therefore be in writing, and a mining partner of the lessee cannot claim an interest therein without an instrument of writing showing the same. *Briles* v. *Pace*, 13 Ired. Law (N. C.), 279.

179. Sale of lessee's interest, no implied warranty. Johnston as vendor, and Mendenhall, as vendee, executed articles under seal, witnessing that the vendor "agrees to sell all his right, title and interest" in a certain oil lease, on a certain tract of land, on which there was an oil-well, steam-engine, tubing, etc., in consideration whereof the purchaser agreed to pay $1000. Vendor further agreed to sell "all his interest" in another lease for oil purposes, for

which Mendenhall agreed to pay $1500. The vendor had no former lease upon either premises, but was in possession under agreements, the purchaser knowing the state of his title: *Held*, that the subject-matter being chattel property the articles of agreement between the parties amounted to a conveyance of the premises; 2. That vendee having accepted such conveyance limited in terms to the interest of the vendor and containing no covenants of warranty, the vendor could not be held responsible for not having a greater interest in the property, and no warranty of title could be implied against the express language of the parties. *Johnston* v. *Mendenhall*, 9 W. Va. 112.

180. Damages against lessor's grantee, for eviction. Plaintiffs, purchasers of the reversion, sued outstanding tenants who claimed a mining lease on the premises. Before suit, the plaintiffs had interfered with such tenants' possession, and taken ore out of the same ground. Defendants maintained the validity of their lease on the trial, and proved the amount of ore taken by plaintiffs. Judgment entered under the Iowa practice for the amount of ore taken by them, with interest, less royalty and expenses of mining. *Chamberlain* v. *Collinson*, 45 Iowa, 429.

181. Sub-lease distinguished from assignment. A condition in a lease for life, or for years, that the lease is to be void if the lessee assigns, is valid; and the reasons for this are especially applicable in the case of a lease for mining purposes. But a lessee under such a condition may associate others with himself in the enjoyment of the term, or he may make a sub-lease. (The lease in question provided in terms for associates.) *Hargrave* v. *King*, 5 Ired. Eq. (N. C.) 430.

182. Ratification. A verbal lease made by a mining foreman, ratified by a receipt of royalty by his company, is valid against the company. *Chamberlain* v. *Collinson*, 45 Iowa, 429.

183. Demand of royalty. Where lead mines were let at a royalty of one-fourth the ore raised, and the lessees had taken out 32,000 pounds of lead ore, a demand in terms for one-fourth of such amount is sufficiently definite, without a demand for 8000 pounds specifically. *Cook* v. *Decker*, 63 Mo. 328.

184. Custom controlled by contract—Coal pillars. The lessees of a coal mine contracted to leave the mine in good working condition at the termination of the lease. They entered and worked until, as they claimed, the mine was exhausted; except the pillars which had been left for support, and proved a custom to remove such pillars when the coal was exhausted. The roof began to fall in, and a depression on the surface resulted therefrom: *Held*, that as the mine could not be left in good working condition after such removal of the pillars, it would be a violation of their lease, and that the custom proved could not restrict the contract of the parties. That even if the mine was exhausted the consideration of surface injury would be sufficient to sustain the lessors' claim that the mine be left in good working order. *Randolph* v. *Harden*, 44 Iowa, 328; see section 93.

185. Scrambling—Possession—Estoppel. The right of lessees on a certain lead range was disputed by a subsequent purchaser of the reversion who threatened to oust them. While each asserted rights in the premises, lessees attempting to work, and the owner attempting to stop them; lessees accepted permission to work "in the cap-rock:" *Held*, that such act must be viewed in relation to all the circumstances, and under such circumstances was not an admission that they had no right to work there or elsewhere on the premises. *Chamberlain* v. *Collinson*, 45 Iowa, 429.

186. Mining lease subject to prior farming lease. Where a tenant holds a general lease of land for farming purposes, a subsequent lease of the land for mining purposes cannot authorize the entry upon the land by such mining lessee. *Logan* v. *Green*, 4 Ired. Eq. (N. C.) 370.

LEDGE.

1. Defined. The term "ledge of lime rock," held to mean "a body of connected lime rock, whether hill or valley, or upon the general level of the land," as construed in connection with all parts of the deed, and the fact that the ledge had been worked at points below the level of the surface. *Dexter Lime Rock Co.* v. *Dexter*, 6 R. I. 353.

LEVEL.

1. Level. Parol evidence is admissible to show the meaning of the term "level" in a mining lease; and whether used in a local or general sense is a question for the jury. *Clayton* v. *Gregson*, 4 Nev. & Man. 602; S. C., 5 Ad. & E. 302; S. C., 6 Nev. & M. 694; S. C., 1 Har. & W. 159.

LIBEL AND SLANDER.

1. Slander of mine—"Pockety." Halferty being in negotiation with M. for the sale of land containing ore, Paull, knowing the land, falsely represented to M. that the ore was only a "pocket" or "nest," and would soon run out, and that he was so informed by men who had worked in the mine and the

furnace. On the trial he failed to prove either the fact or that he had received such information: *Held*, that he was liable in damages. *Paull* v. *Hafferty*, 63 Pa. St. 46.

2. Unjustifiable publication. For case of a publication charging fraud in the sale and manipulation of mines: *Held*, a libel on its face and not justifiable on the ground of its relating to matters of public interest and published without malice. See *Wilson* v. *Fitch*, 41 Cal. 363.

LICENSE.

1. Distinguished from lease. For case of license to take fire-clay and subsequent lease of the fire-clay and coal in the same seams and statement of distinction between lease and license, see *Carr* v. *Benson*, L. R., 3 Ch. App. 524.

2. Amounting to lease — Assignment. A license to search for and raise metals, and also to carry them away and convert them to the licensee's own use, passes an interest which is capable of being assigned. *Muskett* v. *Hill*, 5 Bing. New Cases, 694; 7 Scott, 855.

3. Parol. A parol license, or mere verbal privilege, carries no interest in land, and is a mere authority or privilege to do some particular acts upon the land of another. But a license to work mines confers not only a right to enter and occupy, but to commit waste and carry away part of the realty itself, and is therefore an interest in lands, tenements and hereditaments within the statute of frauds; and must, in order to give any permanent heritable interest in the realty itself, or any right to a continued and perpetual possession, be put in writing and signed by the parties, or be given by deed; otherwise it can have no other or greater effect, either at law or in equity, than to create an estate at will. *Desloge* v. *Pearce*, 38 Mo. 588.

4. Parol license from surface-owner to mine-owner. A parol license from the owner of land in which the mines are excepted, to the grantee of the mines to enter and dig them, vests no estate in the licensee, and is revoked by a conveyance of the land to a third person. *Gesner* v. *Cairns*, 2 Allen (N. B.) 595.

5. Profit a prendre—How created. A permission to take coal for the use of defendant's works, is a right of profit *a prendre*, is incorporeal and cannot be created except by grant or prescription. *Huff* v. *McCauley*, 53 Pa. St. 206.

6. Oil privilege. Contract by which vendee was to sell certain land in case the vendee found oil in it or became satisfied there was oil on it in a certain time: *Construed* to be only a personal privilege and not assignable. *Mendenhall* v. *Klinck*, 51 N. Y. 246.

7. To get minerals for certain purpose. A licensor is not presumed to know the extent of the business of the licensee, in aid of which business the license is granted. *Carr* v. *Benson*, L. R., 3 Ch. App. 524.

8. Incorporeal hereditament. A license to mine is an incorporeal hereditament. *Crocker* v. *Fothergill*, 2 B. & Ald. 652.

9. Construction — Incorporeal hereditament. Garner, for 25 cents per ton, sold to Irwin the right to mine, take and carry away the iron ore on and in his land, and Irwin agreed to pay the said rate and also $30 for each acre of land destroyed by mining operations, the agreement to extend to the heirs and assigns of both parties: *Held*, that this was not a grant of a corporeal interest, but the grant of the privilege to take ore from the land. *Grove* v. *Hodges*, 55 Pa. St. 504.

10. By one co-tenant. One of two or more tenants in common cannot grant a license to take or destroy the substance of the estate. *Wilkinson* v. *Haygarth*, 12 Q. B. 837; see *Job* v. *Potton*, L. R., 20 Eq. 84.

11. One co-tenant cannot give. One tenant in common cannot mine himself nor give a license to another to mine. *Murray* v. *Haverty*, 70 Ill. 318.

12. Joint tenants—Covenant running with land—Surface damage. A mining license was granted by deed to three persons as joint tenants, and the licensees covenanted jointly and severally to pay compensation in respect of damage to the surface. Two out of the three licensees assigned over, damage having been done: *Held*, that the covenant was one running with the subject matter of the grant, and that the assignee from the two licensees was liable under the covenant for the whole compensation due to the grantor. *Norval* v. *Pascoe*, 34 L. J., Ch. 82.

13. By mortgagee—Construction not exclusive. A. being mortgagee in fee of certain lands, and B. the mortgagor entitled to the equity of redemption, A. conveyed and B. released said lands to C. in fee, who by the same instrument covenants with and grants to B. that it shall be lawful for B., his heirs and assigns, at all times to enter upon said lands and search and dig for coal and other minerals, and take away the same: *Held*, a license only, and not to exclude C. and those holding under him from getting coal. And

further, that it could not operate as an exception or reservation out of the grant in respect to B. who had not the legal title in him at the time. *Chetham* v. *Williamson*, 4 East, 469; 1 Smith, 278.

14. Construction—Incorporeal hereditament not exclusive. A deed to Fell, his heirs and assigns conveying "the free right to dig coal at the coal bed under the foot of the mountain on my lot No. 22, etc.; with the privilege freely to carry the coal from the said lot, as also free egress and regress to and from said coal bed through my land at all times hereafter," is "simply a privilege to dig coal at a specified bed, and carry away the coals so taken, and not interfering in any way with the right of the owner of the land to mine *ad libitum*." It is only an incorporeal hereditament. *Gloninger* v. *Franklin Coal Co.*, 55 Pa. St. 9.

15. Construction—Exclusive. A verbal contract allowing a party "to mine and dig for lead and zinc ore according to mining usages:" *Held*, to amount to an exclusive lease. *Sobey* v. *Thomas*, 39 Wisc. 317.

16. Construction—Property in minerals exsected — Replevin. An agreement of which all the operative words were "I do bargain and sell to James Treganza the right of digging for lead ore on a certain range, it being a sheet dipping south and running east and west, for the sum of $500, granting the said Treganza privilege of following his sheet or crevice in whatever direction it may run," upon a certain tract of land therein described, does not create a property or estate in the land; it is a mere license or privilege to dig and search for the mineral. *Gillett* v. *Treganza*, 6 Wisc. 343.

Semble, under such license: 1. That on account of its conveying a fixed and determinate right it may be irrevocable if prosecuted diligently and faithfully; 2. That mineral severed from the land by the person holding, and by virtue of the license, vests in and becomes the property of the licensee; but, 3. That mineral severed by a person not acting under the license, does not vest in such licensee so as to enable him to recover the same in replevin. Id.

17. Construction — Ejectment — Re-entry. The owner of the fee granted to plaintiff "full liberty, license, power, and authority to dig, work, mine, and search for tin, tin ore," etc., within certain lands described, to raise and dress the ores, with certain reservations, out of "the premises granted," for a term of 21 years, upon a one-eighth royalty: *Held*, 1. That the indenture amounted to a license, but not to a lease; 2. That the licensee could not maintain ejectment, at least not for mines within the limits of the set, but not connected with his workings; 3. That upon plaintiff's having discontinued mining, and the licensor having entered upon the lands and let them to others, such acts should be considered a re-entry, under the clause of re-entry in the license, and not as a trespass. *Doe D. Hanley* v. *Wood*, 2 Barn. & Ald. 724.

18. Construction — Revocation — Use of water-course. The plaintiffs, lessees of a colliery, made a water-course at their own expense to carry the water from their colliery across B.'s land, with B.'s license. Before its completion B. and his mortgagee leased certain mines under the land to the defendant, with power to enter and occupy parts of the surface. The defendant took possession before the lease was executed, and the water-course was made across surface land which he had taken possession of on entering. The lease excepted and reserved to the mortgagee, his heirs and assigns, all mines other than the demised mines; it also reserved to the mortgagee, his heirs and assigns, and the tenants and occupiers of the demised mines, the right to enter on the surface and make all water-courses over it as they might think necessary for the occupation, working, and enjoyment of such exception or adjoining mines, offering no unnecessary impediment or interruption to the defendant, and making compensation to him for damage. B. owned adjoining mines. The plaintiff's colliery also adjoined, but was not held under B. The defendant at first continued, but afterwards revoked the plaintiff's license: *Held*, that he had power to do so. *Roberts* v. *Rose*, 3 H. & C. 162; 33 L. J. Ex. 1, 241; affd. 4 H. & C. 103; L. R., 1 Ex. 82; 35 L. J. Ex. 62.

19. Revocable. A verbal license to dig and carry away ore is revocable at the pleasure of the party to whom it is given. *Riddle* v. *Brown*, 20 Ala. 412.

20. Revocation. A parol license to mine for lead ore, unaccompanied by actual possession or the expenditure of money or labor thereunder may be countermanded by the licensor. *Upton* v. *Brazier*, 17 Iowa, 153.

21. Revocation—Notice. A license to mine under which entry and expenditure have been made cannot be revoked arbitrarily; it is analogous to the entry of a tenant at will for farming purposes, and he has the right to the *six months' notice* allowed by the common law in such cases. *Bush* v. *Sullivan*, 3 Green (Iowa) 344.

22. Revocation, not retroactive. A license cannot be revoked so as to make an entry made, or acts done under it, a tres pass. *Fuhr* v. *Dean*, 26 Mo. 116.

23. When irrevocable. A license to bore for oil in writing and acted upon, is not revocable. *Dark* v. *Johnston*, 55 Pa. St. 164.

24. Estoppel—Irrevocable after expenditures. The expenditure of money upon the faith of a license is to be distinguished from the case of money paid as the consideration for granting the license; in the latter case the mere fact of a consideration paid does not convert the license into a contract giving irrevocable interests. Id. *Huff* v. *McCauley*, 53 Pa. St. 206.

25. Not exclusive. A license to mine for lead ore upon a certain tract will not, unless clearly expressed or necessarily implied, be held to be exclusive. *Upton* v. *Brazier*, 17 Iowa, 153.

A license to dig ore does not exclude the landlord's right of possession both of the surface and all minerals not covered by the license, subject to the right of the licensee to enter and exercise his license. *Neumoyer* v. *Andreas*, 57 Pa. 446.

26. Not exclusive—Prior and later licenses. A license not exclusive cannot prevent the extraction of the same mineral by the licensor nor the granting of subsequent leases or licenses, provided they are not so granted as to defeat the known objects of the first licensee in applying for his license. *Carr* v. *Benson*, L. R., 3 Ch. App. 524.

27. May be exclusive. A license may be exclusive, and such license is good against a subsequent lessee or licensee with notice. *Harkness* v. *Burton*, 39 Iowa, 101.

28. Not divisible nor exclusive of the owner. Where one owning a large tract of land grants, bargains and sells part of it, and for himself, his heirs, executors, and administrators, covenants, promises, grants, and agrees, with the grantee, his heirs and assigns, that he and they may dig, take and carry away all iron ore to be found within the ungranted part of the tract, paying so much a ton, this is not a grant of the ore, but of a right and privilege to dig, take and carry away ore to be found; and no property accrues in the ore until the privilege has been exercised. *Grubb* v. *Bayard*, 2 Wall. Jr. 81; B. & W. L. C. 467.

The right is without stint, but is not exclusive of the owner of the soil. Id.

It is indivisible, and an assignee of it, unless clothed with the whole right, has nothing, and can support no suit as against the owner of the soil. Id.

29. Not assignable. A verbal license "to dig and carry away ore" is not assignable. *Riddle* v. *Brown*, 20 Ala. 412.

30. Assignment void. An assignment of a license (which may not be rightfully assigned) gives no right of entry to the assignee. *Gesner* v. *Cairns*, 2 Allen (N. B.), 595.

31. Improvements—Assignment. McGuire granted to Baird a right to sink one or more wells on his land, and agreed to convey to Baird, if oil was found; also to grant him an exclusive right to sink wells on other land at $100 for every ten years for every well Baird might continuously pump oil from; if he should fail to find oil, to have the right to remove his machinery, etc.; if oil were found, the right to pump to continue as the rent should be paid: *Held*, 1. To be a license to Baird; 2. That Baird having made improvements, McGuire could not revoke the license as to him; 3. That Baird having assigned the license, it was determined. *Dark* v. *Johnston*, 55 Pa. St. 164.

32. Determined by assignment. A license to bore for oil, though in writing and coupled with an agreement for future conveyance of the land in connection with the discovery of oil, is not assignable; and an assignment by the licensee determines the right. *Dark* v. *Johnston*, 55 Pa. St. 164.

33. The right of election—Not assignable. Defendant gave to T. & T. a license to explore and test his lands, and in case they found or became satisfied there was oil therein, and elected before a specified time to take, agreed to convey to them or whosoever they should direct. They did not examine or make an election, but assigned the contract. Plaintiff, as assignee thereof, claimed the right to elect, and asked for specific performance: *Held*, that prior to an election, T. & T. had no interest in the lands; that the right of election was personal and could not be transferred, and that, therefore, plaintiff's election did not satisfy the contract nor give a right of action. *Mendenhall* v. *Klinck*, 51 N. Y. 246.

34. Discovery of new deposit by second licensee. While A. held a license to mine for lead ore over a tract of land where a certain "range" or crevice of lead ore was known and worked, the owner allowed B. to enter on the tract who discovered a new crevice not before known to exist: *Held*, that the license of A. could not be construed to impair the rights of B., and that such license was not exclusive. *Upton* v. *Brazier*, 17 Iowa, 153.

35. Ouster—Case against lessors. The refusal generally of a licensor to allow the licensee to exercise the liberties granted is ground for an action on the case, though accompanied or preceded by an ouster of the workmen of the licensee by an act of

trespass. *Muskett* v. *Hill*, 5 Bing., N. C. 694; 7 Scott, 855.

36. Right of action. A party having a license to quarry stone on certain premises cannot maintain an action against a third party for stone taken from the same premises. *Freer* v. *Stotenburr*, 2 Abb. App. N. Y., rev'g S. C., 36 Barb. 641.

37. Not requiring work. The distinction between a license where the licensee is under no obligation to work, and a lease is, that the former is not exclusive. *Carr* v. *Benson*, L. R., 3 Ch. App. 524.

38. Licensee holding over. One engaged in mining under an agreement with the owners, which by its terms was revocable at any time at their option, holds under a mere license, and by continuing work after its revocation becomes a trespasser. *Lockwood* v. *Lunsford*, 56 Mo. 68.

39. Re-entry—Ineffectual notice. A license to mine was granted, with a proviso that if the grantee, after notice to work according to his covenant, failed to keep six miners at work, and the grantor fixed notice on the premises that he intended to avoid the license, it should be lawful for the grantor to re-enter within a month after fixing the notice, and then the license should be void: *Held*, that notice to the grantee that unless he kept six miners to work, the grantor would re-enter at the expiration of a month, did not avoid the license or render the grantor's re-entry lawful. *Muskett* v. *Hill*, 5 Bing. N. C. 694; 7 Scott, 855.

40. Compensation—Notice. A parol license of mining lands is valid, and can only be terminated by compensation to the licensee or the notice necessary to terminate a tenancy at will. *Harkness* v. *Burton*, 39 Iowa, 101.

41. Compensation—Notice to determine tenancy. A parol license to enter upon mineral lands and mine the same, for a specified share of the mineral raised, for an indefinite time, an entry under such license, and an expenditure of labor and money in sinking shafts, running drifts, procuring machinery, and other preparations for mining under such license, gives to the licensee a valid, subsisting interest in the real estate which the licensor can terminate only by giving him compensation for such expenditure, or the notice necessary to terminate a tenancy at will; and the licensee may assert his right to the possession against the licensor, or his subsequent lessee with notice, by ejectment. *Beatty* v. *Gregory*, 17 Iowa, 109.

42. Abandonment of. Whether the interest of a licensee in a mining license has been forfeited, terminated or abandoned, is a question of fact, upon which the parties are entitled to a verdict of a jury. Id.

43. Notice to quit. A parol license is essentially revocable at will, and may be terminated under the statute by giving notice to quit. *Desloge* v. *Pearce*, 38 Mo. 588.

44. Mine-book of the mine La Motte. In 1838, the proprietors of mine La Motte promulgated certain rules and regulations for the miners, who, by signing them, had a right to mine and extract minerals under their provisions for ten years. At the expiration of this time the proprietors made an agreement (entered in a book to be signed by miners desiring to work on the tract) by which miners might continue operations on condition—among others named—that the agreement was to be revocable by the future action of the proprietors: *Held*, that the agreement was not a lease but a license, revocable at the pleasure of the proprietors. And where the miner, after the license was revoked, resumed work and extracted minerals without the consent of the proprietors, he was a mere wrong-doer, and acquired no title to the mineral by such wrongful act. *Lunsford* v. *La Motte Lead Co.*, 54 Mo. 426.

45. Possession—Extent. A license to dig ore may extend to all the ore upon the land, but, being by parol, cannot be considered a conveyance, and gives no right to a possession greater than such qualified possession as would enable the licensee to prosecute his digging and take away the ore. *Neumoyer* v. *Andreas*, 57 Pa. 446.

46. Enforced as contract—Molding-sand. Where defendant agreed to allow plaintiff to dig molding-sand upon his, the defendant's, premises, in places to be designated by him, at so much per ton, the digging to commence in spring upon the opening of navigation and to end at its close, and the plaintiff dug sand at a place thus designated until the sand at that place was exhausted, and although there were other deposits of same sand on defendant's farm, he refused to designate any other place at which it might be dug: *Held*, his refusal to do so was a violation of his contract. *Hurd* v. *Gill*, 45 N. Y. 341.

47. By devise—Ejectment. A testator devised to three sons a tract of land to be divided among them into three portions, adding: "further, I devise, etc., to my said sons each an equal privilege forever of the coal bank now opened, and the ground on the ridge adjacent, so far as may be necessary for digging and taking coal." It seems that the privilege extended to every part of

the tract containing coal which might be mined through the opening. *Carnahan* v. *Brown*, 60 Pa. St. 25.

The devise as to the coal was a mere privilege and easement, an incorporeal hereditament, and ejectment is not the remedy for an interruption of the right. Id.

48. Incidents of—Created by proviso. Upon the construction of deed of bargain and sale of a manor, wherein the grantee covenanted that the grantor might dig for ore, the covenant being preceded by the formula, *proviso semper*, it was: *Held*, 1. That such covenant amounted to the grant of an estate; 2. That such estate or interest could not be parted or divided; 3. That if assigned to two or more, they must work for ore as one person, with the workmen employed together by the two or more owners; 4. That the proviso being coupled with words of grant did not create a condition. *Huntingdon* v. *Mountjoy* (*or Lord Mountjoy's case*), 4 Leon, 147; Godbolt, case 24, and partially reported in Moore, 174; see 1 And. 307; see *Grubb* v. *Bayard*, 2 Wall. Jr. 100.

LIEN.

1. Wages—Pennsylvania. Under the Act, second April, 1849, the wages of miners, laborers, and mechanics are not entitled to a preference in a distribution of the proceeds of the sale of real estate, over liens of record. *Johnston's Estate*, 33 Pa. St. 511.

2. Miners' wages, Pennsylvania. Under section 3, Act of April 2, 1849, the claims of miners are entitled to preference over execution creditors, out of funds arising from sale of the personalty found in and about the works. *Vastine's Appeal*, 38 Pa. St. 164.

3. Miners' wages—Partnership. Miners' wages by statute are a lien upon their debtors' property; but when a firm is the debtor, a judicial sale of the separate interest of one partner does not entitle the miners to preferred payment out of the money so made, because it does not affect nor divest their miners' lien. *Beatty's Appeal*, 3 Grant (Pa.), 213.

4. Wages and contract money—Joint lien—Note. Where miners were employed in working a developed mine, running tunnels, cross-cuts, winzes, etc., sometimes being paid by the day, and sometimes taking small contracts for particular parts of the work at so much per foot: *Held*, that they were not required to file a lien separately for each period of days' labor and each contract of the kind referred to, but that the whole would be considered as a continuous employment, from the final termination of which only the limitation for filing a miners' lien would begin to run. *Skyrme* v. *Occidental Mill & M. Co.*, 8 Nev. 220.

Where such mining contracts were taken sometimes by one, sometimes by two or more jointly, but in all cases settlements were made separately with each miner, one of the contractors sometimes receiving more than his associate contractor, the filing of a separate lien by each contractor was held valid. Id.

Held further, that a joint lien filed by all the unpaid miners was void, but that such invalid filing did not prevent the subsequent filing of separate liens. Id.

Held further, that the acceptance of a note was no release of a miners' lien. Id.

5. Foreman. The foreman of a mine has a lien for his wages or salary. *Capron* v. *Strout*, 11 Nev. 304.

6. Miners' lien—Montana practice. The complaint of a party who claims to have a lien upon mining ground for labor performed must state facts that constitute a contract. *Nolan* v. *Lovelock*, 1 Mont. 224.

7. On ore. A party mining lead ore and receiving his compensation in lead, or its cash value at the miner's election, has a lien on the ore. *Granby M. & S. Co.* v. *Turley*, 61 Mo. 375.

8. Work on mine and mill. Work done on a quartz mill and work done in a quartz mine is work upon two different parcels of property, and the lien upon each cannot by agreement be apportioned arbitrarily between them, although done under one original contract. *Davis* v. *Alvord*, 94 U. S. 545, reversing *Alvord* v. *Hendrie*, 2 Mont. 115.

9. Agent or Superintendent. An agent or superintendent of a mining corporation, employed at a monthly salary in overseeing the erection of buildings and working the mines of the company, is not entitled to a miner's or a mechanic's lien. *Smallhouse* v. *Kentucky & M. G. & S. M. Co.*, 2 Mont. 443.

10. Agent's traveling expenses—Lien upon "business." An agreement that the traveling and living expenses of a superintendent of mines shall be a charge to and borne by the joint property and business, makes them liens upon such property and business, but does not create any personal liability until their remedy against the property has been exhausted. *Isaacs* v. *McAndrew*, 1 Mont. 437.

11. Hauling quartz. Hauling quartz to a quartz mill is "performing labor for carrying on the mill" (Stat. of Nev., 1861), and gives the laborer a lien upon the mill. *In re Hope M. C.*, 1 Sawyer, C. C. 710.

12. Description—Mechanics' lien on quartz mill. Where the lien describes the land around the building, on which a lien is claimed, in these words, "with such convenient space of ground around the same as may be required for the convenient use and occupation thereof," the description is sufficient; but it is proper for the court by its decree to define the amount and extent of the land connected with the building which is properly subject to the lien; and if the decree follow the description in the lien, it is doubtful whether the purchaser will acquire any land beyond that covered by the building. *Tibbetts* v. *Moore*, 23 Cal. 208.

13. Oil-well. One who contracts to drill an oil-well and to furnish the tools, ropes, fuel, etc., to be used in the drilling, can file a mechanic's lien against the well for the work so done and the materials furnished, under the provisions of the second section of the Act of the seventh of March, 1873. *Vandergrift's App.*, 83 Pa. St. 127.

Materials furnished for engine, derrick, etc., to the lessee of an oil-well are protected by the Lien Acts of Feb. 17, 1858, and April 11, 1866. *Robson & Co.'s App.*, 62 Pa. St. 405.

14. Smelting-works—Suspended labor. A party having contracted to erect *smelting-works*, the final completion of the contract (which was general, not specifying any particular buildings) being suspended for more than the statutory period for filing mechanic's lien, it was: *Held*, upon the facts, that a renewal of the work after that period was not in continuation of the original contract. *Lunt* v. *Stephens*, 75 Ill. 507.

15. Occasional repairs. A lien on a quartz mill, after it is completed, cannot be kept alive by occasional repairs. *Davis* v. *Alvord*, 94 U. S. 545; reversing *Alvord* v. *Hendrie*, 2 Mont. 115.

16. Hoisting cage. An architect filed a lien for the erection of "a hoisting and dumping cage" over a leased coal mine in Schuylkill county, against the entire leasehold interest: *Held*, that his lien was confined under the Act of Feb. 17, 1855, to the specific improvement which he had erected, and that his failure so to restrain it rendered his lien null and void. *St. Clair Coal Co.* v. *Martz*, 75 Pa. St. 384.

17. Track on Slope — Fixture. A track on the slope of a coal mine is a temporary structure and not an "improvement" or "fixture" under the lien act of Feb. 17, 1858, and is not liable to mechanics' lien. Act construed. *Easterley's App.*, 54 Pa. St. 192.

18. Fixtures — Additions to blast furnace—Priority. An iron-furnace company intending to improve and enlarge the works, contracted, before July 16, 1872, with several different manufacturers for various parcels of the heavy machinery and fixtures intended to be erected, and on that day laid the foundation of the boiler stack. The several contractors had also begun the manufacture of the parcels of machinery. On July 17, 1872, the premises were mortgaged: *Held*, that the lien for such improvements was anterior to the mortgage, although they were not brought on the premises until months after; and that from the preparations made, the mortgagee had due notice that the improvements were "additions of material parts" to the original structure. *Parrish & Hazard's App.*, 83 Pa. St. 111.

19. Work continued under sundry contracts. Work done in a mine which is continuous, though done under different contracts, holds the mine under lien from the date of the first work by giving notice under the statute within the proper period after the last work is completed. *Capron* v. *Strout*, 11 Nev. 304.

20. Boarding miners—Appropriation. Where a party working upon a mine has a lien for (part of) his wages only, and while working, also boarded the miner, he may rightfully appropriate payments made on account (not at any time in excess of the board), to the boarding account, although he do not in fact make such appropriation till the time of filing his lien. *Capron* v. *Strout*, 11 Nev. 304.

21. Ditches and flumes. A ditch is not a building, and in no sense can be denominated a superstructure under the mechanics' lien law. Flumes constructed at different points on the line of a ditch are mere connecting links over ravines and gulches, and do not change the general character of the work as an excavation; the whole must be regarded as a ditch. *Ellison* v. *Jackson W. Co.*, 12 Cal. 543.

Equity raises no lien with respect to real estate or work upon real estate, except the lien of the vendor for purchase-money. Id.

Query as to whether a flume is a "superstructure" under the mechanics' lien act. *Head* v. *Fordyce*, 17 Cal. 149.

22. Ditch in sections. Gordon contracted to complete sections 17 to 25 on the South Fork canal, a mining ditch of great extent. Said sections were a continuation or extension of the original work—not a lateral branch or feeder: *Held*, that his lien extended only to the said sections and did not cover the original canal. *South Fork Canal Co.* v. *Gordon*, 6 Wall. 561. See ante p. 82, s. 34.

23. Lien of partner against assets. Each member of a mining partnership has a lien upon the partnership property for the debts due the creditors of the concern, and for moneys advanced by him for its use, which he may enforce in equity, even if there has been no agreement among the partners that such lien shall exist. *Duryea* v. *Burt*, 28 Cal. 569; B. & W. L. C. 489.

24. Between tenants in common. If one tenant in common receive the profits of the estate (of lime kilns, quarry and dwellings) the other tenant has no lien on the land for his share of the same; his remedy is by action of account. *Stenger* v. *Edwards*, 70 Ill. 631.

25. Prior mortgage. The lien upon a mine, given by Act of March 30, 1868, to mechanics, material men, etc., does not operate to give priority against a mortgage recorded before work commenced. *Preston* v. *Sonora Lodge*, 39 Cal. 116.

26. Miner against mortgagee. A party employed on a mine at a stipulated rate per day, payable monthly, who was employed prior to the execution of a mortgage on the premises, holds his lien subject to the lien of the mortgage, from the end of the current month during which the mortgage was recorded. *Capron* v. *Strout*, 11 Nev. 304.

27. Brick. A brick-maker has a lien upon the brick manufactured by him, under contract with the owner of the brick-yard. *Moore* v. *Hitchcock*, 4 Wend. 293.

A party making brick by contract, having no lease or other interest in the ground except the right to enter and make the brick, has no such possession of the brick as to secure him an artisan's lien at common law. *King* v. *Indian O. C. Co.*, 11 Cush. 231.

28. Statute not retroactive. Where an Act giving a lien for labor done on mines was passed Feb. 6, 1867, and in a bill filed under it the plaintiff claimed for the whole period during which he had worked, which had commenced before the passage of the Act and had been continuously carried on: *Held*, that the lien should only apply to work done after the date of its passage (excluding also the day of the date), but that all payments made from time to time should be applied upon the amount due before the passage of the Act. And that an ordinary judgment should be entered for balance still due for work done before the passage of the law. *Hunter* v. *Savage Cons. S. M. Co.*, 4 Nev. 155.

29. Retroactive statute. A lien act may be retroactive if it do not affect intermediate vested rights. *Gordon* v. *South Fork Can. Co.*, 1 McAll. 513.

30. Cord wood — California practice. Lien enforced on a mine for cutting cord wood used at the mine, the pleadings not denying that the work was done on the mine. *Bradbury* v. *Cronise*, 46 Cal. 287.

31. Practice—California. The denial that the work was done at defendant's request in an action to enforce a lien on a mining claim is an admission that the work was done on the claim. *Bradbury* v. *Cronise*, 46 Cal. 287.

32. California act—Constitutionality. The act of 1868, for securing liens of mechanics and others does not, because it fails to give to laborers other than those working on mining claims a lien, violate the provision in the constitution that "all laws of a general nature shall have a uniform operation." *Quale* v. *Moon*, 48 Cal. 479.

LOCATION.

1. Discovery — Walls. The sides of a lode are defined by the walls, and these walls (or at least one of them), must be discovered and the lode identified thereby before it can be located and held. *Foote* v. *National M. Co.*, 2 Mont. 402.

2. Name of lode. One and the same ledge may have several names, or it may become better known by a name applied to a junior or invalid location than by its original and proper name, and in such case may be well described under such acquired designation. *Phillpots* v. *Blasdel*, 8 Nev. 61.

3. Extent — Claim — Mine. The word location, as found in the written laws of White Pine mining district, refers to the aggregate of ground claimed as a mine, and not to the interest of a single tenant in common, nor to any specific number of feet or section of the mine. *Leet* v. *John Dare S. M. Co.*, 6 Nev. 218.

4. District rules. When the district laws point out directly how mining claims must be located, and how the possession once acquired is to be maintained, that course must be strictly pursued, and a failure to do so might work a forfeiture of the ground. *Mallett* v. *Uncle Sam Mining Company*, 1 Nev. 194.

5. Title acquired. No title is divested out of the government by a location, but a right of entry is given, under the government. *Gore* v. *McBrayer*, 18 Cal. 583; B. & W. L. C. 191.

6. The original notice—Evidence. A copy of a notice posted on a mine to show its extent is not admissible in evidence, if

the notice itself be obtainable. Such evidence is secondary, and is admissible only upon the terms which control its admission in other cases. *Lombardo* v. *Ferguson*, 15 Cal. 372. But see *Dunning* v. *Rankin*, 19 Id. 641.

7. Notice—Marking corners. Posting notice upon a five-sided tract claimed for mining purposes, and the marking of three of its corners, in the absence of any mining district rule in the district: *Held*, no valid or sufficient location or possession. *Hess* v. *Winder*, 30 Cal. 349.

8. Record — Original notice. The county record of a notice of location of a mining claim may be by custom the original notice, and not a copy of an independent original (though taken from a draft on paper). *Pralus* v. *Pacific G. & S. M. Co.*, 35 Cal. 30.

9. Status of claim as to patent. The provisions of the mining Act of Congress of July 26, 1866, in regard to patenting lode claims, are not obligatory; the locator need not proceed to patent, and a patent to the land as agricultural, issued during his holding, is void as against his mining claim. *Gold Hill Q. M. Co.* v. *Ish*, 5 Oregon, 104.

10. By agent. Any citizen who is entitled to locate a lode on the public domain, may perform all necessary acts of appropriation and development through the agency of others. *Murley* v. *Ennis*, 2 Colorado, 300.

11. By corporation. Instance of a location on the public domain by a corporation (of a timber claim), and the claim sustained. *Whitman M. Co.* v. *Baker*, 3 Nev. 386.

12. Proof of—Natural monuments. Where the location of a mining claim is made both by posting notices and by designating fixed objects, such as trees, shafts, and ditches, on or near its exterior boundaries, in an action between two companies involving the title to a portion of the ground, witnesses are not confined in their testimony to a statement of the contents of the notices, but may also state whether the location made included the ground in dispute. *Kelly* v. *Taylor*, 23 Cal. 11.

13. Location stake on lode. In order to hold a mining ledge, it is not necessary that the notice of location be placed on the ore, or any part of the vein or lode. It is sufficient if placed in such reasonable proximity to the ledge as, in connection with the work done under it, to give notice to all comers what ledge is intended. *Phillpots* v. *Blasdel*, 8 Nev. 61.

14. Record not stating number of feet claimed. Considering the statute of Montana, which requires, in general terms, a mining claim to be recorded, in connection with the usage of the territory and of Idaho, from which it was formed, it cannot be construed to compel the number of feet claimed on a quartz lode to be stated in such record. And a record of a claim not stating the number of feet is valid. *Conner* v. *McPhee*, 1 Mont. 73.

15. Defining claim—Possession. A mining claim must be in some way defined as to limits before the possession of or working upon part gives possession to any more than the part so possessed or worked. But when the claim is defined, and the party enters in pursuance of mining rules and customs, the possession of part is possession of the entire claim. *Attwood* v. *Fricot*, 17 Cal. 42; *Sears* v. *Taylor*, 4 Colorado, — (1878).

16. Notice—Water. A "notice" of intention to appropriate the waters of a certain stream is evidence of possession, but of itself alone is not sufficient. Taken with other acts, it amounts to sufficient evidence. It forms one of a series of acts which, taken together, make the right perfect. *Thompson* v. *Lee*, 8 Cal. 280.

17. Water right — Notice — Insufficient location. Posting a notice on a tree on the bank of the river, claiming a location of a water right at that point, and of right of way for a ditch of a certain capacity from that point to a bend of the river below, followed within six months by 15 or 20 days' work on the ditch, but not sufficient to make it of any practical use and accompanied by a monument of stones at a point below the bend suitable for a mill-site, after which nothing was done for the next three months: *Held*, not sufficient to constitute possession nor prevent location by a stranger. *Robinson* v. *Imperial M. Co.*, 5 Nev. 44.

18. Ditch claim inclosure. In constructing canals under the license of the State, the survey of the ground, planting stakes along the line, giving public notice, and actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit, and forms a series of acts of ownership which must be conclusive of the right. *Conger* v. *Weaver*, 6 Cal. 548.

The inclosure of the ground used in digging a canal not being necessary for the work would give its proprietors no higher rights, nor is it necessary, as notice to those who have received actual notice of the intended line of the canal. Id.

19. Proof of water notice. In an action involving the right and extent of a water privilege claimed by plaintiffs under

an alleged appropriation by a number of co-partners, defendants, to limit the extent of the appropriation, offered in evidence a paper, purporting to be a copy of the original locating notice of the co-partners, and without direct proof of its execution, showed that it was prepared with a knowledge of some of the partners, and was seen as a posted notice by a portion of them at the point of diversion, and about the time the work was commenced, and that its position was such that it must probably have been seen by all: *Held*, that upon this proof the paper was admissible as part of the *res gestæ*. *McKinney* v. *Smith*, 21 Cal. 374.

20. For mining by one and fluming purposes by another. One party may locate ground in the mineral districts for fluming purposes, and another party, at a same or a different time, may locate the same ground for mining purposes; the two locations being for different purposes will not conflict. *O'Keiffe* v. *Cunningham*, 9 Cal. 589.

21. Ditch across claim. The same ground cannot be located by one party for mining purposes and by another for other purposes, although not interfering with the purposes of the original location. *Correa* v. *Frietas*, 42 Cal. 339 (Crockett, J., dissenting).

22. Posting—Due diligence—Ditch. Whether plaintiffs, who had posted notices claiming the water of a certain river, and stating their intention to construct a ditch and appropriate the water for mining purposes, began their surveys, etc.—had prosecuted their work with due diligence as against parties attempting subsequently to appropriate the water; is a question for the jury, and their verdict on conflicting testimony will be conclusive. *Weaver* v. *Eureka Lake Co.*, 15 Cal. 273.

23. Of ditch—Relation. Where parties projecting a ditch give notice in the usual manner, designate the line of the ditch by the usual marks, and prosecute work with reasonable diligence until the same is ready to receive water, they are entitled to such water as against all intervening or subsequent claimants. *Kimball* v. *Gearhart*, 12 Cal. 28. The title to water conveyed through a ditch constructed in the usual manner, and completed with reasonable diligence, relates, on completion, to the first act of appropriation. Id.

24. Marks and stakes. The "physical marks" sufficient to serve as notice of the possession of a mining claim must be of sufficient prominence to be found by one honestly concerned to discover whether the land has been previously appropriated for mining purposes. *Hess* v. *Winder*, 30 Cal. 349.

25. Location notice on tree—production of the original not strictly required. Where to prove prior possession of a mining claim plaintiff relied upon a notice which had been posted upon a tree at one end of a claim, which notice was not produced on the trial, but in place thereof plaintiff introduced a witness who stated that he had frequently seen the notice, and that when he last saw it a part of it was torn, and the residue so much defaced that it was illegible: *Held*, that this was sufficient to let in secondary proof of the contents of the notice; and that stricter proof of loss ought not to be required in such cases. *Dunning* v. *Rankin*, 19 Cal. 641.

26. Dry diggings—Delay for water—Notice—Town site. A miner locating a parcel of the public domain as a mining claim has a right to the exclusive possession of the ground so taken up. A miner cannot by notice alone, without taking steps towards development, hold a claim for five years without work or occupation; especially when there is no intention to work it except upon a very uncertain contingency. In this case a claim was located upon a spot which showed good pay if water could be had, and was worthless without water; the locator took no steps to bring water, and the natural supply was totally insufficient; meanwhile a town had been built upon and around the claim: *Held*, that the party asserting title to the property as a mining claim was rightfully nonsuited. *Gottschall* v. *Melsing*, 2 Nev. 185.

27. Inclosure. A miner is not expected to inclose his claim. *English* v. *Johnson*, 17 Cal. 108; B. & W. L. C. 172.

28. Fence—Forcible dispossession. A party attempting to locate a claim, and being engaged in fencing it, was driven off by force: *Held*, that having complied with the law as far as he could, he had acquired a good possessory title against all persons; and although the fence he had commenced was not of the proper character, it would be presumed that an inclosure in all respects sufficient would have been completed. *Robinson* v. *Imperial M. Co.*, 5 Nev. 44.

29. Excess in claim—Stakes misset. A claim of more than the number of feet allowed by law upon a quartz claim is void for the excess, but setting the stakes a few feet farther apart than the limit allowed by law does not invalidate the entire claim. *Atkins* v. *Hendree*, 1 Ida. 108.

30. Quantity beyond legal limit. A party locating a claim larger than allowed by the mining rules may still hold the

extra quantity except as against one locating in pursuance of the rules. *English* v. *Johnson*, 17 Cal. 108; B. & W. L. C. 117.

31. Reasonable size of claim. Although mining ground may be located in the absence of local regulations, yet the extent of such locations is not without limit. The quantity taken must be reasonable; and whether it be so or not, will be determined in such cases by the general usages and customs prevailing upon the subject. If an unreasonable quantity be included within the boundaries, the location will not be effectual for any purpose, and possession under it will only extend to the ground actually occupied. *Table Mt. T. Co.* v. *Stranahan*, 20 Cal. 198; S. C., 21 Cal. 548.

32. Boundaries. One seeking to hold a mining claim by virtue of prior possession alone, without any reference to local mining customs, must mark out his boundaries by such distinct physical marks or monuments as will indicate to any person what his exterior boundaries are. *Hess* v. *Winder*, 30 Cal. 349.

33. Proof of, in ejectment. Plaintiffs in ejectment, who seek to recover a mining claim upon the strength of their paper title, there being nothing to show that they or their grantors were ever in possession, must prove a valid location of the claim according to the rules, usages and customs of the district prevailing at the time such location was made. *Sullivan* v. *Hense*, 2 Colorado, 424.

34. Prior agricultural claim. Where the plaintiffs, who were miners, did not seek to enter or occupy for mining purposes the lands of the defendant, devoted to agriculture, but sought to restrain him from flowing water thereon for the purposes of irrigation, by which their adjacent mining claims were injured, the plaintiffs cannot claim any authority under the act of April 25, 1855. (Stats. 1855, p. 145.) *Gibson* v. *Puchta*, 33 Cal. 310.

The right of miners by a later appropriation cannot be exercised to the damage of the ranche or ditch of an agricultural settler lying below. *Levaroni* v. *Miller*, 34 Cal. 231.

35. Side vein within lines of claim. The locator of a claim upon a lode is the owner of the soil between his stakes and to the width allowed by law; and if a vien exist within such limits other than the vein upon which his discovery or location was made, such fact must be established before the claimant of such second vein has any right to enter within the bounds of the claim first located. *Atkins* v. *Hendree*, 1 Ida. 108.

36. Location within lines of prior location. Ground duly located and staked cannot be entered for prospecting purposes as if it were vacant ground, and if veins are supposed to exist therein other than the one upon which the original locator claims, such veins must be found outside and traced into the limits of the claim staked, or otherwise proved to exist, before the holder of such second vein can enter the limits of the claim on the first discovery. *Atkins* v. *Hendree*, 1 Ida. 108.

37. Second location within lines of first. A second location within the lines of a previous location upon a blind lode not developed is not such evidence of abandonment as to justify an instruction to that effect to a jury. *Weill* v. *Lucerne M. Co.*, 11 Nev. 200.

38. Second claim on same vein. The location of a second claim upon a vein within the limits or number of feet claimed by the first location is not an abandonment of the first claim. *Phillpots* v. *Blasdell*, 8 Nev. 61.

39. Claim under Mexican Law. To complete the adjudication and carry it into effect, the boundaries must be fixed, else the title or claim, like other indefinite interests in lands, will be void for uncertainty; and this rule applies to mines situate on public as well as to those on private lands. *U. S.* v. *Castillero*, 2 Black. 20.

40. Colorado, before territorial organization. In the year 1860, a valid location of a mining claim on the public domain could be made only according to the rules, usages and customs of the miners in the district where such claim is situated. *Sullivan* v. *Hense*, 2 Colorado, 424.

41. Of claim on tailings—Requisites—Fencing—Trespass. Where a person entered upon vacant land upon which tailings were deposited, for the purpose of digging them up, hauling them away and milling them, and caused a survey to be made and recorded, marked the boundaries with large posts firmly set in the ground at the corners and one in the center of one of the sides, and thereafter continued to work the claim, and built a cabin on it, which was used for storing the tools used on the premises: *Held*, that he had a possession sufficient to maintain trespass against an intruder entering within his boundaries. *Rogers* v. *Cooney*, 7 Nev. 213.

The same acts which are required to enable a settler to obtain actual possession of pastoral or agricultural land, so as to subject it to the purpose for which it is useful, are not demanded when the claim is only of mining ground. Id.

Fencing a mining claim would serve no

useful purpose except to mark its boundaries, and any other means which will accomplish that object will equally answer the requirements of the law as to the possession of such claim. Id.

42. Town lot on mining ground. A party cannot, under pretense of holding land in exclusive occupancy as a town lot, take up and inclose twelve acres of mineral land in the mining district, as against persons who subsequently enter upon the land in good faith, for the purpose of digging for gold therein, and who in such operations do no injury to the comfortable use of the premises as a residence, or for the carrying on of any mechanical or commercial business. *Martin & Davis* v. *Browner*, 11 Cal. 12.

43. Reasonable time. Upon discovering a lode the locator is entitled to a reasonable length of time in which to perfect the development which the local law requires of him. *Murley* v. *Ennis*, 2 Colorado, 300.

44. In names of strangers. If the discoverers locate their claim in the names of second parties (in this case using the names of friends in Illinois), and continue to work and do all acts in the names of such second parties, they cannot maintain an action for the claim in their own names. The law considers their possession as the possession of the second parties by agent. They could obtain an independent right to the claim only by re-location, in which case their rights would date from the time of re-location. A party whose name is used in the location of a mining claim, is presumed to assent to the same. *Van Valkenburg* v. *Huff*, 1 Nev. 142.

45. Name used without knowledge. If a mining custom allows a person to locate a lode or vein for himself and others, by placing thereon a notice, with his own name and the names of those whom he may choose to associate with him, appended thereto, designating the extent of the claim; and one person thus locates a lode for himself and several others, some of whom have no knowledge of the location, the persons who had no knowledge of the location became tenants in common with the locator and the others, and cannot be divested of their interest by the locators afterwards tearing down the notice and posting up another, omitting their names, unless this is done with their knowledge and consent. *Morton* v. *Solambo C. M. Co.*, 26 Cal. 527; B. & W. L. C. 107.

46. Prospectors locating for co-adventurers. The usual mode of taking up mining claims is to put upon the claim a written notice that the party has located it; and this taking up and giving notice may be done by a party personally, or by any one for him, or with his assent or approval, and whenever the appropriation is made by an agent having authority from a principal to make it, the act is complete, and the title vests in the principal, and the agent, by his mere act, cannot subsequently divest it. *Gore* v. *McBrayer*, 18 Cal. 583; B. & W. L. C. 191.

So, where G. McB. and others, verbally agreed to prospect for quartz, and to be equally interested in claims taken up, and McB. discovered a lead or claim, and located it by putting up a written notice with G.'s name and others on it, appropriating the lead: *Held*, that G.'s right attached by these proceedings, and could not be divested by the mere act of McB., in taking down the notice, and putting up other notices with other names. Id.

After the notice was put up, G. became a tenant in common of the mine, and not a partner, and could bring an action to vindicate his title against McB., or any one who excluded him or denied his right. Id.

47. Location for persons outfitting prospectors—District rules. The mining law of a district, which allows those who furnish money and provisions to the discoverers of placer gold mines, to hold claims without personally pre-empting them is not against public policy, and should be upheld. *Boucher* v. *Mulverhill*, 1 Mont. 306.

48. Contract to explore, cotemporaneous with location—Location by use of names of strangers.—Where two parties located a ledge in the names of themselves and four others, using their names without their knowledge, and five days afterwards entered into a written contract with prospectors to prospect the claim "until they struck pay dirt," for a half interest in the claim, which contract was drawn up in form between A. B. C. D. E. and F. (all the locators), as parties of one part, but was only signed by the two persons who actually made the location, which prospectors, after vast expense, developed the claim into a mine of great value, whereupon, one of the parties whose name had been used in the location, brought ejectment for one-twelfth of the mine, he having sold his other twelfth interest: *Held*, 1. That the agreement was not an executed agreement as to the parties who had not signed it; 2. That the agreement so signed by only two of the six grantors named therein, operated to convey only one-half of the interest of the persons who signed it, and they conveyed no more than the half of their interest through any failure of the others to execute it; 3. And as the agency did not

appear upon the face of the instrument, the acting locators would not be considered as having acted as the agents of the other locators;* 4. That the plaintiff might take the benefit of location, without assuming the burden of the contract for development; 5. After the notices of location were posted and recorded, and the limits of the mine determined, all the locators became tenants in common, and the acting locators could not dispose of the interests of their co-tenants. *Chase* v. *Savage S. M. Co.*, 2 Nev. 9.

49. Underground channels—"Base to base" of mountain. If a company locates a mining claim of a certain width extending through a mountain from base to base, and afterwards another company succeeds to their possession, whatever it was, and puts up a notice stating that its claim comprises the claim held by the old company, * * * and comprises the channel then existing, with its dips and angles, through the mountain, the latter company is not restricted by this notice to one paying channel within the claim. *Table Mt. Co.* v. *Stranahan*, 31 Cal. 387.

50. Possession not equivalent to. Where the exterior boundaries of a placer claim are not marked and a plaintiff claims by possession only, he cannot recover in ejectment, nor does his possession extend beyond the surface, which he may have leveled or otherwise changed so as visibly to mark his possession, unless in the absence of such boundaries at the time of defendant's entry, the plaintiff, being in actual occupation of a part, pointed out to such defendant (who had entered to survey for patent) the extent of ground which he claimed. *Sears* v. *Taylor*, 4 Colorado (1878).

51. Indefinite — Contract — Estoppel. A. made an entry "running so as to include the rock quarry," a notoriously well-known site, but the entry was so vague as to be void for want of description. Afterwards B. made an entry definite in its description and including the quarry. A., with full notice of B.'s entry, caused a survey to be made on his entry two miles in length and only a few yards in width, passing over several granted lands so as to reach the quarry, and upon such survey obtains a grant: *Held*, that under these circumstances A. is to be looked upon in the same light as a junior enterer, and that B. has a right to a decree for conveyance with account of profits. *Allen* v. *Gilreath*, 6 Ired. Eq. 252. (N. C.)

Nor did the fact that B., before he discovered that the quarry was on vacant land, had agreed to purchase from A. a tract of land supposed to contain the quarry, in which purchase the quarry was reserved to A., preclude B. from entering his quarry when he discovered it to be vacant. Id.

52. Indefinite location cured by survey. An entry of "640 acres of land, beginning on the line dividing the counties of Haywood and Macon, at a point at or near Lowe's Bear-Pen, on the Hogback mountain, and running various courses for complement," is, in itself, too vague and indefinite. But the defect may be supplied by a survey which renders the party's claim more specific. But if the entry be not so explicit as to give reasonable notice to a second enterer of the first appropriation, and the same land is entered again before a survey on the first entry, equity will not deprive the second enterer of his title. *Johnston* v. *Shelton*, 4 Ired. Eq. (N. C.) 85.

53. Defective location cured. Where mining ground has been claimed and actually possessed and worked for several years, the claim being generally recognized as valid by the miners in the vicinity, the title of the claimant is good, even though the location may not have been originally made in strict accordance with mining rules in force at the time, especially so as between co-claimants and their grantees. *Kinney* v. *Con. Virginia Mining Co.*, 4 Sawyer, 382.

54. Substantial compliance with statutes — Equity. A person who seeks the aid of a court of equity to protect his interest in a mining claim located under the mining laws of the United States, must show a substantial compliance with such laws. *Chapman* v. *Toy Long*, 4 Saw. 28.

55. Joint locations. Placer claims may be located and occupied jointly; a joint location of and joint patent to both lode and placer claims is expressly recognized in the United States Mining Acts. R. S., secs. 2324 and 2330. *Chapman* v. *Toy Long*, 4 Sawyer, 33.

56. Aliens. An alien who has never declared his intention to become a citizen is not a qualified locator of mining ground, and he cannot hold a mining claim either by actual possession or by location against one who connects himself with the government title by compliance with the mining law. *Golden Fleece M. Co.* v. *Cable Cons. Co.*, 12 Nev. 327.

57. Protected by injunction against aliens. An injunction will be allowed to restrain the working of a placer of gold mine located by the complainants under the United States Mining Acts, while in the possession of persons not qualified to

*A rehearing was granted, and no final decision was ever rendered. The opinion itself, states that the strict application of the "rules of law" to the facts of the case, operates as "a flagrant injustice."

take and hold such lands, *e. g.*, aliens. *Chapman* v. *Toy Long*, 4 Saw. 28.

58. Reasonable time to sink discovery shaft. Upon testimony which was not contradicted, and therefore presented no question of fact, the Bull of the Woods lode was discovered April 17, 1874; to complete the location the law required a discovery shaft ten feet deep to be sunk. Such shaft was commenced in the middle or latter part of June, and completed on the eleventh day of July. The time between the date of discovery and the completion of the shaft was eighty-five days. The court instructed the jury that "ninety (90) days was not a reasonable time to occupy in sinking a discovery shaft in the manner and to the depth required by law:" *Held*, that the question of reasonable time is a matter of fact to be determined by the court when the facts are not controverted. That the court should have itself decided that the period occupied in sinking said shaft was not a reasonable time, and their having left the question to the jury under an instruction by which the jury were not absolutely precluded from finding that eighty-five days (the time actually occupied) was a reasonable time, it was a matter of mere grace, of which the locator of the Bull of the Woods could not complain. *Patterson* v. *Hitchcock*, 4 Colorado, — (1878.)

Had the evidence shown or tended to show that the delay in sinking the shaft was the result of extraneous circumstances, such as personal disability, inaccessibility of the lode, obstructions by heavy snows, or other impediments, then the question of reasonableness of time would have been for the jury under the instructions of the court. Id.

The law contemplates that the discoverer of a lode shall prosecute the work of sinking his discovery shaft with at least ordinary diligence. The time reasonable in which to do a given work, as a matter of law, must be referred measurably to the time necessary to do it as a matter of fact, and since as a matter of fact it took twenty-five days to sink this shaft, it is difficult to see why, as a matter of law, a reasonable time in which to do it would be eighty-five days; such a period exceeds any possible time required by reason or necessity. Id.

59. Vein confined to its side lines. Under the mining laws of the United States, unaided by any supplementary miners' rules, there is no way of locating a quartz vein except by marking out surface lines; and where these lines have been marked they cannot be changed so as to take in ground that has been located by others prior to such attempted change. The Golden Fleece lode mining claim was located in 1874, upon a vein supposed to run in the direction of its location, north, 45 degrees west. Afterwards the Leonard Lode, owned by the defendant, was located as a claim running due north and south. As thus located the interference was slight, the Golden Fleece claim cutting off only a few feet of the survey of the Leonard. After a patent had been applied for on the Leonard Lode, the Golden Fleece was re-surveyed upon the true course of the lode as developed, and adversed the Leonard Lode as a location covering a large part of its area, including its outcrop and workings. The discoveries were several hundred feet apart. At the time of the original location of the Golden Fleece, the course of the vein was supposed to be at an angle which proved to be nearly a right angle to its real course:* *Held*, that the lines of the original location could not be changed so as to interfere with claims subsequently located. See diagram, p. 321. *Golden Fleece Co.* v. *Cable Con. Co.*, 12 Nev. 329. Hawley, C. J., dissented upon this point.

See APPROPRIATION, RE-LOCATION.

LOCATION CERTIFICATE.

1. Recorder—Identity of names. A witness being produced to disprove his alleged signature as county recorder to the jurat of the location certificate of a mining claim: *Held*, that the identity of the person should be presumed from the identity of the names. *Stapleton* v. *Pease*, 2 Mont. 550.

LODE.

1. Meaning as used in U. S. statutes. The mining acts of Congress do not define the term lode. They use it in association with vein, and in the act of 1872 with the word ledge, without distinction therefrom. The act refers *inter alia* to lodes of quicksilver which is not found in lodes as geologically defined; and yet the word lode must be construed to cover the deposits of all the metals named if it cover any of them. Its scientific definition must yield to the construction which will carry out the intent of the acts. "We are of opinion therefore that the term as used in the acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes..... all deposits of mineral matter found

*NOTE.—This question is now before the Supreme Court of Colorado, and the decision ought to appear in 4 Colorado. The rulings of Beck, Wells, Stone and Belford, district judges, at *nisi prius*, and of Hallett, judge of U. S. District Court, Colorado, have all been in accord with the opinion of the majority of the court in the above case.

through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes." *Eureka Cons. M. Co.* v. *Richmond M. Co.*, Field, Sawyer and Hillyer, JJ., 9th Cir. Ct.; 4 Saw. 310.

2. Scientific definition. "The definition of a lode given by geologists is, that of a fissure in the earth's crust filled with mineral matter, or more accurately as aggregations of mineral matter, containing ores in fissures." Van Cotta on Ore Deposits, Primes' Trans. 26; *Eureka Cons. M. Co.* v. *Richmond M. Co.*, Field, Sawyer, and Hillyer, JJ., 9th Cir. Ct.; 4 Saw. 311.

3. Popular and derivative meaning. The term lode or lead, is of the same root as the verb "to lead" and as the word "lode" or guiding-star, being whatever the miner could follow and find ore. To the practical miner the fissure and walls are only of importance as boundaries within which he expects to find the ore. "A continuous body of mineralized rock lying within any other well-defined boundaries" would to the miner "equally constitute, in his eyes, a lode." *Eureka Cons. M. Co.* v. *Richmond M. Co.*, Field, Sawyer, and Hillyer, JJ., 9th Cir. Ct.; 4 Saw. 311.

4. Application of the meaning under the acts. A body or zone of limestone within clearly defined limits, and geologically a single deposit impregnated throughout with silver-bearing ore, though in greatly varying quantity, lying between a wall of quartzite and a seam of clay or shale, at the east end separated by a bare seam less than an inch in width, diverging to the west until about 800 feet apart at the surface at a certain point within a linear and horizontal distance of about —— feet in length, the inclosing body of quartzite dipping at 45 degrees north, and the shale at about 80 degrees north, which respective dips, if preserved, would bring the walls together at some depth: *Held*, adopting the miner's definition or understanding, *a lode*, of rock-bearing mineral, within the meaning of the mining acts of Congress of 1866 and 1872. Id. 312; See Map, p. 304.

The geological features of such deposit as to disintegration, vuggs, iron stain, whether fissures or sedimentary deposit, walls, distribution of minerals, water penetration, etc., considered. Id.

5. Definition. A quartz lode "is a fissure or seam in the country rock filled with quartzy matter bearing gold or silver." *Foote* v. *National M. Co.*, 2 Mont. 402.

6. Blind lode — Ejectment — Dip — Relation to surface. Where suit is brought for a blind lode bounded by walls not found till the depth of about 200 feet is reached, the lode or ledge only can be recovered and no part of the surface. *Bullion M. Co.* v. *Croesus M. Co.*, 2 Nev. 169.

Where a miner locates a portion of the surface and also a lode with its dips, angles and spurs, he may have his common law judgment for the surface, and judgment also for the lode following its course under other public lands. Id.

Where a ledge located as such comes to the surface, locator may recover the surface provided the outline of the ledge is visible on the surface. Id.

The common law doctrine that he who possesses the surface owns to the center of the earth is greatly modified as to the rights of miners and others on the public lands. One party may be entitled to occupy the surface, and another the mineral veins running under the same land. Id.

7. Proving up—Geological features. Where two lode locations had been worked towards each other upon a connected body of ore or vein matter for several hundred feet, and found to approach constantly until a space of only twenty-five feet is left between them, such fact affords a clear preponderance of evidence in favor of their identity. *Phillpots* v. *Blasdel*, 8 Nev. 61.

The presence of bodies of lime and spar in the excavated chambers among the ore does not affect the continuity or connection of the several chambers. Id.

8. Name—Location—Stake. Placing a notice of location headed with a certain name is in effect to christen the lode with that name. *Phillpots* v. *Blasdell*, 8 Nev. 61.

9. Location—Mistake in course of vein. A misdescription in the notice of a claimant of a quartz lode posted up near the premises in compliance with the mining laws of the district in which the lode was situate, calling for the vein in a southwesterly direction, when, in fact, the vein, as afterwards ascertained, ran nearly due south, the lode being underground and undeveloped, will not vitiate the claim. *Johnson* v. *Parks*, 10 Cal. 446.

The thing intended to be taken up was the vein, and its exact direction could not, of course, be ascertained or accurately described until the vein was followed up or explored. Id.

10. Same vein located as separate lode claims. Where two interfering claims have been made upon the same vein and are held by the same party, the deed of the one will convey the other to the extent of the ground covered by both locations without regard to their being located

and known by separate names. *Phillpots* v. *Blasdell*, 8 Nev. 61.

11. Second vein within side lines. The locator of a quartz-claim has a right to only one vein, although another vein exist between his stakes or within his surface bounds. *Atkins* v. *Hendree*, 1 Ida. 108.

A second quartz-claim located within the length of 200 feet and breadth of 50 feet allowed by law (of Idaho) to the first locator: *Held*, invalid, its *non-identity* with the original or first located vein not being proved. Id.

12. Estoppel—Asserting non-identity of ledges. When A. first located a ledge on certain croppings and B. afterwards located a ledge near by, and was encouraged to work by A., who stated that there were two ledges and that the claims would not interfere; and when, by development, two distinct ledges were disclosed, dipping at different angles and widely diverging as they went down, but mingling their croppings at the surface at the point where A. made his elder location: *Held*, that the declarations of A. were evidence against him either upon the principle of estoppel or as showing an abandonment of the ledge upon which B. was at work; and the location of A. was limited to one of said ledges.* *Van Valkenburg* v. *Huff*, 1 Nev. 142.

13. Pleading—Description—Identity. Where money was to be paid upon the sale of certain mining property, as expressed in the instrument: *Held*, that the plaintiff must show that the property had been sold before he could recover, and a general statement that property on the same lode had been sold will not be presumed to be the identical part of the lode intended in the instrument, without proof. *Cheney* v. *Barber*, 1 Colorado, 73 and 256.

14. Conveyance—Description—Same lode by different names. Where A., being the owner of a location known as the Ward Beecher lode, located in 1867, and of the location known as the Colfax lode, located in 1868, such locations when made and at the date of the deed in controversy, being supposed to be on separate ledges, but afterwards proving to be on the same vein, made a deed to B., describing premises as follows: "All that portion of the claim known as the Ward Beecher, commencing at the south side and east end of a long cut running easterly and westerly, generally known as the Ward Beecher cut. Also all my right, title and interest in the Montrose, Colfax, and Barris & Sproul lodes, lying south of a due east and west line drawn from the south side and east end of the above mentioned cut," etc.: *Held*, that although the description under the name of Ward Beecher was incurably defective (not stating on which side of the cut the portion intended lay), yet the grantee took the vein of the Ward Beecher claim under the description of Colfax lode, south of the line described in the deed. *Phillpots* v. *Blasdel*, 8 Nev. 61.

In this case the Ward Beecher was the older and better title, and the location of the Colfax void as to any person holding a proper conveyance of the Ward Beecher title; but the Colfax lode, having been conveyed by the person holding the Ward Beecher as well as the Colfax title, and both locations covering the same ground, it was held that the word Colfax could be used as a part of the description of the vein or subject matter of the grant, although the record of location under that name was not the original source of the title conveyed. Id.

15. Slide quartz. The locator of a quartz lode is not confined simply to the solid quartz in place, but is entitled to the loose quartz rock and decomposed material containing gold, which was once a part of the lode and is now detached, so far as the general connection with the ledge can be traced. *Brown* v. *'49 & '56 M. Co.*, 15 Cal. 153.

16. Dips, spurs, and angles. The use of the words "dips, spurs, and angles" in a notice of location clearly indicates that it is a lode which is claimed, and not a placer. *Weill* v. *Lucerne M. Co.*, 11 Nev. 200.

17. Spurs—Theory—Weight of evidence. When the plaintiff and defendant, claimants on different parts of the Arizona lode, had agreed upon a division line, the defendant receiving from the plaintiff a conveyance of all its interest north of the line, and the plaintiff taking a like deed for the interest of defendant south of the line, and the defendant, being charged with working a deposit on plaintiff's side of the line, attempted to show that the deposit was a separate ledge, or if the same, it was a spur which struck off from the Arizona ledge at a point north of the line, the plaintiff asserting that it was a single ledge, neither theory being demonstrated by complete developments, the court instructed the jury that when plaintiff attempts to recover a mining claim upon the strength of a stated theory, "the existence of such theory must be established by the plaintiff conclusively, and not merely by a preponder-

* The non-identity of ledges was not admitted in this case, and the court state that much of the evidence was unintelligible, for want of maps, etc.

ance of evidence," it was *Held*, that such charge was error. *The Silver M. Co.* v. *Fall*, 6 Nev. 117.

Held further, that the word "existence," although taken literally, reducing the words of the charge to nonsense, was intended for "correctness," and that the charge was as apt to mislead the jury in the form it was given, as if proper language had been used. Id.

18. Width of claim—Center of lode. The statute of Montana allowing to discoverers as the width of their claim "fifty feet on each side of said lead, lode, or ledge," means fifty feet on each side in addition to the width of the lode itself. It does not mean from the center of the lode. *Foote* v. *National M. Co.*, 2 Mont. 402.

19. Width of lode claim—Montana practice. Plaintiff claimed two lode mining claims described in the complaint as 1500 feet in length and 600 feet in width each. Their claims had been located since the mining Act of May 10, 1872, fixing length of a lode at 1500 feet, and allowing local law to fix the width. The law of Montana fixes the width at 50 feet on each side of the lode. The jury returned a verdict (under the code): "We the jury find for the plaintiffs, and allow and find for them only 50 feet on each side of said lodes. No damages allowed." The court entered judgment for so much of the lodes as were developed, with 50 feet on each side of such portion of said lodes: *Held*,* that the defect in the complaint was cured by the verdict, and that the judgment could not narrow the verdict. *Frohner* v. *Rodgers*, 2 Mont. 179. Dissenting opinion of Wade, C. J., p. 183.

20. Proof on trial of adverse claim. Proof of a clearly defined surface claim, surveyed and marked by a United States surveyor in accordance with law, including a quartz lode running with the claim, and work on the vein inside of the surface claim and within the lines of the disputed ground, is proof of possession sufficient to put the defendant on proof of its right. *Golden Fleece Co.* v. *Cable Con. Co.*, 12 Nev. 312.

21. Failure to cover the lode by the location or survey—Adverse claim. The American lode and the Bull of the Woods lode were both located under the Mining Act of 1872 (U. S. Rev. Stats., secs. 2320 and 2322), fixing the length of claims at fifteen hundred feet. The width of each, under Colorado statute, was one hundred and fifty feet. Patent on the former lode was applied for, and an adverse claim filed on behalf of the Bull of the Woods. The survey or location lines of the latter crossed the survey of the American (or *vice versa*), but evidence was offered by the adverse claimant to show that the vein upon which the American location was based did not in fact cross, or enter within, the surface or survey lines of the Bull of the Woods location; but that the vein of the American departed from its survey before reaching the line of the Bull of the Woods survey. The court below refused to admit the evidence offered: *Held*, that such exclusion was error; that if a lode which had been located was found to terminate at any point within the location, or departed at any point from the side lines, the location beyond such point and to that extent is defeasible if not void. *Patterson* v. *Hitchcock*, 4 Colorado, — (1878).

That the object of the Act of Congress was to give to the discoverer his lode with surface ground adjacent to and within a certain distance on either side of that lode, and to avoid questions of vein identity, to give him in addition all other veins within his surface location; but that if the vein originally discovered was not followed by a survey which included such vein, the surface ground allowed to the discovery vein and the side veins additionally granted, could not be construed to include the surface and the side veins within a lot of ground which did not contain the original vein first discovered, and upon which the privilege to locate and claim the side veins and surface was based. Id.

22. Location lines presumed to include vein. A location of a lode mining claim will be presumed to include the vein upon which the discovery was made until the contrary appears. *Patterson* v. *Hitchcock*, 4 Colorado, — (1878).

But when the vein has been proved to leave the lines of the location in fact, the location beyond such point of departure is defeasible if not void. Id.

See LOCATION; VEIN.

LUNATIC.

1. Mining for his benefit. Coal may be mined from the lands of a lunatic, by his committee, upon the report of the master that it is for the benefit of the lunatic. *Ex parte Tabbart*, 6 Ves. Jr. 428.

2. Lunatic tenant in common—Sale. A., B. & C. were tenants in common of mineral land. C. became of unsound mind. A. and B. sold or let the minerals under certain parts of the land for a certain term, covenanting that C. should concur, and that they would hold her share of the

* The opinion of the court treats the case as one of a too general complaint, cured by verdict. The dissenting opinion supposes the defect to be in the verdict itself as well as in the complaint.

money in trust for her. B. then became of unsound mind, and A. sold other parcels of the mines, covenanting in like manner for B. & C. Both B. & C. were found lunatic by inquisition. But the court confirmed the contracts, under the facts of the case, as for the benefit of the lunatics, and ordered the committee to execute deeds accordingly. *In re Smith*, L. R. 10 Ch. App. 79.

8. Lunatic partner — Sale. A firm was established to work a mine. Each partner, after notice, was to be at liberty to sell his share, which the continuing partners were at liberty to purchase. The first partner gave notice to sell his share. The second partner afterwards became a confirmed lunatic; and the third partner then purchased the share of the first, and filed his bill for a dissolution of the partnership. The committee of the lunatic then filed a cross-bill, and insisted upon the clause of pre-emption, and a right to participate in the purchase: *Held*, that the partners ought not to be compelled to carry on business with a lunatic or his committees; that the partnership must be dissolved; that notice of sale by one partner to the other before his lunacy was sufficient to bind his committees, and determine any right of pre-emption; but that the real value of the undertaking could only be ascertained by a sale of the whole as a going concern. *Rowlands* v. *Evans*, 31 L. J., Ch. 265.

MANDAMUS.

1. Stockholder. A relator showing himself the apparent owner of stock in a mining corporation, who is admitted to have paid his assessments and to hold the stock in his own name upon the books of the company, has a right to demand relief in the form of a writ of mandamus. *State* v. *Wright*, 10 Nev. 167.

A demand for the holding of an annual election is well made upon each member of the Board of Trustees; it need not be made upon them in session. Id.

An adverse claimant of stock held by a relator in a mandamus proceeding cannot intervene and compel an issue to try his right to the stock. Id.

Mandamus lies to compel the calling of a stockholders' meeting for the election of trustees; and this though there might be a personal action which would lie in favor of the complaining stockholders. Id.

2. Legal remedy. To supersede the remedy by *mandamus*, a party must not only have a specific, adequate, legal remedy, but one competent, to afford relief upon the very subject-matter of his application. *Fremont* v. *Crippen*, 10 Cal. 211.

Neither a remedy by criminal prosecution nor by action on the case for neglect of duty, will supersede that by *mandamus*, since it cannot compel a specific act to be done, and is therefore not equally convenient, beneficial and effectual. Id.

3. To compel issue of stock. Where relator claimed that he was the owner of, and entitled to, certain certificates of mining stock which the trustees of a corporation refused to issue to him, *Held*, that mandamus was not the proper remedy, as he might have adequate relief by action against the corporation for the value of the stock claimed. *State* v. *Guerrero*, 12 Nev. 105.

Mandamus should not be granted to compel trustees of a corporation to issue certificates of stock to relator where it appears from the petition that the stock is claimed adversely to him by other persons not parties to the proceedings before the court. Id.

MANSLAUGHTER.

1. Want of ventilation. Where an engineer who had charge of an engine which was worked for the purpose of keeping up a supply of pure air in a mine, neglected his duty so that the engine stopped and the mine thereby became charged with foul air which afterwards exploded and caused the death of one of the miners: *Held*, that in such a case the engineer could not be convicted of manslaughter, especially upon an indictment which did not allege a duty in him which he had neglected to perform. *Reg* v. *Barrett*, 2 Carr. & K. 343.

If it be the duty of a person, as ground bailiff of a mine, to cause the mine to be properly ventilated by causing air-headings to be put up where necessary, and by reason of his omission in this respect another be killed by an explosion of fire-damp, such person is guilty of manslaughter, if, by such his omission, he was guilty of a want of ordinary and reasonable precaution, and if it was his plain and ordinary duty to have caused an air-heading to have been made, and a man using reasonable diligence would have done it. It is no defense in a case of manslaughter that the death of the deceased was caused by the negligence of others as well as by that of the prisoner; for if the death of a deceased be caused partly by the negligence of the prisoner, and partly by the negligence of others, the prisoner and all those others are guilty of manslaughter. *Reg* v. *Haines*, 2 Carr. & K. 368.

2. Negligence. The prisoner was convicted of manslaughter. It appeared that the deceased was with others employed in walling the inside of a shaft in a colliery. It was the duty of the prisoner to

place a stage on the mouth of the shaft, and the death of the deceased was the direct consequence of the negligent omission on the part of the prisoner to perform such duty: *Held*, that the conviction was right. That which constitutes murder, being by design and malice prepense, constitutes manslaughter when arising from culpable negligence. *Reg* v. *Hughes*, Dears. & B. 248.

An act of omission, as well as of commission, may be so criminal as to be the subject of an indictment for manslaughter. Where a man appointed to superintend a steam-engine employed in a colliery for the purpose of raising colliers from the pits, left the engine in the charge of an incompetent person, and in consequence of that incompetence, death ensued: *Held*, that the man so leaving the engine might be found guilty of manslaughter. *Reg* v. *Lowe*, 4 Cox, Cr. C. 449.

MAPS.

1. As evidence. The necessity of maps to explain the evidence in a mining case (identity of lodes disputed) stated by the court. *Van Valkenburg* v. *Huff*, 1 Nev. 146.

MASTER AND SERVANT.

1. Negligence — Accident. When by the negligence of the master an injury is caused to a workman in the course of his employment (by tram-plate falling down the shaft) the master is liable although he was employed as a workman at the time, and was working with the servant. *Ashworth* v. *Stanwix*, 34 L. J. Q. B. 183.

2. Negligence—Fellow-employer. An employer is not bound to indemnify an employee for damages he sustains in consequence of the negligence of a fellow-employee employed by the same employer in the same general business. *McLean* v. *Blue Point G. M. Co.*, 51 Cal. 255.

The above rule is not changed by the fact that the employee (foreman of a placer mine) through whose negligence the injury came was the superior of the employee who was injured, in the service in which they were engaged. Id.

3. Fellow-workman. The man who lets the miners down into the mine is a fellow laborer with the miners within the rule as to injuries from fellow-laborer's negligence. *Bartonshill C. Co.* v. *Reid*, 3 Macq. 266; *S. P. Bartonshill C. Co.* v. *McGuire*, 3 Id. 300 (Scotch cases).

4. Overseer—Bookkeeper. An overseer and bookkeeper of a mining and manufacturing company is a "servant" within the meaning of the statute of 1848, authorizing the formation of such companies. *Hovey* v. *Ten Broeck*, 3 Rob. (N. Y.) 316.

MEASURE OF DAMAGES.

1. Peculiar situation of plaintiff and defendant in proving damages in mining trespass. In an action for damages, for taking gold from a mining claim, the plaintiffs labor under great difficulty in proving the exact amount of damages they have sustained, and the defendants have the means in their power of showing the correct amount of gold taken out; and if they neglect to do so, they can not complain that the jury by their verdict have fixed a large estimate upon the damages. *Antoine Co.* v. *Ridge Co.*, 23 Cal. 219.

2. Diamonds--Defendant withholding proof. A chimney-sweeper's boy found a jewel and took it to a goldsmith to know what it was. The goldsmith offered him three half-pence for it, which the boy refused to take, and asked back the jewel. The goldsmith took out the stones and reached the socket to the boy. Upon trial in trover: "As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him and make the value of the best jewels the measure of their damages, which they accordingly did." *Armory* v. *Delamirie*, 1 Strange, 505.

3. Authorities reviewed. The English and American authorities on the measure of damages in cases of trespass for mining coal reviewed (1873). *Barton Coal Co.* v. *Cox*, 39 Md. 1.

4. Removal of the soil. In trespass for cutting into the plaintiff's close and carrying away the soil, the proper measure of damages is the value to the plaintiff of the land removed; not the expense of restoring it to its original condition. *Jones* v. *Gooday*, 8 M. & W. 146.

5. Crossing boundary. Trespassers who had followed a vein beyond the line of their own ground, held to "account for the mineral which they have wrongfully and unjustly taken," but the measure of damages not stated. *Ganter* v. *Atkinson*, 35 Wisc. 48.

6. Passing boundaries — Consequential damages. When a mine-owner had passed his boundary and taken coals from his neighbor's mine, upon bill filed, it was: *Held*, that he was liable to account for the value of the coals at the pit's mouth, with

all just allowance for the cost and expenses incurred in bringing them to the pit's mouth, but not including the cost of getting or severing the coal; *Also* (under Lord Cairn's Act), for the consequential damages caused by breaking the barriers. *Llynvi Co.* v. *Brogden*, L. R., 11 Eq. 188.

7. Consequential damages. Where a drift had been cut through plaintiff's coal by the operators of adjoining mines on each side and the barriers cut down: *Held*, that a court of chancery could not compel compensation for ultimate injury to the mine by the presence of such drift in forcing plaintiffs to leave certain masses of coal unworked, or other consequential injury, but could decree compensation for the coal removed. *Powell* v. *Aiken*, 4 Kay & J. 343.

8. Crossing boundary, without fraud. Where coal has been wrongfully taken by working into the mine of an adjoining owner, the trespasser, in the absence of any suggestion of fraud, will be treated as the purchaser at the pit's mouth, less the actual disbursements (not including any profit or trade allowances), for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal. *In re United M. C. Co.*, L. R., 15 Eq. 46.

9. Mining and carriage across boundary—Way-leave. The owners of a colliery worked across their line and extracted coal from adjoining lands, and carried coal to some extent from mines of their own through the workings under the land trespassed on. Upon bill for an account: *Held*, that the owner was entitled to the value of the coals gotten under his land, with an allowance for raising but none for getting, and to compensation in the way of way-leave and royalty for all minerals gotten by the defendants from their own land and carried under plaintiff's land. *Phillips* v. *Homfray*, L. R., 6 Ch. 770.

10. Trespass — Crossing boundary. Where the defendant, in working his coal mine, went over the boundary and worked the coal under the land adjoining, belonging to the plaintiff, and raised it for purposes of sale: *Held*, in trespass, that the measure of damages was the value of the coal when gotten, without deducting the expense of getting it. And the jury were directed to find the value at the time defendant began to take it away, that is, as soon as it existed as a chattel, being its value at the pit's mouth, deducting expense of carriage from the breast, the place where broken. *Martin* v. *Porter*, 5 M. & W. 351; S. C., 2 Horn & H. 70; *Morgan* v. *Powell*, 3 Q. B. 278; S. C., 2 G. & D. 721.

11. Ignorance of boundary. When two mining claims adjoin each other, and the owners of one claim work across the dividing line and take away gold-bearing earth from the other claim, the fact that they did so in ignorance of the location of the dividing line, is no excuse or justification, and it is error to admit evidence of such ignorance as an excuse for the trespass, or in mitigation of damages. *Maye* v. *Yappen*, 23 Cal. 306.

12. Trespass, resulting in further ulterior damage. Defendants, taking coal of an adjoining mine, and so taking it as seriously to injure the future operations of plaintiff's mine, resulting in consequential damages, for which compensation cannot be decreed in chancery: Query, whether a court of chancery will allow to defendants any charges on account of the cost of working. *Powell* v. *Aiken*, 4 Kay & J. 343.

13. Trespass — Unlawful entry. In trespass upon a mining claim, the court charged the jury to find for the defendants if they believed no damage was done to them by the plaintiffs: *Held*, palpable error, in violation of the rule presuming damage for unlawful entry, and that the jury might have found for defendants upon such instruction, although the trespass and unlawful entry and title of the plaintiff were proved. *Attwood* v. *Fricot*, 17 Cal. 37.

14. Trespass—Taking lead ore from U. S. lands. In trespass for digging and taking away a large quantity of lead ore from lands of the United States (Illinois, 1843): "The plaintiffs contended that they were entitled to the value of the ore after it was dug; but the court instructed the jury that that was not the measure of damages, but the injury done to the soil by the trespass. That the digging and carrying away by the same person is presumed to be a continuous act, and the lead ore removed must be considered in aggravation of the trespass upon the soil." "Neither is the rate at which leases are made for these mineral lands a proper criterion of damages. A trespasser is not to be put upon the footing of a lessee." *United States* v. *Magoon*, 3 McLean, 171.

15. Trespass—Mesne profits. In trespass for mesne profits after recovery in ejectment, plaintiff offered to prove the amount of coal dug and sold by defendant during his possession: *Held*, "that more than the bare rent or annual value of the premises may be recovered in this action is well settled," "and it would seem to follow from this as well as from principles of justice, that a defendant would be answerable for all actual damage and injury to the premises as well as all actual profits." *Huston* v. *Wickersham*, 2 Watts & S. 314.

16. Trespasser digging ditch. In an action arising out of the digging of a ditch on plaintiff's land, the court decreed that the same be abated, and awarded as damages a sum sufficient to pay the cost of filling up the ditch and restoring the land to its original condition: *Held*, 1. That such was not the proper measure of damages (as the cost of filling up might be greater than the real injury to the land), in the absence of proof that the plaintiff would be subject to such particular outlay: *Held, further*, upon the facts of the case, that it was not an instance where prospective damages should be allowed. *De Costa* v. *Mass. F. W. Co.*, 17 Cal. 613.

17. Trespass — Way-leave. When defendant crossed the boundary of the coal belonging to him, and besides taking the coal used the working beyond his boundary as a passage-way for his own coal, damages were allowed as for a way-leave, in addition to the value of the plaintiff's coal asported. *Martin* v. *Porter*, 5 M. & W. 351; S. C., 2 Horn & H. 70; *Morgan* v. *Powell*, 3 Q. B. 278; S. C., 2 G. & D. 721.

18. Trespass—Plaintiff out of possession. A person disseised of a mine cannot maintain trespass except for the entry and ouster, in which case damages would be restricted to the entry and ouster; but damages for a continuance of a trespass can be recovered only after the party disseised has regained possession. *Bracken* v. *Preston*, 1 Pinney, 585; *Hugunin* v. *McCunif*, 2 Colorado, 367.

19. Trespass—Increased value. Plaintiff in trespass for mining coals cannot recover any increased value given to the property by the act of defendant in removing it from the place where broken to the pit's mouth or elsewhere. *Morgan* v. *Powell*, 2 Q. B. 278; S. C., 2 G. & D. 721.

20. Coal taken by trespass, with means of knowledge. In an action of trespass for breaking and entering the plaintiff's close, and mining and carrying away their coal (the defendants knowing, or having the means of knowing their boundaries) the proper estimate of damages is the value of the coal per ton, after it is severed from its native bed, and before it is put upon the mine-cars, without deducting the expense of severing it; and if the defendant knew, at the time the trespass was committed, that the land was not its own, the plaintiffs are entitled to exemplary damages. *Barton C. Co.* v. *Cox*, 39 Md. 1. (Robinson, J., dissenting.)

21. Rental value—Trespass. The rental value of the land is not a proper measure of damages in the case of trespass in taking ore. *U. S.* v. *Magoon*, 3 McLean, 171.

22. Rental value. Proof of custom of paying a certain proportion of gold extracted by the operator to the proprietor allowed to show the rental value of a gold mine in an action where the rental value was decreed to be the proper measure of account. *Allen* v. *Barkley*, 1 Speer, S. Car. Eq. 264.

23. Coal—Wrong-doer. In trespass for taking coals from the plaintiff's mine, where the defendant is a mere wrong-doer, the measure of damages is the value of the coals at the time when they first existed as chattels, and the defendant is not entitled to any deduction for the expense of getting them, or for a rent payable to the mine-owner on coals got from the mine. *Wild* v. *Holt*, 9 M. & W. 672; S. C., 1 Dowling, N. S. 876.

24. Claim of right—Colliery. Plaintiffs purchased a colliery at a sheriff's sale. Defendants claimed under a purchase from the owners, the defendants in execution, alleging that the judicial sale was void. There was no evidence of fraud or vexation: *Held*, that it was no case where damages beyond compensation could be allowed. *Carey* v. *Bright*, 58 Pa. St. 70.

25. Coal taken in good faith. In trover for coal mined under *bona fide* claim of title, the jury at *nisi prius* were instructed that if there were fraud, or want of caution as to his rights in the premises, the jury should find the value of the coal upon its conversion into a chattel; if no fraud or negligence, they should find at the rate at which coal in bank sold by the acre. *Wood* v. *Morewood*, 3 Q. B. 440, note; cited in *Morgan* v. *Powell*, Id. 282.

26. Coal taken under claim of title. A defendant, the owner of certain coal lands, desiring to work coal in adjoining lands, purchased the coal under such adjoining lands from a person who afterwards proved to have no right to such coal. Upon bill to establish title, and for an account by the real owner: *Held*, that the defendant having gotten the coal under such lands in good faith, without fraud or negligence, the measure of damages was only the fair value of such coal as if he had purchased the coal-field from the plaintiff. *Hilton* v. *Woods*, L. R., 4 Eq. 432.

27. Motive — Evidence. The letters passing between a company and its agent are not evidence upon the question of damages for breach of contract to deliver coal, the motive for the breach not being at issue. *Grand Tower Co.* v. *Phillips*, 23 Wall. 471.

28. Flooding a mine—Trespass not malicious. In trespass for breaking a dam, by which the workmen were driven

from the mines by the water, evidence of the amount each miner would produce and of the expense of keeping mules whilst the mines could not be worked, is admissible on the question of damages. *Douty* v. *Bird*, 60 Pa. St. 48.

Where there is evidence that the trespass is malicious, "a court should not be too stringent in holding the rules excluding the evidence as to damages, but should rather wait and instruct the jury as to the true rule to be given upon the whole evidence." Id.

29. Cutting timber—Knowledge. In an action of trespass for cutting timber on vacant land against a mining corporation where it is proved that the defendant's agent in good faith believed it was the company's land, the verdict ought not to be for a sum greater than will "cover the injury shown by the proof to have been inflicted." *Yahoola River M. Co.* v. *Irby*, 40 Ga. 479.

30. Benefits. The general benefit of a canal is no compensation for the loss of minerals, the working of which it may interfere with. *Dudley Can. Co.* v. *Grazebrook*, 1 B. & Ad. 59.

31. Free gold—Placer claim. Where a trespass is committed by entering upon and taking away the gold-bearing earth from a mining claim, and the same is not done willfully, or with a malicious intent, and the action is brought for an injury to the land itself, the true measure of damages is the value of the gold-bearing earth at the time it is separated from the surrounding soil, and becomes a chattel. *Maye* v. *Yappen*, 23 Cal. 306; *Goller* v. *Fett*, 30 Id. 481.

In estimating the damages, the expense of separating the earth from the gold after it is moved to the place of washing, is to be deducted from the value of the gold. Id.

If, however, a demand is made for the possession of the gold after it is separated from the earth, and an action is then brought for the conversion of the chattel, the measure of the damages would be the value of the gold detained. Id.

32. Warranty of ditch—Gold-dust. In an action to recover damages for the breach of warranty in a deed, the consideration of which is "two thousand dollars in clean gulch gold-dust," only $2,000 in currency can be collected as damages for the value of the consideration. *Taylor* v. *Holter*, 1 Mont. 688.

33. Tenant holding over. When a tenant of a colliery, under a lease purporting to cover a longer term than lessor could give, holds over in good faith, the measure of damages in equity must be the coal taken, less the expense. *Jegon* v. *Vivian*, L. R., 6 Ch. App. 742.

34. Action by reversioner. A lessor may recover compensation for ore wrongfully taken from his mine by a trespasser, on account of the injury to the reversion. And if the sum found be less than the royalty reserved against his lessee, it cannot be considered to exceed the injury to the reversion. *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80.

35. Evicted lessee—Rent. Defendants in an action for mesne profits had leased premises for a term of fifteen years at an annual rental of $2000 besides the payment of royalty on each ton of iron ore mined, and received the rent for one year, but the premises were in no way injured and no ore was taken therefrom. Defendants, having been evicted by plaintiffs, became unable to fulfill their covenants in the lease, and the lessees thereby acquired a right of action against them for damages: *Held*, that the $2,000 received by defendants did not establish a correct basis for fixing the just rental value of the premises, and it was error in the court below to instruct the jury that these circumstances did not affect the plaintiffs' right to the rental received by defendants. *Kille* v. *Ege*, 82 Pa. St. 102.

36. Royalty in coal lease—Coal not dug. Plaintiffs leased to the defendant the right to dig and mine coal, the defendant agreeing to pay "three-eighths of a cent for every bushel he may dig." They were permitted to recover not only the royalty for the amount dug, but for what the defendant reasonably could and should have mined upon the land leased; but for the quantity not mined the measure of damages was the "difference between the stipulated rate of compensation and the value of the coal in the mine."* *Lyon* v. *Miller*, 24 Pa. St. 392.

37. Slate quarry—Holding over—Rubbish—Slate exposed to frost. The lessee of a certain part of a slate quarry worked other ground and paid at the same rate for the slate from such other ground, and his payments were accepted with knowledge. Afterwards he agreed to give up possession on July 1, 1864. Instead of giving up possession he continued to quarry outside of the demised premises. Upon the measure of compensation for slate so taken since said date outside of the leased premises: *Held*, that he should pay the value of the slate at the usual place of delivery less the cost of manufacture and carriage ($13,610); 2. That the rental value ($3,121), as if he had leased the premises, taking the chances of finding good quarrying, upon which the master had based his report, was not appli-

* In this case there does not seem to have been any covenant as to diligent work or to like effect.

cable to the facts as a measure of damages; 3. That slate which he left in place exposed to frost which destroyed it ($200 worth), could not be added as an item of compensation; 4. Nor the cost of removing rubbish ($300). *Sheldon* v. *Davey*, 42 Vt. 637.

38. Pillars—Removal of coal made impossible—Bad mining. In an action of trespass for breaking and entering the plaintiffs' coal lands, if it is made to appear that the defendant mined coal from said lands, and made excavations thereunder, and removed the coal so excavated, and thereby injured the coal left remaining as pillars, or by bad mining or otherwise rendered it difficult or impossible for the plaintiffs to get out or remove such pillars of remaining coal, or rendered it of less value to them, then they are entitled to recover for such coal as cannot be removed what it was worth per ton in its native bed, and such damages for so much of said coal as can be removed, but with increased expense, as the evidence may show such coal to be diminished in value. *Barton C. Co.* v. *Cox*, 39 Md. 1.

And if the defendant, in mining and excavating under the said lands, thereby rendered it more difficult and expensive for the plaintiffs to obtain access to the coal thereunder, and depreciated the value of said remaining coal, the plaintiffs are entitled to such damages as they may have sustained from the depreciation of the land, and the increased difficulty and expense of obtaining access to the coal remaining therein. Id.

39. Contract to explore for coal—Evidence. The defendants covenanted with the plaintiff that if he would surrender to his lessor a certain lease they would within two years, or within such period as should be agreed in a new lease, which the lessor had agreed to grant to them, sink upon the demised premises a pit to the depth of 130 yards in search of coal, and in case a marketable vein of coal should be reached, pay to the plaintiff £2,500. The plaintiff having sued the defendants for a breach of this covenant, gave evidence to show that if the defendants had sunk the pit marketable coal might have been found: *Held*, that the plaintiff was entitled to more than nominal damages, and that the true measure of damage was the amount he had lost by being deprived of the opportunity of finding marketable coal. *Pell* v. *Shearman*, 10 Ex. 766.

40. Covenant to mine—Value of coal remaining. The fact that the coal which the lessee failed to exsect according to his covenant was of greater value to the lessor at the end of the term than if it had been mined by the lessee, is no ground for reducing the damages for breach to a nominal amount. *Powell* v. *Burroughs*, 54 Pa. St. 329.

The rent per ton agreed for was stipulated damages to the extent of the nonperformance, and not a penalty; where the lessee had contracted to take out a certain number of tons, and to pay the same rent or royalty for each ton, whether he took it or not. Id.

41. Contract to deliver coal at dump. Where a company contracted to deliver coal at its dump, and there was no market except for coal mined by such company at the place of delivery, upon failure to deliver, it was: *Held*, that the measure of damages was the difference between the contract price and the price which plaintiff would have had to pay for the like quantities of coal at the nearest available market (after allowing for difference in transportation, if any) was the true measure of damages. *Grand Tower Co.* v. *Phillips*, 23 Wall. 472.

42. Coal contract—Liquidated damages. On breach of contract for delivery of coal, plaintiff is not restricted to his "liquidated damages" where he has the option of demanding delivery on the next installment. *Grand Tower Co.* v. *Phillips*, 23 Wall. 471.

43. Contract to deliver iron. Iron being delivered under a contract, the vendor was notified that it was inferior, and requested to take it away, which he refused to do. The vendee had the right to dispose of it or use it, and the vendor was entitled only to its actual market value. The measure of damages held to be the difference between such market value and the price of good iron at the same place. *Youghiogheny Iron Co.* v. *Smith*, 66 Pa. St. 340.

44. Smelting contract. When the defendants (miners) contracted to deliver to the plaintiffs (smelters) 500 tons of copper ore from defendants' mines at a certain rate per ton, but it did not appear that defendants were aware of the particular use intended to be made of the ore, or that it was a kind of ore needed for mixing with other ores, or of any other facts which made special loss and damage to the plaintiffs inevitable, upon the question of the measure of damages, the court: *Held*, that defendants were liable only for the difference between the contract price and the market value at the time and place of delivery; 2. That injuries to plaintiffs' furnace, caused by smelting the ore delivered by itself, at a date later than the contract called for, and at a time when plaintiffs could not get the proper ore to mix with it, and the additional cost of

labor and other losses incident to the matter of smelting, could not be claimed in the absence of the knowledge above stated. *Humphreysville Copper Co.* v. *Vermont Copper M. Co.*, 33 Vt. 92.

45. Nuisance—Smelting works. The plaintiff's farm had been injuriously affected by smelting works of the defendant, which resulted in certain actions at law and a suit in equity. An order had been made in the latter, by consent, declaring, *inter alia*, that the valuations of the farms ought to be calculated upon the basis of the existing state of the farms after the damage, but: *Held*, by the lord justices, that such declaration ought to be omitted from the consent order. *Houghton* v. *Bankart*, 7 Jurist, N. S. 57; see *Bankart* v. *Houghton*, 27 Beav. 425.

46. Ventilation and drainage—Benefit to defendant—No loss to plaintiff. In case of a coal and iron company working over the line and taking coal under an adjoining farm, making the usual drifts and excavations, and using them to carry its own coal as well as the coal taken; also air shafts from one seam to another, and so benefiting itself both by ventilation and the natural drainage of plaintiff's (the lower) mine, while the court gave the full value of the coal at the breast, with way-leave for coal of defendants carried through the excavations under plaintiff's land, the court refused to allow a reference or to order compensation for such benefits of drainage and ventilation accruing to the trespassing mine. *Phillips* v. *Homfray*, L. R., 6 Ch. 770.

47. Profits of exhausted mine—Interest—Trust. A testator entitled to realty and personalty, including a leasehold colliery, gave his general residuary estate to trustees, in trust to sell at a convenient time, with the approbation of his son, and out of the income to pay the testator's daughter for her life, such an annuity as should be £200 a year, over half the income of the residuary estate, but not to exceed £600 a year; and so that any annual overplus after paying £600 a year to the daughter and £400 a year to the son, should go to the son, whom the testator constituted his residuary legatee, and appointed co-executor with the trustees. The trustees disclaimed. The son acted in the trusts, and did not sell the colliery, but carried it on till the mines were exhausted, paying out of his own moneys so much of the testator's debts, as the testator's personal property, other than the colliery, was insufficient to satisfy, and paying the daughter £600 per annum out of the profits of the colliery so long as they lasted: *Held*, 1. That although the sale of the property was to take place with the son's approbation, he was not, after assuming to act as sole trustee, entitled to postpone the sale to his sister's prejudice; 2. That the son was chargeable with the value of the colliery at the end of a year from the testator's death, and with interest at four (4) per cent., and that the value ought, under the circumstances, to be calculated at the aggregate amount of the actual annual profits treated as deferred payments. *Wightwick* v. *Lord*, 6 H. L. Ca. 217, affirming *Lord* v. *Wightwick*, 4 DeG. M. & G. 803, and see S. C., 1 Drew, 576.

48. Gross negligence—Trespass. Where a mining company had worked across its line and into the parts of the ore-bed adjoining, by workings from its shaft, not willfully (as found by the referee), but by gross negligence: *Held*, that the measure of compensation should be the value of the ore as it lay in the bed, and not as it was after the defendants had increased its value by removing it; also, the "damage done to the real estate." *Stockbridge Iron Company* v. *Cone Iron Works*, 102 Mass. 80.

49. Negligence—Blasting. In an action for damages for injury received by plaintiff from defendant's negligence in discharging a blast, simple negligence only being proved, actual damages and not smart money should be allowed. *Moody* v. *McDonald*, 4 Cal. 297.

50. Fraudulent sale of mine. In an action for deceit and fraud in the sale of property, where the purchaser retains it, and where numerous misrepresentations in relation to the property, or in relation to several distinct particulars or qualities of the property, are found to have been made by the vendor, some of which may be material and others immaterial, some fraudulent and others honestly made, though all are false in fact, the rule of damages is the difference between the actual value of such property, and its value as it would have been if it had been such as it was represented to be in those particulars concerning which the false and fraudulent representations were made, and on which the verdict was founded. *Page* v. *Parker*, 43 N. H. 63; S. C., 40 Id. 473.

In such case, the price paid is strong and (*arguendo*) conclusive evidence of the value of the property as it was represented to be, whether such representations were fraudulently or honestly made, provided they were material, as such price is the value placed upon it by the purchaser. Id.

51. Delay by vendor to give possession. Gilmore agreed to convey coal land, etc., to Hunt, part of the consideration to be paid in notes. In a suit on the notes, Hunt gave evidence, by way of set-off, that Gilmore refused to give him possession, etc., and he had to obtain it by ejectment. The court

charged: "If the jury find from the evidence that Gilmore violated his part of the agreement, by refusing to allow Hunt possession, they may assess such damages as the evidence would warrant:" *Held*, error; that such instruction was a misdirection, and not a mere omission; that the true measure of damages, to wit, the mesne profits, the amount of rent or profit that Hunt would have derived from the property while kept out of possession, should have been given to the jury. *Gilmore* v. *Hunt*, 66 Pa. St. 321.

52. Failure to sink oil well. The plaintiff leased to the defendant certain premises, naming no term and reserving no rent. In the same instrument, the defendant covenanted to sink an oil well on the premises, of a certain depth and by a fixed day: *Held*, that when defendant failed to thus sink the well, the plaintiff could recover only nominal damages, and not the cost of sinking such well on the land. *Chamberlain* v. *Parker*, 45 N. Y. 569.

53. Value of waste water. Plaintiff, a mining company, made an arrangement permitting defendant to make use of the waste water from its shaft. It is no defense to an action for payment therefor, to say that the water was going to waste and was applied to no use by the mining company. The true question is, what was the value of the water to the railroad company? That is the true measure of damages in the absence of a special contract. *Chicago & R. I. R. R. Co.* v. *Northern Ill. C. & I. Co.*, 36 Ill. 63.

54. Failure to deliver engine for transportation—Horse and locomotive power. Foster & Co. contracted to furnish defendant, on the first of February, an engine to draw coal cars on a track of unusual width; the engine was not delivered till May. Foster & Co. having sued for the price, defendant showed in proof that an engine for such track could not be hired, and that he had to transport his coal by horses: *Held*, that evidence of the difference of cost of transportation between horse power and by the engine during the period of delay was admissible on the question of damages. *Pittsburgh Coal Company* v. *Foster & Co.*, 59 Pa. St. 365.

But evidence that the defendants could have moved and hauled more coal with the engine than with horses, to show the profits from the increase, was inadmissible, being too remote. Id.

55. Conversion of stock. The measure of damages in trover for conversion of mining stock is not the highest market price between conversion and trial, but the market price at date of conversion with interest from that date and any special damage which may legitimately appear in the particular case. *Boylan* v. *Huguet*, 8 Nev. 345.

In trover for conversion of mining stock the measure of damages is the value of the stock. *Bond* v. *Mount Hope Iron Co.*, 99 Mass. 505.

The market value at date of conversion is the measure of damages in trover; but in the statutory action of claim and delivery of personal property, in case return be not made, the value at time of trial with the addition of the dividends since conversion is the only complete remedy. *Bercich* v. *Marye*, 9 Nev. 312.

56. Value of ditch. The ordinary and proper mode of proving the value of a water-ditch is by showing its capacity, the market value of water in the vicinity, and the probable duration of the demand. *Clark* v. *Willett*, 35 Cal. 534.

In such case evidence of the value or profits of certain mining claims belonging to the owners of the ditch and supplied therefrom with water to mine the same, is inadmissible in evidence to establish the value of the ditch, unless accompanied by farther evidence showing that the claims could not be worked without the aid of the ditch. Id.

57. Shares lent. The true measure of damages in an action for not re-delivering shares lent to the defendant upon a contract to return them on a given day, is not the market price at the time of the breach, but the market price at the time of the trial. *Owen* v. *Routh*, 14 C. B. 327; 2 Com. Law R. 365.

58. Contract to rescind stock sale. J. sold stock in a silver mining company to T., and agreed that when T. should desire it he would take it back and repay the price: *Held*, that upon tender of the stock and refusal to refund the price, the measure of damage was the price, with interest from date of tender. *Laubach* v. *Laubach*, 73 Pa. St. 387.

59. Stock sale—Error cured by verdict. In a suit for conversion of mining stock: *Held*, that though it was error to charge the jury that plaintiff was entitled to recover the highest market value of the stock between the time of the demand and the commencement of the action; yet, if it appeared that the jury, notwithstanding the charge, gave the lowest instead of the highest price, the error in the charge was immaterial. *Menzies* v. *Kennedy*, 9 Nev. 152.

60. Non-delivery of shares. The measure of damages, in cases where there is a conversion of or failure to deliver a

certain number of shares of stock having no peculiar value is their market value, either at the time of the conversion, when it should have been delivered, or at the time of trial, according to circumstances. *Bowker* v. *Goodwin*, 7 Nev. 135.

But the value of stock in a certain ditch company in connection with the ownership of a particular claim (a ranch) supplied by the ditch, in an action for non-delivery of the stock of that company, cannot be considered. Id.

61. Sale of mining shares. Upon a breach of contract for the sale of shares, the proper measure of damages is, the difference between the contract price and the market price at the time of the breach. *Powell* v. *Jessopp*, 18 C. B. 335.

62. Injunction bond. In suit upon an injunction bond in aid of a writ restraining defendants, who were three miners, and were prevented from working their placer claim for 60 days, the value of their labor, proved to be $18 per day for the three men, allowed as proper damages. *Campbell* v. *Metcalf*, 1 Mont. 378.

Damages upon the dissolution of an injunction are to be estimated with reference to the business of the party enjoined at the time of the service of the writ, and not upon conjecture founded on subsequent developments not then anticipated. *Gear* v. *Shaw*, 1 Pinney, 609.

In an action upon a bond, the condition of which is to indemnify the plaintiffs "for all damages they might sustain by reason of the wrongful suing out of an injunction" by the defendants to stop the plaintiffs from working a certain gold mine, it is necessary for the plaintiffs to show a want of probable cause for the former suit, and also, in a legal sense, malice in bringing it. But where it appears that the party who sued out the injunction really and *bona fide*, entertained the belief that he had just grounds for his suit, the idea of malice is negatived, and the action upon the bond cannot be supported. *Falls* v. *McAffee*, 2 Ired. Law (N. C.) 236; S. C., 1 Id. 139.

63. Tenants in common—Account. In an action of account by a tenant in common of mines against his co-tenants, who have worked the mines, neither the measure of damages allowed against a wrong-doer, nor against a party taking minerals by inadvertence, applies. One co-tenant having the right to work the mines, if he account to his co-tenants, all deductions are to be allowed. *Job* v. *Potton*, L. R., 20 Eq. 84.

64. Agent sent abroad. If one who has been employed to act as an agent for a term of years at a distant place (California), upon a certain salary, has been unjustifiably discharged before the expiration of his term, he cannot recover the expenses of his return home (Mass.) as a distinct item of charge; but estimating the actual loss to which he was subjected by reason of his discharge, the compensation agreed to be paid to him may be considered, and from this should be deducted such sum as by reasonable efforts he might have obtained for his time, and in determining how much he might have obtained, for his time, regard may be paid to the necessary expenses in reaching a place where he might obtain suitable employment. *Tufts* v. *Plymouth G. M. Co.*, 14 Allen, 407.

65. Mortgagee working mines. Where a mortgaged estate is of insufficient value to pay the mortgage, the mortgagee, on entering into possession, may open mines and cut timber, and he will be charged only with the net profits; but where the estate is sufficient, a mortgagee in possession has no such right, and if he opens or works mines he will be charged with the gross receipts, and will be disallowed the expenses of working. *Millett* v. *Davey*, 31 Beav. 470.

Upon bill to redeem mortgaged coal lands where the mortgagee in possession had allowed adjacent owners (who also were made defendants) to get the coal: *Held*, that compensation should be allowed to the full value of the coal gotten (the gross proceeds) without deductions, the mortgagee being bound to restore the property in its integrity. *Hood* v. *Easton*, 2 Giff. 692.

A mortgagee in possession, who had opened and worked mines on the mortgaged estate, charged with his receipts, but disallowed his expenses. *Thorneycroft* v. *Crockett*, 16 Sim. 445.

66. Eminent domain—Damages from severance. Where, in the case of land taken by a corporation, the minerals are reserved to the owner, the arbitrators are not bound to inquire into the question of damages resulting from the severance of the surface land from the minerals. *In re Huddersfield*, L. R., 17 Eq. 476: But compare S. C. on app. L. R., 10 Ch. 92.

67. Eminent domain—Interruption of transit. In the condemnation of land for railroad purposes, where the road ran between the owner's coal mines and his wharf, interfering with the transit of the coal, the facilities of the road as a means of transportation in substitution of the stream may be considered in estimating the damages. *Cleveland, etc. R. R. Co.* v. *Ball*, 5 Ohio, St. 568. See Sec. 30.

68. Railroad—No title to coal except for support—Unopened mines. Where there are unopened coal veins on a tract of land over which a railroad is condemned

the case may be treated as one of wild lands, and the further inconvenience to opening the mines from the grade of the road-bed, etc., cannot be considered. As to the minerals themselves, the railroad "gets no title to the coal further than it is needed to support the surface." *Searle* v. *Lackawanna R. Co.*, 33 Pa. St. 57.

69. Condemnation of mining railroad bed by another railroad. Where a railroad attempted to condemn, as part of its road-bed, a part of a shorter railroad owned and used by the owner of an iron ore-bed as an appurtenance to such ore-bed: *Held*, that confining the damages to the actual value of the land taken, and the ties and track as at present laid down, was not that just compensation intended by law, and that if the ore-bed and the remaining section of its railroad not taken were depreciated in value by such taking the owner must be allowed damages for such depreciation. *In re Poughkeepsie & E. R. R. Co.*, 63 Barb. 151.

70. Dump deposits. Where the plaintiff claimed damages for the deposit of a dump pile from a quartz lode upon his building lot, and it was shown that the cost of removing the dump would be greater than the value of the premises, the measure of damages is limited by the value of the lot—although, in ordinary cases, the measure of damages would be the cost of removal. *Harvey* v. *Sides M. Co.*, 1 Nev. 539.

71. Trover—Coal in the run. Defendant, in 1872, sank a shaft on its own land 333 feet west of the west boundary of its own land, to the depth of 549 feet, and worked its coal bed to and beyond such boundary. Upon defendants filing certain maps required by statutes in aid of ventilation, etc., in 1873, plaintiff learned for the first time that defendant had worked across bounds into his part of a stratum of coal two feet thick, and extracted 610 tons. Plaintiff then demanded this coal, which had long since been sold and disposed of. In trover for the coal so taken it was *Held*, that the measure of damages was the value of the coal at the mouth of the shaft less the cost of carriage from the breast where broken, which is only another mode of expressing its value as it lay in the run where it had no value as a salable article. 2. That the conversion was complete at the moment of severance. 3. For the expense and trouble of sorting, defendant could not claim to be reimbursed, but for the cost of bringing it to the pit's mouth they should be allowed, because any person purchasing the coal in the pit would have deducted from the price such cost of carriage. *McLane County C. Co.* v. *Long*, 81 Ill. 363.

72. Trespass and trover. A different rule of damages does not prevail in trespass for breaking and entering a coal mine and carrying away coals, from that which governs in trover for the coals, except where circumstances of aggravation are relied on in trespass. The rule is the same in both forms of action. Id.

73. Execution purchaser against tenant. Where an execution purchaser of the reversion disputed the right of outstanding mining tenants, entered upon their possession and took out lead ore to the value of $3,248.40, his claim of right being in good faith: *Held*, that the measure of damages was the value of the ore less the royalty which the lessees were paying; and less, also, the reasonable cost of raising the ore, with interest from date of mining and sale of the same. *Chamberlain* v. *Collinson*, 45 Iowa, 429.

74. Discharged agent — Recoupment. The agent of a coal company, discharged before the expiration of his time, is entitled to compensatory damages. But in mitigation of damages, where other employment has been obtained, the extent of compensation received in such other employment may be shown, but if this other employment is a business requiring harder labor and more capital, the damages should not be reduced to the full amount of his earnings, but the amount to be deducted should be left as a question of fact for the jury. *Williams* v. *Chicago Coal Co.*, 60 Ill. 149.

75. Contract to furnish transportation to full capacity of a coal mine. Where defendants agreed to build a railroad connecting with plaintiff's mines, and to receive and transport all the coal the plaintiffs should mine and offer to them for transportation, not exceeding the contract limit of one million tons, the contract not being definite in particulars, and further, having been departed from as to its mode of execution by consent, it was *Held*, 1. As to that which is not expressed in a contract but must be implied, such as the time, manner, and quantity of coal delivered, the law fixes a reasonable measure of performance which is to be regulated by the usual course of business. 2. That plaintiffs, while pursuing their mining operations in a reasonable and proper manner, were entitled to transportation for all the coal they mined and offered. 3. If parties mutually adopt a mode of performing their contract, differing from its strict terms, or if they mutually relax its terms by adopting a loose mode of executing it, neither can go back on the past and insist upon a breach because it was not fulfilled according to the letter, though he may require a return to the terms in future. 4. As there was no

general market of sale for coal at the point of delivery, the measure of damages would be the price of coal in the market of sale less the expense of putting the coal into market from the point of delivery, and the cost of mining and preparing the coal and transporting it to the point of delivery. 5. If the defendants, by refusing to furnish transportation, compelled the plaintiffs to desist from mining up to their reasonable capacity of production, damages might be allowed for what would be the loss they suffered on the reasonable amount they were in due course mining. *Hazleton Coal Co.* v. *Buck Mountain Coal Co.*, 57 Pa. St. 301.

The difficulty of determining the productive capacity of a coal mine, and especially of establishing a pro-rate upon the productive capacity of many mines dependant upon the same railroad and the several methods which have been adopted to determine such capacity, stated at length. Id.

MERGER.

1. Easement. An incorporeal easement is extinguished by unity of title and possession. *Coleman's Appeal*, 62 Pa. St. 252; B. & W. L. C. 275.

2. Judgment—Stock. Where the holder of a lien upon mining stock which had been attached became the owner by assignment of the judgment under which it had been attached: *Held*, that the assignment at once merged the lien, and the assignee, as against third parties, became the absolute owner of the stock. *Strout* v. *Natoma Water Co.*, 9 Cal. 78.

3. Outstanding mining lease. — Hall, in 1823, made a lease of a tract of land for 30 years, under which the tenant, Owens, entered. The lease was for farming purposes. In 1831, Hall's devisee made a mining lease on the same premises to D., M. and L. Afterwards Owens became the purchaser of the reversion: *Held*, 1. That no valid lease of the minerals could have been made which would authorize the lessee to enter while the original tenant was in possession. 2. But that such second lease would operate to prevent a merger, as D., M. and L. would have a right to enter and mine after the expiration of Owens' term, although he had in the meantime become the purchaser. 3. But if the deed conveying this second interest created only what is sometimes called a future lease, that is, a contract to have a lease to commence after the expiration of the first lease, then it conveyed no present estate in the land, either in interest or possession. It would be only an *interesse termini*, which neither makes a merger nor prevents one, but which may be accelerated as to the time of its becoming an estate by possession through the merger of an antecedent vested term, by the termors purchasing the next immediate estate in reversion. *Logan* v. *Green*, 4 Iredell Eq. (N. C.) 370.

MEXICAN AND SPANISH GRANTS.

1. Mines. Nature of title to mines under Mexican Law considered. *Boggs* v. *Merced M. Co.*, 14 Cal. 281, B. &. W. L. C. 131.

2. Mexican grant — Title to land. A mining right or privilege under the Mexican ordinances relating to that subject, is a title to land within the meaning of the Act of 1851, and therefore the Board of Land Commissioners had jurisdiction to investigate a claim to such right. *U. S.* v. *Castillero*, 2 Black. 18.

3. Jurisdiction—Alcalde—Mining deputation. An Alcalde had no jurisdiction under the mining laws, and could make no title to a mine. The tribunal empowered to exercise this jurisdiction was the Mining Deputation of the territory or the nearest one thereto. *U. S.* v. *Castillero*, 2 Black. 20.

It may be safely inferred from the character and history of Mexico, that its supreme government reserved to itself the power over its mines, and purposely withheld all jurisdiction of that nature from the local authorities of its distant and frontier territories. Id.

4. Ordinances of 1783. The ordinances made and established by the King of Spain at Madrid in 1783, prescribe the mode of acquiring titles to mines, and were in force throughout the Republic of Mexico at the date of the American conquest of California. *U. S.* v. *Castillero*, 2 Black. 18.

A strict compliance with the terms and conditions of those ordinances is required by the ordinances themselves, and is shown to be necessary on general principles by all the writers on the subject. Id.

5. Partidas — Compilacion del Indies. By the law of the Partidas, mines were so vested in the King that they were held not to pass in a grant of the land, although not excepted out of the grant; and where included in the grant, the grant was valid as to them only during the life of the King who made it. *Chouteau* v. *Moloney*, 16 How. (U. S.) 220.

The compilation of the Indies enacted by Spain in 1783 was in force in all her North American colonies; by these laws a certain property in the mines was granted to the subjects of Spain, subject to the payment of the Royal dues, and to be worked under

the "ordinances." *Chouteau* v. *Moloney*, 16 How. 220.

6. Mines discovered after grant made. The discovery of a mine of gold or silver under the mining laws of Spain (Mexico) did not destroy the title of the individual holding a grant of the land; and the claim of the United States, if it have any, to mines of such metals in the land so covered by grant (the Alvarado grant), cannot be asserted in a case under the Act of 1851, for the adjudication of the validity of a Mexican grant (1854). *Fremont* v. *United States*, 17 How. 565.

7. Estate conveyed—Confirmation. A patent in confirmation of a Mexican grant is not restricted to the interest transferred by Mexico to its grantee, although such Mexican grant did not convey the precious metals. *Moore* v. *Smaw; Fremont* v. *Flower*, 17 Cal. 200; B. & W. L. C. 52.

The ordinary grant of land by the Mexican government transferred only an interest in the surface or soil, distinct from property in the metals. Id.

8. Mariposa grant. At the date of the cession of California, no minerals of gold or silver had been discovered in the grants under consideration in this case (the Mariposa or Alvarado grant, etc.), and of course no proceedings had been taken by which any individual interest had been acquired from the Mexican government. Such minerals, therefore, were at that time the property of the Mexican government, and passed by the cession to the United States government. *Moore* v. *Smaw; Fremont* v. *Flower*, 17 Cal. 200; B. & W. L. C. 52.

9. Registry. Registry is the basis of title to a mine, and no mine can be lawfully worked until it is registered; nor can any title thereto be acquired either by the discoverer or by any other person, without a registry. *United States* v. *Castillero*, 2 Black. 18.

Registry consists of an entry in a book kept by the proper public authority. Id.

10. Registry—Denunciation—System. The Mexican and Spanish mode of registry and denunciation of mines and the nature of their reservations and grants of mines considered. *United States* v. *Castillero*, 2 Black. 17.

11. Law of Spain. The history of the Spanish system of opening mines of gold and silver to the operation of individuals stated. Id. *Moore* v. *Smaw*, 17 Cal. 200; B. & W. L. C. 52.

Review of the Spanish legislation on the subject of mines. *Chouteau* v. *Moloney*, 16 How. (U. S.) 220.

12. Mexican revolution. Upon the separation of Mexico from Spain, the mines of gold and silver, which until that period were vested in the Spanish crown, passed to and vested in the Mexican nation. *Moore* v. *Smaw*, 17 Cal. 200; B. & W. L. C. 52.

13. Louisiana purchase lead mines. The concession of land made by the Spanish government to St. Vrain of the Mine Shibboleth in Missouri, is not subject to the forfeitures imposed under the Act of Congress of 1807. The United States may reserve the lead mines in the Louisiana territory, but liable to the privileges attached to them in the hands of Spain at the time of the concession made by her. *Wilson* v. *Smith*, 5 Yerger (Tenn.), 379.

14. Lead Mines—Louisiana purchase. Lead mines are not excepted in the Act of May 26, 1824, as to confirmation of French and Spanish titles; and an inchoate title under the French government to lead mining property may be confirmed. *Delassus* v. *U. S.*, 9 Pet. 117.

15. Missouri lead mines. A Spanish grant of lead mines in Missouri considered. *Wilson* v. *Smith*, 5 Yerger (Tenn.), 379.

16. Dubuque—Indian and Spanish grant. The title of Julien Dubuque under an alleged grant in 1788 from the Fox Indians of a large tract at the lead mines, including the now city of Dubuque, Iowa, though confirmed by the Spanish governor: *Held*, to be merely a permit to work mines and to occupy for that purpose the needful land. *Chouteau* v. *Moloney*, 16 How. (U. S.) 220.

MILL SITE.

1. Location of, not incident to ditch location. A notice of appropriation of a right of way for a water ditch is not a notice of the appropriation of the land upon the sides of it, nor of a mill site in connection with it. *Robinson* v. *Imperial M. Co.*, 5 Nev. 45.

2. Appropriation of water. The location of a mine site is not an appropriation of water for purposes of the mill site. *Obiter.* Id.

MINES.

1. The word covers new mines. It is not waste for the lessee of lands "with the mines," etc., to open a new mine. *Darcy* v. *Askwith*, Hob. 234, S. C. Hutt. 19.

2. Unopened. A vein is not a mine until it is opened. *Astry* v. *Ballard*, 2 Mod. 193.

3. Vein. The word "mine" does not necessarily intend the whole vein. *Shaw* v. *Wallace*, 1 Dutch (N. J.), 453.

4. Mines included by general terms. A. being seised in fee of a manor grants "the said manor, messuages, lands, commons and mines." The grantee leases "all the messuages, lands, tenements and hereditaments" that he had in the said manor, omitting the word mines: *Held*, that notwithstanding, the lessee might work all mines that were open at the time of the demise, but he cannot open a new mine. *Astry* v. *Ballard*, 2 Mod. 193.

5. Identified by parol evidence. Where there is a grant of lands under farms, the identity of the mines is a question of fact, and may be decided by evidence *dehors* the deed. *Field* v. *Beaumont*, 1 Swanst. 204.

6. Terms not covering. The reservation of "rents, fines, * * and all other royalties and manerial jurisdictions whatsoever," is not a reservation of mines. *Townley* v. *Gibson*, 2 Term. 701.

7. Local synonym. The word "mine," used in the sense of "ore" or "mineral" in presentment of the free miners of the Forest of Dean. *Smirkes' Rep. of Vice* v. *Thomas*, 129.

8. As a descriptive word—Mortgage. Where a controversy arose between Brandow and the Pocotillo Silver Mining Company, as to the ownership of eight hundred feet of mining ground, and on an amicable settlement, a contract was entered into between them, in which, after reciting the controversy as to such mining ground "known as the Pocotillo Mine," Brandow agreed to convey to said company all his right, title and interest in "said claim or mine," and the company agreed among other things to pay Brandow $15,000, and that the contract should "operate as a lien by way of mortgage upon said mine" to secure the same: *Held*, that the mortgage was restricted to the mining ground in controversy, and could not include the Pocotillo Mine, in fact, which embraces much more ground; and that the words "Pocotillo Mine" being used in the contract to designate certain mining property therein specifically described, could not be construed to intend any additional part of the larger tract afterwards known as the Pocotillo Mine. *Brandow* v. *Pocotillo S. M. Co.*, 6 Nev. 169.

9. Presumption that mines go with the soil—Custom. The ownership of all mines other than royal mines is by the common law of England "in the owner of the freehold of the soil;" but this ownership may be qualified by a custom such as tin bounding. *Rogers* v. *Brenton*, 10 Q. B. 26; 12 Jur. 263; 17 L. J. Q. B. 34.

10. Distinction between mine and quarry. The distinction between a mine and a quarry is, that in a quarry the surface is removed, and in mining the beginning only is on the surface, and a roof is left over head. *Darvill* v. *Roper*, 3 Drew. 298; S. C., 24 L. J. Ch. 779; see *Cleveland* v. *Meyrick*, 37 L. J. Ch. 125; S. C., 17 Law Times R. (N. S.) 238; *Brown* v. *Chadwick*, 7 Irish, C. L. 101.

The distinction between mines and quarries stated. *Listowell* v. *Gibbings*, 9 Irish C. L. 223.

11. Quarry or mine. Whether a working be a mine or a quarry is a question of fact. And the court will not decide as matter of law, that a freestone bed worked underground through a level, is a mine. *Rex* v. *Dunsford*, 4 Nev. and Man. 349; S. C. 2 A. & E. 568; S. C. 1 H. & W. 93.

12. Quarries distinguished from—Ireland. A tenant for lives renewable forever, having demised for years part of the lands upon which there was at one time an open quarry (which he was in the habit of working for sale), without any reservation or exception in the sub-lease: *Held*, the sub-tenant was not entitled to work the quarry for sale, and that his landlord had the right to enjoin him. There is no analogy between open quarries and mines. *Mansfield* v. *Crawford*, 9 Ir. Eq. 271.

13. Royal mines. The word mines alone nor the word lands not sufficient to pass royal mines. *Great case of Mines, Reg.* v. *Northumberland*, Plowden, 337.

14. Shares—Interest in land. A sale of shares in the Mining Company of Ireland, who are possessed of mines and other real property, and which shares are made transferable by a private act of parliament, is a sale of an interest in lands within the statute of frauds, and requires a note or memorandum in writing. *Boyce* v. *Greene*, 1 Batty, 608.

15. Workings distinct from mines. The expression "other lands or grounds," construed with the context to refer to pits and quarries, as distinguished from mines. *Hedley* v. *Fenwick*, 3 H. & C. 349; *Midgley* v. *Richardson*, 14 M. & W. 595.

16. Deep stone workings. A limestone working, where the stone is taken out through shafts and tunnels, is a mine. *Rex* v. *Sedgley*, 2 B. & Ad. 65.

17. Underground workings. The word mines implies underground workings. *Bell* v. *Wilson*, 1 Law Rep. Ch. App. 303; S. C. 35; L. J. Ch. 337.

18. Sale of the soil analogous to mining. A testator had been in the habit of selling gravel, peat, and bog-earth from his waste lands; after his decease the trustees

continued to make like sales: *Held*, that it was analogous to the continuing of open mines, and the proceeds were ordered to be treated as the income of the land; and that new pits for such digging might be opened as parts of one work. *Cowley* v. *Wellesley*, 35 Beav. 638.

19. Test—Poor rate. The mode of working, without reference to the material extracted (freestone), is the criterion to ascertain what constitutes a mine, under the poor-rates act. *Rex* v. *Dunsford*, 4 Nev. & Man. 349; S. C. 2 A. & E. 568; S. C. 1 H. & W. 93.

20. The right to mine, how acquired or lost. "The right of mining is a subject of grant, and may be transferred or assigned. It is said to be a right which lies in grant and cannot be transferred without deed," and if such a right is once acquired it cannot be lost by non-user or by any means other than the same as were necessary to acquire it. *McBee* v. *Loftis*, 1 Strobh. Eq. (S. Car.) 90.

21. Ground essential to working of mine treated in equity as parcel of the mine. A transaction with a parcel of land essential and absolutely necessary to the working of the colliery: *Held*, to amount to a breach of a covenant made with respect to the colliery itself, to not impeach a certain annuity to come out of the profits of the colliery, the same as if the colliery itself had been the subject of the transaction. *Pitt* v. *Williams*, 5 Ad. & El. 885; S. C. below, 2 Id. 419; 4 Nev. & Man. 412.

22. Depth of strata affecting surface works. The difference between the coal strata of England and of New Brunswick as to depth and mode of working stated in arguments and referred to in opinion upon a question of the materiality of injury to the surface from mining, or rather, in the form of a query, whether considering such injury (*inter alia*) a reservation of coal should imply a right of entry under a crown grant. *McMahon* v. *Berton*, 2 Allen (New Brunswick), 321.

23. Clay pits. "Clay pits," excavations where clay for fire-brick and pottery purposes is obtained, worked by shafts and like coal beds in this and other respects, are mines. *Rex* v. *Brettell*, 3 B. & Ad. 424.

24. Lime works. Lime works (quarry and kiln) are not a mine. *Rex* v. *Alberbury*, 1 East. 534.

25. Slate-work. A slate-work or quarry is not a mine. *Rex* v. *Woodland*, 2 East 164.

26. Jurisdiction—Lex loci. A creditor of a mining corporation can proceed against its real estate in the courts of the State where situated without any reference to proceedings in another State against such corporation; and such proceedings in another State cannot affect the title to such property. *Simpkins* v. *Smith & Parmelee G. M. Co.*, 56 How. Pr. (N. Y.) 56.

27. Underlying coal seam. A lower lying stratum of coal unknown at the time of sinking the shaft to the upper seam, or at the time of the devise of the upper seam, although it cannot be worked through the old mine shaft, is not a new mine. It is to be treated as having all the incidents, or as parcel of, the old mine. *Spencer* v. *Scurr*, 31 Beav. 334.

28. Coal way. There may be a "mine open" without a "coal way." *Story* v. *Lord Windsor*, 2 Atk. 650.

29. Proof of gold mining. Evidence that a person is at work on a claim, and is mining, and is at work with tools commonly used by gold miners, is sufficient to justify a jury in finding that he is mining for gold, without any proof that he has found any gold in the claim. *Hill* v. *Smith*, 27 Cal. 476.

30. Separate minerals in several proprietors. The right to the tin may be in the lord of the manor, while the right to another metal (copper) may be in the tenants; and the usage which establishes the right of the lord to one may establish the right of the tenant to the other. *Curtis* v. *Daniel*, 10 East. 272.

31. Name of Mine—Mistake. The mine intended by a certain name may be shown upon proceeding in equity, brought to restrain proceedings at law, based upon the proposition that the mine intended in the contract was in fact the mine named; when the original understandings of the parties intended a different mine by such a name, and the name used, though intended for one mine, was really the name of another. *Freestone* v. *DeCamp*, 17 N. J. Ch. 509-517.

32. Slandering mine. Where one knowing more than others of the occult qualities or internal values of land (an iron bed), and knowing or believing the condition to be one thing, he represents the facts differently to the prejudice of the owner, he is liable in damages. *Paull* v. *Halferty*, 63 Pa. St. 46.

33. Timber cases—Account. There are many instances where the court has decreed an account (of waste) in the case of mines, which they would have not done in cases of timber. *Jesus' College* v. *Bloom*, 3 Atk. 262.

34. Timber. The working of a valuable mine may be distinguished from the

ordinary trespass of cutting timber. *United States* v. *Parrott*, 1 McAll. C. C. 271.

85. New workings not new mines. A mine being opened, the tenant for life is not obliged to pursue the vein of ore underground, but may sink pits in pursuit of it. And so it was resolved "on great consideration, and consulting and examining the most able miners." *Clavering* v. *Clavering*, Macnaghten's Sel. Ca. 221; S. C. 2 Peere Wms. 388; Sel. Ca. Ch. Temp. King, 79; 2 Eq. Ca. Ab. 589; Mosely, 219.

See VEIN; LODE; LEDGE; QUARRY; POOR RATE.

MINERALS.

1. Various meanings considered. The various meanings of the word minerals stated and considered. *Darville* v. *Roper*, 3 Drew. 298; S. C. 24 L. J. Ch. 779.

2. Extent of meaning. Everything except the mere surface, which is used for agricultural purposes, whether 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. *Midland Railway Co.* v. *Checkley*, Law R. 4 Eq. 24.

3. Meaning explained by context. In an agreement for partition and the deeds carrying out the agreement, the mines of lead and coal and other mines and minerals were excepted, and it was expressed that the profits of the mines excepted should be taken according to the respective estates of the parties: *Held*, that the word minerals was limited by the context to include substances of a mineral character which could be worked by mines, as distinguished from quarries and that limestone quarried from the surface was not within the exception. *Darville* v. *Roper*, 3 Drew. 298; S. C. 24 L. J. Ch. 779.

4. Construction — Unknown mines — Paint stone. By a conveyance of "mines and minerals," the grant does not convey everything in the mineral, as distinguished from the animal kingdom.

But the expression cannot be restricted to "metalliferous ores." And it includes mineral deposits in strata or beds as well as veins. And in this particular case was applied to a deposit of "paint stone" found on the premises, although when the deed was made the land may have been supposed to be valuable for copper ore alone. *Hartwell* v. *Camman*, 2 Stock. Ch. (N. J.) 128.

5. Definition—Stone. The term "minerals" is more frequently applied to substances containing metals, but in its proper sense includes all fossil bodies or matters dug out of mines; in this sense, beds of stone may be included in the word minerals. *Rosse* v. *Wainman*, 14 M. & W. 859; S. C. 2 Exch. 800; S. C. 15 L. J. Exch. 67; B. & W. L. C. 1.

6. Materials. The word "minerals" occurring in an Act of Parliament in a certain connection treated as introduced by mistake for the word "materials." Id.

7. Stone. Stone got from quarries is a mineral. *Micklethwait* v. *Winter*, 6 Exch. 644; S. C. 5 Eng. L. & E. 526; S. C. 20 L. J. Exch. 313; *Midland R. Co.* v. *Checkley*, Law R. 4 Eq. 24.

8. Loose boulders — Falling masses — Accretion. Where large masses of stone had, from time to time, fallen from some cliffs above upon the field of a copy-holder, had become partially imbedded in the soil, and had so remained immemorially, although one fall was shown to have occurred at a particular time many years before, it was *Held*, that they were parcel of the soil, and as minerals, belonged to the lord and not to the copy-holder. *Dearden* v. *Evans*, 5 M. & W. 11; 2 H. & H. 7.

9. Soil. The word "soil," as used in an enclosure act, wherein special mention was also made of minerals, construed to refer to the surface only. *Pretty* v. *Solly*, 26 Beav. 606.

10. Gravel, stone, etc. It is not every substance which is raised from under the surface of the soil that is to be considered the produce of a mine, e. g., gravel, stone, marl, sand, and the like. *Rex* v. *Woodland*, 2 East. 164.

11. Fossils. The word "fossils" may in a strict sense apply to stones dug or quarried. *Earl of Rosse* v. *Wainman*, 14 M. & W. 859; S. C. 2 Exch. 800; S. C. 15 L. J. Exch. 67; B. & W. L. C. 1.

12. China clay. A bed of China clay is included in a reservation of mines and minerals. *Hext* v. *Gill*, Law R. 7; Ch. App. 699; S. C. 3 Moak, 574.

13. Brick Earth—Substrata—Reservation—Surface. Where under an enclosure act there was a reservation of "all mines, minerals, stone, and other substrata," with right of entry, etc., "making compensation for any damage to the surface:" *Held*, that a deposit of brick earth must be estimated as part of the surface, and not as parcel of the reserved minerals and substrata. *Church* v. *Enclosure Com.*, 11 C. B. N. S. 664.

14. Oil. Oil is a mineral. *Kier* v. *Peterson*, 3 Pgh. 201; and see *Kier* v. *Peterson*, 41 Pa. 357.

15. Pass by deed. Minerals are a corporeal hereditament, and pass by apt words in a deed, though not susceptible of livery

of seisin. *Caldwell* v. *Fulton*, 31 Pa. St. 474; see 32 Id. 241, and 53 Id. 229.

16. Proof of coal bed, by deposit on other lands—Expert. For the purpose of showing the existence, quantity, and quality of coal in certain lands, it is competent to prove that seams of coal have been opened and mined upon other lands in the immediate vicinity and similarly situated, in connection with the opinions of witnesses, skilled in the geological formations of the neighborhood, that like seams exist on the lands in question. *Stambaugh* v. *Smith*, 23 Ohio St. 594.

17. Attempted severance of ores intimately mixed—Evidence. Where complainant claimed a certain vein under his grant of "zinc ore and other ores except franklinite," and the defendant claimed it as a vein of franklinite, the ores being in fact found intimately mixed in the vein: *Held*, that the fact of long previous working of the vein as a zinc mine, with conveyance thereof as such, and the formation of companies and erection of works for mining it as a zinc vein, and the fact that franklinite was a comparatively worthless iron ore, and the name itself much more recent than the original working of the mine, as well as other extrinsic facts, should be considered in defining the grant, and that under the evidence the vein in dispute belonged to the complainant as a vein of zinc ore. *N. J. Zinc Co.* v. *Boston F. Co.*, 15 N. J. Ch. 418; overruling S. C. 13 Id. 322.

MINERAL LANDS.

1. Uniform policy. In construing a particular or local Act of Congress the uniform legislation of the government in regard to its lead ore lands, will be looked to, to aid in the interpretation of such statute. *U. S.* v. *Gear*, 3 How. 120.

2. Commonly reserved. Where the court perceives a settled policy in regard to a particular class of lands, especially such as are supposed to be of peculiar value, no equivocal words in the statute will be sufficient to allow a departure from such a policy. *Atty. Gen.* v. *Smith*, 31 Mich. 360, and see *Morton* v. *Nebraska*, 21 Wall. 660.

3. Exempt from Pre-emption Laws. Neither the Act of 1858 as to the location of seminary land, nor the Act of Congress donating it, allows mineral land to be located. *Burdge* v. *Smith*, 14 Cal. 380.

Mineral land is expressly exempted from pre-emption by the legislation of Congress (1859). *Boggs* v. *Merced M. Co.* 14 Cal. 281; B. & W. L. C. 131.

4. Patent—Mineral Deposits—Possession. A patent for agricultural lands, returned by the surveyor as agricultural lands, does not pass title to "known mineral deposits." *Gold Hill Q. M. Co.* v. *Ish*, 5 Oregon, 104.

The open and notorious possession of the locator of a claim on a gold lode is notice that the land contains "known mineral deposits," and the patent of the United States conveys no title against such mining location. Id. (1873.)

5. Minerals not worth working. There is no certain criterion to determine between mineral lands and those that cannot be classed in that category; lands may contain the precious metals but not in sufficient quantities to work them as mines; the subject considered. *Ah Yew* v. *Choate*, 24 Cal. 562.

6. California—Burden of proof. An applicant for patent under the Act of Congress of July 23, 1866, entitled "An Act to quiet land titles in California," must not only aver, but prove that the lands contain no mines of gold, silver, copper or cinnabar. (1869.) *The Secretary* v. *McGarrahan*, 9 Wall. 299.

Mandamus to compel the issuance of a Patent under that Act cannot be sustained. Id.

7. R. R. Reservations—Mineral tracts not granted. The clause in the Patent of the United States to the Western Pacific Railroad Company for land granted to aid the construction of its railroad, which excepts "all mineral lands, should any be found to exist in the tracts described," is equivalent to an exception of all the subdivisions which were mineral lands. "In other words, the patent grants all of the tracts named in it which are not mineral lands." *McLaughlin* v. *Powell*, 50 Cal. 64.

The fact cannot be assumed that all the lands described in such patent are mineral so as to make the exception void. Id.

8. U. S. railroad reservations—Quicksilver. The court assumes, the contrary not being alleged, that lands containing cinnabar or quicksilver, are mineral lands within the meaning of the Act of Congress of July 1, 1862, granting lands to the Western Pacific Railroad Co. *McLaughlin* v. *Powell*, 50 Cal. 64.

See PUBLIC DOMAIN.

MINERAL SPRINGS.

1. Profits of springs. The profits of a mineral spring are part of the produce of the land. *Rex* v. *Miller*, 2 Cowp. 619.

2. A Trade. The proprietor of mineral springs, using them as a source of revenue,

is entitled to sue for damages resulting to his business as such proprietor, by reason of injury to, or interference with, such springs. *Bonner* v. *Welborn*, 7 Ga. 276.

3. Pro rata—Increased value. If one rent a piece of land, together with a mineral spring thereon, at a gross yearly rent, he is ratable to the poor in respect of the whole of such rent, though in fact the annual value of the land, independent of the spring, is only one-fifth of its value with the spring. *Rex* v. *Miller*, 2 Cowp. 619.

4. Explaining contract by nature of business. Upon the construction of an agreement to rent a medicinal spring, and for building a platform about it: *Held*, that the nature of the spring, and the use made of it by the owner, were admissible in explanation of the "ambiguity" of the contract, and to show the intent of the parties that it should not be used to the exclusion of the owner, and should not be enclosed by the other party. *Armistead* v. *McGuire*, 46 Ga. 232.

5. Arkansas Hot Springs. Special legislation of Congress in regard to the land on which the hot springs of Arkansas are situate, considered. *Hot Springs cases*, 92 U. S. 698; *Gaines* v. *Hale*, 93 U. S. 3.

6. Trade mark—Injunction. Where the waters of mineral springs have acquired a reputation under certain names, and such names have been adopted as a trade mark, the property in such trade mark is entitled to protection by injunction. *Congress and Empire Spring Co.* v. *High Rock Spring Co.*, 45 N. Y. 291; *Dunbar* v. *Glenn*, 42 Wisc. 118.

See TRADE MARK.

MINING DISTRICT.

1. English local custom—Bar-master—Judicial officer taking lease—Incompatible relations. By the custom of a lordship in a lead-mining district, there was an officer called a bar-master, appointed by the lord to see that the duties of lot and cope, etc., were properly accounted for to the lord; to be indifferent and to do justice between miner and miner, and miner and adventurer, and the miner and the lord; to apportion veins of ore newly discovered between the discoverer and other adventurers, and the lord; to enforce proper working of the veins; to keep a dish by which all the ore could be measured; to punish small depredations, and to collect fines. In case of certain defaults, he was himself liable to fines, payable to the lord of the field or his farmer. Certain disputes within the lordship were tried at a customary court called the Barmote Court, before the deputy stewards and a jury who were summoned by the bar-master or his deputy on precept from the deputy steward. The summoning officer selected them at his discretion. The lord granted, by indenture, to A. for years, in consideration of a certain fine and rent, all the mines in the district, with the duties of lot and cope, and also, for the same term, the office called the bar-mastership, with all profits, etc., thereto belonging, at a rent, with a proviso for re-entry, if the grantee should make deputation of the office without license, or without having such deputation enrolled: *Held*, that the grant as to the bar-mastership was void because the grantees took an interest as lessee or farmer, incompatible with the duties of bar-master; 2. That the grant was not void as giving incompatible offices, the lease not conferring an office; 3. And that on an issue whether or not A. was a bar-master at a certain time, the verdict on the above facts ought to be entered in the negative. *Arkwright* v. *Cantrell*, 7 Ad. & E. 565.

2. District rules recognized. The mining laws of the United States recognize and sanction the custom of the miners in organized mining districts, to adopt local laws or rules governing the location, recording and working of claims, not in conflict with state or federal legislation. *Golden Fleece Co.* v. *Cable Con. Co.*, 12 Nev. 312.

3. District rules need not be proved in ejectment. Plaintiff in ejectment for a mining claim, after proving an actual and prior possession, need not show the district rules, nor prove compliance with them until his *prima facie* case made by such proof of possession, has been attacked by the defendant. *Sears* v. *Taylor*, 4 Colorado (1878).

4. Change of boundaries. The boundaries of a mining district may be changed, but such change cannot interfere with rights vested under district rules existing before the change. *King* v. *Edwards*, 1 Mont. 236.

5. Jurisdiction of United States courts. Where the only questions to be litigated in suits to determine the rights to mining claims are as to what are the local laws, rules, regulations and customs by which the rights of the parties are governed, and whether the parties have in fact conformed to such local laws and customs, the courts of the United States have no jurisdiction of the cases under the provisions of the act giving jurisdiction in suits "arising under the constitution and laws of the United States." *Trafton* v. *Nougues*, 4 Saw. 178.

6. No necessity for.* It is not essential that mining districts should be organized and local rules adopted in order that mining claims may be held on the government title thereto acquired. A compliance with the mining laws of the United States is sufficient to secure the claim. *Golden Fleece Co.* v. *Cable Con. Co.*, 12 Nev. 322.

MISTAKE.

1. As to quantity—Acquiescence. A mistake in the quantity of coal land conveyed, being an excess of about 850 acres over the supposed quantity of 6,123 acres mentioned in the deed, being long acquiesced in and valuable improvements having been made in connection with the coal thereunder, a rescission of the contract was refused, and also compensation for the excess. *Western M. & M. Co.* v. *Peytona Cannel Coal Co.*, 8 W. Va. 406.

2. Reformation — Severance. Where land was conveyed reserving ore, but it was asserted that the parties had agreed on a reservation of the ore for certain furnaces only, and that it had been otherwise written by mistake: *Held*, that a court of equity could relieve such mistake and reform the deed; but the fact not being admitted, an issue of fact was, in the discretion of the court, submitted to the jury. *Hudson Iron Co.* v. *Stockbridge Iron Co.*; *Stockbridge Co.* v. *Hudson Co.*, 102 Mass. 45; S. C. 107 Mass. 290.

But such mistakes must be proved beyond a reasonable doubt. S. C. 107 Mass. 290.

The delay of a party to a deed reserving ore, to bring suit to reform such deed, when the delay was based on his construction of the contract which had been originally assented to by the other party, is not laches. Id.

The question of the intention of parties as to the insertion or wording of a reservation of ore in a deed, may be submitted as an issue of fact to a jury. Id.

3. Unstamped conveyance should be reformed, not canceled. Where K. conveyed interest in a mining claim to W. and M. respectively, by unstamped conveyances, who afterwards conveyed the same to C. by conveyance good in form; and K. afterwards conveyed his remaining interest to C., and then filed a bill in equity against C. to correct an alleged mistake in the latter conveyance, on the ground that he conveyed more than was intended, and in order to make out the mistake it is necessary to repudiate his former unstamped conveyances to W. and M., a court of equity will not correct the mistake in order to allow him to avail himself of the advantages to result from repudiating his prior unstamped conveyances. Equity requires that he should make good his former void conveyances, and he who asks equity must do equity. *Kinney* v. *Con. Virginia M. Co.*, 4 Saw. 383.

4. Mistake cured by counter mistake. If a party, in making a conveyance of part of a mining claim, makes a mistake against himself as to the amount conveyed, and in another part of the same conveyance makes a mistake in his favor of a corresponding amount in another portion of the same mine, and the grantee obtains no more in the aggregate than he purchased and paid for, the equities are equal, and a court of equity will not, on the application of the grantor, reform the conveyance by correcting the mistake against him to the injury of the other party upon the entire transaction. *Kinney* v. *Con. Virginia M. Co.*, 4 Saw. 383.

5. Mistake cured by Estoppel. Where parties had acted upon a certain decree which was in fact void, whereby twenty feet on the Comstock lode had been set off as the several property of the plaintiff and another; and defendant had purchased such twenty feet from the plaintiff, both parties treating the decree as valid, the plaintiff having received his price, and the defendant having, by its expenditures, greatly increased the value of the property, there is no such mistake as a court of equity will correct. Equity will act upon the same hypothesis on which the parties have acted. *Kinney* v. *Con. Virginia M. Co.*, 4 Saw. 383.

MORTGAGE.

1. Mortgagee working mines—Account. A mortgagee who holds property in pledge is responsible for it in its integrity; therefore a mortgagee of lands containing underneath unopened coal fields, who allowed the owners of adjacent coal mines to explore and work the coal, on a bill filed by the mortgagor against him and such coal owners, was held responsible; and, besides the common decree, the court directed an account of all coal worked by the defendants, or either of them, or of the proceeds thereof. *Hood* v. *Easton*, 2 Giff. 692.

2. Does not prevent quarrying. The proper use of a quarry cannot be considered

*NOTE.—Since the congressional legislation of 1866-1872, the mining district organizations have been practically abandoned in most places. They have left their mark as geographical divisions, but their rules are supplied to a great extent by the acts referred to, as well as by state and territorial statutes. Except where no common width for lode claims has been established, and excepting, also, the case of crowded placer diggings, the further attempt to create or continue district organizations can only be productive of confusion and mischief.

waste, and will not be enjoined in favor of a mortgagee, and especially of a mortgagee who had himself sold the premises to the mortgagor as a quarry lot. *Vervalen* v. *Older*, 4 Halst. N. J. Ch. 98.

3. Mortgagee may work mines. A mortgagee who has entered may lawfully work a gold mine, applying the money upon the mortgage debt. *Irwin* v. *Davidson*, 3 Ired. Eq. (N. Car.) 311.

4. Mortgagor may continue mining. A charge of waste (mining) whereby the mortgage security is diminished, is always a sufficient ground for an injunction as between mortgagor and mortgagee: but when the property was purchased and is occupied for mining purposes, use of the property in mining operations cannot be considered waste. *Capner* v. *Flemington M. Co.*, 2 Gr. Ch. (N. J.) 467.

5. Foreclosure not stayed by contract to take pay out of claim. If A. mortgages his mining claim to B. to secure a debt which he owes to C., and which is already due, and a clause is inserted in the mortgage that B. is to pay the debt as fast as it comes out of the claim, after deducting three dollars a day for each day's work, and there is no stipulation to extend the credit on A.'s debt to C., the clause does not amount to an agreement that the debt shall be paid only out of the proceeds as they come out of the claim, after deducting three dollars per day, and the mortgage may be foreclosed by C. at any time. *Sharpe* v. *Arnott*, 51 Cal. 188.

6. Expenses of mining. A mortgagee in possession and working a mine or quarry cannot charge any loss in the undertaking against the mortgagor. *Millett* v. *Davey*, 31 Beav. 470; *Hughes* v. *Williams*, 12 Ves. 493.

7. Opening mines—Expenses. A mortgagee cannot open a quarry or a mine upon the mortgaged premises, and charge the expense against the mortgagor upon the accounting. *Hughes* v. *Williams*, 12 Ves. Jr. 493.

8. Mistake—Exception of ore deposits. The New Jersey Franklinite Company executed to the complainant a mortgage of certain lands, in which mortgage, by agreement of the parties, certain ores were to have been excluded. Afterwards a second encumbrance was made wherein the ores were intentionally included: *Held*, that the mistake in the first mortgage was not such as equity was bound to reform (Cornelison, J., and Vandyke, J., dissenting). *New Jersey Franklinite Co.* v. *Ames*, 1 Beasley (N. J. Ch.), 66 and 512 and 507.

9. Levy upon mortgagor's interest. The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession as against the mortgagee until foreclosure. *Halsey* v. *Martin*, 22 Cal. 645.

10. Account. Mortgagee of the share of one tenant in common of a mine, may maintain a bill for an account against the mortgagor and the co-tenants in common. *Bentley* v. *Bates*, 4 Y. & C. 182.

11. Furnishing accounts — Costs. An overstatement on the part of mortgagees in possession of a colliery as to the balance represented by them as remaining due on their mortgage, and their refusal to furnish accounts to the mortgagors, except on being paid the expenses of so doing: *Held*, not such vexatious conduct as to deprive them of their costs of a redemption suit. *Norton* v. *Cooper*, 5 De G. M. & G. 728.

12. Severance. Mortgagee in possession with power of sale allowed to sell the surface, reserving the mines and minerals under 25 and 26 Vic. c. 108, such severance being shown to be advantageous to the premises. *In re Wilkinson's Mortgaged Estates*, L. R. 13 Eq. 634.

13. Surface damage. It seems a mortgagee in possession working a mine is not chargeable for surface destroyed, as the unavoidable consequence of working the mine. *Millett* v. *Davey*, 31 Beav. 470.

14. Co-tenant's interest — Parties. Where, in an action by certain tenants in common against their co-tenants to compel them to account for rents and profits, it appeared that an undivided part of the interest, of which the plaintiffs were in actual possession, claiming title, was owned at the time the suit was brought, by a mortgagee, who had foreclosed but had never taken actual possession: it was *Held*, that such mortgagee was not a co-tenant in possession, so as to make it necessary that he should have been joined as a plaintiff. *Barnum* v. *Landon*, 25 Conn. 138.

15. Water company—Ultra vires. A loan of money upon mortgage security by a corporation organized for the purpose of constructing ditches for the conveyance and sale of water, is not necessarily an act exceeding its corporate powers. Such contract, if necessary to attain its general objects, and made as an incident to the exercise of its granted powers, is valid. In the absence of proof, its validity will be presumed. *Union Water Co.* v. *Murphy's F. F. Co.*, 22 Cal. 620.

16. From company to director to secure against indorsements. The Uncle Sam Mining Company executed a mortgage upon their mining claims to R., a director of the company. The mortgage was in fact

in trust to secure F. *et als.*, who had, as sureties to R., signed with him a joint and several note to D., for money loaned by him to R. The money was for the company. R. assigns this mortgage to F., to secure him against his liability on the note, delivering the mortgage at the same time to F., who retained it a few minutes and returned it to R., to receive the interest from the company, as agent for him, F. The note is unpaid; R. owes the company nothing: *Held*, that after the assignment R. had no interest in the mortgage which a judgment creditor could reach; that the delivery of the mortgage to R. for the purpose of collecting interest, there being no circumstances of fraud or suspicion, did not impair the rights of the assignee, and that the liability of F. *et als.* as sureties was a sufficient consideration for the assignment. *Hall* v. *Redding*, 13 Cal. 214.

17. On ditch and proceeds—Construction. A ditch company by writing "granted, bargained and sold" a water ditch, "and also the entire proceeds derived from said ditch, from the sale of water, and also the proceeds from the sales of water" of a second ditch; and in the same connection the grantees were authorized to collect, demand, and receive the rents, issues, and profits and the entire proceeds of said ditches, or sufficient to meet the payments thereinafter mentioned. Then followed the usual proviso in a mortgage, that if the installments of a certain debt were duly paid the conveyance should be void, otherwise the grantees might sell, etc.: *Held*, that the instrument was simply a mortgage, and that nothing in its provisions respecting the proceeds of sales authorized the mortgagees to take possession of either ditch before a foreclosure and sale, in a State where a mortgage is not construed to allow the mortgagee to take possession. *Kidd* v. *Teeple*, 22 Cal. 255.

18. On share, subject to pre-emption—Parties. The articles of a mining partnership gave each partner a right to sell or dispose of his shares, but gave a right of pre-emption to the other partners. Upon a mortgage of shares in such case, all the partners are necessary parties, and in default of redemption by the owner, any partner has a right to redeem. *Redmayne* v. *Forster*, Law R. 2 Eq. 467; S. C., 35 L. J. Ch. 847.

19. Remedy against share. Foreclosure and not sale is the remedy of an equitable mortgagee of a share in a mining partnership. *Redmayne* v. *Forster*, Law R. 2 Eq. 467; S. C., 35 L. J. Ch. 847.

20. Of shares—Restriction on transfers. A company's deed provided that the company should not be affected by notice of any trust, and that where any share should become vested in any person for any interest not absolute, the receipt of the shareholder should remain a sufficient discharge: *Held*, that the equitable mortgagee of shares had a right to sue the company. *Binney* v. *Ince Hall C. & C. Co.*, 35 L. J. Ch. 363.

21. Unregistered mortgage held by directors. In the winding up of a company registered under the Companies Act, 1862, directors will not be allowed to set up against the general creditors a mortgage of or charge on the property of the company not registered pursuant to the forty-third section of the Act. *In re Wynn Hall C. Co.*, L. R. 10 Eq. 515.

22. Corporation—New York statutory regulation. A mining corporation organized under the general laws of New York (chap. 40, 1848, amended by chap. 517, 1864) may, upon filing the requisite assent of two-thirds of the stockholders, mortgage its real estate to secure the payment of its debts, but not to raise money to carry on its operations. *Carpenter* v. *Black Hawk G. M. Co.*, 65 N. Y. 43.

Separate mortgages to each creditor are not required; nor is the power restricted to the common form of mortgage, but may include a trust deed. Id.

A mortgage issued for a lawful object, and to also secure money for purposes not authorized, is valid to secure the bonds issued on account of the lawful object. Id.

23. Sale and agreement to re-convey. Where a mining claim was sold by deed absolute, the purchaser at the same time making his agreement in writing to reconvey upon certain payments, and that the proceeds of the claim should be applied as payments under such agreement, after deducting interest and expenses: *Held*, that the original debt for which the deed was given was not extinguished, and that the cotemporaneous instruments should be construed as a mortgage. *Hickox* v. *Lowe*, 10 Cal. 197.

24. Deed and title bond. Tubbs conveyed to Walker his interest in certain mining property, and the next day Walker executed a title bond to Tubbs binding himself to re-convey after he took from the mine the amount of a certain note: *Held*, that the deed and bond together amounted to a mortgage, and that Walker as mortgagee in possession was bound to re-convey as soon as his debt was satisfied. *Walker* v. *Tiffin M. Co.*, 2 Colorado, 89.

25. Trust deed. A mining corporation organized under the laws of New York, and having authority to make a mortgage,

may give a trust deed, with power of sale upon its mines in Colorado, there being no proof that such trust deed is in conflict with the law of the place where the real estate is situate. *Carpenter* v. *Black Hawk G. M. Co.*, 65 N. Y. 43.

26. Subrogation. Where an interest in mining property is purchased in good faith at an administrator's sale, which is declared void for irregularities under statute, and the purchase money is applied to extinguish a mortgage to which such land was subject in the hands of the owner, the purchaser will be subrogated to the rights of the mortgagee to the extent of the purchase money applied to the extinguishment of the mortgage, and the owner cannot recover possession until he repays such purchase money. *Valle's Heirs* v. *Fleming's Heirs*, 29 Mo. 152.

27. Collateral to mining contract—Forfeiture. The lessee of a colliery agreed with plaintiffs to sell them all the coal mined, they contracting to pay all mining expenses, default on such payments for a time specified to avoid the agreement. With the agreement the lessee executed a mortgage of his leasehold as collateral security. Plaintiffs made default, and the lessee gave notice that he claimed forfeiture, whereupon plaintiffs sued on the mortgage: *Held*, that nothing was due on it, as the plaintiffs had forfeited their agreement by default in paying the mining expenses. *Columbia Coal Co.* v. *Miller*, 78 Pa. St. 247.

After forfeiture of a mining contract a mortgage given as collateral security to such contract becomes void; and no breach of the contract can occur by acts of defendant after he has claimed the forfeiture. Id.

28. Injunction. A mortgagor seeking to enjoin the mortgagee who has entered and is working the mortgaged premises (a gold mine) may obtain an injunction to restrain wanton or improvident waste of the estate, but not to stop the working of the mine, without tendering him the amount due on the mortgage. *Irwin* v. *Davidson*, 3 Ired. Eq. (N. Car.) 311.

29. Statute of limitation—Trover for produce of mines by mortgagee. A colliery and also barges used in transporting its coal, were mortgaged to A. The mortgage matured, but he allowed the mortgagor to remain in possession, and afterwards the mortgagor assigned his lease in the colliery and the barges to a purchaser, and delivered possession. Afterwards the coal barges and a part of the produce of the mines were seized and sold by a canal company for an alleged bill of tolls: *Held*, that A. could maintain trover for the coal produced from the mine and for the barges; 2. That the statute of limitations in such case ran against A. (the mortgagee) from the date of sale, though, it seems, against the party in possession, from the date of seizure. *Fraser* v. *Swansea Canal Co.*, 3 Nev. & Man. 391.

30. Record. A mortgage upon a coal lease may be enforced between the parties, though not recorded within the five days allowed by statute. *Hosie* v. *Gray*, 71 Pa. St. 199.

31. Franchises—After acquired realty. The fact of a mortgage by a mining corporation purporting to grant the franchises of the company, or including personal property, does not invalidate the grant of the real estate. *Carpenter* v. *Black Hawk G. M. Co.*, 65 N. Y. 43.

And such mortgage may cover after acquired realty. Id.

32. Chattel mortgage—Pennsylvania. The Act of January 11, 1867, allowing mining corporations to mortgage their "property," does not allow them to execute a chattel mortgage of their personalty, such incumbrances being opposed to the policy adopted by the Commonwealth upon the incumbrance of personal property. *Roberts & Pyne's Appeal*, 60 Pa. St. 400.

33. Lien—Chattel mortgage. A chattel mortgage executed and recorded as such upon a quartz mill and ledge: *Held*, upon the facts of the case, to create no lien. *Collins* v. *Montgomery*, 16 Cal. 398.

34. Conveyance, treated as. Where A. made a conveyance to B. and C., absolute on its face, for his interest in a gold mine, for the consideration of $40, when it was shown to be worth $400; when A., at the time, was in great distress for money; when the alleged price was not paid at the preparation or execution of the deed, nor any security given for it; when, upon the interest being afterwards sold by B. and C. for $400, they retained $40, and paid A. $60 more out of the amount received on the sale; when A. asserted, in the presence of B. and C., that he had made the conveyance in trust, and they did not deny it; and A., after the conveyance, continued in possession of the mine, taking the profits as he had done before: *Held*, that upon these circumstances, the conveyance must be deemed and taken by the court as intended for a security only, and that A. is entitled to the same relief as if it had so appeared on the face of the instrument. *Blackwell* v. *Overby*, 6 Ired. Eq. (N. C.) 38.

35. Possession of mine after supposed sale. Where a grantor in a deed conveying a gold mine continues in possession after delivery of the deed and under no new

contract, it creates a strong presumption that the sale was not absolute, upon bill charging the conveyance to amount to, and to have been intended as only a mortgage. *Blackwell* v. *Overby*, 6 Iredell Eq. (N. C.) 48.

NEGLIGENCE.

1. Dangerous occupation. Mining for coal is a dangerous occupation. *Barksdale* v. *Finney*, 14 Grat. 338.

2. Blasting—Act of agent. Where the complaint averred that H. was the managing agent and superintendent of the company; that the powder for blasting was furnished by the company through him, and that he furnished the same to the plaintiff for use: *Held*, that these allegations of facts were equivalent to a direct and simple averment that the defendant furnished the powder to the plaintiff for use, notwithstanding the allegation that the agent, when he directed its use by the plaintiff, informed the latter that he wished to test it for blasting purposes, assuring him that it could be used with perfect safety. *Spelman* v. *Fisher Iron Co.*, 56 Barb. (N. Y.) 151.

That the directions and assurances of the managing agent and superintendent were those of the company; and even if he had no such authority in fact as he assumed to exercise, yet inasmuch as his acts came within the general scope of his powers and duties, the company was bound by them, in the absence of any notice to those with whom he dealt that he was acting in his own behalf, and not in the business of his principal. Id.

3. Tubing salt well—No judicial knowledge as to skill, etc. Where lessor was charged in the repairs he was bound to make, with having rendered, by improper measures, the well less productive than it would otherwise have been, and the court held that he was responsible therefor, if guilty of lack of care or skill, the question of lack of care or skill was then properly left to the jury, as the court could not assume a judicial knowledge on the proper method of boring and tubing a salt well. Such matters are questions of fact, upon which courts are not bound to have, and this court does not assume to have, any judicial knowledge on the subject. *Clark* v. *Babcock*, 23 Mich. 164.

4. Bad rope. In October, 1869, an employe in a coal mine, while descending the shaft in a cage, was precipitated to the bottom, a distance of about 35 or 40 feet, by the breaking of the rope, and seriously injured. In the Spring prior to the injury the rope was old and in bad condition, and was then spliced; and was again spliced in August and September. The employer was then informed it was unsafe. The party injured had been employed at the mine only about 20 days when the accident occurred. One witness stated he told him he would be injured if he worked in the mine. The defect in the rope could not be detected by ordinary observation: *Held*, the use of such rope was gross negligence in the employer, and that he should answer in damages; and that it was not incumbent on the employee, under the circumstances, to notify his employer of a defect which he had but slight opportunity of knowing, and notice of which had already come to the employer. *Perry* v. *Ricketts*, 55 Ill. 234.

5. Miner must have safe egress. The master who lets the workman down his mine is bound to bring him up safely, even though he come up on his own business, and not for that of his master. *Brydon* v. *Stewart*, 2 Macqueen Sc. App. 30.

6. Scale—Negligence of underlooker. The plaintiff, a workman in the coal mine of the defendants, received damage from the fall of a stone from the roof of the mine, which had lost its support by reason of the removal of the coal below in the ordinary course of working the mine. The defendants' underlooker, whose duty it was to superintend the mining operations, had negligently, though the danger had been pointed out to him, omitted to prop up the roof. The removal of the coal and the propping up of the roof ought, in the exercise of due and reasonable care, to be nearly contemporaneous operations: *Held*, that as there was no evidence that the defendants had not exercised due care in the selection of their underlooker, nor in putting the mine into a proper condition before the miners were sent into it, they were not answerable for the injury caused to the plaintiff by the negligence of the underlooker, his fellow-laborer. *Hall* v. *Johnson*, 34 L. J. Ex. 222; 3 H. & C. 589.

7. Falling scale—Notice to superintendent. Where an employee of a mining company was killed by the falling of rock from the roof of a common gangway in a coal mine, and it was sought to charge the company with negligence, it was *Held*, that notice to the mining superintendent of the dangerous condition of the roof was notice to the company, and if this were long enough before the accident to have given time to repair the same, it was sufficient to fix negligence upon the company. *Quincy Coal Co.* v. *Hood*, 77 Ill. 69.

8. Defective shaft—Variance—Concealing danger—Evidence. In an action for injuries received by plaintiff while in defendant's employ sinking a shaft in a copper

mine, plaintiff averred the negligence to consist in failure to secure the sides and in not planking the shaft. The negligence shown by the proof was that defendant, being aware of the existence of a fissure in the side of the shaft (at the point where it caved in), neglected to inform plaintiff of it: *Held*, no variance, or at least that it could not have misled defendant, and could be disregarded. *Strahlendorf* v. *Rosenthal*, 30 Wisc. 675.

Where the owner knows of the existence of facts increasing the risks of the labor beyond ordinary hazards of the business, and fails to disclose such facts to his employee, he is liable for accidents resulting from such undisclosed facts. Id.

Admissions made by defendant to several persons on different occasions to the effect that he knew of the existence of such fissure before plaintiff went down, and knew it was dangerous, but thought it would hold until they got through: *Held*, sufficient evidence to justify the submission of the question of his negligence to the jury. Id.

9. Accident from reservoir in hands of the contractor. Where parties employed architects reputed to be skilled in their profession, to construct at a designated point on a creek, a dam or embankment, of certain specified dimensions capable of resisting all floods and freshets of the stream for the period of two years, and to deliver it completed by a given time, and before the embankment was completed it was broken by a sudden freshet, and a large body of water confined by it rushed down the channel of the stream, carrying away and destroying in its course the store of plaintiffs with their stock of merchandise. The employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work. Plaintiffs having brought suit to recover the damage sustained by them against the employers and contractors, *Held*, that the latter alone were liable. *Boswell* v. *Laird*, 8 Cal. 469.

10. Defective construction of dam—Liability of architect. The architects alone were responsible to third parties, the defective construction which caused the injury not being inherent in the original plan contracted for. If the plan of this work had been devised by the owners, and the builders simply engaged to carry it out, and the defects from which the injuries resulted had been inherent in the plan, then the former would have been liable to plaintiffs. Id.

11. Accident—Co-employee. Plaintiff, a workman, employed with others in sinking a coal shaft, being at the bottom, was injured by the fall of a tub of water, which was being drawn up by machinery. Evidence was given that the tackle was improper, not being fitted with a safe hook, and that a jiddy should have been used. The plaintiff worked with the hook, making no complaint of it. A jiddy had been provided by the master, who directed that it should be used when earth was raised. The plaintiff, in his master's presence, had complained that the jiddy was not used for water. The master was at the workings several times each day: *Held*, that the master was not liable, first, because, assuming the injury to have arisen from the defect of the hook, the workman himself voluntarily used it, and it was not shown that the injury was not caused by his rashness; 2. because, assuming it to have arisen from the neglect to use the jiddy, the master having provided a proper apparatus, was not liable for the neglect of the plaintiff's fellow-workmen in omitting to use it. *Griffiths* v. *Gidlow*, 3 H. & N. 648.

12. Miners and laborers—Co-employees. Where several persons are employed in a mine, some breaking down the ore with picks and by blasting, and others at the same time loading and wheeling out the ore so broken down, those engaged in breaking the ore and those engaged in loading and wheeling it out, are fellow-servants in the same line of employment within the rule that they take the risks arising out of the negligence of their co-employees. *Kielley* v. *Belcher S. M. Co.*, 3 Sawyer, 500, see S. C. p. 437.

13. Superintendent—Co-employee—Pleading—California. In an action against the owners of a mine to recover damages for an injury sustained by an employee, if the complaint avers that the injury was caused by the negligence and want of skill of the engineer, and that the superintendent had full power to control the working of the mine, and employed and discharged all the workmen at his discretion, it must also allege that the defendants were negligent in employing the superintendent, or it does not state a cause of action. *Collier* v. *Steinhart*, 51 Cal. 116.

14. Contributive negligence—Master and servant. Where a miner is injured or killed while in the employ of his master by an accident resulting from the habitual negligence of his fellow servants, known and acquiesced in by the master, the master is not liable to an action by the servant, or, if he be killed, in an action by his representative, if the servant has by his own negligence at the time, in knowing and disregarding the danger, materially contributed to the accident. *Senior* v. *Ward*, 1 E. & E. 385.

Unless there be such contributary negli-

gence by the servant, the master is liable. Id.

Defendant, proprietor and manager of a colliery, published under statute 18 and 19 Vict., c 108, special rules, one of which provided for the testing each day, in a particular manner, the rope by which the pitmen descended. This rule was, to defendant's knowledge, habitually violated by the banksman and others whose duty it was to carry it out. S., a pitman in defendant's employ, who knew of the rule and of its habitual violation, refused, though advised by the banksman, to examine the rope (which had been accidentally injured the night before, and not tested since) before descending by it into the pit. The rope broke and S. was killed. In an action by S.'s administratrix: *Held*, that the defendant was not liable. Id.

15. Mine-pit near highway. Iron miners had excavated into the side of a road, making a precipitous bank; no guard was put up; a wagoner in driving along the road broke the bank so that his wagon and team fell over and were injured: *Held* to be negligence by the supervisors, for which the township was liable. *Lower Macungie Township* v. *Merkhoffer*, 71 Pa. St. 276.

16. Fencing quarry—Highway. The owner of a quarry is under no obligation to fence or secure the same, and is not liable for an accident happening to a person who strays from a path and falls into the quarry, unless the quarry is situate so near to a public road or way as to amount to a nuisance. *Hounsell* v. *Smyth*, 7 C. B. N. S. 731.

So held, as to a quarry situate between two highways, on a waste over which persons were accustomed to cross from one road to another. Id.

17. Licensee not fencing shaft—Cattle. A person entitled to the minerals under the land of another, with license to make a mine shaft opening into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft so as to prevent its being a source of danger to his cattle which may be upon it; and is liable to an action for injury accruing to those cattle for want of such fencing. *Williams* v. *Groucott*, 4 B. & S. 148.

18. Neglect of statutory mine regulations. Where a mining company failed to comply with the terms of the Act of 1872, which required "the top of each shaft" to be "securely fenced by vertical or flat gates, properly covering and protecting the area of the shaft," as a result of which an employee, using due care, fell into a shaft and was killed: *Held*, that the company was liable in an action on the case brought by his personal representatives. *Bartlett Coal Co.* v. *Roach*, 68 Ill. 174.

The fact that the accident occurred only a few days after the act took effect, and before the company had time to comply with its provisions, affords no defense. If the company was not prepared to comply with the law it should have suspended operations until it was so able. Id.

The failure of a company to comply with a statutory requirement which induces injury to an employee distinguished from cases where injury is the result of negligence of a co-employee. Id.

19. Washing away pay-dirt, etc.—Joinder of causes of action. In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam, and the consequent washing away of the pay-dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Fraler* v. *Sears Union Water Co.*, 12 Cal. 555.

20. Dam—Care. The owner of the dam is bound to see to his own property, and to so govern and control it that injury may not result to his neighbors. Id.

21. Lessor and lessee. The defendants demised a coal mine to one Lewis, with the usual covenants, reserving, amongst other things, the right to view and examine the mine, and to re-enter for non-payment, neglect, etc. During the term, plaintiff's house, built on the surface, over the mine, was, as the jury found, injured from negligent working of the mine: *Held*, that the lessors were not liable for the results of their tenant's negligence. *Offerman* v. *Starr*, 2 Pa. St. 395.

22. Dictum. There would have been no difference in regard to the responsibility of defendants if the instrument were a license in terms. Id.

23. Ignorance of defect—Burden of proof. In suit against a mining company to recover for injuries received by employee caused by a defective platform, an averment that plaintiff was ignorant of the defect, or that it was known to defendant, is not necessary, and proof as to such facts should come from the defendant. *Knaresborough* v. *Belcher S. M. Co.*, 3 Sawyer, 446.

24. Ditch. In an action for damages for injury to land by reason of the alleged careless management of defendant's water ditch, the rule applicable is, that "defendant is bound to the use of such care in the management of the ditch as prudent persons employ in the conduct of their own affairs." *Campbell* v. *Bear River & A. W. & M. Co.*, 35 Cal. 679.

25. Ditch — Appropriators. A ditch owner is responsible for damages resulting from his failure to keep it in repair without regard to priority of appropriation as between himself and the claimant of the lands injured. *Richardson* v. *Kier*, 34 Cal. 63.

26. Ditch—Degree of care. The owner of a ditch is bound to use that degree of care and caution in its construction and management, to prevent injury to others, which ordinarily prudent men use in like instances when the risk is their own. *Wolf* v. *St. Louis Co.*, 10 Cal. 541; S. C., 15 Cal. 319.

The question of negligence in the management of such property and the degree of it must necessarily depend in great measure upon the surrounding facts, such as the existence and exposure of property below the dam and the like; for what under one state of facts would be prudence, might, under a different condition of things, be gross or even criminal negligence. Id.

27. Claim injured from ditch located prior. When plaintiff sued for an injury done to his mining claim by the breaking of defendant's canal, which was constructed prior to the location of plaintiff's claim, neither party claiming ownership of the soil and no negligence in fact being shown: *Held*, that the rights of the parties were acquired at the dates of their respective locations, and that the rule of "coming to a nuisance" might be applied. *Tenney* v. *Miners' Ditch Co.*, 7 Cal. 335.

28. Broken ditch — Complaint — California. In an action for damages for breaking defendant's dam and flooding the plaintiff's mining claim, where the complaint was in one count and charged that the defendant's said reservoir, by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness or mismanagement on the part of the said defendant, broke away, etc.: *Held*, that the complaint was sufficient. *Hoffman* v. *Tuolumne County W. Co.*, 10 Cal. 413.

Whether such negligence arose from the want of care in constructing the dam, or want of care in letting off the water, is not sufficiently material under our system of pleading to require separate counts. Id.

29. Idem—Degree of care. In such a case where the court instructed the jury that if they believed the dam was improperly or inartificially constructed, or that defendants could have constructed it in a better or more substantial manner so as to prevent its breaking, then they were liable: *Held*, that such charge was too broad, and the court erred in giving the same. The question is, not what the plaintiffs could have done, but what discreet or prudent men should do, or ordinarily do, in such cases where their own interests are to be affected. Id.

The mere fact that rock upon which the timbers of the dam lay, presented outwardly a solid appearance, etc., does not necessarily show due diligence in making it a foundation, since many other circumstances, such as the knowledge by the defendants or the builders, of the character or qualities of such rock, or a knowledge of it from testing it, etc., might still show it was unsafe for the purpose. Id.

30. Ditch flooding ditch—Pleading—California. A complaint which alleges that the plaintiffs were, on a certain day, the owners and proprietors of a certain valuable water ditch for the purpose of conveying water, at which time and place the defendants were also the owner of a certain other water ditch for the purpose aforesaid, and that afterwards, on the same day and year, at, etc., the said defendant's ditch was so badly and negligently constructed and managed, and the water therein so negligently and carelessly attended to, that said ditch broke and gave way, and the water flowed over and upon the ditch of plaintiffs, greatly damaging and injuring the same, and carrying down therein and thereon great quantities of rock, stone, earth, and rubbish, and breaking said plaintiffs' ditch, and depriving them of the use and profit of the water flowing therein, to said plaintiffs' damage of $3,000, and therefore they bring suit, is sufficient. *Tuolumne County W. Co.* v. *Columbia and Stanislaus W. Co.*, 10 Cal. 194.

A person who has been a stockholder in an incorporated ditch company, but ceased to be such holder, before suit was brought, is a competent witness in an action in the name of such company. Id.

31. Reservoir—Measure of care. In an action for injuries to a garden occasioned by the breaking of a reservoir, the court instructed the jury, that to entitle the plaintiff to recover it must appear that the breaking of the reservoir resulted from gross negligence of defendants, and then proceeded to explain that defendants must have taken the same care of their reservoir, and of the water in it, as they would have done, being prudent men, had the garden of plaintiff been their property; and that otherwise they had been guilty of gross negligence, and were liable to damages: *Held*, that although the instruction, without the explanation, was wrong, still, with the explanation, it was right, and could not have misled the jury: *Todd* v. *Cochell*, 17 Cal. 97.

The measure of care required of a party

defendant charged with negligence in allowing his reservoir to break, is that which a discreet person would use if the whole risk were his own. Id.

82. Shedding water through gangway—Flooding one mine to save another—Measure of damages. Where defendants operating a coal vein permitted plaintiffs, working on the same vein at a lower water level, to use a gangway belonging to defendants, which gangway connected the two workings: and where, upon the case of a freshet, defendants constructed a dam which diverted the water which threatened to come into their own works so as to necessarily enter the plaintiff's work through this gangway: *Held*, that the act was one of willfulness, and not of negligence; that evidence of counter negligence was inadmissible, and that the user of the gangway did not affect the relations of the parties: *Held*, further, that the measure of damages was the actual injury sustained in delay, loss of time, damage to machinery, etc.; and if the mine was irreclaimable, then the value of the estate and property; but that speculative profits could not be included, and it was error to charge that "if the mine was rendered entirely useless, then the profits that might have been made out of the coal would be a fair basis for estimating damages." *McKnight* v. *Ratcliff*, 44 Pa. St. 156.

If the plaintiffs notified or informed the defendants that the water would escape before it would damage them, then any damage done resulted from their own misrepresentations, and for damage in such case they ought not to recover. Id.

83. Declaration—Co-owners—Defective shaft. Declaration stated that defendants were owners of a coal mine, and plaintiff was employed by defendants as a collier in the mine, and in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by defendants; that by the negligence of defendants the shaft was constructed unsafely, and was, by reason of not being sufficiently lined or cased, in an unsafe condition, which defendants well knew; and by reason of the premises, and also by reason, as defendants well knew, of no sufficient or proper apparatus having been provided by defendants to protect plaintiff from injuries arising from the unsafe state of the shaft, a stone fell from the side of the shaft on the head of the plaintiff and he was dangerously wounded. Plea, not guilty. At the trial it was proved that S., one of the two defendants, was manager of the mine, and that it was worked under his personal superintendence; and that the plaintiff was not aware of the state of the shaft. The jury found that the defendants were guilty of personal negligence, *Held*, 1. On motion to enter a non-suit: that on this finding of the jury S. was liable, and therefore the other defendant was liable also; 2. On motion in arrest of judgment, that the declaration must be taken to allege personal knowledge in the defendants of the state of the shaft, and therefore the action was maintainable. *Mellors* v. *Shaw*, 1 B. & S. 437; 30 L. J. Q. B. 333.

84. Miner leaving work, etc. It is no answer to the claim of damages by the surviving relatives of a workman accidentally killed in a mine "which was not in a safe and sufficient state," to say that he was at that moment of time in the act of leaving the work for a purpose of his own. *Brydon* v. *Stewart*, 2 Macqueen, Scotch App. 30.

85. Trespass, to prevent destruction of property. In an action against a ditch company for damages caused by the washing away of a lot of pay dirt by the overflow of defendants' flume while plaintiff was present and could have prevented the mischief by pulling off a board from the flume: *Held*, that this fact was no defense, because plaintiff was not obliged to prevent the injuries complained of by committing a trespass. *Wolf* v. *St. Louis Co.*, 15 Cal. 319; S. C. 10 Cal. 541.

86. Negligence of third party. The want of reasonable care on the part of another who is injured by the breaking cannot be set up in defense to an action for damages for the injuries thus suffered. *Fraser* v. *Sears W. Co.*, 12 Cal. 555.

87. Blasting cases not mining.—Cases of injuries from blasting and by other explosions not connected with mining. *Johnson* v. *Boston*, 118 Mass. 114; *Parrott* v *Barney*, 1 Saw. 424; *The Nitro-Glycerine Case*, 15 Wall, 523.

NOTICE.

1. Purchase pendente lite. K. conveyed portions of a mining claim by unstamped and unrecorded deeds to W., M. and L., who, together with their grantees, by various deeds, conveyed the same to C. K. subsequently conveyed to C. all his interest in the same mining claims by valid deeds duly recorded, and C. went into possession under said several conveyances. K. afterwards filed a bill in equity against C. to correct a mistake in his conveyance to C. and, *pendente lite*, conveyed all his interest in said mine to one of his counsel of record in the case and another (Smith & Bryant), without actual notice of the said prior unstamped and unrecorded deeds, and said persons were made parties by supplemental bill, simply alleging the conveyance *pendente lite: Held*, 1. That C. having a good

conveyance upon record from K. of all his interest in the mine, and being in possession, there was nothing left in K. which he could convey to his said grantees *pendente lite*, except such equity as he had against C. to have his prior conveyance reformed on the ground of mistake; 2. That if K. had no equity to reform his said deed, and K.'s said grantees *pendente lite* took any equities as against K.'s prior grantees under said unstamped and unrecorded deed, then C., having before obtained conveyances from said prior grantees in the unstamped and unrecorded deeds, held their equities, which were at least equal to the equities of K.'s said grantees *pendente lite*, and C., being in possession, his possession is best, and a court of equity will not interfere to disturb it; 3. That by purchasing the subject-matter of the suit *pendente lite*, the said grantees of K. took with notice of all the rights of defendants, and subject to any judgment or decree that might be entered in the case, and since no new equities were alleged, but only a transfer of the subject-matter of the action, with a prayer for the same relief, the decree must be the same as it would have been between the original parties; 4. That the actual sole possession by the defendants of the mine, at the time of the said conveyance *pendente lite*, imparted notice to the purchaser of the title and all equities of defendant; 5. That the purchasers *pendente lite*, Smith and Bryant, are in no better position than the complainant, their grantor. *Kinney* v. *Con. Virginia M. Co.*, 4 Saw. 384.

NUGGET.

1. Parcel of the realty. "Nuggets of gold are lumps of native metal, and are often found separated from the original veins," by natural causes, in which case they are parcel of the realty. *State* v. *Burt*, 64 N. C. 619.

2. Cleaning up. For case involving the distribution of the proceeds of a nugget weighing about nine pounds avoirdupois, as parcel of the proceeds of a single day's labor or cleaning up, see *Reid* v. *Barnhart*, 1 Jones Eq. (N. C.) 142.

NUISANCE.

1. Quarry—Blasting. If a quarry be carried on in such a manner as to result in a nuisance to adjoining land owners, in the absence of a defense in the nature of a presumed grant or easement, the owner must answer in damages. *Scott* v. *Bay*, 3 Md. 431.

2. Blasting in the night. A mine owner cannot be restrained from blasting in the night time, as is usual in the mines, because it disturbs the sleep and thus affects the health of the owner of the surface, and his family, or diminishes the value of his estate. *Marvin* v. *Brewster Iron Co.*, 55 N. Y. 538; 14 Amer. R. 322.

3. Coal dirt. Where a dam of the Schuylkill Navigation Co. becomes filled up with coal dirt, etc., so as to obstruct navigation, they have a right to raise it; and for damages ensuing are liable only under their charter. *Fehr* v. *Schuylkill Nav. Co.*, 69 Pa. St. 161.

But injuries to riparian owners caused by neglect of the company to remove the deposits of coal dirt filling in their works from the collieries above, they must answer for at common law, the injury not being the result of the act of taking the land for public use; and the fact of such deposits being made by others, is no defense to the Company. *Schuylkill Nav. Co.* v. *McDonough*, 33 Pa. St. 73.

4. Coal dirt in streams—Contribution to injury. A dam was filled by deposits of coal dirt from different mines on the stream above the dam, some worked by defendants and their tenants, and others by persons entirely unconnected with the defendants. The court charged, in substance, that if at the time the defendants were throwing coal dirt into the river, the same thing was being done at other collieries, and defendants knew of it, they were liable for the combined results of all the deposits: *Held*, to be erroneous. *Little Schuylkill Co.* v. *Richards*, 57 Pa. St. 142.

The ground of the action is not the deposit of the dirt in the dam by the stream, but the negligent act above. Throwing the dirt into the stream is the tort, the deposit only the consequence. Id.

The tort of defendants was several when committed, and did not become joint because its consequences were united with other consequences. Id.

5. Coal yard. Where the owner of a block of ground in the city of New York divided it into building lots and sold to each purchaser by deed, containing a covenant to not carry on any business offensive to the neighboring inhabitants: *Held*, that a coal yard was an offensive business, and demurrer overruled to a bill to restrain the keeping of the same. *Barrow* v. *Richard*, 8 Paige Ch. 351.

6. Smelting works—Inconvenience. In an action for a nuisance to a messuage, dwelling house and premises, caused by noxious vapors proceeding from smelting works upon land of the defendants, to which the defendants pleaded the general issue, the judge laid down the law to the jury that

every man is bound to use his own property in such a manner as not to injure the property of his neighbor, unless by the lapse of a certain period of time he has acquired a prescriptive right to do so. But that the law does not regard trifling inconveniences; everything must be looked at from a reasonable point of view, and therefore, in an action for nuisance to property by noxious vapors arising on the land of another, the injury, to be actionable, must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That in determining that question, the time, locality, and all the circumstances should be taken into consideration; that in counties where great works have been erected and carried on, which are the means of developing the national wealth, persons must not stand on extreme rights, and bring actions in respect of every matter of annoyance, as, if that were so, business could not be carried on in those places. And he directed them to find accordingly: *Held*, no misdirection. Affirmed in Exchequer Chamber and House of Lords. *Tipping* v. *St. Helen's Smelting Co.*, *Same ads. Same*, 4 B. & S. 608, 616; 5 Id. 935; 35 L. J. Q. B. 66.

For case in equity between same parties see L. R. 1 Ch. App. 66.

7. Injury to colliery by obstruction of highway. A declaration that the plaintiff was possessed for a term of years of a colliery situate in the parish of A., near to the king's highway leading through the said parish of A., and that the defendant, to injure the carriage of the coals, obstructed the highway aforesaid, by which the plaintiff totally lost the benefit of his said colliery, etc., is good, although no specific injury be particularly stated; for although the defendant was guilty of a public nuisance in obstructing a common highway, and for such offense could only be punished by public prosecution, yet as a special damage was occasioned thereby, he is liable to a civil action at the suit of the party injured, and the *quantum* of damages sustained is for the consideration of the jury on the evidence: at least the omission of stating the particular injury, is cured by the verdict. *Iveson* v. *Moor*, 12 Mod. 262; compare same case as reported 1 Ld. Rayd. 495: 1 Salk. 15; 1 Comyn. 58; Carth. 451; Holt, 10; Comb. 480.

8. Surface injury. The exercise of a right to mine, reserved in a grant, cannot be complained of because it creates a nuisance to the owner of the surface. *Marvin* v. *Brewster Iron Co.*, 55 N. Y. 538; 14 Amer. R. 322.

9. Diversion of water. To turn aside a useful element from premises is as much a nuisance as to turn upon them a destructive element. *Parke* v. *Kilham*, 8 Cal. 77.

A ditch to carry off water rightfully flowing to a mining claim is as much a nuisance as a dam to flood it. Id.

10. Brick-kiln injunction. Burning bricks on a man's own ground so as to be offensive to a neighbor: *Held*, to be a nuisance and restrained by injunction. *Walter* v. *Selfe*, 4 DeG. & S. 315.

11. Lime-kiln—Change of owners. When a lime-kiln has once been erected and used, its subsequent use in the course of business, if a nuisance, is a continuing one, for which he is liable only after notice to abate it; and each successive burning of lime therein is not to be regarded as an original nuisance. *Slight* v. *Gutzlaff*, 35 Wisc. 675.

12. Continuance of, by grantee. The *alienee* of a person who erected a nuisance is liable for its continuance after request to abate it. *Bonner* v. *Welborn*, 7 Ga. 296.

13. Maintaining, after demand to abate. A party who is maintaining a nuisance but was not the original creator of it, is entitled to notice that it is a nuisance, and a request must be made that it may be abated, before an action may lie for that purpose, unless it appear he had knowledge of its hurtful character; where the extent of the nuisance is increased by such party, the rule is otherwise. *Grisby* v. *Clear Lake W. W. Co.*, 40 Cal. 396.

14. Request to abate. No request to abate is required against the person erecting a nuisance, from either the party first injured or his *alienee*. *Bonner* v. *Welborn*, 7 Ga. 296.

15. Abatement—Damage to wrong-doer. In abating a nuisance to his property, a man may be justified in interfering, so far as is necessary, with the property of the wrong-doer, but not in interfering with the property of innocent third persons; and consequently, where there are alternative modes of abating the nuisance, he is bound to choose that mode that may inflict damage, however great, on the wrong-doer, rather than that which would be productive of mischief, however small, to innocent third persons or to the public. *Roberts* v. *Rose*, 35 L. J. Ex. 62; 33 Id. 1 and 241; 3 H. & C. 162; 4 Id. 103; L. R. 1 Ex. 82.

16. Abatement—Obstructing water in mining gulch. The obstruction of water in a mining gulch, to the common injury of many miners working their possessory claims below, is a nuisance which such miners might abate in a peaceable manner if they were first in the appropriation of the water for mining uses. *Stiles* v. *Laird*, 5 Cal. 120.

17. Dry ditch. While a ditch by which the waters of a stream have been appropriated, is and has for a considerable period been out of repair and not in a condition to carry water, an action does not lie to abate, as a nuisance—a reservoir above the ditch which detains the water and causes it to flow unequally—the reservoir cannot become a nuisance until the ditch is in condition to use the water itself. *Bear River & A. W. & M. Co.* v. *Boles*, 24 Cal. 359.

18. Proof of title. In case for damages done by nuisance, it is only necessary for plaintiff to prove title to the extent of possession of the premises injured. *Bonner* v. *Welborn*, 7 Ga. 296.

19. Special damage. The plaintiff in an action for nuisance cannot recover damages for injuries which affect the public generally; but if he has suffered damages peculiar to himself, it becomes to that extent a private nuisance for which he may recover. *Grisby* v. *Clear Lake W. W. Co.*, 40 Cal. 396.

20. Extension—Acquiescence. Acquiescence in the erection or operation of noxious works, while they produce little harm, does not warrant the subsequent extension of them to an extent productive of great damage. *Bankart* v. *Houghton*, 27 Beav. 425.

21. Injunction—Acquiescence. Though A. be disentitled, by acquiescence, to an injunction to suppress works which are noxious to the neighborhood, yet it does not follow that B., the owner of the works, is entitled to enjoin A. from recovering damages at law. Equity may leave both parties to their legal rights. *Bankart* v. *Houghton*. 27 Beav. 425.

22. Sale of liquor to coal miners. On a bill by one co-tenant in a mining company operating a colliery, against another co-tenant occupying a parcel of the common property as a saloon at which liquor was sold to the miners employed by complainant: *Held*, that an injunction could not be granted to restrain the sale of liquor upon a complaint not averring special damage except as suffered in common with the public, nor that the sale was without license, or in contravention of any rights of complainant, nor that the injury threatened to be continued. *Oglesby Coal Co.* v. *Pasco*, 79 Ill. 164.

OCCUPATION.

1. Incomplete location. One who claims a tract of mining ground for mining purposes on the public domain, but is actually occupying and working only one portion of it, cannot recover damages for an entry by a stranger upon the tract beyond his actual occupancy, unless his boundaries were plainly indicated by marks or monuments, or there was some local mining custom allowing his possession to extend to the ground upon which the entry was made. *Hess* v. *Winder*, 30 Cal. 349; *S. P. Sears* v. *Taylor*, 4 Colorado, — (1878).

2. Receipt of royalty. When a person receives without risk part of the produce extracted from the bowels of the earth, he is an occupier of land, but when he merely receives a rent or money payment, he is not an occupier. *Rex* v. *Baptist Mill Co.*, 1 M. & S. 612; *Reg.* v. *Crease*, 11 A. & E. 677.

3. Agricultural claim subject to miners' entry. A party in occupation of public mineral land is entitled to hold it against all the world, the government excepted, subject only to the qualification that upon land taken up for other than mining purposes, a right of entry for such purpose may attach. *Lentz* v. *Victor*, 17 Cal. 272.

4. Mine under license—Poor rate. Where a tin mine was worked by licensees paying a royalty of one-eighth of the ore raised, picked, and dressed, with the option of paying in money at the same rate (not a fixed rent): *Held*, that the owner was to be considered as an occupier of the land, and as such ratable to the poor. *Rex* v. *St. Austell*, 5 B. & Ald. 693; 1 D. & R. 351.

5. Way—Poor rate. The owner of the right to the use of a wagon way for carriage of coals, so using the land as to be an exclusive occupant of it, is ratable to the poor as an occupier of land, without regard to his title. *Rex* v. *Bell*, 7 Term R. 598.

6. Poor rate—Title immaterial. The owners granted for twenty-one years to certain grantees full liberty, license, and power to dig shafts, etc., and work and raise and make salable and sell the minerals under certain limits, and to erect within the limits such sheds and other buildings as should be necessary for the above purposes. A cost book mine company was established under the above grant, and certain buildings, machinery, tramways, etc., were erected on part of the surface within the limits: *Held*, that it was immaterial what title, if any, was conferred by the above grant; the partners in the company were by their servants and agents the sole occupiers of that part of the surface on which the buildings, etc., were erected, and were ratable to the poor rate in respect of such occupation. *Kittow* v. *Liskeard Union*, L. R. 10, Q. B. 7.

See POSSESSION.

OIL.

1. History. For an account of the first discovery of oil and of the mode in which obtained before the discovery of the method of getting it by boring wells in connection with the construction of a license or grant of oil rights made before such discovery. See *French* v. *Brewer*, 3 Wall. Jr. 346.

2. Is a mineral. Oil is a mineral, and is included in the Act of 1850, relating to tenants in common, of minerals under the general enumeration of "other minerals." *Thompson* v. *Noble*, 3 Pgh. 201.

3. Its peculiar mineral character. The peculiarities of petroleum as a fluid and yet a mineral, stated. *Dark* v. *Johnston*, 55 Pa. St. 164.

4. Nature of right in mineral oil. Oil disclosed in a well sunk by the owner of the land, is his exclusive property; and the case is not analogous to the surface owner's right in running streams of water. *Hail* v. *Reed*, 15 B. Monroe (Ky.) 479.

5. Protection. Oil land described by metes and bounds with a "protection" of eight rods on the north side, and ten rods on the east side, was leased to the complainant "for the sole and only purpose of mining for petroleum," etc.; complainant having struck a paying well, his lessor let to a third party the tract of land lying north-east of the ground of complainant, and within the distance of eight rods from complainant's north-east corner, upon which land Treat began to sink, and threatened to tap complainant's well. Complainant filed bill for injunction and for an accounting in case his well should be tapped before relief obtained: *Held*, that the outside lines of the "protection" should be extended until they intersected, and that the "protection" included the parallelogram of ground bounded by said outside lines so extended, and the north and east lines of the tract leased in like manner, extended as per the following diagram:

Protection, 8 Rods North.	Part in dispute containing defendant's well.
Ground Leased.	Protection 10 Rods East.

Allison & Evans' Appeal; Porterfield & Treats' Appeal, 77 Pa. St. 221.

6. Construction of complicated oil land contract — License — Forfeiture. McElheny, being the owner of a farm composed of land in Cherokee and Cornplanter townships, in consideration of $200, granted to Funk, his heirs and assigns, the free and uninterrupted privilege to go upon a tract of said land in Cornplanter township for prospecting, boring, etc., and erecting engines, etc., and taking any oil, salt, coal, etc., out of the earth; Funk to have the exclusive use of one acre of land around each pit or well, with free ingress on said land in common with McElheny; Funk diligently to search for oil, etc., and give McElheny one third of all taken out, McElheny reserving the right of tillage. McElheny afterwards conveyed to Haldeman all his farm subject to the agreement with Funk. Haldeman afterwards agreed with Funk that his rights should include all lands in Cornplanter township (reserving a strip of ground) giving to Funk the right to transfer in whole or in part to others, and afterwards granted to Funk the same rights in the Cherokee tract which he had in the Cornplanter: *Held*, 1. The conveyances gave Funk an incorporeal hereditament in fee, which would have been indivisible at law, but was made divisible by the grants, and this interest which would also at law have been held in common with his grantors was made exclusive in Funk by the terms of the grants;

2. The grantors have no mining privileges, and can have none until Funk shall forfeit his rights by breach of covenant;

3. The grants to Funk did not amount to a lease, nor a sale of the land or the mineral; no estate in the soil or minerals was granted. The right granted to Funk was to prospect for oil, extract and take it, rendering one-third to the landlord;

4. Funk's right was a license to work the land for minerals, coupled with an interest revocable only for breach of covenant.

5. The $200 paid was the consideration for the right of entry or privilege to bore for oil.

6. If Funk has violated his tenure or his covenants, e. g., if he has undertaken to divide into severalty that which he could only hold as an entirety, he has lost all, but even then a Chancellor would send the grantors to law to enforce the forfeiture. But there being no violation either of tenure or covenants, there is, therefore, no forfeiture to enforce either at law or in equity. *Funk* v. *Haldeman*, 53 Pa. St. 229; B. & W. L. C. 444.

7. Fluctuations—Time. Oil wells are a species of property which is, more than any other, subject to rapid, frequent, and extreme fluctuations in value. This circumstance considered in the determination of the question of what is reasonable time upon a bill to set aside a trust-deed sale where such property had been the property

granted as security. *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587.

8. Oil well drilling—Contract of skill. In *quantum meruit* upon parol contract to drill a well, the question as to whether such contract was an undertaking requiring personal supervision was held properly left to the jury; and the jury having found in the affirmative, the sickness of the plaintiff was allowed as an excuse for discontinuing before the depth called for was reached. *Green* v. *Gilbert*, 21 Wisc. 395.

9. Actions for severance. The owner of land may maintain detinue or replevin for oil extracted from a well on his freehold. The oil is his property and the severance does not destroy his title nor defeat his recovery. *Hail* v. *Reed*, 15 B. Monroe (Ky.) 479.

Or trover for its value. Id.

10. Delivery by tube company into barges. Plaintiffs sold to defendant four barges of oil, to be delivered in barges at a given rate per barrel. Defendant furnished the barges. The oil was furnished from the wells to a tube company, who carried it by underground tubes to the river, not attempting to keep the oil from various well owners separate, but delivering an equal bulk at the tube company tanks at the river. While the oil was passing from the tanks to the barges and two of them were partially filled, the oil caught fire, and both barges and contents were consumed: *Held*, that there was no delivery, and that defendants were not liable for the quantity which had got into the barges. *Rochester and O. O. Co.* v. *Hughey*, 56 Pa. St. 322.

11. Tubing Company—Eminent domain. A company chartered by the legislature for the construction and operating of a line of underground tubes for the transportation of oil to railroads and navigable streams, etc., is a "tube highway for transportation," and as such an "internal improvement" within the meaning of the constitution, and consequently such a corporation as the legislature might create by special act. *West Virginia T. Co.* v. *Volcanic Oil and Coal Co.*, 5 W. Va. 382.

12. In tanks not carried by sale of tanks. A clause in a deed assigning leasehold interests in oil wells as follows: "Also all our right, title, and interest of, in, and to the engines, boilers, tanks, tubing, derricks, and all other fixtures and personal property situate upon and appertaining to the above leasehold interest and well to us belonging," does not cover oil in the tanks. *Dresser* v. *West Va. Trans. Co.*, 8 W. Va. 553.

13. Burning during delivery. Defendants purchased of the company, plaintiff, four barges of oil at a certain price per barrel. The barges were furnished by defendant, and were partially filled when the oil caught fire, and barges and oil were burned: *Held*, that the property did not pass as fast as the oil entered the barges; that the defendant could not have been compelled to accept partially filled barges; that the delivery was not complete, and defendant therefore not liable for the value of the oil; 2. That evidence that by the custom of the trade at the place of delivery (Oleopolis) the barges to receive the oil were during the delivery in the custody and control of the purchaser, was properly rejected as not aiding the fact of delivery. *Rochester Oil Co.* v. *Hughey*, 56 Pa. St. 322.

14. Fraudulent sample. Plaintiff agreed to deliver oil of a specified quality in payment of a judgment, and produced a sample in a bottle, which he assured defendant was of the quality which had been mentioned. A written agreement was then drawn for the delivery of "oil of the quality of the sample." Such oil was in fact delivered, but the sample in reality was cheap, crude oil, instead of a refined oil of a particular grade, as understood and represented: *Held*, that it was a palpable fraud, and that the defendant might show that the oil was not of the quality the plaintiff agreed to deliver. *Maute* v. *Gross*, 56 Pa. St. 250.

15. Delivery at landing. Upon contract to deliver oil barrels on board of boats "preparatory to running out on the first water," the barrels to be paid for on delivery: *Held*, that the vendor was bound to load the barrels, or at least to notify the purchaser of his readiness to load them, and that merely having them in readiness on the bank without notifying the purchaser until after the rise of the water, did not sustain the defense of performance or readiness to perform. *Cullum* v. *Wagstaf*, 48 Pa. St. 300.

16. Entire contract—Delivery. Defendants bought 4000 barrels of oil from plaintiff, and eight similar papers the same day were executed by them, each calling for the delivery of five hundred barrels on the last day of certain consecutive months, payment to be made on each delivery: *Held*, that these were several contracts, and parol evidence was inadmissible to show that at the time of the purchase it was agreed that it was an entire contract, and that the several papers were executed with that understanding and according to the custom of the trade. *Morgan* v. *McKee*, 77 Pa. St. 228.

Where the consideration for the delivery of an article is single and entire, the contract is entire, although it may consist of several and distinct items. Id.; *Lucesco Oil Co.* v. *Brewer*, 66 Pa. St. 354.

17. Tenants in common of oil in tank. Plaintiff and L. being tenants in common of an oil well, filled a tank with oil equal in quantity to 2400 barrels, of which 1600 belonged to plaintiff and 800 to L., and they agreed that the oil was not to be sold under $5 per barrel; they were not partners. L., without authority, contracted for the sale of all the oil in the tank at $1.25 per barrel: *Held*, on bill against the purchaser, that L. had no right to sell the plaintiff's portion of the oil, and that the defendant's removal of it would be wrongful, but that as the oil was a staple commodity which had no value peculiar to itself, and as there was no fiduciary relation between the plaintiff and L., the plaintiff was not entitled to an injunction and must be confined to his remedy at law. *Mason* v. *Norris*, 18 Grant. Ch. 500.

18. Pleading—Description of boring tools. In action against common carrier for goods lost, plaintiff declared for "one box of oil well tools, containing ...., one drill stem ...., and one sand pump ...., the said enumerated articles comprising a set of oil well boring tools." He produced a receipt for "one box boring tools, one sand pump, one boring stem." He also proved that boring stem, auger stem, and drill stem, were terms used indifferently to describe the same thing: *Held*, no variance; the descriptions being substantially the same. *Williams* v. *Baltimore & Ohio R. R. Co.*, 9 W. Va. 38.

ORE.

1. Meaning—Severance. The word "ore" in an indictment for larceny held to imply no severance from the realty. *People* v. *Williams*, 35 Cal. 672.

Contrary holding in like case. * *State* v. *Berryman*, 8 Nev. 270.

2. Trover—Possession in the ore getter. Where in trover for copper ore it was proved that the plaintiff was in possession of land in which he sank a shaft and raised the ore in question, and the same witness, on cross-examination, proved that the ore was taken away by a person who had a shaft in an adjoining close, and who was getting the same lode of copper ore under the plaintiff's land when he sunk his shaft: *Held*, that this was *prima facie* evidence of the plaintiff's title to the ore, which must be left to the jury. *Rowe* v. *Brenton*, 8 B. & C. 737; 3 Mann. & Ry. 133.

3. Ore got by trespass. The title to ore extracted by a wrongdoer, remains in the owner of the land. *Lunsford* v. *La Motte L. Co.*, 54 Mo. 426.

4. Produce of mines—Profits. The produce of mines is parcel of the annual profits of an estate and is not a part of the *corpus*. It goes to the tenant for life, and is different from the case of timber cut where tenant for life receives only the interest. *Daly* v. *Beckett*, 24 Beav. 114.

5. Deed—Minerals combined in same ore. A deed conveyed "all the zinc and other ores, except the ore called Franklinite where it exists separate and distinct from the zinc." The Franklinite (which is an iron ore containing a proportion of zinc) was found mechanically mixed with the zinc ore so that one could not be exsected without the other: *Held*, that the grantee took the ore so mixed with the zinc ore. *N. J. Zinc Co.* v. *Boston F. Co.*, 15 N. J. Ch. 418; overruling, S. C., 13 N. J. Ch. 322.

6. Coke. Coke is the produce of a mine. *Bowes* v. *Ravensworth*, 29 Law. & E. R. 247; 15 C. B. 512.

7. Moisture—Weight. A contract to deliver 500 tons of ore, "moisture to be deducted from the weight of the ore" at a certain rate, in the absence of proof of special custom or business usage, must be construed to mean that 500 tons of ore, including moisture, are to be delivered, and deducting the weight of the moisture will show the weight of ore to be paid for. *Humphreysville Copper Co.* v. *Vermont Copper M. Co.*, 33 Vermont, 92.

8. Sale without assay. A fair sale of ore, made *en masse*, on the dump, will not be set aside although it realized to the purchaser an extraordinary profit. It was sold for $500. The purchaser had valued it at $400. He was alleged to have received $6000 for it upon sale in England. *Deep River G. M. Co.* v. *Fox*, 4 Ired. Eq. (N. C.) 61.

See COAL; MINERALS.

OUSTER.

1. Tenant in common. The receipt of more than his share of the profits of mines by one of two tenants in common is not an ouster; and the only remedy is by bill or action for an account. *Denys* v. *Shuckburg*, 4 Y. & C. 42.

* NOTE.—The opinion refers to *People* v. *Williams*, *supra*, without attempting to distinguish it. It purports to base the judgment on Webster's definition of ore. But the statement that the word ore in its "usual acceptation" implies ore severed from the realty, must be taken as local to the jurisdiction. Everywhere else it is used indiscriminately in referring to ore in place, undressed ore, or milling ore, by all who have occasion to use the term.

OUTFIT.

1. Construction. A. owning a share of the outfit of a California gold company, executed to B. a writing, by which he sold "one half of his interest in the company." A subsequent clause provided that B. should not be a partner in the company, but only "purchaser of one-half of A.'s interest in the metals and ores" that might be obtained: *Held*, A.'s interest in the "outfit" did not pass. *Phillips & Kay* v. *Jones Adm'r*, 20 Mo. 67.

PARTITION.

1. By parol. A parol partition of a mining claim is "doubtless" valid. *420 M. C.* v. *Bullion M. Co.*, 3 Saw. 634.

2. Ore bed. The court will not order a partition of an ore bed whose value cannot be ascertained, and of different richness in different parts; nor will it order an enjoyment thereof in rotation, nor a sale though authorized by statute. The remedy of cotenants is in chancery, which can restrict the owners to their respective interests, order accounts, or appoint a receiver. *Conant* v. *Smith*, 1 Aiken (Vert.) 67.

3. Cornwall ore banks — Agreement running with the land barring partition —Irregular deposits — Faults—Mines as matters subject to partition. In 1787, tenants in common of certain lands, furnaces and forges, and of irregular deposits of iron ore unequally distributed over three contiguous hills, the deposits differing greatly in quantity and quality in the several places where they were worked, broken in continuity by faults, and showing indications of the possibility of concentrating as they descended from the different points opened on the surface, by articles of agreement jointly appointed arbitrators to make partition of all the lands, except the "mine hills" containing these deposits. Upon a previous effort to make partition of all the lands the arbitrators had reported that no just and equal partition of these ore deposits could be made. Upon the report of the latter arbitrators, under the agreement, amicable actions of partition were entered, and the court decreed accordingly, parting all the lands except the Bingham tract with forty acres adjoining, and the Cornwall ore banks, of which it was decreed by the court that they do still remain undivided, to be held by the parties as tenants in common, according to their respective shares, and to the covenants and articles in the said agreements. The said agreements "had not only provided for partition of part of the land, but also that the ore banks not parted should remain together and undivided, and declaring it to be the intent of the agreement that neither of the parties should interrupt either of the other parties at any mine hole by them opened, and occupied for the purpose of raising iron ore. Under this decree the original owners, their heirs and assigns worked the mines until 1851. In that year partition was sought, but the Supreme Court *Held*, that the partition made in 1787 by the agreement of the parties in interest and decreed upon by the court, was binding on their successors in the title, not only because of the judgment of the court under which they claim, but because the covenants in the agreement of 1787 were real and ran with the land, though the words "heirs and assigns" were not used. Even if the covenants did not so run with the land as to give a right of action to an heir or alienee, they would serve to defeat this action for partition. The agreement of 1787 and the judicial proceedings had thereon, constitute a bar to this action. *Coleman* v. *Coleman*, 19 Pa. St. 100; B. & W. L. C. 260; see *Coleman* v. *Blewett*, 43 Pa. St. 178.

The continuance of the mine hills in common after the covenants between the parties and the decree of the court, became the consideration for submitting to the partition of the rest of the estate. The implied warranty which attends partition attached in this case; and if what was done as to the mine hills were to be overthrown, it would destroy the whole of the partition. If the rest of the estate be held in severalty by virtue of the partition, by virtue of the same proceeding the mine hills are to be held in common. Id.

The words contained in said agreement "shall remain together and undivided as a tenancy in common," construed to mean a tenancy in common not for the present nor forever, but as long as the objects and purposes of the covenant in which they occur are in process of fulfillment, and so far they bar the action of partition. Id.

Coleman and Grubbs owned together large quantities of real estate, including the Cornwall Ore Banks. They selected men to part and allot the real estate, agreeing that the Cornwall ore banks should remain together and undivided as a tenancy in common, because of the impossibility of ascertaining the extent and limits of the ore, and because partition could not be made without great injustice to some of the parties. In amicable actions to carry out the partition, the court adjudged that the "ore banks, etc., do still remain undivided, to be held by (the parties) as tenants in common, according to their respective shares:" *Held*, that the parties and their successors were tenants in common. *Coleman's Appeal, Grubbs' Appeal*, 62 Pa. St. 252; B. & W. L. C. 275.

Under the plea of *non tenent insimil* it

may be shown that the parties had barred themselves by covenant from partition. Id.

The agreement that the Cornwall ore banks should remain undivided established a permanent tenancy in common, and partition could not be had without violating the covenant which ran with the land. Id.

The agreement provided that neither party should interfere with or interrupt the other at any "mine holes" by any other party opened and occupied for the purpose of raising ore: *Held*, that this was not a mode of providing for the enjoyment in severalty of the shares of the parties, but meant that the parties should be undisturbed in their rights as tenants in common to take and use their respective proportions of ore, and was a grant to open and occupy other mine holes. Id.

4. Surface owner. The owner of the surface is not a necessary party to proceedings for partition between tenants in common, of minerals. *Canfield* v. *Ford*, 28 Barb. 336.

5. Severed estate in minerals. A conveyance of all the mines, ores, and minerals in certain lands, and all the interest of the grantor therein, and the right of ingress and egress to get the same, etc., is a grant of an estate of inheritance, is a certain grant, and may be the subject of partition. *Canfield* v. *Ford*, 28 Barb. 336.

6. Alternate enjoyment, etc. Partition of a mine cannot be made by metes and bounds. They are to be otherwise parted by alternate enjoyment, or division of profits, as the circumstances may require. *Adam* v. *Briggs' Iron Co.*, 7 Cush. 361.

7. Partition of water. It is utterly impracticable for a court to make a mechanical division of water running in a ditch, and used by tenants in common for mining purposes, in such a manner as to permanently do justice between the parties. *McGillivray* v. *Evans*, 27 Cal. 92.

If partition is made, it can only be by a sale and division of the proceeds. Id.

An attempted mode of partition of water made by the court below, considered and repudiated. Id.

8. Ditch — Mortgage — Account. A mortgage upon an undivided interest in a ditch may be adjusted in a suit for partition of the ditch, and an account of water rates taken. *Obiter: Bradley* v. *Harkness*, 26 Cal. 69.

9. Accounting—Incidental benefits—Nevada statute. Where a bill under the statute of Nevada was filed for partition of 25 feet on Gold Hill, where one of the parties claimed that he had made large expenditures in excess of those made by the other party: *Held*, that a decree should have been refused until an accounting had been had, although no special provision for such case was found in the statute. *Dall* v. *Confidence M. Co.*, 3 Nev. 531.

Held, further, that improvements made on an adjoining claim, although necessarily incidentally beneficial to the claim in question, could not be considered in such accounting. Id.

Held, further, that where one party opposes a sale, and makes the sworn answer or affidavit required by the statute, the court must proceed to partition and not to sale, the statute being construed as mandatory. Id.

10. Claim worked in partnership. The mere fact that a mining claim is owned and worked by several persons as partners, is no valid objection to a partition of the same between the owners where the answer does not set up, and it is not shown, that a suit in equity is necessary to settle the accounts and adjust the business of the partnership; and all the material allegations in a complaint for a partition of real property, which are not denied by the answer, are deemed admitted for the purposes of the trial. *Hughes* v. *Devlin*, 23 Cal. 501; B. & W. L. C. 311.

11. Possessory Claims. When a mining claim upon the public lands is claimed and possessed by several as joint tenants, tenants in common, or as coparceners, or even as partners, such several interests or estates are in the nature of an estate of inheritance, and liable to be partitioned between the several claimants the same as other real property. *Hughes* v. *Devlin*, 23 Cal. 501; B. & W. L. C. 311.

12. Claimed by equitable owner. An executory contract to convey to an agent a certain interest in mining lands which he has purchased or assisted in purchasing in the name of his principals, does not give such party any such estate, although coupled with actual possession, as to enable him to maintain suit for partition. *Seitzinger* v. *Ridgway*, 4 W. & S. 472.

13. Indivisibility of mines. Mines in land, when opened, are, from their nature, indivisible, and neither partition can be made at law, nor dower assigned by metes and bounds. The only partition that can be made is to order a sale and divide the proceeds. *Lenfers* v. *Henke*, 73 Ill. 405.

14. Void decree as evidence of. A decree of court though void for want of parties and other reasons, if subsequently acted on, may possibly be treated as evidence of partition according to the terms of such decree. *Kinney* v. *Cons. Virginia M. Co.*, 4 Saw. 383.

15. Grantee of one tenant in common. The grantee of the right to dig ores, claiming his right by the deed of one of two or more tenants in common of the entire estate, cannot compel partition. *Boston Franklinite Co.* v. *Condit*, 19 N. J. Ch. 394.

See "CORNWALL ORE BANKS."

PARTNERSHIP.

1. How inferred. A mining partnership may be inferred from facts and circumstances, as by suffering names to be used jointly, and otherwise holding themselves out as partners. *Lyell* v. *Sanbourn*, 2 Mich. 109.

2. Proof of. As to what acts constitute sufficient proof of defendant being a partner in a mining company. *Dickinson* v. *Valpy*, 10 B. & C. 128; S. C., 5 M. & R. 126.

It is sufficient evidence to prove a person to be a member of a mining company, that he and others had agreed to form a company, and that business had been carried on upon the footing of the agreement. *Owen* v. *Van Uster*, 1 Eng. L. & E. 396; 10 C. B. 318.

3. Evidence establishing the relation. By a deed whereby a joint stock company was established, any shareholder desirous of transferring his shares was to give notice at the office of the company that he had agreed to sell the shares, and no person who purchased shares was to be deemed a proprietor until he executed the deed. The directors on notice of the transfer of any shares (made in conformity to the rules of the company), were to cause the transfers to be registered in the books of the company. Every person by whom such shares were transferred immediately after such transfer was registered in the books of the company to cease to be a proprietor. In an action in which the plaintiff sought to charge the defendant, as a member of the company, for goods sold, etc., the letters of the plaintiff, in which he admitted himself to be a shareholder on the thirtieth of March, 1826, were held to be proof of that fact, although it was not proved that he had ever executed the deed; 2. There being no proof of any actual transfer of the shares to a purchaser, or of the execution of the deed by him, an entry in the books of the company of a transfer to a purchaser on the twenty-eighth of March was held not to be evidence that the plaintiff then ceased to be a partner; or if it was *prima facie* evidence of that fact, it was rebutted by the letters of the plaintiff of a subsequent date, admitting himself to be a partner. *Reynolds* v. *Kay*, 9 B. & C. 356.

4. Proof of membership—Admissions. Where a defendant is charged with a debt as partner in a mining company, but is not shown to have either contracted such debt personally, or represented himself to the plaintiff as a partner, the fact of his having been partner may nevertheless be shown by evidence short of strict proof that he had executed a deed of copartnership, or was legally interested in the mine. Admissions made by him before or after the debt was incurred may be evidence for this purpose. *Ralph* v. *Harvey; Richards* v. *Harvey*, 1 Q. B. 845.

5. Peculiarities of mining partnerships. A mining concern differs from a common partnership in that: 1. The shares are assignable; and, 2. The death or bankruptcy of a holder of shares does not operate as a dissolution, but it is in the nature of a trading concern. *Fereday* v. *Wightwick*, 1 Russ. & M. 45; S. C. 1 Tam. 250.

6. "Mining partnership" distinguished from other cases. Where two persons entered into an agreement to engage together in a mining adventure, under a firm name, and to share the profits and losses equally, and as a firm they purchased a mine, and paid a note given in the firm name for a portion of the price: *Held*, that the contract was one of partnership, in the ordinary sense, as distinguished from what is known as a "mining partnership," and that either partner had the same authority to bind the firm as if it were an ordinary trading partnership. *Decker* v. *Howell*, 42 Cal. 636; B. & W. L. C. 508.

7. Distinctions from other partnerships—Delectus personæ. Mining partnerships, where there are no partnership articles, are governed by the law of ordinary partnerships, except so far as the general usage of persons engaged in similar pursuits or the established practice of the particular company has established a different rule, the only differences generally existing being such as flow from the fact that in such partnerships there is no *delectus personæ*. *Jones* v. *Clark*, 42 Cal. 180; B. & W. L. C. 525.

8. "Strict partnership" by agreement between Mining Partners. The rule that in "mining partnerships" one partner has no authority to bind the firm by a promissory note, is based upon the reason that in such partnerships there is no *delectus personæ*, and that consequently the membership is continually subject to changes beyond the control of the partners; but there is nothing in the nature of mining which forbids a contract of strict partnership; and when it appears that the confidential relations of an ordinary partner-

ship are established, and the firm not subject to the intrusion of other partners at will, the reason of the rule fails, and with the reason the rule itself. *Decker* v. *Howell*, 42 Cal. 636; B. & W. L. C. 508.

9. No delectus personæ—Incidents. It is well established that in mining partnerships there is usually no *delectus personæ*, and as a consequence that such a partnership is not dissolved by the death of a partner, or a sale of an interest by a partner to a stranger. *Taylor* v. *Castle*, 42 Cal. 367; B. & W. L. C. 52.

10. Facts not amounting to.—A. and B., who had carried on business as iron-masters, being unable to meet their engagements, assigned all their plant and effects to five trustees, upon trust, amongst other things, to carry on the business under the name of "The Stanton Iron Company;" and, out of the profits, to pay interest on certain mortgages, etc., and to "pay and divide the net income of the business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of A. and B., in ratable proportion according to the amount of their respective debts," with an ultimate trust for A. and B. Upon the question of partnership under these facts the court was equally divided, and the judgment of the common pleas, that the defendants were partners, affirmed: *Hickman* v. *Cox*, 3 C. B. (N. S.), 523, affirming S. C., 18 C. B. 617.

But both courts were reversed in the House of Lords: *Wheatcroft & Cox* v. *Hickman*, 8 H. L. Ca. 268; S. C. 9 C. B. N. S. 47; S. C. 30 L. J. C. P. 125; S. C. 7 Jur. N. S. 165; S. C. 8 W. R. 754.

11. Owners of adjoining diggings agree to work together as partners—Unequal expenses and unequal results—Settlement. K. and J. owned the Starr Lot, a lead mine in the Dubuque lead regions. L. owned the Levi Lot adjoining. The owners agreed to work them together, K. and J. to receive one-fourth of the mineral from the Starr Lot as royalty, and L. to receive one-sixth of the mineral from the Levi Lot as like owner's royalty. The working interests were divided as follows: K., five-eighteenths of the Starr Lot; J., five-eighteenths of the Starr Lot; L., eight-eighteenths of the Starr Lot; K., six-eighteenths of the Levi Lot; J., nine-eighteenths of the Levi Lot; L., three-eighteenths of the Levi Lot. The receipts were $65,000, exclusive of rent, while mineral was raised to the value of about $137,000. The contract was "that each partner was to pay his equal proportion, according to his mining interest in said Lots, of all expenses necessary to carry on said business of mining therein."

The lode was worked from east to west, passing first through the Levi, and then into the Starr Lot. For some months a large amount of mineral, found on the Starr Lot, was carried back along the drift on the Levi Lot, and thence lifted through a shaft which had been previously sunk on the last lot for the purpose of working out the mineral found on that lot alone. This proving inconvenient, and as the owners of the Starr Lot would not permit the sinking of a shaft on the Starr, they determined to sink one immediately upon the line between the two, and thus shorten the length of the drift along which they had to carry the mineral. After this, they had to deepen the drift in order to carry off the water, and in doing this, mineral was struck on the Levi Lot, which for some time had been yielding but little; and in doing most of the work, and all of that involving the heaviest expenditure, the parties had to use the same hands, horses and machinery. At first the accounts were settled monthly, and apportioned the same as if there were two separate adventures; but afterwards these monthly apportionments were neglected, and the accounts were so kept that the expense on each lot could not be ascertained. The machinery erected on one was mostly for the benefit of the other. An exact adjustment of the expenses and benefits to each lot might have been impossible upon any system of accounts. The two lots produced mineral very unequally. Upon these facts the court *Held* (qualifying their opinion on S. C., 8 Iowa 150, as correct in the abstract, but not capable of application), that in stating the accounts for the term during which they were kept separately, each partner should be charged with his proportion of the expenses incurred in raising mineral on each lot; 2. That in stating an account for the time during which they were not thus kept, the entire expense should be apportioned to each lot in proportion to the value of the mineral raised, and the copartners charged in the ratio of their interest in each lot. *Levi* v. *Karrick*, 13 Iowa, 344; 8 Id. 150.

12. Tenants in common working claim. Tenants in common of a mine, working it together, and, after paying expenses, dividing the profits in proportion to their interests in the claim, are mining partners. *Nolan* v. *Lovelock*, 1 Mont. 224.

13. Owners of claim. The parties owning a mining claim as tenants in common, and engaged in working the same, are partners. *Dougherty* v. *Creary*, 30 Cal. 290.

14. Co-owners working claim—Incidents of mining partnership. Where the several owners of a mine unite and cooperate in working the same, they form a

mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has some rules peculiar to itself. *Skillman* v. *Lachman*, 23 Cal. 199.

One of these rules, peculiar to a mining partnership, is, that each owner has a right at any time to sell and convey his interest, and such sale does not dissolve the partnership. Id.

A rule peculiar to a mining partnership is, that the law does not imply any authority, either to a member of such partnership, or to its managing agent, to bind the company or any of its individual members by a promissory note, or a contract of indebtedness executed in the name of the company; but it is incumbent on the party claiming to hold the company for such indebtedness, to show that the person executing or contracting the same in the name of the company had power and authority to do so. Id.

15. Mine owners working claim together. If two or more persons acquire a mining claim for the purpose of working the same and extracting the mineral therefrom, and actually engage in working the same, and share, according to the interest of each, the profit and loss, the partnership relation subsists between them, although there is no express agreement between them to become partners, or to share the profits and losses. *Duryea* v. *Burt*, 28 Cal. 569; B. & W. L. C. 489.

16. Covenant for privilege of pre-emption. Where there is a privilege of pre-emption in a contract between mining partners, a subsequent sale, by consent of a part interest of one partner, or a descent cast, will prevent the further operation of the covenant. *Weisman* v. *Smith*, 6 Jones, Eq. (N.C.) 125.

17. Purchaser becomes partner. As a sale of an interest in a mining partnership, by a partner, to a stranger, does not dissolve the partnership, such a stranger, by his purchase, presumptively becomes a partner, though he takes no part in the management of the partnership affairs, and does not hold himself out to the world as a partner. *Taylor* v. *Castle*, 42 Cal. 367; B. & W. L. C. 521.

18. Equity—Legal title in third party. Where property belongs in equity to an association of members, each having an undivided interest in whatever belongs to the company, it is of no consequence in a controversy over the distribution of the proceeds of a sale of the property authorized by the general consent, that the legal title stood in a third person. *Butterfield* v. *Beardsley*, 28 Mich. 413.

19. Business under two firm names. Where a partnership is carried on under two different firm names, a judgment against either firm will support an execution against the partnership effects, and a sale under it will pass the title of all the partners. *Carey* v. *Bright*, 58 Pa. St. 70.

20. Partner member of both selling and buying firms—Account. A. and B. were partners in mining coal. A. mined and shipped to B. at Philadelphia, where B. received and sold it. B. was also partner in another firm, coal merchants, Philadelphia. He employed this firm to sell on commission. A., at the mine, knew of this course of business, and did not object. In fact, by the arrangement the expense of conducting the business was lessened: *Held*, that after dissolution and settlement, A. could not demand a share of B.'s commissions. B. also sold coal to this other firm, with notice to his partner, for full value: *Held*, that he was not bound to account for profits received by him as partner in the purchasing firm, although such firm took the coal to fill contracts for delivery at a larger price than they paid for it. *Freck* v. *Blakston*, 83 Pa. St. 474.

21. Evidence of the relation—Joint stock co. An application for shares and payment of the first deposit in a joint stock oil company, does not constitute one a partner, where he has not interfered with the concern. *Hedge & Horus' Appeal*, 63 Pa. St. 273.

The insertion of such subscriber's name by the secretary in a book of the company, containing a list of the members, is not holding him out to the public as a partner, because he does not thereby acquire a right to a share of the profit. Id.

If a subscriber act as a member or director, attend meetings, etc., or otherwise give himself out as a member, he will make himself liable, though there be some want of the necessary formalities or acts of a party to make him legally a member. Id.

22. Joint stock co. The members of an unincorporated joint stock association, engaged in boring for oil, sustained by money advanced by each, may in a proceeding for the distribution of a common fund be treated as partners. *Butterfield* v. *Beardsley*, 28 Mich. 413.

23. Unincorporated ditch companies—Incidents of partnership and co-tenancy—Note. Unincorporated ditch companies organized for the sale of water to miners and others, the stock of which is bought and sold at the pleasure of the owners, without consulting the co-owners, differ from ordinary commercial partnerships. Some of the incidents of a partnership per-

tain to such companies, and some of mere tenancies in common likewise pertain to them. *McConnell* v. *Denver*, 35 Cal. 365.

The superintendent or managing agent of such company has no authority to bind the company by a promissory note, given for materials used by the company, unless the authority to give such note is expressly conferred upon him by the company, or such authority may be implied from his acts recognized by the company, with full knowledge of the acts at the time of the recognition. Id.

A member of such a company has no general authority by virtue of such membership to bind the company by his contracts. Id.

24. Ditch—Real estate—Co-tenancy. A ditch is real estate, and each interest may be sold or incumbered without regard to the consent of the co-proprietors. *Bradley* v. *Harkness*, 26 Cal. 69.

25. Shareholders in ditch. The shareholders in a ditch may be regarded as partners entitled to participate in the profits derived from the business of carrying on a ditch, where such profits consist in sales of water from the ditch. *Abel* v. *Love*, 17 Cal. 238.

26. Cost book company a partnership—Injunction—Parties. A shareholder in a cost book mining company filed his bill against the managing committee and against a creditor of the company, to restrain an action at law brought against him by the creditor at the instigation of the managing committee. The bill also asked for an account as to the amount of the plaintiff's liability to the company. The court granted an injunction to restrain the action by the creditor, but dismissed the bill as against the managing committee, on the ground that as the company was a simple partnership, formed under no act of parliament, it was necessary, in order to have an account, that all the members should be made parties to the bill. *Sibley* v. *Minton*, 27 L. J. Ch. 53.

27. Cost book company—Evidence of membership. A mining company, by its prospectus and certificates, professed to be a company of 30,000 shares of £1 each, to be conducted on the cost book principle. The directors passed rules, by one of which the company was to be considered as constituted, and the directors to be at liberty to commence business, so soon as one-third of the shares should have been subscribed; and by another that no person should be recognized as an adventurer in, or entitled to any benefit from the company until he should have signed the rules and be duly registered in the cost book as an adventurer. W. H., having seen the prospectus, but not the rules, applied verbally, and paid for and received certificates of shares in the company; the company failed. W. H., a year after he received the certificates, brought an action to recover his money, and the action was compromised: *Held*, that the certificates were notice of the rules; and although W. H., assuming him not to have had previous notice, would have been allowed, perhaps, a reasonable *locus penitentiæ*, to return the certificates, still, having retained them and not having brought his action for a year, he must be taken to have acquiesced in and be bound by the rules; 2. That although W. H. had not signed the rules, still, having applied and paid for and accepted the certificates of shares, he had authorized the company to register his name in the cost book without his signing the rules; the contract was complete, and he was a "contributory." *In re Great Cambrian M. & Q. Co.; Hawkins Case*, 2 K. & J. 253.

28. Burning lime on shares. An agreement to burn lime on shares, one furnishing the stone and the other the fire, constitutes a technical partnership between the parties. *Muster* v. *Trumpbour*, 5 Wend. 274.

29. Contract between quartz mill and amalgamating works. James and Hill were the owners of a quartz crushing mill with some vacant land adjoining. They leased this vacant land to Farrington & Mier, proprietors of neighboring amalgamating works, and agreed to crush the ore for the amalgamating works at $5 per ton, to place it on the ground leased, and also furnish motive power to the amalgamating works. After this arrangement James became a partner in the firm of Farrington & Mier in the amalgamating works: *Held*, that neither the lease, the contract, nor the association of James, made Hill a partner in the amalgamating firm. *Mears* v. *James*, 2 Nev. 342.

30. Contract between Masons and Quarry-men. When one of a firm of stone masons sold tools to the defendant, a quarryman, on agreement that they should be paid for in stone, and the defendant delivered stone accordingly within the time as contracted, but after dissolution of the partnership: *Held*, that the contract was a valid partnership contract, and that neither the dissolution of the firm, unless known to the defendant, nor the application of the stone to the private use of one member of the firm, affected the validity of the payment. *Kenney* v. *Altvater*, 77 Pa. St. 34.

31. Capital—Profits. Circumstances considered under which net profits may, at

the wish of the majority of the shareholders, be applied in repayment of contributed capital, although the deed of settlement seems to contemplate a continuing capital, as in an ordinary partnership, there being, however, no express prohibition in the deed. *Binney* v. *Ince Hall C. & C. Co.*, 35 L. J. Ch. 363.

82. Land considered as personalty. When land is brought into a partnership as stock, it is, as between the partners, their creditors and one who has knowingly dealt with them for it, personally belonging to the firm. *West Hickory M. A.* v. *Reed*, 80 Pa. St. 38.

83. Mines as assets — Account — Interest. Parties owned ore land as tenants in common; they entered into partnership in manufacturing iron and bought other real estate. The proceeds from the land and the purchase-money of the real estate were carried into the firm books with the partnership transactions: *Held*, that these circumstances did not make the land and the proceeds firm property. *Grubb's Appeal*, 66 Pa. State, 117.

Each party used the ore without requiring the other to account, and there was no known excess to be paid for as the business progressed. Being a voluntary delay of both, interest was properly chargeable only from the time the balance was struck. Id.

84. The mine, partnership assets. The mining ground belonging to and worked by a mining partnership and acquired for mining purposes, whether purchased with partnership funds or brought into the concern by individual members, as a portion of the capital stock, is, in equity, for the purpose of a settlement of the partnership affairs, to be treated as partnership property. *Duryea* v. *Burt*, 28 Cal. 569; B. & W. L. C. 489.

85. Share, not goods, etc. A share in a joint stock mining company is not "goods, wares or merchandise," within the seventeenth section of the Statute of Frauds. *Watson* v. *Spratley*, 10 Ex. 222.

86. Limited partnership. In an action on the case for flooding plaintiff's mine, brought against three defendants individually, who were carrying on business under a limited partnership, two of them being general partners, and the third a special partner, it was sought to charge the latter by proof that he had done some act under which the law rendered him liable as a general partner: *Held*, that if he was not a managing partner, nor directing the workmen, proof of an act having no relation to the injury sued for, which would render him liable in matters of contract as a partner, would not render him liable for a trespass. *McKnight* v. *Ratcliff*, 44 Pa. St. 156.

87. Trading concern—Construction of Will. R. C. being in possession of mines and iron works, held under leases of unequal duration, by his will bequeathed £25,000 to B., "as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works so long as the lease endures," with a devise to H. and his wife of the residue of his estates, real and personal. By a codicil the testator gave to W. C. three-eighths of the concern at the ironworks: "So the partnership will stand at my decease—W. C., three-eighths; H., three-eighths; B., two-eighths." After the testator's death, W. C., H. and B., carried on the works for two years, selling iron manufactured not only from the produce of their mines, but from ore and old iron purchased for the purpose of manufacture and resale. B. having then assigned his share to C., the business was carried on in like manner by C. and H, till the death of the latter, no agreement having ever been entered into for the duration of the partnership: *Held*, that the codicil withdraws the trade from the operation of the residuary clause in the will, and vests three-eighths in H., to the exclusion of his wife; 2. The concern is not a mere joint interest in land, but a partnership in trade. *Crawshay* v. *Maule*, 1 Swans. 495.

88. Construction of articles. When articles of copartnership provided for certain stipulated advancements to be made by each of the partners, and contained the further clause, "after which it is understood that should it be necessary to obtain more money for the completion of the works, such money is to be raised between us on our joint note or otherwise;" the true construction of the agreement is that after each partner had advanced the sums stipulated in the agreement, any further money required was to be raised by the joint efforts and upon the joint credit of the partners. *Patterson* v. *Silliman*, 28 Pa. St. 304.

89. Authority of copartner. A partner in an undertaking is, by virtue of that relation, constituted a general agent for his copartners in all matters relating to the partnership; and he has all the authority necessary for carrying on the undertaking, and all such as is usually exercised by the partnership. *Oatey* v. *Bourne; Hawkens* v. *Bourne*, 10 L. J. Ex. 361; 8 M. & W. 703.

40. Authority of partners. The law presumes that every member of a mining firm has authority to hire laborers and make the firm liable for their wages, if they are

necessarily employed in working upon the joint property, and no evidence of such authority is required. *Nolan* v. *Lovelock*, 1 Mont. 224.

41. Borrowing for the mine—Construction of articles. The defendants were partners for the purpose of working a coal mine. Two of them conducted the business of the colliery. The firm being in debt, and two actions having been brought against them, the managing partners borrowed of the plaintiff, upon the credit of the firm, money for the purpose of settling these actions, and accepting in the name of the firm a bill of exchange drawn by him on them. The partnership deed contained a clause "that if any partner should, for his own use, or for any other purpose than the immediate use of the partnership, draw, accept, or endorse any bill of exchange in the name of the firm," the others might determine his interest in the partnership: *Held*, that the managing partners had authority to bind the partnership by borrowing the money and accepting the bill. *Brown* v. *Kidger*, 3 H. & N. 853; 28 L. J. Ex. 66.

It is an incident of a common trading partnership that the managing partners have authority to borrow money for partnership purposes, which include the payment of partnership debts incurred in the ordinary course of business, and this authority is not excluded by special provisions in the partnership deed as to the raising of additional capital, or supplying deficiencies in the funds by contributions of the partners. Id.

42. Power to purchase on credit—General agency. The members of a mining company have authority by law (in the absence of any proof of a more limited authority), to bind each other by dealings on credit, for the purpose of working the mines, if that appear to be necessary or usual in the management of the mines. *Tredaven* v. *Bourne*, 6 M. & W. 461.

Each partner is the general agent of the others. *Hawken* v. *Bourne*, 8 Id. 703.

43. Managing partner—Power to expend proceeds. A managing partner of a mine has authority to defray all the necessary and proper expenses incidental to the beneficial working of the mine, out of the joint profits derived from the sale of the minerals. *Roberts* v. *Eberhardt*, 1 Kay. 148.

44. Managing adventurer no power to bind firm. One of several co-adventurers in a mine has not, as such, any authority to pledge the credit of the general body for money borrowed for the purposes of the concern. And the fact of his having the general management of the mine makes no difference, in the absence of circumstances from which an implied authority for that purpose can be inferred. *Ricketts* v. *Bennett*, 4 C. B. 686.

45. Acting Partner—Abandoned project. A vendee under executory agreement for sale of an interest in iron works, entering and acting as a partner, as between himself and the other partners is to be treated as a partner, and must contribute to the losses until the time he gave notice of withdrawal, although the executory contract was not completed by reason of defect in vendor's title. *Jefferys* v. *Smith*, 3 Russ. 158.

46. Allowance to managing partner. As a general rule every copartner is bound to exercise due skill and diligence in promoting the interest of the copartnership without reward or compensation, unless it be otherwise agreed between the parties. but such an agreement may be implied from the course of business pursued between the copartners as disclosed by the evidence; and when a partner renders services which neither the law nor the agreement of the parties imposes upon him, an agreement that he shall be paid is implied. *Levi* v. *Karrick*, 13 Iowa, 344; S. C. 8 Id. 150.

47. Allowance for extra services of partner. A member of a mining partnership, expressly requested to render his services as superintendent, in the management of producing mines worked steadily, and requiring and receiving his active skill and management, is entitled to compensation for such services from the firm, although no express contract was proved. And the amount being based on the nature and character of the services, the time employed, and the benefits derived to the firm, $75 per month for 21 months was allowed out of the fund for division. The claim presented was $5 per day. *Levi* v. *Karrick*, 13 Iowa, 344; S. C. 8 Id. 150.

48. Managing director accepting bill. By the deed of association of a mining company, it was provided that the affairs of the company should be managed by a committee of seven shareholders, called managing directors, and B. was appointed the resident director or manager to superintend the mine and the local concerns thereof, hire workmen, provide machinery, etc., but subject to the instructions he might from time to time receive from the managing directors, to whom he was to transmit monthly accounts of the ore raised, wages paid, etc., and a full statement of all the debts and liabilities due from the company; with a proviso that he should not expend or

engage the credit of the company for any sum exceeding £50 in any one month, without the express authority in writing of three of the managing directors: *Held*, that this deed did not authorize B. to draw or accept bills of exchange in the name of the company, even for the necessary purposes of the mine, without the express authority of the managing directors. *Brown* v. *Byers*, 16 M. & W. 250.

49. Bill accepted by "manager." Where a bill was addressed to a mining company, and accepted by the defendant as manager, and it was shown that the defendant and three others had agreed to form a company, and that the mine had been worked on the footing of that agreement: *Held*, that the defendant was individually liable on the bill as a member of the company. *Owen* v. *Van Uster*, 1 Eng. L. & E. 396; 10 C. B. 318.

50. Note given by agent of mining partners—Pleading. The complaint alleged that the defendants had been partners in gold digging at "Pike's Peak," Colorado, under the name of H. & W.; that one K. was their agent in such business; that plaintiff, at their request, worked for them in their said business; that on the day he ceased work, plaintiff accounted with K. as defendant's agent, who was by them authorized; and there was found due from defendants to plaintiff, for said work, a certain sum, for which sum K. thereupon, as such agent for defendants, executed to plaintiff a note for the amount so found due; that defendants had promised to pay said note. The answer denied that defendants were partners at the time of the execution of said note, and denied that they executed said note, or that K. had any authority to execute it in their name and behalf: *Held*, that the answer did not deny the indebtedness of the defendants, as alleged in the complaint, for work and labor done, and that the court below did not err in entering judgment for plaintiff on the pleadings. *Risto* v. *Harris*, 18 Wisc. 400.

51 Note by superintendent. A promissory note, purporting to have been executed for and on behalf of a mining partnership, and signed by the superintendent as such, is binding on the partnership, provided the superintendent had authority to execute it, or it has been subsequently ratified by the company. *Jones* v. *Clark*, 42 Cal. 180; B. & W. L. C. 525.

52. Name of firm—Note. Three persons, partners, carried on business as "The Newcastle and Sunderland Walls End Coal Company." One of them made a note payable at a bank at which the firm did not keep an account, and subscribed it with the name of "The Newcastle Coal Company:" *Held*, that it was properly left to the jury as a question of fact whether the name used so far varied that the indorser must be taken to have issued the note on his own account and not as a partner. *Faith* v. *Richmond*, 11 Ad. & El. 339.

53. Note of a "strict partnership." Where A. and B. entered into a strict partnership for the purpose of purchasing, holding, and working a mine, and while so partners, A. gave a firm note for money borrowed in the name and for the use of the firm, and afterwards conveyed all his interest to B.: *Held*, that the note was valid as a firm note, and could be collected of B. *Decker* v. *Howell*, 42 Cal. 636; B. & W. L. C. 508.

54. Note—New members. If a promissory note is binding upon a mining partnership as a valid contract, such partnership continues liable, at least to the extent of the partnership assets, though some members of the company may have parted with their interests, the new members having purchased with knowledge, and subject to the payment of partnership debts. *Jones* v. *Clark*, 42 Cal. 180; B. & W. L. C. 525; see *Babcock* v *St. Wart*, 51 Pa. St., 181.

55. Note by partners in arrears. Persons failing to sign the deed of settlement of a mining concern and to pay their installments, cannot claim to be partners in the concern, so as to support a plea that a note signed by them in their individual names was a note of the partnership. *Fox* v. *Frith*, 10 M. & W. 130; 1 Car. & M. 502.

56. Money advanced on note to Purser —Release. The plaintiff, A., the purser of a mine, in order to carry it on, raised money by the deposit of a promissory note made in his favor by seven of the shareholders, and which two other shareholders had refused to sign, and applied the money so raised in paying the workmen. At a subsequent meeting of the shareholders and creditors, an assignment of the mine, in order to sell it and pay the debts, was resolved upon, and A. then claimed to be admitted as a creditor "for money which he had raised on a note of hand to pay the workmen." A deed of assignment was accordingly executed, to which all the adventurers were parties of the first part, and the several persons whose names were thereunto subscribed as creditors of the several adventurers for supplies to and debts incurred by them for or in respect of the same mine, to the amount set opposite their respective names, of the second part. This deed, after reciting that the shareholders had in the prosecution of the mine incurred debts thereon with the persons

parties thereto of the second part, contained a conveyance in trust for those creditors, and a provision that no action should be brought by any of the persons parties thereto of the second part, against all, any, or either of the persons parties thereto of the first part, for the recovery of any debts due or owing upon the said mine, or in anywise relative thereto; and that if any such action was brought, the deed might be pleaded as a release. A. executed the deed, the amount of the note and interest thereon being placed against his name. To an action brought by A. upon the note against the seven persons who signed it, they pleaded the deed as a release, averring that A. signed it as a creditor of the parties thereto of the first part, in respect of the causes of action in the declaration mentioned, which allegation was traversed by the replication: *Held*, that A. must be considered to have signed the deed in respect of his claim for the advance of the money raised upon the note, and applied for the use of the mine, and not in respect of his claim upon the note itself, which therefore was not released, and that consequently the plea was not proved. *Lanyon* v. *Davey*, 11 M. & W. 218; 12 L. J. Ex. 200.

57. Contribution on joint note. The plaintiff and defendant were shareholders in a joint stock mining company. Money being required to work the mine, T., who was also a shareholder, applied to a bank for an advance of £500, which they consented to make on the security of the joint promissory note of the plaintiff, defendant and T. The note was given and the money advanced, and applied to the purposes of the mine. The plaintiff, having been compelled to pay more than his share of the note, sued the defendant for contribution: *Held*, that this was not a partnership transaction, and therefore that the action was maintainable. *Sedgwick* v. *Daniell*, 2 H. & N. 319.

58. Bill of Exchange drawn by partner—Debt inter sese. A member of a joint stock tin smelting company was employed by the company as their agent to sell goods, receiving a commission of two per cent. for his services besides a *del credere* commission for guaranteeing the purchaser. He drew a bill on a purchaser of tin, payable to his own (the drawer's) order, and after acceptance he indorsed it to the actuary of the company, who indorsed it to another member to whom the company were indebted for advances. The acceptor having become insolvent before the bill became due, the drawer received from him ten shillings in the pound upon the amount of the bill by way of composition: *Held*, that the indorsee being a member of the company could not sue the drawer on the bill, inasmuch as it was drawn by the latter on account of the company, and that he could not recover the sum received by the drawer on the bill, because that money must be taken to have been received by him in his character as a member of the company, and not on his own account. *Teague* v. *Hubbard*, 8 B. & C. 345.

59. Superintendent—Necessaries. A managing superintendent cannot bind a mining partnership, except upon such contracts as are usual and necessary in the ordinary prosecution of the work, unless specially authorized. *Jones* v. *Clark*, 42 Cal. 180; B. & W. L. C. 525.

60. Prospecting contract. An agreement between one or more persons who claim an undeveloped mine, and another person, that if the latter will devote his labor and skill in exploring and developing the mine, the former will furnish him with tools and provisions, and give him a share in the mine if it proves valuable, and a joint working of the mine and sharing in the profits by the parties after development, constitutes one of those qualified partnerships common in California, known as mining partnerships. *Settembre* v. *Putnam*, 30 Cal. 490; B. & W. L. C. 514.

61. Prospecting Adventure. A mining prospecting partnership is not governed by technical rules of the law of commercial partnership. *Boucher* v. *Mulverhill*, 1 Mont. 306.

62. Prospecting contract — Special Compensation. Six persons associated together, contributed money and sent one of their number to go to California, and select a mine which they were to buy and work, if his recommendation should be satisfactory, and his associates advanced him $500 for expenses, and agreed to pay him the balance of expenses: *Held*, that the association was a partnership, that the plaintiff though agent was also a partner, and that he could only recover in equity upon an accounting for his expenditures, and could not maintain an action at law, the sum claimed not being a sum agreed upon on settlement. *Duff* v. *Maguire*, 99 Mass. 300.

Upon bill in equity afterwards brought on the same contract it was held that the plaintiff was entitled to recover five-sixths of such a sum as would reimburse to him his fair and reasonable expenses, and be a fair compensation for his services although the sum should exceed the amount raised by the payment of $100 each by the subscribers; 2. That the rule that a partner in a joint adventure cannot charge a compensation for his services in the joint busi-

ness, did not apply to such special arrangement and they stood upon the same footing as if a stranger had been employed. *Duff* v. *Maguire*, 107 Mass. 87.

68. Prospecting contract—Location—Discovery claim—Admissions. Where under a mining partnership between Welland, Gross, Koch and Huber, in which each party was to have an equal interest, Huber located 1000 feet of mining ground, 400 in his own name, and 200 in the name of each of his partners, and afterwards Welland, Gross and Koch brought suit against Huber for a dissolution and conveyance to them of their interest in the 400 feet located in the name of Huber: *Held*, that the fact that Welland, Gross and Koch had conveyed all the interests located in their names to Huber, and declared that they had sold out their interest in the mine, constituted no defense, and that the admission of such conveyances as evidence that Huber had acquired plaintiffs' interest in the 400 feet located in his name, was error. *Welland* v. *Huber*, 8 Nev. 203.

64. Contract to prospect by tunnel. An agreement by which plaintiff was to run a tunnel and receive from defendants an interest in lodes to be intersected, does not create a partnership between them. *Barber* v. *Cazalis*, 30 Cal. 92.

65. Members of void incorporation. Persons doing business under an assumed and void corporate capacity will be treated as partners in both courts of law and equity. *Hill* v. *Beach*, 1 Beas. (N. J.) Ch. 31.

66. Partnership attempting to prove corporate organization. Where one of an association of persons, charged as partners, seeks relief from liability on the ground that such association is a corporation legally organized and doing a corporate business, the burden of proof rests on him to show the existence of such corporation. Failing to establish it, he cannot avoid liability on the ground that he does not appear as a subscriber to the capital stock of such association. And the question in such a case is not so much whether such person has held himself out as a partner, but whether he was a member of the company, assuming to act as a corporation—holding himself out to the public, using his name, and engaging in its transactions as such. *Abbott* v. *Omaha Smelting Co.*, 4 Nebr. 416.

67. Wrongful assumption of corporate franchises—Injunction—Account—Receiver. A partnership of a great number of persons was constituted before the passing of the joint stock companies Registration Act. The members subscribed a certain sum, and received a sort of scrip certificate, specifying the number of shares to which each was entitled. No deed was executed, nor was any register of shareholders kept. They occasionally held meetings, at one of which the defendant and another person were appointed sole directors and trustees of the property of the association, which consisted of mines, plant, and slaves in the Brazils. The defendant survived his co-trustees, and disputes having arisen, a bill was filed against him by the plaintiff, who was a derivative shareholder, by purchase, of one of the scrip certificates, for an account of the receipts and payments of the defendant, and of the debts of the association, and for payments of such debts, and a division of the profits, and for a receiver and injunction, but the bill did not pray for a dissolution. Pending a motion for a receiver and injunction, the defendant clandestinely left England for Brazil: *Held*, that though the association might not be legal, as wrongfully assuming to act in the form of a corporation, yet the plaintiff having been treated by the defendant as a member of the association, could maintain the suit; 2. That he had an equity to secure the property of the association, and for that purpose a receiver was appointed. *Sheppard* v. *Oxenford*, 1 Kay & J. 491.

68. Between lessor and lessee. An agreement by which an iron company leased its works for a certain term in consideration of receiving one-quarter of the profits construed to create a partnership between the lessor and lessee, as to third parties. *Catskill Bank* v. *Gray*, 14 Barb. 472.

69. Lessor and lessee—Special contract. A contract by which salt springs are let, the lessee agreeing to manufacture 60,000 bushels of salt per annum, to pay two-thirds of it to the lessor, it being considered delivered when measured at the salt works, and to sell lessor's proportion and pay over to him the proceeds, does not constitute a partnership between the parties. *Preston* v. *McCall*, 7 Grat. (Vir.) 121.

70. Lessor sharing profits. The rule that all who participate in profits are liable as partners is subject to many exceptions. H. entered into articles of agreement with B. and C. by which he leased to them certain coal mines, but without rent, and was "to furnish the funds necessary to conduct the said coal business," etc. B. and C. were to receive two-thirds of the profits, and H. one-third. This agreement was held not to constitute a partnership. *Heckert* v. *Fegely*, 6 W. & S. 139.

71. Lease between partners. A lease by one partner to another of the coal mines operated by the firm for the term of two years at a fixed rental, placing the parties

in relationship incompatible with their relationship as partners, must operate either as a dissolution, or by consent, as a suspension of the partnership during the term. *McAdams* v. *Hawes*, 9 Bush. (Ky.) 15.

72. Lease to partners. The purchase of a leasehold interest as part of a stock in trade is not evidence of an agreement to contract a partnership commensurate with the duration of the lease. *Crawshay* v. *Maule*, 1 Swans. 495.

73. Leasehold colliery — Partition — Dissolution. Several persons holding leases of a colliery and working it together in copartnership: *Held*, to constitute an ordinary case of partnership, and that upon dissolution one of the co-owners could not insist upon a partition, but that the whole must be sold. *Wild* v. *Milne*, 26 Beav. 504.

74. Under lease with covenant of renewal. An agreement to continue a partnership in the working of quarries for three years and so much longer as the lessees (two of the partners) should continue to be lessees under the lease then existing, does not bind such lessees to take advantage of an option of renewal contained in their lease, nor prevent them from taking the same premises upon a new and original lease not given as a renewal of the former lease. The partnership expired with the first lease, the term of which ended a few days after the expiration of the three years. *Phillips* v. *Reeder*, 18 N. J. Ch. 96.

75. Renewal of lease — Joint benefit. Parties interested jointly with others in a lease of a mine, working it as partners, cannot take to themselves the benefit of a renewal to the exclusion of the others so jointly interested with them. *Clegg* v. *Fishwick*, 1 Mac. & Gor. 294.

76. General power of partner — Restrictions inter sese — Dormant partners. Each member of a mining copartnership has power to bind the company by any contract within the scope of the partnership, and is a general agent of his copartners for such purpose. The fact that some of the partners were dormant, or the fact of their subsequent dissent does not affect the joint liability. *Burgan* v. *Lyell*, 2 Mich. 102.

A special limitation of the powers of the partners contained in the articles of copartnership does not affect the power of each partner so to contract and bind his copartner, except as against parties having notice of such limitation. Id.

Dictum. A dissolution by one of the partners silently withdrawing or assigning his stock to another, cannot relieve such partner from liability for work done before, or debts contracted after thus silently withdrawing or assigning. Id.

77. Control of majority. Those owning the major portion of a mining claim have the power to decide what may be necessary and proper for carrying on the business of mining, and to control the working of the claim, in case all the parties in interest cannot agree, provided that the exercise of such power is necessary and proper for the carrying on the enterprise for the benefit of all concerned. *Dougherty* v. *Creary*, 30 Cal. 290.

78. Control of majority — Limit of liability. When a mining firm is composed of more than two members, a majority ought to control; and it is doubtful whether any one could limit his liability for necessaries. *Nolan* v. *Lovelock*, 1 Mont. 224.

79. Limiting liability. All the partners of a firm (a mining partnership) are liable for the debts contracted by that firm; but this responsibility may be limited by express notice by one that he will not be liable for the acts of his copartners. *Vice* v. *Fleming*, 1 Y. & J. 227.

80. Notice of limited liability — Wages. Laborers that are hired by one member of a mining firm cannot recover their wages from the firm if they had notice of an express agreement that such a contract must be ratified by all the members. *Nolan* v. *Lovelock*, 1 Mont. 224.

81. Incomplete liability. A. pays money for shares in a mine to B., describing himself as treasurer of the mine, and receives from persons calling themselves directors a memorandum to the purport that A. is a proprietor of shares, and that his name is entered in the cost book. A., in writing and in conversation, acknowledges himself to be a shareholder, and receives money from B. as treasurer, on account of supposed profits, but no deed is executed, nor is there an assignment of any interest in the mine from the lessee thereof: *Held*, that A. is not liable for supplies furnished the mine, unless furnished on his credit. *Vice* v. *Lady Anson*, variously reported; 1 M. &. M. 96; 1 Man. & Ry. 113; 7 B. & C. 409; 1 C. & P. 19.

82. When liability begins. A party paying a deposit on shares in a trading company, and afterwards signing the deed of partnership, is to be considered as a partner from the time of his paying the deposit. *Lawler* v. *Kershaw*, Moo. & M. 93.

The defendant and others met for the purpose of forming a company for working a mine on the cost book principle, the concern to consist of 60,000 shares, of which 15,000 were to be appropriated to the owner

of the mine, 33,750 to A. B. and C., and the remainder allotted to other parties in proportion to certain capital subscribed by them, 1125 being allotted to the defendant, for which he paid 100 pounds; and it was at that meeting resolved, amongst other things, that the requisite capital to work the mine for the first six months should be found by A., B. and C. The same resolution also stated that the mine had been purchased of the owner for the sum of 100 pounds in cash, and 15,000 pounds to be paid in cash or shares at the end of six months, should it be deemed desirable by the adventurers to continue operations, such payment of 15,000 pounds or surrender of the mine to the owner being optional with said adventurers: *Held*, that by this arrangement, each adventurer became a partner in the concern from the commencement, and liable as such for goods supplied for the working of the mine. *Peel* v. *Thomas*, 15 C. B. 714.

83. Liability for supplies. A shareholder in a mining adventure to whom no conveyance has been made, and whose personal credit is not relied on for goods furnished to the mine, is not responsible for the payment for goods furnished the mine. *Vice* v. *Lady Anson*, variously reported; 1 M. & M. 96; 1 Man. & Ry. 113; 7 B. & C. 409; 1 C. & P. 19.

84. Agreement restricting authority. Any restriction imposed by agreement among the partners on the authority possessed by them, though operative as between the partners themselves, does not limit their authority as to third persons who acquire rights under its exercise, unless such persons knew of the restriction imposed. *Oatey* v. *Bourne; Hawken* v. *Bourne*, 10 L. J. Ex. 361; 8 M. & W. 703.

85. Relations inter sese. Persons may be partners towards the world without being partners between themselves; but if they be partners between themselves, they are undoubtedly partners in respect of the public. *In re Staunton Iron Co.*, 21 Beav. 164; 25 L. J. Ch. 142.

86. Belligerent relations. A partnership requiring the joint enterprise and funds of the contracting parties (mining) cannot lawfully exist while belligerent relations separate the partners. The late civil war operated to dissolve such partnerships then existing, and to prevent the formation of others. *McAdams* v. *Hawes*, 9 Bush. (Ky.) 15.

87. Contract between partners—Remedy. Plaintiffs and defendants formed the "Empire Water and Mining Co.," a partnership. Plaintiffs owned five and defendants nine shares. It was formed by uniting the ditches and ground owned by plaintiffs and defendants, the arrangement being in the form of a contract requiring each party to do certain work towards bringing the property so united into available condition, and stipulated damages for failure in this respect were provided for: *Held*, that no action could be maintained at law upon this arrangement; nor in equity, unless an account and dissolution were prayed for. That upon seeking equitable relief if the damages were liquidated, the court could state the account; if unliquidated, an issue would be directed to a jury. *Stone* v. *Fouse*, 3 Cal. 292.

88. Lien upon share bought with "notice" of "lien." If a member of a mining partnership sells his interest in the mine, the purchaser takes it subject to any lien existing in favor of a copartner for debts due the creditors, or advances made for the uses of the concern, unless he becomes a purchaser in good faith for a valuable consideration, without notice of such lien. *Duryea* v. *Burt*, 28 Cal. 569; B. & W. L. C. 489.

If, while a mining company is engaged in working its mining grounds as partners, one partner sells his interest in the mine, the purchaser will be deemed to buy with notice of any lien resulting from the relation of the partners to each other and to the creditors of the partnership. Id.

89. Pre-emption of partner's share—Bankrupt. A coal mine was worked by several persons under a lease, the articles of partnership giving each a power of pre-emption in case any partner wished to dispose of his share; a partner deposited an attested copy of the lease, in order to give an equitable mortgage on his share to a stranger: *Held*, the court could not make the usual order for sale, for want of jurisdiction in the Court of Bankruptcy to take an account. *Ex parte Broadbent*, 1 Mont. & Ayr. 635.

90. Debt of partner to the firm. Where a lease of mines is taken by six persons, for the purpose of working them in partnership, and the managing partner becomes, in the course of such management, indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday* v. *Wightwick*, 1 Russ. & M. 45; S. C., 1 Tam. 250.

91. Misbehavior of partner. A partner is required to exercise towards his copartners the utmost good faith in all matters relating to the copartnership, and if one deals with or uses firm property, he will be held to account for all profits arising from such use or transaction, and if loss arises from his fraud, he is liable to his co-

partners for all injuries from such misconduct. *Levi* v. *Karrick*, 13 Iowa, 344; 8 Id. 150.

92. Attempting sole purchase in fraud of the firm. If two or more persons as mining partners, claim and develop a mine situated upon land owned by a third person, and the partners authorize one of their number to purchase the land of the owner for the benefit of all, and he buys the same in his own name, he holds the legal title of his partners' proportion in the mine in trust for them. *Settembre* v. *Putnam*, 30 Cal. 490; B. & W. L. C. 514.

93. Real estate purchased with joint funds held by one partner—No relief against partner's fraud in such case—Illinois practice. Real estate belonging to a partnership will in equity be treated like its personal funds, and distributed accordingly. If the title stands in the name of one of the partners he will be held as a trustee of the partnership, and be made to account to the other partners. So, where a mine was purchased by one of three partners in his own name, but with money contributed in equal proportions by all parties, upon a dissolution, it was held proper to compel the partner holding the title to convey to his copartners their proportionate interest. *Faulds* v. *Yates*, 57 Ill. 417.

But where the purchasing partner has alleged that he was compelled to pay a larger price than he had in reality paid; and his copartners, upon such misrepresentation, had advanced more than their proper proportion of purchase money, the partner making such representations cannot be compelled to refund such excess, as, where a conveyance of land is asked it must be granted upon the specific terms of such agreement as that at which complainants have agreed to purchase. Id.

Upon such partnership, *held, further*, that the company was neither a necessary nor proper party. Id.

94. Partner against partner—Jurisdiction. A member of an incorporated company (mining) may sue the corporation at law, but a partner cannot sue his partner except in equity. *Barnstead* v. *Empire M. Co.*, 5 Cal. 299.

95. Colliery owner receiving profits of store for good will of colliery. E., one of the defendants, being concerned in a colliery, entered into an agreement with J. for opening a tally shop near it, for the purpose principally of supplying goods to the workmen. E. built the shop, and his name was placed over the door. J. managed the shop. E. received, in the first instance, £7 per cent., and afterwards £5 per cent., on the amount of all sales to his workmen, and J. received all the rest of the profits. The plaintiffs were the assignees of bankers, with whom J. had opened an account, and who had advanced money to J. for the purchase of goods for the shop. There was no evidence to show that credit was in fact given to E. The jury, having found that there was no sharing of profit and loss between E. and J., and that credit was not given by the bankrupts to E.: *Held*, that the verdict was not against the evidence; that as credit was given to J. alone, E. could only be made liable on the ground of an actual partnership between him and J.; and that E.'s taking £5 per cent. on the sales to his workmen, did not, as a matter of legal inference, render him liable as a partner to third persons, but was in the nature of a commission on certain sales, supposed to be effected through his influence over his workmen. *Pott* v. *Eyton*, 3 C. B. 32; 15 L. J. C. P. 257.

96. Mining company store—Active partner—Note. A mining company, unincorporated, consisting of eleven members, formed a partnership with one Davis, for trading purposes, the company and Davis each advancing half the capital. One of the mining company acted as salesman in the store; two other of its members attended to the business for the mining company: *Held*, that each member of the mining company was a member of the trading firm; 2. That the particular party who acted as salesman was by no means a dormant partner, and upon the facts of the case his note bound the firm. *Rich* v. *Davis*, 6 Cal. 163.

97. Bias of partner on account of side-trade. Plaintiff and defendant (who was a shopkeeper) entered into partnership in the business of purchasing *lapis calaminaris* from the miners, the defendant being the active purchaser. He changed the purchases from cash transactions into barter, and paid the miners in goods from his store: *Held*, that his partner had a right to a division of the profits made by the partner in his barter of goods. *Burton* v. *Wookey*, 6 Madd. 367.

98. Negligence. All the partners are liable for the negligence of one producing injury to a miner employed. *Ashworth* v. *Stanwix*, 30 L. J. Q. B. 183.

99. Survivorship. A mining partnership is not dissolved by the death of a partner, nor has a surviving partner any right to take control of the property as survivor, the right only applying where the *delectus personæ* exists. *Jones* v. *Clark*, 42 Cal. 180; B. & W. L. C. 525.

100. Laches—Construction of special contract—Surviving partner. Bill by sur-

viving partners, operators of coal mines, against the executors of a partner who had died thirteen years before the institution of the suit, for an account of the partnership dealings and transactions, charging that the deceased partner was indebted to the firm at the time of his death, dismissed with costs, on the ground of the lapse of time, no new liabilities of the former partnership appearing to have arisen, or become known after the death of the deceased partner. *Tatam* v. *Williams*, 3 Hare, 347.

By an agreement between some of the partners in a colliery reciting that it was apprehended it would be competent for one partner to determine the joint interest and bring the partnership property to sale, and that the death of any partner would have that effect, and that they were desirous that their interests should be so far several that the share of any partner should be transmissible to his representatives, and that the partnership interest should not be determined and the entire property sold, without the consent of the majority in value, but each should be competent to sell his own share only; it was agreed that each of them should hold to himself, transmissible to his own representatives or assigns, an aliquot share of certain of the partnership property, and that their joint holding should not be subject to the ordinary terms applying to partnership property, so as to entitle any one of them to a sale without the concurrence of such majority, or to dissolve the partnership, or so as to cause a total dissolution of partnership by the death of any one of them: *Held*, that this was not an agreement by the parties, that the representatives of a partner, after his death, should continue partners with the survivors, and contribute to the working of the colliery on their joint account, but was only an agreement that none of the partners or their representatives should be entitled to a sale of more than his own share of the partnership property. *Tatam* v. *Williams*, 3 Hare, 347.

101. Deceased partner — Renewed lease—Fraud—Laches. Where after the decease of a partner in a lease of mines, the survivor renewes the lease in his own name, and carries on the business in his own name, the court will not in general assist the representative of the deceased partner (claiming an interest on behalf of the estate in the renewal), unless he come forward promptly. The survivor should not be obliged to take the sole risk, and then share the profits. But this rule cannot be applied in a case where the survivor keeps the representative of the deceased in ignorance, refusing to furnish accounts so that such representative had not knowledge upon which to elect whether to continue his interest or abandon the concern. Cranworth L. Ch. *Clements* v. *Hall*, 2 DeG. & J. 173; 27 L. J. Ch. 349; reversing S. C., 24 Beav. 333.

And the interest of the deceased partner was held upon the facts to continue in a renewed lease of a mine upon a bill filed seven years after his decease. Id.

102. Deceased partner's effects. A. and B., both citizens of Missouri, were digging gold on shares and living together in California. A. died, leaving a sum of gold and some wearing apparel. B. sold the wearing apparel, paid funeral expenses, caused the gold to be weighed and a memorandum of it to be made by A.'s acquaintances, and started to bring the amount home, but on the road the trunk was broken open and the gold stolen: *Held*, B. was not liable to A.'s administrators for the gold. *Graves* v. *Poage*, 17 Mo. 91.

103. Assignment no dissolution. One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. *Duryea* v. *Burt*, 28 Cal. 569; B. &. W. L. C. 489.

104. Transfer of shares to infant. The holder of shares in a mining company who delivers them to a person through whom he may receive the profits, if any accrue (his son aged 17 years), or who purchases shares in the name of such person, is not by this device relieved from liability as a shareholder although the shares of such company are transferable by delivery alone. *In re Cobre M. Co.; Weston's Case*, 5 Ch. App. 614.

105. Transfer of shares — Cost book system. A member of a mining (cost book) partnership may sell his shares and insist upon his vendee being admitted to his place in the partnership, which is a right not existing in ordinary partnerships. *Watson* v. *Spratley*, 10 Ex. 222.

106. Unrecognized assignee. An assignee of the interest of a partner (in iron works) not being recognized as a partner by his assignor's associates, does not, by his acceptance of the assignment, incur any liability as between himself and the copartners. *Jefferys* v. *Smith*, 3 Russ. 158.

107. Fraudulent purchase at sheriff's sale. A mining partner (or associate) may buy in the interest of a cotenant at sheriff's sale with his own funds in the absence of any circumstances of fraud or trust, and the rule governing the relation of trustees and guardians does not apply to such case. *Bradbury* v. *Barnes*, 19 Cal. 120.

But he cannot, especially while holding sufficient money of the concern to pay the claims, buy up a tax title or purchase a

judgment against the company and so oust his associates. Id.

And if he so purchase a judgment against the company he is only entitled to contribution if the company is willing to affirm the purchase for the benefit of the concern. Id.

108. Colliery—Biddings at dissolution sale. Upon a sale of a colliery, on dissolution of the firm operating the same, all the partners allowed to bid except the one having conduct of the sale. *Wild* v. *Milne*, 26 Beav. 504.

109. Forfeiture of share—Lease—Assets. Where an agreement of copartnership provided that the party violating the stipulations of the agreement should forfeit his interest in the concern, and at the option of the other partner might be ejected therefrom, by such other partner refunding to him the money advanced to or expended in the same, it was *held*, 1. That it lies upon the partner claiming a right to forfeit the interest of his copartner, to prove fully and clearly that a cause of forfeiture had arisen; 2. That the *onus probandi* will lie upon the party asserting and claiming the forfeiture, although he be respondent to a bill in equity, wherein the complainant avers performance on his part and ejection by the other without cause; 3. Where a lease is made of certain coal mines to two persons as tenants in common, and the lessees afterward associate themselves as partners for the purpose of mining, shipping and selling coal from the demised premises for the whole period of the lease, the leasehold is thereby converted into partnership assets, and becomes the property of the firm. *Patterson* v. *Silliman*, 28 Pa. St. 304.

If a stipulation in such lease provides that any transfer or assignment of the lease by the lessees, or permitting it to be seized in execution, should work a forfeiture of the lease, and enable the lessor to re-enter without prejudice to the right to claim damages from the lessees, such forfeiture is not incurred by a sale of the leasehold estate under a decree of a court of chancery as the property of the firm. Id.

110. Sale by partner of mine held in trust. If one of several partners in a mine holds the legal title in the same in his own right, to the extent of his interest, and in trust for his copartners to the extent of their interests, a sale made by him, without the consent of his associates, of an undivided interest, not exceeding in amount the interest held in his own right, to one who had no notice of the trust, will convey only the title of the grantor, and not the interests of the *cestuis que trust*. *Settembre* v. *Putnam*, 30 Cal. 490; B. & W. L. C. 514.

111. Withdrawing partner—Liability—Notice. S. and others carried on business under the name of the "Plas Madoc Colliery Company." S. withdrew from the firm, which afterwards became indebted to C., no notice having been given to C. or the public of S.'s withdrawing: *Held*, that S. was not liable for the debt, there being no sufficient evidence that he had ever, while a partner, represented himself as such to C., or appeared so publicly in that character that C. must have been presumed to know of it. *Carter* v. *Whalley*, 1 B. & Ad. 11.

112. Partners using credit of retired member—Cost book. In an action by a creditor for goods supplied to a mine conducted upon the cost book principle, against the defendant as a shareholder, it appeared that the goods had been ordered by the superintendent after the defendant had verbally agreed to transfer his shares to another partner, and had withdrawn from the partnership into which he had originally entered by verbal agreement only. The learned judge told the jury that if, before the goods were ordered, the defendant had agreed by word of mouth to transfer his shares to another shareholder, who had agreed to take them, or if he had given notice to the rest of the shareholders that he relinquished his shares to them, they had no longer any authority to pledge his credit: *Held*, no misdirection. *Northey* v. *Johnson*, 19 Law Times, 104.

113. Dividend due retiring shareholder treated as a debt of the concern—Cost book system. A shareholder in a Cornish mine, worked on the cost book system, relinquished his shares in July, 1868, and paid his portion of the expenses up to his retirement. In August, 1869, an order for winding up the company was made, and the retired shareholder claimed to prove as a creditor for the value of his own share of the stock and plant. The assets were insufficient to pay the creditors of the mine. It having been found by a jury that, according to the custom of Cornwall, an adventurer in a cost book mine, upon relinquishing his shares and discharging his proportion of the liabilities of the company at that date, is entitled to be paid his share of the then value of the stock and plant, and that such share is due to him immediately, and payable within two years, the proof was admitted. *In re Prosper U. M. Co.*, L. R. 7 Ch. 286.

114. Parties—Retired partner. If, in case of a mining partnership, a retiring partner still continues bound for a partnership debt, he nevertheless parts with his equity to have the partnership debts paid out of the partnership property; and in a suit to dissolve the partnership as among the part-

ners, though he may be a proper, he is not a necessary party. *Jones* v. *Clark*, 42 Cal. 180; B. & W. L. C. 525.

115. Mining company assessments—Constitutionality of California partnership act of 1866. The statute of 1865–6 in relation to levying assessments against the owners of interests in mining claims for the purpose of working the same, applies only to copartners in the claim, and has no reference to those who are mere owners and shareholders, without the partnership relation. *Brundage* v. *Adams*, 41 Cal. 619.

To warrant such assessment, if the partnership relation does not exist, the joint owner must be notified that thenceforward he will be deemed a copartner for the purpose of working the claim, and the service of the notice changes the relation of the parties, and creates a mining partnership. Id.

The question of the constitutionality of the act referred to, "An act concerning partnerships for mining purposes," approved April 2, 1866, statutes, p. 828, providing for forced sale of partnership interests without contract or judicial process, suggested by the court but not considered. Id.

116. Laches effecting equities between copartners. One of a firm of oil refiners purchased in his own name a lot on which to erect a refinery; the firm took a lease of it from him, and erected buildings on it: *Held*, that after accepting such lease, erecting the buildings and delaying for years to assert title until the relations of the parties became altered and complicated, it was too late to claim relief in equity by bill calling for a conveyance. *Slemmers' Appeal*, 58 Pa. St. 169.

117. Ditch—Partner failing to contribute—Forfeiture. The failure of one partner in a ditch to pay his proportion of the expenses of the concern does not forfeit his right in the common property. *Kimball* v. *Gearhart*, 12 Cal. 28.

118. Usage of the firm—Mode of contracting. Where a contract in writing purported to have been made by a mining partnership in its firm name, through its secretary, and it appeared that such contract had been authorized by a vote of a majority of the shares at a meeting of the company, and, after being signed by the secretary, had been ratified and approved in the same manner; and it further appeared that, though there were no written regulations or by-laws, the company usually did business in this way: *Held*, that the organized and established usage on the part of the firm should be taken as a part of the contract of partnership. *Taylor* v. *Castle*, 42 Cal. 367; B. & W. L. C. 521.

119. Account. For case of assignment of partner's interest in a quarry concern and mode of division and allowance of profits among the partners, see *Atkinson* v. *Cash*, 79 Ill. 53.

120. Complaint failing to pray account. Complainant filed his bill, claiming balance on profits in working a placer claim under a mining partnership; the bill did not pray for an accounting: *Held*, on appeal, that the bill was fatally defective, although not excepted to below. *Russell* v. *Ford*, 2 Cal. 86.

121. Mining company—Practice—Montana. Judgment can be entered against defendants individually who are named and described in the complaint as a certain mining company, although they are not members of it, if the jury finds that they are liable individually. *Comanche M. Co.* v. *Rumley*, 1 Mont. 201.

122. Books. Order for production of mine books, in which all coadventurers were interested, but only one a defendant, refused. *Lopes* v. *Deacon*, 12 L. J. Ch. 311.

123. Books, property of the company. The books of a mining company are the property of the company, although they may also be the vouchers of the agent. *Atwood* v. *Ernest*, 13 C. B. 881.

124. Deposit of the firm books. A chattel in which two or more are jointly interested (the books of a company of mining adventurers) having been deposited with a stranger, a demand by one in his own name only will not entitle him to maintain an action for them; and this although he was purser of the company. *Atwood* v. *Ernest*, 13 C. B. 881.

125. Access to books. One of a firm of mining partners being interrogated as to the contents of books of the partnership, answered before the master that his copartner refused him access to the books: *Held*, that any partner had a right to inspect the books and make extracts from them, and that the answer should show that he had inspected the books as required by the interrogatory, or an affirmative showing that he had used his best efforts to obtain access to them. *Bute* v. *Stewart*, 12 L. J. Ch. 140.

126. Interfering mortgagor. The mortgagee of shares in a mining partnership is not at liberty to contest, or share in settlements made prior to the filing of the bill. *Redmayne* v. *Forster*, Law R. 2 Eq. 467; S. C., 35 L. J. Ch. 847.

127. Mortgage against share in colliery. A mortgagee of shares in a mining partnership is entitled to an account of the profits of the partnership made after the filing of the bill, and of the existing debts and liabilities, and to have the share of such debts and liabilities attributable to the mortgaged shares ascertained. The mode of operating a colliery considered. *Redmayne* v. *Forster*, Law R. 2 Eq. 467; S. C., 35 L. J. Ch. 847.

128. Notice of Withdrawal—Liability. Where the defendant, a part owner of a mine, told the plaintiff who had supplied the mine, on the credit of the firm, that he, the defendant, had sold his share of the mine to A. and B., who for the future would be his paymasters, and that he, the defendant, would be no longer responsible: *Held*, that the operation of the notice was a question for the jury. *Vice* v. *Fleming*, 1 Y. & J. 227.

129. Dissolution—Notice—Dormant partner. A partnership (in alum works), general in point of duration, may be dissolved at any time (as to the future transactions), and such dissolution need not be published or communicated to exempt a retiring dormant partner from liability for subsequent engagements, as the making of a promissory note in the name of the ex-firm. *Heath* v. *Sansom*, 1 Nev. & Man. 104.

130. Dissolution—Insolvent assignee. An assignment of his share by a partner in iron works, though made to an insolvent person, is not the less effectual in putting an end to the assignor's liability. *Jefferys* v. *Smith*, 3 Russ. 158.

131. Account—Prayer for Dissolution. On a bill for an account of the dealings and transactions of a mining partnership, it is not necessary to pray for a dissolution of the concern. *Bentley* v. *Bates*, 4 Y. & C. 182.

132. Dissolution—Division of tools, etc.—Account stated. The plaintiff and defendant had worked a coal pit in partnership till it was exhausted, when plaintiff said he would join in no more coal pits, and defendant said he should work another whether plaintiff joined him or not. The materials and utensils belonging to the mine were valued, and each party was to take an article by turns, according to that valuation, till the whole was divided. The valuation was made, and it was subsequently agreed that the defendant should take the whole at the valuation, and he took possession of them. The other partnership debts and credits remained unsettled: *Held*, that this was a transaction so separate and distinct from the general accounts that the plaintiff might sue for his moiety of the value of the materials and utensils before the final settlement of the partnership accounts. *Jackson* v. *Stopherd*, 4 Tyrwh. 330; 2 Cr. & M. 361.

133. Power to dissolve—Compensation to ousted partner. The plaintiff was lessee of seams of coal for a term of years, and had abandoned the working of the upper seams as unprofitable. In 1845 he entered into partnership for working the upper seams with the defendant, his colliery manager. In 1857, the upper seams having been worked as far as could be done from the existing pits, the defendant, with the privity and approbation of the plaintiff, sunk a new pit at considerable expense, which was defrayed out of the partnership moneys. In 1858, differences having arisen, the plaintiff gave the defendant notice to dissolve the partnership, which notice the defendant refused to receive, insisting that the understanding had been that the partnership should continue for the whole duration of the lease. The new pit was only just finished. No express agreement as to the duration of the partnership was proved: *Held*, that the burden of establishing that there was more than a partnership at will lay upon the defendant, and that in the absence of such proof the plaintiff was entitled to dissolve the partnership at his pleasure, and the defendant could not claim any interest in the seams of coal. But that an inquiry had rightly been directed, whether any, and what sum ought to be allowed to the defendant in respect of the expenditure on the new pit. *Burdon* v. *Barkus*, 4 DeG. F. & J. 42.

134. Specific relief without dissolution. Where a party institutes an action against a portion of his associates in a mining partnership, to establish a disputed right to an interest in a mine, and a conveyance of the interest claimed is a part of the relief sought, a court of equity may give judgment establishing the right and directing a conveyance to be made, without dissolving the partnership, and the other partners are not necessary parties, no accounting, dissolution or partition being insisted upon. *Settembre* v. *Putnam*, 30 Cal. 490; B. & W. L. C. 514.

135. Dissolution a question of fact—Dissolution while lease unexpired. The defendant B., and the other defendants, having bought an estate, obtained from the Bishop of Durham a lease for twenty-one years, of land adjoining, called the Byers Green Coal Royalty, and commenced working the same under the name of the Byers Green Coal Company. In March, 1839, they signed an agreement that they should be entitled to the land so purchased in

equal shares, and also to the Byers Green Royalty in equal shares; and that each party should participate in the advantages or losses to be derived from the purchase, and the said royalty, etc., and that any money paid for the same estate or royalty, or respecting the mining of any colliery by any of the said parties should carry interest until the repayment. B., having refused to pay up his calls, to sign a partnership deed, and also to concur in borrowing money, the other partners, in February, 1841, served him with a notice that they would no longer continue partners with him, and that he was to consider the partnership between them entirely dissolved, and they offered to pay him back the sum of 850 pounds, previously advanced by him, with interest. This sum was not paid, and negotiations afterwards took place between the parties, respecting the payment of the sum, and other compensation to B., and as to the terms of the dissolution: *Held*, that such partnership was not for twenty-one years, but might be dissolved at any time; that it was determined by the notice; but it was a question of fact for the jury whether the subsequent negotiations did not amount to a waiver of the notice or a renewal of the partnership. *Laycock* v. *Bulmer*, 13 L. J. Ex. 156.

136. Dissolution — Assets converted into money. Before a final decree can be rendered dissolving a partnership, it is necessary that the assets should be converted into money, and each partner's balance ascertained and allotted to him. *Levi* v. *Karrick*, 8 Iowa, 150; 13 Id. 344.

137. Judgment of dissolution—California practice. A judgment dissolving a mining partnership, and directing a sale of the partnership property, and a division of the proceeds, is a final judgment. *Clark* v. *Dunnam*, 46 Cal. 205.

138. Receipt in settlement. A receipt "in full settlement of my interest in the diggings," given by one partner in lead mines to his associates, is fairly susceptible of but one construction, and that is, that he had received all that was coming to him at that date from the proceeds arising from the working of the mines. *Levi* v. *Karrick*, 13 Iowa, 361; 8 Id. 150.

Such receipt is not conclusive upon either party, but is a *prima facie* settlement until impeached. Id.

139. Timber on hand at dissolution. Where timber had been purchased for a colliery, and after its purchase, but before its use, certain partners retired and the other paid for and used the timber, such retiring partners have no interest in and need not be made parties to a suit against the vendor arising out of the sale. *Massey* v. *Davies*, 2 Ves. Jr. 317.

140. Final settlement — Cross bill. When one of several partners (working a quarry) files a bill for settlement of all the partnership affairs, the court may decree as the equity of the case may require, and no cross bill is necessary to establish the rights of the other partners. *Atkinson* v. *Cash*, 79 Ill. 53.

141. Abandoning the adventure. An abandonment of an undertaking to mine for the benefit of an associate advancing expenses, when induced by uncontrolable circumstances, and which is not willful or unnecessary, gives no cause of action to the associate. *Waring* v. *Cram*, 1 Pars. Eq. Ca. 516.

142. Excluded member. A partner or stockholder in a joint stock mining ditch company has a right to an accounting and relief upon showing his exclusion from participation in the business or profits of the company and his right to an interest therein. *Smith* v. *Fagan*, 17 Cal. 179.

143. Ousting of partner in renewed lease not favored. Although it cannot be laid down that in no case can a partner, during the partnership, contract for a new lease, it is very difficult, and especially as regards a managing partner (in charge of mines); and the mere intimation of his intention so to do, and to dissolve partnership, is not sufficient to exclude their interest, though the partnership is at will. *Clegg* v. *Edmondson*, 8 DeG. M. & G. 786.

144. Company name—Practice. An action cannot be sustained in the name of the "proprietors of the Mexican mill," such style not being a name of a corporation and not purporting to be the firm name of particular partners. A suit so instituted is a mere nullity. *Proprietors, etc.* v. *Yellow Jacket S. M. Co.*, 4 Nev. 40.

145. Partnership implies mutual agency. The ground of liability of one partner for the acts of the other, is that of an implied general agency within the scope of the partnership business. *Babcock* v. *Stewart*, 58 Pa. St. 181.

146. Liability of incoming partner. An incoming partner is not liable on contracts of the firm, made before he became a member. *Babcock* v. *Stewart*, 58 Pa. St. 179.

A. and B. purchased an interest in an oil lease; shortly afterwards C. and D. became partners with them, and these four employed E. as overseer with a joint interest; E. hired the plaintiff Babcock to work by the day in sinking a well. After he commenced work three new partners came into the concern.

Against these eight persons plaintiff brought suit for his wages: *Held*, that the partners who came into the concern after the contract had been made, were not liable upon the contract; but that they would be liable upon a *quantum meruit* for work done since they came into the firm; and that the mode in which interests in oil leases were sold, divided and sub-divided while work was going on, could not alter the rule as to that class of cases. Id.

147. Accounting demanded by deserting and insolvent adventurers. Rhea, Vannoy, Garland and McKay entered into a written agreement for the purchase of Cherokee lands, and to work them by mining, etc., as partners. One of the specifications in the agreement of copartnership was, that such disposition was to be made of the property as a majority might deem advisable. Lots were purchased under statutory sales, the legal title however, remaining in the State. After outlays made, it appeared that the land would not pay for mining. Two of the partners who were wholly insolvent deserted the adventure. A third, who was at least partially insolvent, "went to Georgia, where he thought the prospects of finding gold were more flattering." Vannoy being left as the only partner adhering to the adventure, to relieve his sureties and save further liability for unpaid purchase money, disposed of the land at as good a price as could be obtained: *Held*, that the abandonment by three out of the four partners superseded any contract for a concurrence of the majority; 2. That neither of the abandoning partners had any equity against Vannoy's disposition of the property, especially as against a purchaser at a fair price without notice of any equity. *Rhea* v. *Vannoy*, 1 Jones Eq. (N. C.) 283.

All that such abandoning partners could ask under such circumstances would be an account of the moneys received on disposition of the land, and for any tolls, rents or profits arising out of the mining or other operations of the adventure. Id.

As to another tract of land owned by the same copartnership, Vannoy, to relieve his sureties, surrendered the land to the State under the act of 1844. And afterwards under another act obtained a "pre-emption right" for a sum of money: *Held*, that neither the original partners nor their assigns could hold him to any account for this money. *Rhea* v. *Tathem*, 1 Jones Eq. (N. C.) 290.

148. Family arrangement in nature of partnership—Division of nine pound nugget. John Reid was the owner of a gold mine in the county of Cabarrus; he granted permission to his sons and sons-in-law to work the mine upon the following terms: they were daily to pay him one-third of the gold found, the residue to be divided equally among those who worked on the several days. If any one was necessarily prevented from working he was to furnish one of his white family as a hand in his place. On November 20th, 1854, four of the parties so associated were working, and the plaintiff being necessarily detained at home, sent his son, Arthur Reid, to work in his stead that day. During the day one of the party found a nugget of gold weighing about nine pounds avoirdupois, which, after paying the father's third they divided among themselves, allowing no share to George who had sent his son to represent him; upon bill filed, defendants denied that Arthur Reid was accepted as a hand; asserted that he was not fit to do a man's work, etc.; upon these facts an issue was directed and found for plaintiff. It appeared that Arthur had commenced work and then been sent for a "dipper," during which time one of the partners at work had made a remark in the presence and hearing of the other partners, the purport of which was an acceptance of Arthur in his father's place, though with an expression of dissatisfaction: *Held*, that such statement was evidence against all the copartners, they not having dissented therefrom. *Reid* v. *Barnhart*, 1 Jones Eq. (N. C.) 142.

PATENT.

1. Senior patent on junior location. The patent of a mining claim granted under the acts of Congress perfects the right initiated by location, and relates back to the date of location, cutting off all intervening claims, except where the patentee has neglected to adverse the claim of an intervening or later location; in which case, under the provisions of said acts, such failure is a waiver of the priority. *Eureka Cons. M. Co.* v. *Richmond M. Co.*, 9 Cir. Ct. (Field, Sawyer and Hillyer, JJ.) 4 Sawyer, 317.

2. Veins—Surface—Departure from side lines. The act of 1866 gives to the patentee a right to the single vein patented. The act of 1872 adds all other veins the apices of which lie within the surface lines. The lode or lodes are granted with their dips, angles and variations, although they may enter the land adjoining—but whether a lode under either act which leaves its surface lines on its strike may be followed into the land adjoining, was not involved, and whether the opinion intended to touch on the point at all is not clear. Id. Compare pp. 322 and 324.

3. Construed as deed. The conveyance of land by an individual carries the deposits of gold and silver, unless expressly reserved, and the patent of the United States must

receive the same construction. *Moore* v. *Smaw*, 17 Cal. 200; B. & W. L. C. 52.

4. Minerals conveyed. The patent of the United States passes to the patentee 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 fact, in everything embraced within the term land. *Moore* v. *Smaw*, 17 Cal. 200; B. & W. L. C. 52.

5. Mexican grant. A patent from the United States for land in California, issued upon a confirmation of claims held under grants of the former Mexican Government, invests the patentee with the ownership of the precious metals which the land may contain. *Moore* v. *Smaw*, 17 Cal. 200; *Fremont* v. *Flower*, Id. 200; B. & W. L. C. 52.

6. Mining on confirmed Mexican grant. In the matter of the Mariposa grant, being a grant of the government of Mexico, afterwards confirmed by United States patent: *Held*, that the title to the gold in the premises was reserved by Mexico and passed by treaty to the United States, and did not pass to the party whose grant was confirmed by United States patent. (But see *contra*, as to same premises, 17 Cal. 200.)

That no implied license or permission from the United States can be presumed in favor of miners, while another party is by patent the superior proprietor—owner of the soil. That the State laws giving general license to miners to enter upon lands and extract the gold, apply only to the public domain, and not to lands held by private proprietors, although such proprietors are not owners of the gold therein. *Boggs* v. *Merced M. Co.*, 14 Cal. 281; B. & W. L. C. 131.

7. Application for a proceeding in rem. It seems that a proceeding under the United States mining acts of 1866 and 1872, to procure title to a mining claim, is a proceeding *in rem.*, or in the nature of a proceeding *in rem.* *420 Mining Co.* v. *Bullion M. Co.*, 3 Saw. 659.

8. No presumptions against. A grant of mines from the government cannot be presumed against the superior proprietor—the party holding the patent of the United States for his lands—although such patent may not include the minerals in the land. *Boggs* v. *Merced M. Co.*, 14 Cal. 281; B. & W. L. C. 131.

9. Issued against law. No title can be valid which is acquired against law. *Atty.-Gen.* v. *Smith*, 31 Mich. 360; see *Morton* v. *Nebraska*, 21 Wall. 660.

10. Effect of patent where State law reserves minerals—Duty of surveyors. Where land is located under a State school land warrant, and a patent is issued after all the proceedings required by law have been taken, the patent is the record of the judgment of the State that the land covered by the patent is not mineral land within the meaning of the section reserving mineral land from sale. *Ah Yew* v. *Choate*, 24 Cal. 562.

And the fact that gold has been found upon land conveyed by such patent, sufficient to induce the patentee to open a mine from which he can extract $25 to $30 a day with seven or eight hands, is not a fact sufficient to justify the court in holding that the land is mineral land within the meaning of the statute, after the issuance of a patent as stated. Id.

Where mineral lands are reserved from sale, it is the duty of the officers of the government to ascertain whether the land is mineral or not, before offering it for sale. Id.

11. Mining claim on school section. The patent of the United States to a mining claim on a school section in the State of Nevada, located prior to the survey of such lands, relates back to the original location, and passes title against an intervening patent from the State. *Heydenfeldt* v. *Daney M. Co.*, 93 U. S. 634; affirming S. C., 10 Nev. 290.

12. Quarter section containing lode claim. The patentee of a quarter section entered as agricultural land, upon which valid mining locations, authorized by the act of July 26, 1866, existed at the time of the entry and patent, cannot be declared the trustee of the legal title for the benefit of the owner of such mining claims, inasmuch as the patent conveyed no title to such mining claims. *Gold Hill Q. M. Co.* v. *Ish*, 5 Oregon, 104.

13. Flooding—No easement acquired while title in the United States. An owner of land cannot acquire a prescriptive right to flood with water land higher than his own belonging to the United States, and the purchaser of such higher land from the United States may commence an action for an injury at any time within the statutory period after he buys from the United States, notwithstanding the fact that it may have been flooded while the United States owned it. *Ogburn* v. *Connor*, 46 Cal. 347.

14. Relation. The United States patent to a mining claim "relates back to the original location and entry," and perfects the right to the exclusion of all adverse intervening claims. So held in a case between the mining claimant and a party holding the State patent to the same ground as a school section. *Heydenfeldt* v. *Daney M. Co.*, 93 U. S. 641; affirming S. C., 10 Nev. 290.

15. Relation—Receiver's receipt—Land-office practice—Town lot. In an action of trespass brought by plaintiff as claimant of a certain town lot against the defendant, using the same premises as a dump and as a part of his location of a ledge, where the plaintiff had, after the trespass, obtained a receiver's receipt from the land office for the price of certain land pre-empted, including the premises: *Held*, that such receiver's receipt related back to the time of filing the declaratory statement, and should have been received as evidence, although the trespass had been committed before the issue of such receiver's receipt; 2. That as between claimants neither of whom deraign a legal title from the United States, priority of possession must prevail; but that, where one party holds a title from the paramount proprietor, it must prevail against a title which has never been recognized by grant of any kind; 3. That although the decision of the register and receiver is not a judicial decision, and although liable to reversal by the commissioner of the general land office, it is evidence of the facts upon which it is supposed to be based until actually reversed; 4. That the proviso of the second section of the act of Congress of July 1, 1864, in reference to mineral veins upon town lots, could not "help the defendant." *Courchaine* v. *Bullion M. Co.*, 4 Nev. 376.

16. Notice of equities. One who, prior to the issue of a patent from the State, knew that the State authorities claimed that the lands covered by it were reserved from sale, and knew of ineffective efforts to purchase them from the State, had sufficient notice to put him on inquiry, and to subject him to any equities growing out of any mistake or fraud under which the patent had been issued, and is not entitled to any consideration as a *bona fide* purchaser. *Attorney-General* v. *Smith*, 31 Mich. 359.

17. Bill to cancel—Parties. In an action brought to cancel a patent for land sold without authority of law, the State and persons who have a right to mine on the land under the mining laws of this State, may be joined as plaintiffs. *People* v. *Morrill*, 26 Cal. 337.

Where the parties joined as plaintiffs are all interested in the principal question raised in the bill (which was in regard to land containing minerals), and the issues tendered are simple, and a multiplicity of suits may be avoided, a demurrer for multifariousness will not be sustained. *People* v. *Morrill*, 26 Cal. 337.

18. Tax on foreigners working private land—Patent—Mexican grant. The patent of the United States confirming the Mexican grant of the Mariposa estate invested the patentee with the title to the precious metals contained in those lands; and the rights of the owners with respect thereto cannot be enlarged or diminished by any license of the State. *Ah He* v. *Crippen*, 19 Cal. 492.

They may extract the gold as they see fit, or allow others to extract it, unrestrained by the foreign miners' tax act, which refers only to the public domain. Id.

19. Possessory claimant not bound to go to patent. Under the mining laws of the United States, the locator of a mining claim becomes the assignee of the United States, and so long as he complies with the conditions imposed by them, and the license to occupy remains in force, the right of the locator to the possession of the land, and to appropriate to his own use the minerals therein, is full and complete, and he need not take any step to purchase the same, or go to patent unless he think proper. *Chapman* v. *Toy Long*, 4 Saw. 28; *Wolfly* v. *Lebanon M. Co.*, 4 Col. —.

20. Estoppel by failure to, adverse. The silence of the first locator when a subsequent locator applies for a patent, is under the statute a waiver of his priority. *Chapman* v. *Toy Long*, 4 Saw. 28.

21. Proof of receiver's receipt. To admit the certificate of the register of the United States land office showing a mining claim in controversy to have been entered for patent, it is necessary to first prove the signature of the register. *Jackson* v. *McMurray*, 4 Col. —.

22. Vein cannot be followed beyond the side lines of patent. The Ben Hardin lode was patented under the act of 1866. The Bell Tunnel lode was patented under the act of 1872. The vein of the former on its strike, crossed its side lines and entered within the side lines of the Bell Tunnel lode, the developments tending to show identity of the veins: *Held*, that the vein of the Ben Hardin lode, could not be followed beyond its side lines into the side lines of the Bell Tunnel lode; 2. That the grant of the vein, made under an act authorizing the following of the vein in its downward course to any depth, excluded the inference that the vein could be followed beyond the survey lot on its strike, or otherwise than on its downward course or dip; 3. Any local custom which might have existed, allowing the owner to follow the course of the discovered lode, would be in subordination to the acts of Congress, and could not enlarge the grant of a patent under the terms of the act of 1866. *Wolfly* v. *Lebanon M. Co.*, 4 Col. — (1878).

PAUPER.

1. Settlement. A pauper was by indenture hired for a year as a driver in a colliery, at the wages of 1s. 10d. for a good day's work, not exceeding fourteen hours, and 2d. a day more when that time was exceeded, and he was to forfeit 10s. 6d. for every act of disobedience, and 2s. 6d. per day for lying idle, to be deducted out of his wages. There was a proviso that nothing in the indenture should be construed to oust the jurisdiction of the justices, or to prevent either master or servant from applying to them in case of disputes; and a covenant that in case the master about Christmas should wish to repair any engine, etc., belonging to the colliery, he might stop the workings for any period not exceeding seven days, without paying any wages to the pauper, unless employed in other work: *Held*, that this was a conditional and not an exceptive contract, and that the pauper gained a settlement by serving under it for the whole year. *Rex* v. *Byker*, 2 B. & C. 114.

2. Settlement—Hiring. The pauper was, together with many other persons, hired to work in a colliery from the fifth of April, 1813, to the fifth of April, 1814. Amongst other things it was stipulated that each man should, on each working day, do such a quantity of work as should be deemed equal to a full day's work, and should not leave the pit until that quantity was completed, or in default thereof should forfeit 2s. 6d. The master stipulated to find work for the men during the whole year, and to forfeit 2s. 6d. for every day that he should oblige them to lie idle, except at the Christmas holidays, which were not to exceed ten days. There was also a proviso that nothing in the agreement should oust the jurisdiction of the magistrates. The pauper worked for the whole year, including the holidays, except on certain Saturdays, called pay Saturdays, when the wages were paid and the men did no work: *Held*, that this hiring and service did not confer a settlement. *Rex* v. *Gateshead*, 2 B. & C. 117, note.

3. Settlement by hiring. A. hires men from fifth April, 1816, to fifth April, 1817, to hew, work, fill and drive coals, and to do such other work as shall be necessary for the carrying on of A.'s colliery, and as they shall be required and directed to do by A.; the men to receive 2s. 6d. for each day that they should be laid idle (be unemployed) by A., except on the pay Saturdays, when the pit is going single shift (working twelve hours); but if the pit were going double shift (working twenty-four hours), the men to work one shift, in order to make each shift work eleven days (i. e., in a fortnight), and except when prevented by sickness or other unavoidable cause, to do and perform a full day's work on every working day, except a single shift on the pay Saturdays, and in default thereof for every such default to pay 2s. 6d. to A.: *Held*, that in this hiring there was an exception of pay Saturdays, and Sundays, and that therefore no settlement was gained by services under such hiring. *Rex* v. *Cowpen*, 5 Ad. & El. 333; 2 Nev. & M. 559.

4. Exceptive hiring — Settlement. Pauper was hired by agreement in writing from the fifth of April, 1826, to the fifth of April, 1827, to hew and work coals, and it was provided that the hewers were to be allowed, during the whole period of their hiring, save for one fortnight at Christmas, and in case of accident, as thereinafter provided, not less work than will yield them 28s. in each fortnight; but the owners were empowered, if they thought it expedient for the parties hired, to work no more than nine days in each fortnight, to "lay the pits off work" for the other days; also that the owners might lay the pits off work, at or about Christmas, for any time not exceeding ten working days, but that "the parties hired should nevertheless continue during such time, and during all other times that the pits should be laid off work, the servants of the owners," also that "the parties hired should do and perform a full day's work on each and every working day, or a quantity of work equal to a day's work, and should not leave their work until such day's work or quantity of work should be fully performed:" *Held*, an exceptive hiring. *Rex* v. *Walbottle*, 9 Q. B. 248; 15 L. J. M. C. 153.

5. Continuous hiring. A pauper agreed with the owners of a colliery to work constantly in the said colliery from the fourth of February, 1815, to the fourth of February, 1816, or to forfeit and pay to his master 1 shilling for each and every day he should absent himself from his work, and not work a reasonable day's work to the satisfaction of his master: *Held*, not an exceptive hiring. *Rex* v. *St. Helens*, 4 B. & Ad. 718.

See POOR RATE.

PERSONAL LIABILITY.

1. Nature of liability. Stockholders of a corporation are conditionally liable as partners for its debts; not as guarantors or sureties. *Moss* v. *Averill*, 10 N. Y. 449.

2. Mining company is not a manufacturing company. A mining corporation is not a manufacturing corporation within the statute of 1862, c. 218, defining and reg-

ulating the enforcement of the liabilities of officers and stockholders of manufacturing corporations. *Byers* v. *Franklin C. Co.*, 106 Mass. 131.

3. Principal debtor. A stockholder who, as such, is personally liable for the debts of a corporation, is so liable as a principal debtor and not as a guarantor. *Moss* v. *McCullough*, 7 Barb. 279.

4. Stockholder—Principal debtor. In California each member of an incorporated company is answerable personally for his proportion of the debts and liabilities of the company; and that as a principal debtor and not as a mere surety for the corporation. *Mokelumne Co.* v. *Woodbury*, 14 Cal. 265.

5. Liability not contingent on recovery against corporation. The right of action against a stockholder of a mining corporation on account of his individual responsibility for its debts and liabilities, as prescribed by the sixteenth section of the act concerning mining corporations, accrues at the same time as against the corporation, and is not contingent on a recovery against the corporation. *Davidson* v. *Rankin*, 34 Cal. 503.

6. Assertion of solvency. An officer and stockholder of a corporation who states to a creditor that the corporation is, in his opinion, solvent, does not thereby make himself liable to the creditors, if the statement was made in good faith, although the corporation was, in fact, at that time insolvent. *Searight* v. *Payne*, 2 Tenn. Ch. 175.

7. Enforced in equity. The personal liability imposed by the statute of 1863, c. 246, sec. 2, upon the officers of any corporation organized under the General Statutes, c. 61, for its debts contracted during their neglect to perform duties required by the Statute of 1862, c. 210, may be enforced, in the case of a mining corporation, by a suit in equity, under the General Statutes, c. 68, sec. 17. *Byers* v. *Franklin C. Co.*, 106 Mass. 131.

8. Extent of—Payment. Each stockholder of a corporation formed under the act of 1853, entitled "An act to provide for the formation of corporations for certain purposes," is liable for his proportion of the corporate debts; and any one creditor, whose debt is sufficient, may collect of him the entire amount of his liability on all the corporate debts, leaving him to seek contribution out of his co-stockholders. When such stockholder has paid to any one or more creditors the amount of his entire liability, his liability ceases. *Larrabee* v. *Baldwin*, 35 Cal. 155.

To determine the amount of such liability to any corporate creditor, it is necessary to find the whole amount of corporate indebtedness incurred while a party has been a stockholder; and any one creditor, whose demand is large enough, may have judgment for the stockholder's proportion of the entire corporate indebtedness. Id.

9. For what debts—Proceedings. Where the charter of a mining company declared the stockholder personally liable for the payment of all debts or demands against the company: *Held*, that a suit to assert such personal liability could be maintained only against such as were stockholders when the debt was contracted. *Moss* v. *Oakley*, 2 Hill, 265; see *McCullough* v. *Moss*, 5 Den. 567.

Where such charter required that judgment in such case should first be had against the company, with an execution returned unsatisfied: *Held*, that the note on which suit was brought would be presumed to have been made when the debt was originally contracted, unless the contrary were shown, and that such judgment would be *prima facie*, and perhaps, conclusive evidence of the validity of the note. Id.

10. For what debt liability attaches—Draft—Corporation. The obligation of a corporation, either as drawer of a bill of exchange or under an express agreement in relation to a bill of exchange, drawn for its benefit by a third person, to indemnify an accommodation acceptor for his payment of the bill, is a debt contracted by a corporation at the time of the acceptance, within the meaning of the personal liability law. *Byers* v. *Franklin C. Co.*, 106 Mass. 131.

11. Annual installments. A stockholder in a mining company organized under the New York act of 1848 is liable for the wages of servants of the company which became due within one year next prior to the recovery of the judgment therefor, although the engagement of service was for more than one year. *Hovey* v. *Ten Broeck*, 3 Rob. (N. Y.) 316.

12. Agent not a servant. One employed by a mining corporation, organized under the general manufacturing act of this State (chap. 40, laws of 1848), as agent to take charge of its mines in another country, with full power to control its property and manage its financial affairs in that country in all respects as the company itself could do, is not a servant within the meaning of the provisions of said act (sec. 18), making the stockholders of any company organized under it liable for services performed for the corporation by its laborers, servants, etc., and an action cannot be maintained by him against a stockholder to

recover for his services in such employment. *Hill* v. *Spencer*, 61 N. Y. 274; reversing S. C., 2 J. & S. 304.

13. Wages paid by orders—Supplies. Under section two of the act of April, 1849, making stockholders personally liable for wages of miners, quarrymen and laborers, and for certain supplies, such liability extends to the case of goods furnished the laborers by parties on orders from the company. *Reading I. M. Co.* v. *Graeff*, 64 Pa. St. 395.

Such act applies only to cases of purchase in the course of the usual business of the company; and it cannot be applied to an arrangement to purchase effects and pay in stock, although some of the effects purchased were within the class of supplies intended, and the company had failed to deliver the stock. *Weiss* v. *Mauch Chunk Iron Co.*, 58 Pa. St. 295.

14. When liability attaches—Transfer. The eleventh section of the act for the incorporation of manufacturing and mining companies (1 G. & H. 425) provides that "the stockholders of such company shall be individually liable, jointly and severally, for all debts due and owing laborers, servants and apprentices for services rendered, and to other creditors of the company they shall be liable to an amount equal to the stock held by them respectively." The person holding stock at the time a debt is contracted is the person who is liable, under the latter clause of this section, to an amount equal to the stock held by him, and a subsequent holder is not liable. *Williams* v. *Hanna*, 40 Ind. 535.

15. Existing debts—Annual report. A trustee of a mining corporation made by statute liable for "existing debts," upon default in filing annual report, is not liable for a note made before but not due till after such default. *Nimmons* v. *Hennion*, 2 Sw. (N. Y.) 663.

16. Debts before purchase. A stockholder is not liable for debts accrued before he became a stockholder; and if part of the consideration of a note so accrued, he can be held only for the excess. *Moss* v. *McCullough*, 7 Barb. 279.

17. Debt incurred before default—Offset. The personal liability of directors under 1 R. S. 604, sec. 3 (New York, 1848), on account of allowing the indebtedness of the corporation to exceed three times the actual capital paid in, extends in favor of creditors holding debts contracted before such excess as well as in favor of parties whose claims accrued after such excess existed. *Tallmadge* v. *Fishkill Iron Co.*, 4 Barb. 387.

Defendants in such case who, as sureties, have been compelled to pay other debts of the company, may credit such advances to the amount for which they are personally liable under the statute. Id.

18. On contracts before stock purchased. A judgment rendered against the stockholders of a corporation, after the defendant became a stockholder, upon a contract entered into before this relation of stockholder existed, is not a contract within the meaning of the act which makes such stockholder liable for the corporate debts contracted while he was such stockholder. *Larrabee* v. *Baldwin*, 35 Cal. 155.

19. Accrues against last holder. The charter of the Rossie Lead Mining Company, rendering stockholders personally liable for debts, construed to apply to persons holding stock at date of suit brought, not to such as were stockholders when the debt was contracted. *McCullough* v. *Moss*, 5 Denio, 566.

20. Individual belief. The fact that a person believes himself to own an interest in a mine, or that he was liable for its debts, does not make him so in fact, in a case where the goods sold were not furnished on his credit. *Vice* v. *Lady Anson*, variously reported; 1 M. & M. 96; 1 Man. & Ry. 113; 7 B. & C. 409; 1 C. & P. 19.

21. Effect of release to stockholder. The release to a stockholder of his personal liability is a discharge to the corporation and to the other corporators. If it be a release of the stockholder's proportion of the debt, it is a release *pro tanto*. And such release will support a plea of payment. (Rhodes, J., and Crocker, J., dissent.) *Prince* v. *Lynch*, 38 Cal. 528.

22. Parol agreement to waive personal liability—Contract. A boiler, steam engine and appurtenances were purchased by an incorporated company, it being a part of the agreement of purchase that the purchase money should be secured by a promissory note of the company and a mortgage on the interest of the company in certain lands, and that the vendors should look only to the company and to the mortgage for the payment of the purchase money. The note was given by the company according to the agreement, and the mortgage was duly executed and delivered to the vendors, and by them accepted. On an action brought under the provisions of article 26, section 52 of the Code of Public General Laws, by the vendors against a stockholder of the company to recover on the note: *Held*, that the plaintiffs were not entitled to recover; and that such collateral agreement or independent fact of the release of personal liability might be proved, whether preliminary to or

cotemporaneous with the written contract with the company. *Basshor* v. *Forbes*, 36 Md. 154.

23. Action against director — Strict construction. Section 14 of the General Corporation Law of April 22, 1850, making the directors of a corporation jointly and severally liable for the excess of the debts of the corporation, over and above the amount of capital stock actually paid in, being a statute creating a forfeiture or imposing a penalty, is to be strictly construed. *Irvine* v. *McKeon*, 23 Cal. 472.

In an action brought against one of the directors of a corporation, under section 14 above referred to, it is necessary for the plaintiff to prove that defendant was a director when the debt was created, and was present at the meeting of the board when the same was passed upon. Id.

24. Corporate assets. A stockholder in a mining company cannot defend himself from judgment, in an action against himself, impleaded with his corporation, under stat. 1851, c. 315, by showing that the officers of the corporation have sufficient property to pay the judgment. *Brayton* v. *New England C. M. Co.*, 11 Gray, 493.

25. Notes of discontinued corporation. Stockholders of a corporation (mining) do not become liable as partners, on notes given by the treasurer of the corporation, merely because after organizing under the act of incorporation, no corporate business is transacted, or because the notes were given for debts beyond the corporate authority of the company. *Trowbridge* v. *Scudder*, 11 Cush. 83.

26. Where company has reorganized under new name. In an action to enforce the individual liability of a stockholder, in a mining corporation organized under the general law, it appeared that defendant was a director in the Piute Mining Co., which company had never issued any certificates of, and it was not shown that he ever subscribed for stock, but it appeared that he was a stockholder in the Piute Silver Mining Co., which was a company subsequently organized with a different directory, and in a manner succeeding the Piute Mining Co.: *Held*, that he was not liable individually, in a suit by a creditor of the first-named corporation. *Steele* v. *Dunne*, 65 Ill. 299.

The remedy given against stockholders individually is purely statutory, and cannot be extended by implication; proof that defendant was a director is not sufficient to fix his liability as a stockholder. Id.

27. Practice — Effect of judgment against corporation. In an action on an account annexed against a manufacturing corporation, under the General Statutes, c. 61, begun more than a year after the signing of the articles of association, and nearly a year after the first meeting of the signers and their choice of officers, the corporation filed an affidavit of merits and an answer, and afterwards submitted to a default and judgment thereto. In a suit in equity brought by the creditor, under the statute of 1862, c. 218, sec. 4, to recover from the stockholders individually the amount of this judgment: *Held*, that the judgment, if not conclusive, was at least *prima facie* evidence that the account was one on which the corporation was liable, even though the account bore date three days before said meeting. *Hawes* v. *Anglo-Saxon Petroleum Co.*, 101 Mass. 385.

28. Judgment not a contract. A judgment against an incorporated mining company, rendered while a party is a stockholder, upon a contract entered into before the relation of stockholder existed, is not a contract within the meaning of the act which makes stockholders liable for corporate debts contracted while they are stockholders. *Larrabee* v. *Baldwin*, 35 Cal. 155.

29. Judgment—Impeachment. A judgment against a mining company cannot be impeached except for fraud or collusion in an action to enforce personal liability of its trustees. *Nimmons* v. *Tappan*, 2 Sw. (N. Y.) 652.

30. Judgment—Merger. A judgment against a corporation upon a simple contract debt, for which its officers are personally liable under the statute of 1863, c. 246, sec. 2, does not merge the debt so as to extinguish their liability. *Byers* v. *Franklin C. Co.*, 106 Mass. 131.

31. Debt—Judgment. The action of debt will lie against the officers of a corporation to enforce their individual liability upon a judgment recovered against the corporation. *Union Iron Co.* v. *Pierce*, 4 Biss. C. Ct. 327.

32. Assignment after liability. A stockholder who has in good faith assigned his stock by endorsement, if originally liable under the charter, is still liable for the debts of the company where the transfer does not appear upon the books of the company. *Worrall* v. *Judson*, 5 Barb. 210.

33. Neglect of statutory requirements. The general act under which a company becomes incorporate and its articles of incorporation, taken together, constitute the charter of incorporation, the acceptance of which charges the corporation with knowledge of all the duties prescribed by the act, and of all consequent liabilities. Neglect to make the report required by sec-

tions 5, 18 or 19, or to file it in any of the requisite places, will be presumed to be intentional, and such neglect unexplained renders each director liable for all debts of the corporation contracted during the period of such neglect. *Van Etten* v. *Eaton*, 19 Mich. 189.

34. Trustee of stock—Liability—Witness. A person who holds stock upon the books of a (water) company, and an office to which stockholders only are eligible, although he hold his stock only in trust for another, is responsible for the debts of the company, as a stockholder, and therefore disqualified as a witness. *Wolf* v. *St. Louis Co.*, 15 Cal. 319.

35. Trustee—Successive defaults. A trustee of a mining corporation, in office at time of failue to make an annual report, is liable both for existing debts and such as may be contracted until the report is filed. *Nimmons* v. *Tappan*, 2 Sw. (N. Y.) 652.

And such liability reattaches upon each successive default, so that though the three years Statute of Limitations applies, if the last default was within three years the statute will be no bar. Id.

36. Deed in fraud of creditors. A deed made by a promoter of an insolvent mining company in liquidation, with an order outstanding to investigate the conduct of such party, made in anticipation of the effect of such order, in the nature of a voluntary settlement: *Held*, void, although at the suit of a creditor whose claim was not yet reduced to judgment. *Reese River S. M. Co.* v. *Atwell*, L. R. 7 Eq. 347.

37. Proof—Practice. Liability as a stockholder for a judgment debt of a corporation is not established merely by proof that, in the suit in which the judgment was recovered, the person sought to be charged as a stockholder was summoned and failed to appear. *Mason* v. *Cheshire Iron Works*, 4 Allen (Mass.) 398.

38. Practice. The pendency of an action against all the trustees of a mining company, to enforce their liability for falsely certifying that all the capital had been paid in, is no bar to an action against one of such trustees to enforce his individual liabilities for a default of the company in not filing its annual report. *Nimmons* v. *Tappan*, 2 Sw. (N Y.) 652.

39. Multifariousness—Practice—Pennsylvania. Under the manufacturing company act of July 18, 1863, a bill cannot be filed against the corporation and the officers to enforce the individual liability of the latter, but against the officers only. The bill must be filed by the creditors on behalf of themselves and all other creditors of the corporation. A bill which joins defendants, some of whom are liable to one plaintiff only, some of whom are liable to another, and some of whom are responsible, if at all, for independent violations of the statute, falls within the definition of multifariousness. Such a bill dismissed. *Sherif* v. *Globe Oil Co.*, 7 Phila. 4.

40. Joinder of parties. A joint or several action may be brought against stockholders of a corporation for corporate debts. *Larrabee* v. *Baldwin*, 35 Cal. 155.

41. Practice—Massachusetts. It is not necessary for persons summoned as stockholders, in an action against a corporation, to file an answer containing a specific denial that the corporation has failed to comply with the statutes of the commonwealth concerning corporations; but it is incumbent upon a plaintiff, who seeks to charge them with the corporate debts, to prove that the corporation had failed to comply with some one of the requisitions of the statutes, by the omission of which stockholders are rendered liable. *Taylor* v. *New England Coal M. Co.*, 4 Allen (Mass.) 577.

The liability of a stockholder for the debt of a corporation is extinguished by the recovery of a judgment thereon against the corporation, if he was not summoned to appear in the suit and ceased to be a stockholder before the recovery of the judgment. *Handrahan* v. *Cheshire Iron Works*, 4 Allen (Mass.), 396.

42. Pleading—Massachusetts. A bill in equity under the statute of 1862, c. 218, to charge persons with individual liability, as members or stockholders, for the debt of a manufacturing corporation, sufficiently describes such a holding of the stock as would bring the holders within the provisions of the statute by alleging that the defendants were members of and the stockholders in said corporation, holding the stock of the same undivided, and need not allege the par value of shares in the capital stock. *Hawes* v. *Anglo-Saxon Petroleum Co.*, 101 Mass. 385.

43. Statute—Massachusetts. A bill in equity, filed after the passage of the statute of 1870 c., 224, to enforce personal liabilities of officers of a mining corporation on the ground of their neglect while the statute of 1862, c. 210, and the statute of 1863, c. 246, were in force, to file the certificate thereby required, must aver that judgment has been recovered against the corporation, and that the other proceedings required by the statute of 1870, c. 224, secs. 40 and 42, have been taken, notwithstanding the provision of sec. 69 of the latter statute, that the repeal of the statutes of 1862 and of 1863 shall not impair any right or liability incurred under existing laws. *McRae* v. *Locke*, 118 Mass. 269.

See STOCK.

PERSONAL PROPERTY.

1. Severance—Consent. Whatever is severed from the land is personalty, without reference to the consent of the owner to the severance. *Riley* v. *Boston Water Co.*, 11 Cush. 11.

2. Loose block of stone. Where personal property (a stone loosened from a ledge) has been suffered to lie on land conveyed, without any user by grantor or grantee, no request as to its removal nor objection as to its remaining, the property remains the same, and is not divested by lapse of time. *Noble* v. *Sylvester*, 42 Vt. 146.

3. Oil-well lease. Oil leaseholds are not "goods and effects" under the Attachment Act. They are chattels real. *Vandergrift's App.*, 83 Pa. St. 126.

PLACERS.

1. Definition—Distinguished from veins. "Placers are superficial deposits which occupy the beds of ancient rivers or valleys." *Moxon* v. *Wilkinson*, 2 Mont. 421.

The distinction between veins and placers stated. Id.

A vein does not include a placer deposit. Id.

2. Not covered by "valuable deposits" in statute concerning lodes. In the statute of Montana requiring the record of "any mining claim upon any vein or lode bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits," the words, other valuable deposits, cannot be construed to include a placer mine. *Moxon* v. *Wilkinson*, 2 Mont. 421.

3. Slide quartz. The location of a lode carries broken masses detached from and fallen below the gangue rock in place, and all the gold in the decomposing quartz lying below the outcrop, so far as the general formation of the ledge can be traced; but this right cannot be extended to cover free gold at a distance of several hundred feet, although such gold might be proved to have originally come from the ledge above. *Brown* v. *49 & 56 M. Co.*, 15 Cal. 153.

4. Water purchases—Evidence of appropriation. In a controversy between two mining companies, it was competent to prove the execution of certain receipts for water purchased by the plaintiffs as tending to show the existence of the company and that it had actually located and was in operation at the time the receipts purport to be signed. *Lone Star Company* v. *The West Point Company*, 5 Cal. 447.

PLEADING.

1. False averment of value—Ex delicto. A complaint averring that the defendant, by false representations of the value of a lode, induced plaintiff to purchase and pay a sum of money therefor, and the receipt of deed, and claiming general damages exceeding the consideration paid, is an action *ex delicto* and not *ex contractu*. *Ahrens* v. *Adler*, 33 Cal. 606.

The averment in such complaint of an offer to return the deed is not an averment of a rescission of the contract nor an offer to rescind. Id.

And an amendment striking out the offer to return the deed does not change the issues tendered in the complaint. Id.

2. Pleading right to mine on agricultural claim, California. Where a miner enters upon land already possessed by another, claiming the right of entry for mining purposes, he must justify his entry by showing: 1. That the ground is public land; 2. That it contains mines or minerals; 3. That he enters for the *bona fide* purpose of mining; all of which facts must be affirmatively alleged with all the requisite averments, to show a right under the special statute and otherwise, to enter. *Lentz* v. *Victor*, 17 Cal. 272.

3. License—Tenant in common. A plea to a declaration in trespass for taking peat and turf, that the close was not the close of the plaintiff, is not supported by proof that plaintiff was a tenant in common of a person under whom the defendant entered. *Wilkinson* v. *Haygarth*, 12 Q. B. 837. See *Job* v. *Potton*, L. R. 20, Eq. 84.

4. License—Ditch. In order to justify the digging of a ditch on the land of another, under a parol license, the license must be specially pleaded. *Alford* v. *Barnum*, 45 Cal. 482.

5. Averment—Description. An averment in a plea that a certain colliery is within and parcel of a certain manor, is not a sufficient averment that it is a colliery belonging to the same. *Midgley* v. *Richardson*, 14 M. & W. 595.

6. Description. A declaration in ejectment for mines (*de mineris carbonum*) is good without showing the number of mines, such description being well understood in the venue where laid. *Whittingham* v. *Andrews*, 1 Salk. 255; 4 Mod. 143; Carth. 277; Comb. 201; 1 Show. 364.

7. Covenant—Annuity secured on profits of colliery. An indenture recited that F. and G. were entitled to a fourth part of a colliery for a term of years; that G. was also entitled, by agreement with A.,

to a lease of land essential for working the colliery, and held the agreement in trust for himself and F. jointly; that P. had a power of sale upon a moiety of the colliery, for the same term, to secure an annuity, which power he was about to exercise; that F. and G. agreed to purchase the moiety, which was to be discharged from the annuity, and to grant a fresh annuity to P., payable out of the profits accruing from the working the coal, by virtue of the term in the three parts of the colliery and the agreement. By the same indenture, after such recital, the moiety was assigned and the annuity granted; and F. and G. covenanted severally for themselves, their executors, administrators and assigns, to pay the annuity, as above, from the profits accruing, after payments of all rates, taxes, etc., and of the rents reserved on the term, or by the agreement; a right of entry on the premises charged, and of mortgage and sale, was given to P., on the annuity being in arrear; and F. and G. covenanted severally for themselves, their heirs, executors and administrators (not naming assigns), to do nothing whereby the annuity might cease, determine, be impeached, or become void or of no effect, or whereby the lease by which the colliery was originally demised, or the agreement, should be forfeited, or the terms thereby created cease. P. sued in covenant on the indenture, assigning for breaches, 1. That F. and G. took a lease of the land to which G. was entitled under the agreement, in their own names, and not in trust for P., but for other persons, and forfeited and surrendered the agreement, whereby the annuity was impeached, and the plaintiff's right over the land, and in the profits which would have accrued, ceased; 2. That under the land subject to the agreement there were veins of coal, the property of A., and that F. and G. took the land at a higher rent, and otherwise on worse terms than G. was entitled to by the agreement, in order to obtain the last-mentioned coal on better terms than they otherwise could have done, whereby, etc. (as before); 3. That F. and G. afterwards assigned the land, amongst other things, to H., whereby, etc. (as before.) On general demurrer to the declaration, it was: *Held*, 1. (affirming K. B.), that the want of an averment that profits had or would have actually accrued from working the colliery was no objection to the declaration; 2. But that the first two breaches showed no cause of action, as the variation between the lease and agreement did not invalidate the security, and the security was not shown to be affected, since the profits on the colliery on which the annuity was secured were those remaining after payment of such rent only as was reserved by the agreement; 3. But that (reversing K. B.) the third breach showed the annuity was impeached, since the land in the hand of H. would not be subject to the power of entry, mortgage and sale, his interest not being that which the covenantors held under the agreement, and he appearing to come in as a purchaser, not privy to the covenant, nor estopped by it. *Pitt* v. *Williams*, 5 Ad. & El. 885; S. C. below, 2 Id. 419; 4 Nev. & Man. 412.

8. Extent of recovery—Fraud—Consideration. In an action for damages for the fraudulent sale of a mine, the plaintiff's recovery is not restricted to the amount of the consideration paid by him. *Akrens* v. *Adler*, 33 Cal. 608.

9. Case—Destroying dams—Tenant in common—Showing title. A declaration, in case for obstructing plaintiff in the enjoyment of a liberty of digging fire clay, stated that one J. T. was possessed of an undivided moiety of certain land, as one of two tenants in common; and being so possessed, by a certain indenture made between the said J. T. and the plaintiff, the said J. T. granted to the plaintiff the liberty to dig for and carry away the clay in a certain parcel of said land, and to make adits, pits, etc., for the more effectual exercise of the liberties so granted, etc., for the period of twenty-one years. It then went on to aver that there were at the time divers clay pits, etc., in the said land, and certain leats, etc., necessary for washing, etc., the said clay; that after the plaintiff had become so entitled, and had begun to enjoy the said liberties under the said grant, with the assent of the tenant in common, the defendant, intending, etc., wrongfully obstructed the plaintiff in the use of the said liberties, etc., by destroying certain dams, etc., lawfully erected upon the said land, and diverted the said leats, etc., whereby the plaintiff was deprived of the benefit of the several liberties so granted to him, etc.: *Held*, on special demurrer, that the title of the plaintiff being pleaded by way of inducement only, an averment of his seisin in fee was unnecessary; 2. That the deed referred to in the declaration not forming the foundation of the plaintiff's title, a profert of it was not required; 3. That the breach was sufficiently laid; 4. That the consent of the co-tenant being immaterial, it was not necessary that it should be shown. *Thriscutt* v. *Martin*, 6 D. & L. 489; 3 Ex. 454; 18 L. J. Ex. 291.

10. Diversion of Water. The denial of an "unlawful and wrongful" diversion of water is an admission of the fact of diversion. *Toombs* v. *Hornbuckle*, 1 Mont. 245.

11. Oil lands—Variance. An averment in action for purchase-money paid on

fraudulent sale of oil land, charged the false representations to be, that defendants were prepared to put down eight wells, and had eight engines ready for use, and that derricks were erected, and that defendants would put down eight wells: *Held*, that the complaint stated sufficient false representation of facts, and that defendants were not helped by the further statement of what they had agreed to do. *Oliver* v. *Bennett*, 65 N. Y. 560.

12. Construction of admission under rule. In an action on a bill of exchange against a mining company, an admission of the bill under a rule of court was in the following form: "Bill of exchange drawn for the sum of £121 10s., by the plaintiff upon, and directed to the above-named defendants as 'The Newbridge Coal Company,' Forest Dean, Gloucestershire, and accepted by one Henry Bishop, for the defendants:" *Held*, that under this admission the defendants could not dispute the authority of Bishop to bind them by this acceptance. *Wilkes* v. *Hopkins*, 1 C. B. 737; 3 Dow. & L. 184; 14 L. J. C. P. 225.

See PRACTICE.

POOR RATE.

1. Tin bounds. On appeal against a rate upon tolls of tin, the sessions stated a case, showing that, by the custom of the stannaries, the right of working tin mines in certain manors is vested in the owner of tin bounds, he paying the lord or his lessee one-tenth of the tin gained; that the appellant, being the lord's lessee of the toll and farm of tin, granted to R., for a term, liberty to enter one of the said mines, and dig and search for tin there, and to carry away the tin, yielding, paying, and delivering to appellant from time to time, within six weeks after the return or sale of every parcel of tin gotten in the premises, one shilling in the pound on the gross value of all tin which should from time to time be so gotten; that R., at the time of the grant, was an owner of tin bounds, within which the mine was situate; and that R. worked the mine after the demise, paying appellant one shilling in the pound, in money, according to the reservation: *Held*, that the grant was a good and not a colorable demise, at least of the tin tolls, the sessions not finding fraud; that the one shilling reserved was a rent, and not a virtual share of the produce of the mine; and, therefore, that the appellant was not ratable in respect of it as an occupier. But that, for tin toll received in kind from other mines, he was so ratable. *Reg.* v. *Crease*, 11 Ad. & El. 677.

2. Tin bounds—Occupier. The Duke of Cornwall, being entitled, as lord of a manor, to a certain quantity of the tin ore raised by the bound owners within the manor, which was rendered by them to him in an unmanufactured state, demised this toll: *Held*, that the lessee, though not an inhabitant of the parish in which the tin was raised, was ratable to the poor there, as occupier of the tin toll, under statute 43 Eliz., c. 2, sec. 1. *Crease* v. *Sawle*, 2 Q. B. 862; 2 D. & G. 812.

The rate being made upon him as occupier of the toll, the court refused to inquire, in an action of trespass for levying the rate by distress, whether a part of the rate was or was not for tin toll not in the plaintiff's occupation, some tin toll appearing to be in his occupation, and the amount being only matter of appeal. Id.

3. Tin royalties. A person entitled to toll tin or farm tin, which are royalties of the tin raised by the adventurers in tin bounds, is ratable to the poor in respect thereto. *Rex* v. *St. Agnes*, 3 Term, 480.

4. Lead mines. Lead mines are not ratable to the poor under act of 43 Eliz., c. 2. *Smelting Co.* v. *Richardson*, 3 Burr. 1341; 1 Wm. Bl. 389.

5. Coprolites. A party occupying land and working over the same for "coprolites" held liable to the poor rate. Whether the workings constituted a mine not decided. *Roads* v. *Trumpington*, L. R. 6 Q. B. 56.

6. Coal and iron mines. Coal mines, which are ratable, being rated conjointly with iron mines, which are not ratable without any apportionment, the order of Sessions confirming such rate was quashed. *Rex* v. *Cunningham*, 5 East, 479.

7. Machinery—Iron mine. The owner and occupier of an iron mine is not ratable to the poor with respect to the machinery of the mine, the mine itself being not ratable. *Rex* v. *Bilston*, 5 Barn. & C. 851; 8 D. & R. 734.

8. Lime works—Slate quarry—Clay pits—Iron mines. Lime works are liable to the poor rate in the hands of the occupier, though there be risk and expense in the working, and the profits are uncertain. *Rex* v. *Alberbury*, 1 East, 534.

The same of a slate quarry. *Rex* v. *Woodland*, 2 East, 164.

The same admitted as to clay pits, on authority of these cases. *Rex* v. *Brown*, 8 East, 528.

Iron mines are not ratable to the relief of the poor. *Rex* v. *Cunningham*, 5 East, 479.

9. Lot and cope. The lessee of lead mines under the crown is ratable to the poor for royalties (called lot and cope) paid him by the adventurers without risk on his part. *Rowls* v. *Gells*, 2 Cowp. 451; 1 Doug. 394.

10. Lessor—Washed ore. The owner of certain lands, and of mines therein, demised for years all the lead mines and veins of lead and other ore, saving to himself a right of entering to view the premises, the lessee yielding, paying and rendering to him a full fifth part of all the lead or other ore from time to time gotten by the lessee, well cleaned, dressed, washed and made merchantable and fit for smelting at the cost of the lessee, to be delivered clear of all deductions. For the purpose of preparing the ore for delivery according to the terms of the lease, it had to undergo a laborious and expensive process, by which foreign substances were removed, but the character of the ore was not otherwise altered: *Held*, that the lessor was ratable to the relief of the poor in respect of the ore delivered to him under the above demise. *Reg* v. *Todd*, 12 Ad. & El. 816.

11. Lessee. The lessee of a coal mine is liable to be rated to the relief of the poor, though he derive no profit from the mine. *Rex* v. *Parrott*, 5 Term R. 593.

12. Lease of manganese mine. An owner of the soil who has granted to adventurers the liberty to dig, mine and search for manganese for a term of twenty-one years, and the same to take and convert to their own use, they rendering to him at a certain rate in money for every ton of manganese raised during the term, is not an occupier of the soil, and consequently not ratable to the poor. *Rex* v. *Tremayne*, 4 B. & Ad. 162; 1 Nev. & Man. 394.

13. Lessees—Non-residents. The lessees of a calamine mine, non-residents, are ratable to the poor as occupiers of land. *Rex* v. *Baptist Mill Co.*, 1 M. & S. 612.

14. Mines let at a rent certain. The trustees under the will of a person seised in fee of two-thirds parts of a manor subject to certain leases to a company of adventurers of the mines of lead, tin and copper ore, and other minerals, under the moors, commons and wastes of the manor, at a rent certain, are not ratable to the relief of the poor for such rent. *Rex* v. *Welbank*, 4 M. & S. 222.

15. Lessor of non-producing mine. Landlords not resident within the parish, having leased lead mines and other minerals, with liberty to the tenant to dig, etc., reserving a certain annual rent, and also certain proportions of the ore which should be raised, are, at any rate, not assessable to the relief of the poor for such certain rent, no ore being raised; whatever the question might be as to the proportion of ore reserved when, in fact, any should be raised. *Rex* v. *Rochester*, 12 East, 353.

16. Fixtures. The lessee of a coal mine, being the occupier, having erected a steam engine for working the mine, and thereby improved its annual value, is liable to be rated for such improved annual value. *Rex* v. *Granville*, 9 B. & C. 188; 4 M. & R. 171.

17. Artificial water course. The land covered by an artificial water course, used in the operation of a lead mine, is ratable to the poor for the enhanced value given to the land by its use as the bed of the water course. *Talargoch* v. *St. Asaph*, L. R. 3 Q. B. 478; 9 B. & S. 210.

18. Surface improvements at non-ratable mine. The appellant was the owner of iron mines, and he rented two acres and a half of surface land, partly over and partly adjoining the mines. He occupied the mine and lands together, using the surface for the purpose of working the mines and getting the ore, and he had erected thereon buildings, machinery, workshops and tramways. The surface land, buildings, etc., without the mines would be practically valueless: *Held*, that the appellant was ratable to the poor rate in respect of the surface land, with the buildings, machinery, workshops and tramways, although they were occupied in connection with a non-ratable subject-matter, viz.: an iron mine. *Guest* v. *East*, L. R. 7 Q. B. 334; see *Kittow* v. *Liskeard Union*, L. R. 10 Q. B. 7.

19. Expressio unius. The express mention of coal mines in the statute 43 Eliz., c. 2, sec. 1, is a virtual exclusion of all other mines, and therefore other mines are not ratable to the relief of the poor. *Rex* v *Sedgley*, 2 Barn. & Ad. 65; *Rex* v. *Bettell*, 3 B. & Ad. 424.

20. Expressio unius—Coal mines only ratable. Iron mines and all other mines, except coal mines, are, under the statute of Elizabeth, exempt from liability to the poor rate. The statute mentioning mines mentions coal mines only, and a long course of decision has established that the rule, *expressio unius est exclusio alterius*, applies to the enactment. *Morgan* v. *Crawshay*, L. R. 5 H. L. 304.

21. Way leaves. If A. has an exclusive right of using a way leave over land which he holds in common with B., paying B. a certain sum yearly, and has the privilege of using a way leave occupied by C., paying him so much per ton for the goods carried over it, A. is not liable to be rated to the relief of the poor in respect of either of such way leaves. *Rex* v. *Jolliffe*, 2 Term R. 90.

22. Assessment. The lessee of the coal mines is ratable for the amount of royalty

or rent which he pays, and in neither case is any allowance to be made for money expended in rendering the mines productive. *Rex* v. *Attwood*, 6 B. & C. 277.

Where a poor rate was made upon two-thirds of the net rent of lands and one-half the net rents of collieries: *Held*, that this might be a fair and equal mode of rating; and as the rate did not manifestly appear to be unequal, the court refused to quash it. *Rex* v. *Tomlinson*, 9 B. & C. 163.

See TAXATION.

POSSESSION.

1. Of surface, extends to minerals. *Prima facie* the party in possession of the surface is in possession of the minerals also; and a plea which admits such possession impliedly admits possession of the minerals. *Smith* v. *Lloyd*, 9 Exch. 562; 2 Com. L. R. 1007.

2. Of minerals—Surface occupation. Possession under a lease of lands generally by occupation of the surface only, is possession of the minerals not reserved, and of unopened mines, though the tenant could not work them. *Keyse* v. *Powell*, 2 El. & Bl. 132.

3. Surface possession includes minerals- Lease. If a house and the land on which it stands are demised without any reservation of mines, any coal that may be under such house is, during the tenancy, in the possession of the tenant. *Raine* v. *Alderson*, 1 Arnold, 329.

4. Of surface, not adverse to mine owner. The possession of the surface is not a possession adverse to, or inconsistent with, the claim of the grantee of the minerals, especially where he has worked in other parts of his claim, though not under the *locus in quo*. *Hodgkinson* v. *Fletcher*, 3 Doug. 31.

5. Relation of surface possession to mines after severance. Where mines, opened or unopened, have been duly conveyed separate from the surface, so as to be severed from the surface, the maxim or rule that possession of the surface carries with it possession indefinitely downwards, has no application to the mines so severed. *Caldwell* v. *Copeland*, 37 Pa. St. 427.

6. After severance. The presumption that the party having the possession of the surface has the possession of the subsoil also, does not exist after a severance. *Armstrong* v. *Caldwell*, 53 Pa. St. 284.

7. Non-user after severance.—Limitations—Mining for domestic use. After a severance between the title to the surface and the title to the minerals, the owner of the minerals does not lose his right or his possession by any length of non-user. He must be disseised to lose his right, and there can be no disseisin which does not take the minerals out of his possession. *Armstrong* v. *Caldwell*, 53 Pa. St. 284.

The statute of limitations is applicable to all corporeal hereditaments, including those that are only sub-surface rights. Id.

The court below left it to the jury to find that the plaintiff acquired title to the coal by having taken it out for family and neighborhood uses at intervals for twenty-one years, without evidence that the taking had been constant and continuous: *Held*, to be error. Id.

The first entry of the grantee to mine having been made more than twenty-one years after the grant, the court below instructed the jury that the statute was *prima facie* a bar: *Held*, error; the presumption being that possession followed the title, and the burden was on the plaintiff to show that he had taken and maintained adverse possession. Id.

8. No presumption of right to minerals by surface possession after severance. In ejectment for mines, the plaintiff proved himself lord of the manor, and that he was in possession thereof. But the same witness proving that the defendant had his possession of the mines above twenty years, the court, upon a trial at bar, held this no evidence to avoid the statute of limitations. there being no entry within twenty years upon the mines, which are a distinct possession, and may be different inheritances; and therefore directed the jury to find for the defendants. *Rich* v. *Johnson*, 2 Strange, 1142; cited as *Cullen* v. *Rich*, Bull. N. P. 102.

9. By working. The working of a mine is possession of a mine. *Harker* v. *Birkbeck*, 3 Burr. 1556; S. C. 1 Wm. Bl. 482.

10. By working level. The possession of a level in a mine on a vein gives possession for the length of that level from the surface to the centre of the earth. *Hugunin* v. *McCunniff*, 2 Colorado, 367.

11. Working part covers entire grant. Evidence of the grantee of minerals working them within his grant treated as evidence in trespass by the surface owner, although such working was not under the *locus in quo*. *Hodgkinson* v. *Fletcher*, 3 Doug. 31.

12. Vein opened at different points—Actual against constructive. While property owned by the same party was worked at different points, under different locations, upon separate discoveries, under different names—the Elkhorn Lode and the Casket Lode—the owner, A., conveyed the

Elkhorn Lode to B., delivering possession of the Elkhorn works but retaining possession of the Casket works. By subsequent development the Elkhorn Lode and Casket Lode were shown to be the same; upon the question as to which party was in possession of the Casket workings: *Held*, that the constructive possession of the grantee must, as matter of fact, yield to the actual possession retained by the grantor. *Hugunin* v. *McCunniff*, 2 Colorado, 367.

13. Working one seam, evidence of possession of overlying seam. Where a party had claim and color of title to all the coal in a certain tract, evidence of his working one bed may be given for the purpose of showing title by possession to an overlying bed on the same tract. *Turner* v. *Reynolds*, 23 Pa. St. 199.

14. Of abandoned shaft—Negligence—Finding of jury of miners. A horse having been killed by falling down an old shaft of a mine, which had not been sufficiently covered over, the owner of the horse charged a person who was in the possession of a mine near to the spot with being also in possession of that shaft. The latter denied that the shaft was his, but said that if a miners' jury was called, and they say that the shaft was his, he would pay for the horse. A miners' jury was accordingly called, and they found, in writing, that the shaft was his: *Held*, that this finding of the jury, coupled with his declaration, was admissible in evidence against him in an action on the case to recover compensation for the loss of the horse, but that such evidence of itself was not sufficient proof of defendant's possession of the shaft. *Sybray* v. *White*, 1 M. & W. 435; 1 Tyrwh. & Gr. 746.

Held, further, that such finding of the jury did not amount to an award. Id.

15. Clearing out shaft. The mere clearing out of a shaft, without extending it to a seam well known to exist underneath over a large tract, does not give possession of such seam as against a party not a trespasser. *Carr* v. *Benson*, L. R. 3 Ch. App. 344.

16. By shaft not reaching the vein. The *quasi* possession of a seam of fire-clay by a fire-brick manufactory, to the extent of clearing out an old shaft which had not yet reached the seam known to exist under it, is not a sufficient state of facts from which to infer that the licensor of such seam to such manufactory must know that the manufactory would require, for the purposes of the license, the whole of the fire-clay found in such seam, so as to make its license exclusive of the right to let to others. *Carr* v. *Benson*, L. R. 3 Ch. App. 524.

17. By one tenant. Possession of one partner or tenant in common of a mining claim is the possession of all. *Waring* v. *Crow*, 11 Cal. 360.

18. Copyhold lands—Possession without entry. A close, held by copyhold tenure, contained an unopened coal mine. B. was tenant, from year to year, of the close to the copyholder in fee; B., in fact, occupied the surface, and it did not appear that in the demise to B. there had been any exception or reservation of the mine. While B. was such tenant, in 1821, the copyholder in fee granted the mine, for valuable consideration, to B. and P. In 1832, B.'s tenancy from year to year ceased: *Held*, that before and at the time of the grant of 1821, B. was in possession of the mine by virtue of his tenancy from year to year, though without the right to work the mine; that he therefore, by the grant, became possessed of the mine for the term without actual entry, and that his possession inured to the benefit both of himself and P., and therefore B. and P. were both possessed of the mine from the time of the grant, and had not a bare *inter esse termini*. *Keyse* v. *Powell*, 2 El. & Bl. 132.

19. Occupant of public domain. The person in possession of mineral lands of the United States is deemed in law the owner, as against all the world, until the United States, or a person showing title under it, makes entry upon such lands, but his possession must then yield to the legal title of the government or its grantee. *Doran* v. *Central Pac. R. R. Co.*, 24 Cal. 245.

20. Possession—What is sufficient on public domain. The possession of public land necessary to support ejectment in favor of a party relying solely upon his prior possession must be an actual occupation—a subjugation to the will and control—a *pedis possessio*. *Coryell* v. *Cain*, 16 Cal. 568; *Hess* v. *Winder*, 30 Cal. 355; *Robinson* v. *Imperial S. M. Co.*, 5 Nev. 44.

21. Insufficient. The mere assertion of title, casual acts of ownership or improvement, or the bare marking of boundaries, have never been held a valid possession after the lapse of sufficient time to complete the location or appropriation. *Robinson* v. *Imperial S. M. Co.*, 5 Nev. 44.

22. Forcible entry — Insufficient location and possession. Plaintiffs, in 1863, had entered on the public domain and "commenced running tunnels for prospecting purposes," built a cabin, continued prospecting at different times until November, 1873, when they ceased work, leaving their tools in the cabin. Defendants, in May, 1874, entered upon the ground and occupied the cabin. Plaintiffs had never marked

off any claim or designated their boundaries until after defendants' entry, when they surveyed a tract of 600 acres: *Held*, that plaintiffs failed to prove such a possession as entitled them to maintain an action under section 1160 of the Code; 2. That there was no proof of a forcible entry or detainer. *Laird* v. *Waterford*, 50 Cal. 315.

23. The negative of abandonment. When an abandonment takes place, a vacancy in the possession is created, and without such vacancy no abandonment can take place. *Richardson* v. *McNulty*, 24 Cal. 339; B. & W. L. C. 206.

24. Miner's possession. A miner's possession of his mining claim is an actual *possessio pedis*. *McKeon* v. *Bisbee*, 9 Cal. 137.

25. Attempt to get possession. An attempt to obtain possession of a mining claim may not so result as to ultimate in possession, but may be evidence of the *bona fides* of the claimant or of notice to the adverse holder, when taken in connection with other evidence. *McGarrity* v. *Byington*, 12 Cal. 427.

26. Test of priority. "Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are dependent upon the ownership of the land through which the water flows," *i. e.*, dependent upon the fact of its being public land? *Kimball* v. *Gearhart*, 12 Cal. 28; *Kelly* v. *Natoma Water Co.*, 6 Cal. 105.

27. Mining, not settling. The Act of March, 1856, "for the protection of actual settlers and to quiet land titles in this State," was passed for the benefit of those who are desirous of building up homes in the country, and for that purpose are seeking, in good faith, lands for settlement and occupation; and hence, the eleventh section of the act does not apply to miners engaged simply in extracting gold from the quartz vein. They are not "settled upon" their vein in the sense of the statute, and the two years' limitation of that section cannot avail them. *Fremont* v. *Seals*, 18 Cal. 433.

28. "Actual possession" of claim. Mining claims are held by possession, but that possession is regulated and defined by usage and local and conventional rules, and the "actual possession" which is applied to agricultural land and which is understood to be a *possessio pedis*, cannot be required in the case of a mining claim in order to give a right of action for the invasion of it. *Attwood* v. *Fricott*, 17 Cal. 37; *English* v. *Johnson*, Id. 108; B. & W. L. C. 172.

29. Possession without location. A possession which will be protected may exist without showing a formal location of the mining claim. *Pennsylvania M. Co.* v. *Owens*, 15 Cal. 135.

30. Character of country varying nature of possession. The character of the possession necessary to work mining claims will vary with the nature of the mines, the mode adopted in working them, and, perhaps, with the character of the country. *Correa* v. *Frietas*, 42 Cal. 339.

31. Presumption — District rules — Ejectment—Possession of a mining claim is *prima facie* evidence of the claimant being rightfully possessed; and no presumption can be indulged that such possession was in violation of any law, local or general. *English* v. *Johnson*, 17 Cal. 108; B. & W. L. C. 172.

Plaintiff suing for possession of a mining claim need not show in the first instance a possession in accordance with the local laws, but may make a *prima facie* case upon possession, and this is enough until defendant show such possession to be wrongful, because in violation of such rules. Id. *Sears* v. *Taylor*, 4 Colorado.

32. Fences—Location. The nature of possession varies with relation to the nature of the property possessed. Fences are not necessary around a mining claim. The physical marks upon and around the claim are sufficient to notify every one of the possession and claim of the possessor. *English* v. *Johnson*, 17 Cal. 108; B. &. W. L. C. 172.

Actual possession of mining ground, to an extent no greater than the limits of a claim as fixed by the district rules, is a good holding, although not registered as required by the district rules, in the absence of a rule declaring that a failure to record would avoid an entry. Id.

33. Buildings—Fence. In trespass for taking stone from a three-quarter-acre lot on which were two buildings, upon the question of possession: *Held*, that the buildings gave constructive possession to so small a lot, the land further being of such character as not to require a fence. *Brown* v. *Majors*, 7 Wend. 495.

34. Evidence — District rules—Residence. Possession, although not taken under district rules, is valid, and need not be evidenced by actual inclosure, if the ground be included within distinct visible and notorious boundaries, and a portion of it being worked within those boundaries. *English* v. *Johnson*, 17 Cal. 108; B. &. W. L. C. 172.

No acts are required as evidence of the

possession of a mining claim other than those usually exercised by the owners of such claims. Id.

A miner is not expected to reside on his claim, or build on it, or cultivate it. Id.

35. Evidence. Under a demise of all mines and minerals lying under a large continuous tract of waste land, working under one part of the surface is evidence of possession of the entire subject of demise. *Taylor* v. *Parry*, 1 Scott, N. R. 576; S. C. 1 M. & G. 604.

36. How evidenced—Parol sale. The possession of one claiming under a parol sale, or recorded bill of sale, in order to impart notice to a subsequent purchaser, need not be evidenced by an actual inclosure or anything equivalent thereto. The case of *Atwood* v. *Fricot*, 17 Cal. 37, and *English* v. *Johnson*, Id. 107, as to possession of mining claims, affirmed. *Patterson* v. *Keystone M. Co.*, 23 Cal. 575.

37. Transfer of possession operating to carry title—Mill and mill privileges. Right to water acquired by appropriation may be transferred like other property, and the transfer of a mill carries its water privileges. As applied in this case, a transfer of possession without deed was held good against an intervening appropriation between the first appropriation and the time of the transfer. *McDonald* v. *Bear River Co.*, 13 Cal. 221.

38. Improvements not mining—Adverse claim. Proof of the occupation of a dwelling-house and blacksmith shop do not tend to show the possession of land as mineral ground. Evidence of such facts, *Held*, properly excluded in suit for placer mining ground in support of adverse claim in the United States land-office. *Moxon* v. *Wilkinson*, 2 Mont. 421.

39. Mining claim—Company—Transfer of possession. The possession of a mining claim by a company (unincorporated) is the possession by each member of his undivided share; and where there is a substitution of a new member there is a transfer or change of possession as to that interest which he may represent. *Patterson* v. *Keystone M. Co.*, 30 Cal. 360.

40. Outstanding title — Appropriation. When there is a question of priority between a mining claim and an agricultural claim, proof that the lands had been previously occupied for mining purposes by parties, with whom or whose title the present claimants of the ground for mining purposes do not pretend to connect themselves, is of no avail to the present claimants. *Levaroni* v. *Miller*, 34 Cal. 231.

41. Constructive. The possession of the larger part of a mining claim is generally constructive. *Correa* v. *Freitas*, 42 Cal. 339.

Actual possession of a mining claim, according to the custom of miners, extends by construction to the limits of the claim held in accordance with such customs. *Hicks* v. *Bell*, 3 Cal. 219.

42. Constructive, how proved. A party claiming mining ground, not actually possessed and worked, and beyond the *possessio pedis*, must show his right thereto by constructive possession, and he can show such constructive possession only by physical works and monuments, or by the local mining laws and rules and compliance therewith. *Roberts* v. *Wilson*, 1 Utah, 292.

43. Constructive, by deed. One who enters upon a part of a mining claim under a deed, does not by the deed alone acquire a constructive possession to the entire claim unless the deed contains definite and certain boundaries which can be located, marked out and made known from the deed alone. *Hess* v. *Winder*, 30 Cal. 349.

44. Constructive, under invalid conveyance. If a party enter upon a mining claim in good faith, under color of title as under a deed or lease, the possession of part as against any but the true owner or prior occupant is the possession of the entire claim described in the paper; and this though the paper did not convey the title. *Attwood* v. *Fricot*, 17 Cal. 37; *English* v. *Johnson*, Id. 108.

A third person could not invade the possession of a party so holding and set up as against him outstanding title in a stranger with which he had no connection. Id.

This is the same rule which applies to other classes of real estate, and applies where possession is held independently of district rules, but it cannot apply to forbid the entry of a third party under the district rules, as for a forfeiture or abandonment. Id.

45. Scrambling possession. Two parties cannot be in possession of the same premises (lead ore diggings) holding adversely to each other, the one rightfully, the other tortiously. *Ecker* v. *Moore*, 2 Chand. (Wis.) 85.

46. Ore—Possession good against wrong-doer. As against a party in possession, working or seeking for minerals, a second party entering and deporting the minerals severed by the first occupant, is a mere wrong-doer, he not attempting to connect himself with a better title. *Northam* v. *Bowden*, 11 Exch. 70.

47. Statute giving right to mine on ranch claims, not extended to ditches. The statute making the possessory rights of settlers on public lands for agricultural or grazing purposes yield to the rights of miners, has legalized what would otherwise be a trespass, and the Act cannot be extended by implication to a class of cases not especially provided for; *e. g.*, it cannot be extended in favor of a ditch for mining purposes. *Burdge* v. *Underwood*, 6 Cal. 45; *Weimer* v. *Lowery*, 11 Cal. 104.

48. Nor allowed to affect improvements. A miner has no right to dig or work within the enclosure surrounding a dwelling house, corral and other improvements of another. Id.

49. U. S. Surveys — Segregation. Failure of government surveyors to segregate mineral from agricultural lands, cannot operate to defeat the rights of occupant miners. *Gold Hill Q. M. Co.* v. *Ish*, 5 Oregon, 104.

50. Allegation of, in pleading. In an action to recover possession of mining ground, the general allegation of plaintiff that he is in possession of a large tract of land (160 acres) for mining and agricultural purposes, no specific occupation of the particular portion of ground in controversy being shown, nor the character of plaintiff's possession, although such allegation of possession be not denied in terms, yet it is sufficiently denied by the answer of defendant, that he (defendant) entered upon the land for mining purposes as a part of the public domain. *Smith* v. *Doe*, 15 Cal. 101.

51. Possession against trespasser—Pleading. Possession is sufficient to enable the plaintiff to maintain trespass, and although a higher title may be attempted to be set up, the failure to sustain it will not defeat the right to recover damages; *e. g.*, as where plaintiff held possession under a bill of sale which was declared void as a conveyance. *McCarron* v. *O'Connell*, 7 Cal. 152.

52. Title transferred by delivering possession. Upon questions as to the occupancy of public mineral land, it seems that a transfer of the occupant's rights of possession may as well be by simple agreement as by deed, the vendee taking possession. *Jackson* v. *F. R. Water Co.*, 14 Cal. 18.

53. Distinguished from occupation. Any subjection of land to the dominion of a party, such as cultivation or other substantial use, is sufficient evidence of possession, to enable an adverse claimant to maintain ejectment against him. Actual occupation in person or by agent or servant is not essential. *Quicksilver M. Co.* v. *Hicks*, 4 Saw. 688.

Where a party claiming a small strip of land on the bank of a creek, constructed and maintained a bridge over the creek abutting on the premises, it was *held*, that this use of the land was sufficient evidence of possession to maintain ejectment. *Id.*

54. Prospecting does not amount to. Where both parties claimed to have been in possession of the land in controversy, but the facts were, that "the premises in question have been and are, wild, vacant, and entirely unoccupied lands, never having been occupied or possessed by any one, except occasionally a miner on his own account paying rent and attorning to no one, has for a short time prospected for mineral on some part of the land:" *Held*, that no possession in either party existed, and that the case must be decided upon the legal title, without regard to any assertion of possession. *Deery* v. *McClintock*, 31 Wis. 202.

55. Cases of "Adverse claims." A plaintiff may support his suit to try his right to mining ground brought in support of his adverse claim under the United States law in regard to the issue of patents to mining claims, as supplemented by the statute of Nevada, and the applicant for patent may defend, without regard to possession. It is immaterial which party is in actual possession at time of suit brought; the action is to determine which has the better right, and to whom the patent shall issue. *Golden Fleece M. Co.* v. *Cable Con. Co.*, 12 Nev. 320.

Plaintiff was in actual possession of a placer claim; defendant entered and surveyed the premises for patent, whereupon plaintiff filed his adverse claim and brought ejectment to support it: *Held*, that defendant's entry for the purpose of survey, was a sufficient possession to enable plaintiff to maintain ejectment against him, for the recovery of the premises; 2. That plaintiff having proved an actual occupancy, though without connecting it with any record or paper title, and without showing the mining rules or any compliance with them had made out a *prima facie* case sufficient to justify a recovery, until attacked by a prior possession or other title in the defendant. *Sears* v. *Taylor*, 4 Col. (1878.)

56. Case of injunction. A plaintiff may procure an injunction against working a mine, without having had or being in possession. *Chapman* v. *Toy Long*, 4 Saw. 33.

57. Possession infers title. In actions of ejectment against a mere intruder (a defendant offering no evidence), proof of possession in the plaintiff and an entry amounting to an ouster by defendant, is

sufficient to support a verdict, whether the plaintiff has declared in fee, or upon possession generally, or upon possession under district rules, without proof of such district rules or of title by record in any manner. *Sears* v. *Taylor*, 4 Col. (1878.)

Whether deeds relied on in addition to possession have been properly or improperly admitted, becomes immaterial, where the evidence is sufficient to sustain a verdict for the party on his possession alone. *Jackson* v. *McMurray*, Id.

58. Early customs of Pacific slope. In the early days (1862-3) in Nevada, the actual transfer of the possession of a mining claim with a view of passing the title, followed by an actual possession of the transferee, acquiesced in by the party transferring it, was a valid transfer of such claim. Any other ruling "would disturb many old and highly valuable titles on the Comstock lode." The same ruling was applied in the "early days" of California. *Kinney* v. *Cons. Vir. Co.*, 4 Saw. 451.

59. Mining as possession, and notice of possession. Where a mine has been sold on execution against the lessor, the position of the lessee is constructive notice to the execution purchaser, who takes subject to such outstanding lease; but if the lessees "had ceased to work the premises in a miner-like way," their possession is not such as to impart constructive notice to the execution purchaser. *Chamberlain* v. *Collinson*, 45 Iowa, 429.

Coal mining treated as actual possession. *Hawxhurst* v. *Lander*, 28 Cal. 332.

The possession of a mine by a party claiming the same, is notice to subsequent purchasers of whatever legal or equitable rights, he may claim, the same as in the case of other lands. *Kinney* v. *Cons. Vir. M. Co.*, 4 Saw. 450.

60. Possession as a question of fact. The evidence of plaintiff in ejectment for claims 16 and 17 west, on the Gregory lode, tended to show possession in, and occupation by himself and his grantors, from 1860 until forcibly dispossessed in 1865. The evidence also tended to show possession in defendant's grantors as early as 1860, leaving the question of priority of possession, however, involved in doubt. Two juries had found successive verdicts for plaintiff: *Held*, that the judgment would not be disturbed, the verdict not appearing to be clearly unsupported. *Jackson* v. *McMurray*, 4 Colorado.

See OCCUPATION.

PRACTICE.

1. Mining Claims — Jurisdiction — Practice—Cal. Where the complaint in an action to recover possession of a mining claim in a Justice's Court contains an allegation of injury done and a prayer for damages, the latter should be disregarded or stricken out, and the plaintiff be allowed to try his right to the claim. *Van Etten* v. *Jilson*, 6 Cal. 19.

The jurisdiction of the District Court over mining claims remains unaffected by the Act giving jurisdiction to Justices of the Peace, if the amount in controversy exceeds $200. *Hicks* v. *Bell*, 3 Cal. 219.

The late Superior Court of San Francisco had jurisdiction of a suit to settle the accounts of a partnership formed for the purchase of mining claims, where both parties resided in that city, but could not by its decree affect the title to or any interest in the claims themselves. *Watts* v. *White*, 13 Cal. 321.

The County Judge may by statute grant an injunction in cases in the District Court, but he cannot appoint a receiver; at least not as a thing distinct from the injunction. *Ruthrauff* v. *Kreez*, 13 Cal. 639.

Justices of the Peace have no jurisdiction in an action for the recovery of the possession of a mining claim where its value exceeds two hundred dollars. *Freeman* v. *Powers*, 7 Cal. 104.

2. Trespass and Injunction — Cal. The jury, under a general submission, found "a verdict in favor of plaintiffs with one dollar damages:" *Held*, that the verdict decided the question of title in favor of plaintiffs, and that upon it they were entitled to a decree perpetually enjoining defendants from working upon the ground claimed in the complaint; the denial of which by the District Court was error. *McLaughlin* v. *Kelly*, 22 Cal. 212.

The Court having instructed the jury that, if they found that plaintiffs were entitled to the mining ground, they must find a verdict for $1,000 damages, upon the admission of the answer: *Held*, that because the jury brought in a verdict for one instead of one thousand dollars damages, it was not therefore to be concluded, in direct opposition to their general verdict, that they did not find the title in the plaintiffs. The damages, being admitted by the pleadings, were not in issue, and the verdict in that respect was immaterial. Id.

3. Injunction—Water—Cal. Where a suit is brought to test the question as to the priority of appropriation of water, a prayer for an injunction to prevent future injury is proper. *Marius* v. *Bicknell*, 10 Cal. 217.

4. Jurisdiction — Partnership — Cal. The jurisdiction of the District Court extends to matters of relief prayed for by a partner in a mining company against his copartners. *Schuepler* v. *Evans*, 4 Cal. 212.

5. Service on Ditch Company—Cal. Where in an action against an incorporated ditch company the return of the Sheriff showed that he had served the summons in the action upon James Street, one of the proprietors of the company: *Held*, that it was not sufficient evidence of service to give the Court jurisdiction, it not appearing that Street was president or head of the corporation, or secretary, cashier or managing agent thereof. *O'Brien* v. *Shaw's Flat and Tuolumne Canal Co.*, 10 Cal. 343.

6. Costs—Water—Cal. In an action to try the right to the use of water and for damages for diverting it, although the amount for which judgment is given is less than $200, it will carry costs. *Marius* v. *Bicknell*, 10 Cal. 217.

7. Unincorporated Company—Cal. If a complaint against a mining company, by its company name, state substantially the conditions stated in Section 656 of the Practice Act, and the summons is returned served on one of the members of the company, such judgment is not an individual judgment against the person served, but against the company, and may be enforced by execution against the common property. Said section authorizes judgment against the company property of unincorporated mining associations for company indebtedness, upon service of any one or more of the associates. *Welsh* v. *Kirkpatrick*, 30 Cal. 203.

8. Nevada—Service on corporation. Service by mailing notice to persons not shown to have been officers of the corporation defendant is "upon the whole * * not a substantial compliance" with the statute authorizing constructive service of summons. *Scorpion Mining Co.* v. *Marsano*, 10 Nev. 370.

9. Water Rights—Equity—Montana. Equity affords the appropriate remedy in an action in which both parties claim the prior right to the use of water for mining purposes. *Barkley* v. *Tieleke*, 2 Mont. 59.

10. Attorney in fact — Appearance. The attorney in fact of a corporation, who is not its general managing agent, cannot appear in an action against it without special authority. *Lamb* v. *Gaston G. Co.*, 1 Mont. 64.

11. Ore taken in another State—Assignment—Mining privileges. A right of action to recover the value of ores wrongfully taken from lands in another State and converted to the defendant's use, is assignable, and may be prosecuted in this State. *Hay* v. *Smith*, 49 Barb. (N. Y.) 360.

12. Account—Lessor, lessee and assignee. For case of settlement of accounts between lessor of salt works and his lessee, as to proceeds, sale of proceeds and accounts of former lessee assumed. See *Preston* v. *McCall*, 7 Grat. (Va.) 121.

13. Discovery and interrogatories after severance—British. Plaintiff suing in trespass for minerals, the defendant claimed title to both surface and minerals: *Held*, that under the Common Law Procedure Act (1854) plaintiff was entitled to interrogate defendant as to deeds or writings relating to the minerals, in order to the production of such deeds or writings, but that he was bound by defendant's answer, and defendant was not bound to state the contents. And further, that plaintiff had no right to interrogate as to plaintiff's title to the lands generally. *Adams* v. *Lloyd*, 3 H. &. N. 351.

14. Payment into court of installments pending suit to set aside sale. Where a party obtained an injunction to restrain an action at law (brought to collect annual installments of a sale of mines) upon the terms of paying the money which is the subject of the action into Court, and the Court afterwards orders such payments to be suspended until a hearing of the cause, the effect of this order is to reserve to the Court both legal and equitable jurisdiction over the money at the hearing. Therefore, if upon the hearing of the cause the Court is of the opinion that the complainant has no equity, and that the defendant has a legal right to the money, it will order the money to be brought into Court and paid over to defendant in compensation for the suspension of his legal right, without putting the defendant to the necessity of taking any further proceedings at law in order to establish his legal right. *Small* v. *Atwood*, 3 Younge & C. 105.

15. Parties—Shareholders. Some of the shareholders in a joint stock company may file a bill to have their deposits repaid, without making all other shareholders parties, if they are ignorant of their names. *Blain* v. *Agar*, 2 Sim. 289; S. C., 1 Id. 37.

To a suit by the directors of a joint stock company, on behalf of themselves and all other of the shareholders, seeking to have the benefit of an agreement entered into by an agent of the company, it is not necessary that all the shareholders should be made parties. *Taylor* v. *Salmon*, 4 My. & Cr. 134.

16. Secured creditor—Parties—Liquidation. A limited colliery company resolved to enlarge its capital, and that 6d. per ton of coal should be retained to repay the persons advancing the additional capital, with powers of distress and entry; and in conformity therewith, by a deed to which the company and the lenders were parties, in

consideration of the advance, the company covenanted to repay the sums advanced and to retain 6d. per ton to pay for such advances, with power for a majority of the lenders, irrevocable, to appoint a receiver; also, that if default should be made by the company in retaining and paying the said rate, or if a majority of the lenders should be of opinion that the company could not in any half year pay such rate, it should be lawful for such majority to enter and distrain upon the collieries and business of the company. The company being in liquidation under supervision, the liquidators contracted to sell one of the collieries: *Held*, that the lenders were not necessary parties to the conveyance by the liquidators to the purchaser. *In re Sankey Brook C. Co.*, L. R. 12 Eq. 472.

17. **Officer — Parties — Interpleader.** Where the property (oil royalty) in dispute between two parties claiming ownership is in the hands of an officer, such officer is a proper party upon a bill of interpleader in order to render the decree effective. *Oil Run Co.* v. *Gale*, 6 W. Va. 526.

18. **Estoppel.** It seems that specific performance ought not to be decreed after a former attempt to set aside proceedings now sought to be enforced. *Blackett* v. *Bates*, L. R. 1 Ch. 117.

19. **Former Recovery—Ore Banks.** A judgment in a former case is mixed matter of fact and record, and to make its finding conclusive it must appear not only that the matter was in issue in the former case, but was of necessity therein decided. *Coleman's Appeal; Grubbs' Appeal*, 62 Pa. St. 252; B. & W. L. C. 275.

20. **Res Adjudicata—Nevada.** In 1872 the 420 Mining Company brought suit against the Bullion M. Co. to determine the right of the latter company to 420 feet of the Comstock lode. Under the statute of Nevada allowing matters going only to defeat the present action, as well as defenses on the merits to be pleaded together, defenses of the two sorts were accordingly plead. The issues upon both were found for defendant, and the judgment was entered in a form appropriate as an adjudication upon the finding upon the merits: *Held*, that the title was *res adjudicata* and the parties were estopped from further litigating the merits. *420 Mining Co.* v. *Bullion M. Co.*, 3 Saw. 634.

21. **Final Judgment—Nevada.** As to what is final judgment in an action for the recovery of a mining claim, the record being affected by a stipulation as to process and a money payment, see *Perkins* v. *Sierra Nevada M. Co.*, 10 Nev. 405.

22. **Judgment in trust for miners and small creditors.** A judgment given by a firm engaged in the iron business to a trustee, for use of the hands about their works and other small home creditors, in pursuance of a bond and declaration of trust specifying the amount justly due each creditor named therein, is not forbidden by law, the debts being justly due and the object being to save costs. *Breading* v. *Boggs*, 20 Pa. St. 33.

23. **Witness—Copyholder.** In an action by the lord of the manor against a copyholder for quarrying stone and slate, where the defendant justifies under an alleged custom of the manor, any other copyholder is a competent witness for the defendant since the statute 3 & 4 Will. 4, c. 42, secs. 26, 27. *Hoyle* v. *Coupe*, 9 M. & W. 450.

24. **Vendor—Witness.** The vendor of a mining claim is a competent witness for his vendee in an action for a subsequent trespass, although a part of the purchase money is still due him. *Rowe* v. *Bradley*, 12 Cal 227.

25. **Stockholders against trustees.** Practice in suit by stockholders against trustees asserting rights against the interest of the corporation. *Parrott* v. *Byers*, 40 Cal. 615.

26. **Stock sale — Pool — Instruction.** Where in a suit for the conversion of mining stock, the court in instructing the jury used the language, "if the plaintiff consented to place his stock in the original pool, which pool was subsequently broken up," etc.; and it was objected that this was charging as a fact that the pool was broken up: *Held*, that the word "which" as there used was dependent on an *if* to be supplied, and should be understood as if, instead of "which" the words "and if that" had been employed. *Menzies* v. *Kennedy*, 9 Nev. 153.

27. **Record—Suit against firm.** Where in a proceeding (under the code) "C. D. Thompson and the other owner or claimants of the Paul Thompson Quartz Lode," was the style by which the defendant (or defendants) was designated, C. D. Thompson alone was served with summons, and an answer was filed on behalf of "defendants," without naming them: *Held*, that the record showed only one defendant, C. D. Thompson, and that another owner on the lode, or a party who had sold his interest therein for a price contingent on the validity of his title, was not, as far as the record disclosed, an interested party. *Real Del Monte Co.* v. *Thompson*, 22 Cal. 542.

28. **Partnership accounting.** Where a bill for a dissolution of a partnership

charges one or more of the partners with usurpation of the management and control of the business, and with concealment from the complainant of all knowledge of the partnership transactions; and where the bill prays for the appointment of a receiver, etc., and the cause is subsequently referred to referees, it is the duty of the referees to inquire into and report upon all the matters in issue between the parties for the information of the court. *Levi* v. *Karrick*, 8 Iowa, 150; 13 Id. 344.

29. Injunction — Waste — Account — Multifariousness. A bill asking injunction to restrain waste, and also an account for rent due, is demurrable, on the ground of multifariousness. *Reed* v. *Reed*, 16 N. J. Ch. 248.

30. Injunction, after new trial. If the plaintiff is entitled to an injunction, and obtains one before the trial, he is entitled to retain it upon the cause being remanded for a new trial. *Hess* v. *Winder*, 34 Cal. 270.

31. Companies Act—Register. Under the Companies Act (1862, sec. 35), the Court of Chancery has a discretionary jurisdiction to remove the names of companies from the register. *In re Russian Vyksounsky Iron Works*, L. R. 1 Ch. 574; 35 L. J. Ch. 738.

32. Mining Company—Misnomer. Miners associated under a company name may be sued by that name under which they transact business; but judgment can not be entered against the "Independent Tunnel Company," upon a default against the "Independent Company." *King* v. *Randlett*, 33 Cal. 318; B. & W. L. C. 334.

33. Service on president. One who is acting president of a mining company is the proper party upon whom to serve process against the company, and he may appear and confess judgment for the corporation. *Chamberlin* v. *Mammoth M. Co.*, 20 Mo. 96.

34. Settled estates—Service. A petition under 25 and 26 Vict., c. 108, sec. 2, by trustees of settled land, with power of sale, exercisable with the consent of the tenant for life, for leave to sell the land and minerals separately, need not be served on the beneficiaries entitled in remainder. *In re Pryse's Estates*, L. R. 10 Eq. 531.

35. Accommodation works—Jurisdiction—Railways—British statute. Section 69 of the 8 and 9 Vict., c. 20, gives power to justices to determine differences arising between railway companies and the owners and occupiers of lands adjoining the railway, respecting accommodation works, the making of which is provided for by section 68: *Held*, that the question whether works made by the company are works made for the accommodation of such owners and occupiers is a question to be determined by the state of things existing at the time such works are made. Therefore, where certain persons were owners of mines extending under a railway, and the company had made drains upon their line for their own purposes, and before the mines had been worked at all, but which, when kept open and clear, carried off water which otherwise percolated through the strata into the mines, and which interfered with the working of the mines, it was *held*, that they were not such accommodation works as the justices had jurisdiction over: *Semble*, also, that these sections do not apply to matters occuring beneath the surface of the land. *Reg.* v. *Fisher*, 32 L. J. C. C. 12.

36. Contract to pay royalty—Affidavit of defense. Articles of agreement in which a party agreed to mine on the land of the other party and take out 8,000 tons per annum, and pay therefor 15 cents per ton, is not "an instrument of writing for the payment of money" requiring an affidavit of defense where the action is covenant for damages for non-performance; otherwise, if the suit had been for the agreed rate for any certain number of tons mined. *Eshelman* v. *Thompson*, 62 Pa. St. 495.

37. Ouster from land and diversion of water. An entry upon and ouster from a dam site and dam in process of construction, and a canal site and canal in process of construction, and a diversion of water claimed by means of the dam and canal, are two distinct causes of action, which cannot be united in the same statement of cause of action in a complaint, but should be separately stated. *Nevada Co.* v. *Kidd*, 37 Cal. 284.

A complaint which leaves it in doubt whether the plaintiff sues for a trespass upon and ouster from his dam site and dam in process of construction, or for a diversion of the water claimed by the plaintiff, is ambiguous, and a demurrer for that reason should be sustained. Id.

38. Assignee of lease. The relation between the lessor of mines and his lessee and those holding in privity with his lessee are legal; and equitable remedies do not apply to the collection of the rents or sums for use and occupation. *Walters* v. *Northern C. M. Co.*, 5 DeG. M. & G. 629.

39. Recovery against one defendant. In suit against several defendants known as "Table Mountain Water Company," for possession of a ditch, the verdict was, "we find for the plaintiff and against L.," one of the defendants. Judgment was entered

that plaintiff recover possession of the ditch: *Held*, no error. *Treat* v. *Laforge*, 15 Cal. 41.

40. Complaint not praying damages. In an action to recover a tract of coal land and for an injunction not praying damages, damages cannot be assessed against defendants in default, although the complaint state facts sufficient to sustain a judgment for damages. *Pittsburgh C. M. Co.* v. *Greenwood*, 39 Cal. 71.

41. Colonial mining courts. The courts of mines, which have been created by acts of the local legislature of the colony of Victoria, with a jurisdiction limited both as to the persons and the matters within the colony over which it is to be exercised, stand in relation to the Supreme Court on the footing of inferior courts. *Bank of Australasia* v. *Willan*, L. R. 5 P. C. 417.

The power of the Supreme Court to issue a *certiorari* to the courts of mines in respect to any proceedings under the Mining Statute, 1865, has been taken away by statute. Id.

An appeal may be brought by the shareholders of a mining company, to the chief judge of the court of mines against an order made by a judge of a court of mines for winding up a company upon such a proceeding as that prescribed by the 28 and following sections of the Mining Companies Limited Liability Act, 1864. Id.

If a party makes a fraudulent use of the process of a mining court, and no remedy is to be had in that court, the parties aggrieved may obtain relief by regular suit in the Supreme or other competent court. Id.

42. Jeofails, "sloughs" for "soughs." A lease granted liberty to make levels, pits and soughs. A declaration in covenant stated it as a liberty to make sloughs: *Held*, that by the rule *noscitur a sociis*, the court could discover this to be the word soughs, only misspelt, and that it was not a fatal variance. *Morgan* v. *Edwards*, 6 Taunt. 394.

43. Pleading—Intervenor. In a suit for the recovery of ore, a third party cannot intervene upon mere allegation of ownership, etc.; but must state facts sufficient to constitute a cause of action, and as fully as in a complaint. *Harlan* v. *Eureka M. Co.*, 10 Nev. 92.

44. Defense to note payable out of mine. Bast sued Anspach, on a note at six months. In his affidavit of defense, Anspach averred that he had bought a colliery from Bast, to pay thirty cents a ton for coal mined, until all the purchase-money was paid, Anspach to work the mine "diligently and constantly;" that he gave the note in settlement of the purchase-money, with an agreement that it was to be renewed, if enough coal had not been got out under the agreement to pay it at maturity, etc.: *Held*, that the affidavit, if otherwise sufficient, was insufficient for not averring that the mine had been "diligently and constantly worked." *Anspach* v. *Bast*, 52 Pa. St. 356.

45. Compulsory arbitration—Interference with injunction—Discharge of bond. A temporary injunction was granted in aid of an action of trespass by continuous mining. The writ was afterwards dissolved upon defendants giving bond to indemnify against their acts and to pay such damages as might be awarded. Afterwards a second order was made, purporting to dissolve the writ already discharged, unless the defendants would submit to arbitration, and waive their right to appeal the court further proceeding to discharge the bond previously delivered under the first order: *Held*, that the writ being dissolved by the first order, the second order was inoperative; 2. that the court cannot impose upon the parties litigant, as a condition of justice, a submission of their cause to arbitration, or a surrender of their right to appeal; 3. that the discharge of the bond was irregular, at least before the final result of the action. *Sobey* v. *Thomas*, 37 Wisc. 568; S. C., 39 Id. 317.

46. Injunction after cause removed to U.S. court. Where proceedings have been perfected for removing a cause from a state court to the circuit court of the U. S., under the act of congress of 1875 (18 Stat. 470), the circuit court, upon petition and notice to the adverse party, will grant leave to file a copy of the record in said court before the first day of the next succeeding term thereafter, for the purpose of administering without delay any of the provisional remedies to which the petitioning party may be entitled, *e. g.*, an injunction to stay the sale or working of a mine, and has jurisdiction to proceed forthwith to determine upon or grant such relief. *Mahoney M. Co.* v. *Bennett*, 4 Saw. C. C. 289.

47. Injunction bond. Where the condition of an injunction bond is, that the complainants "shall well and truly indemnify the obligees for all damages they may sustain by wrongfully suing out the injunction," it will not be necessary for the obligees, upon a dissolution of the injunction, to bring an action on the case to ascertain the damages sustained by them before suing upon the bond. *Falls* v. *McAfee*, 1 Ired. Law (N. C.) 139; S. C., 2 Id. 236.

48. No judicial notice of value of ore. Where, in proceedings under the "Land-

lord and Tenant Act;" it was alleged that one-fourth of 32,000 pounds of lead ore was due as rent or royalty, and on appeal, a motion to dismiss was made, because the amount involved was in excess of the justice's jurisdiction: *Held*, that the court would not take judicial notice of the value of the ore, the transcript not showing such value. *Cook* v. *Decker*, 63 Mo. 328.

49. Citizenship of locator — Admissions. Leonard, one of the five locators of the mining claim of defendant, stated, on cross-examination, that at the date of the location he was not a citizen, and had never declared his intention to become one. The court thereupon decided that the location of the claim was void, and excluded all evidence in regard to it, including the deeds of conveyance from Leonard and his associates to defendant: *Held*, that this action of the court was erroneous; that, as Leonard had parted with his interest, his admissions were not binding on his grantees, and that the question of citizenship was one for the jury, not the court to decide. *Golden Fleece Co.* v. *Cable Con. Co.*, 12 Nev. 313.

There being no evidence tending to show that Leonard's co-locators were aware of his disability, or were colluding with him in his attempted fraud, if he was an alien: *Held*, that in such a case the law would be sufficiently vindicated by holding that the alien's claim was void. Id.

50. Residence of corporation. It seems that a corporation created by an act of the legislature of North Carolina, having its property and carrying on its operations within that state, has its existence there, although its office business be carried on in another state. *Evans* v. *Monot*, 4 Jones' Eq. (N. C.) 227.

51. Adverse Claim — Colorado. For consideration of the sufficiency of averments in a declaration in ejectment, brought in support of an adverse claim, and form of verdict under the Colorado Practice Act, see *Sears* v. *Taylor*, 4 Colorado (1878).

52. Ejectment in support of adverse claim—Possession. Under section 1674 of the compiled laws, which is designed to supplement section 2,326 of the revised statutes of the United States, the pendency of a contest in the land-office, with respect to a mining claim, gives the district courts jurisdiction to determine the right of possession as between the adverse claimants. *Golden Fleece Co.* v. *Cable Con. Co.*, 12 Nev. 312.

Each party must prove his claim to the premises in dispute, and the better claim must prevail. Actual possession makes out a *prima facie* case for the contestant, and throws upon the defendant the burden of proving a superior right in himself. Id.; *Sears* v. *Taylor*, 4 Colorado (1878).

53. Joinder of tort with contract. A claim for brokerage, on sale of a mine, against one defendant, cannot be joined with a count in fraud against two defendants under the North Carolina code, although both causes of action arose out of the same transaction. *North Carolina Land Co.* v. *Beatty*, 69 N. C. 329.

54. Mistakes of law court not relieved by chancery. Where plaintiff had agreed to prospect the King's Mountain Gold Mine Tract, upon a conditional contract of purchase, and for such purpose to erect machinery, the machinery in case of his declining to purchase to go to the original owner of the mine, and had erected machinery accordingly, but afterwards, as alleged, it had been agreed that plaintiff should remove the machinery, rescind his contract and give up possession, upon which arrangement plaintiff did remove his machinery, whereupon defendant, by suit at law, recovered damages for such removal, upon an erroneous ruling of the law court, that plaintiff (defendant in such suit at law) had only an equitable defense by reason of such rescission, and plaintiff thereupon brought his action in equity to restrain the collection of such judgment: *Held*, that a court of chancery could not relieve against the error of the court of law. *Stockton* v. *Briggs*, 5 Jones' Eq. (N. C.) 309.

55. Void decree. Where, in an action under the statute of Nevada, by a portion of the owners in possession of a mining claim against parties out of possession, to determine an adverse claim on a complaint alleging only title and possession in plaintiffs and the adverse claim of defendants, a decree had been rendered in favor of the complainants, and at a subsequent term of the court, without further intermediate proceedings, a supplemental decree was entered, purporting to be by consent, adjudging the title to the north 20 feet to be in two of the plaintiffs, and that the title to the remaining portion of the claim remained in all the plaintiffs, according to their respective rights: *Held*, that the supplemental decree was void as a decree of the court, on the grounds, 1. That there are no allegations in the pleadings or record upon which to base it; 2. That it was made after the rights of the parties had been adjudicated, and the case had been fully ended, and the term of the court thereafter finally adjourned; 3. That a portion of the co-owners were not parties to the proceeding, and their interests could not be affected. *Kinney* v. *Con. Virginia M. Co.*, 4 Saw. 383.

56. Void decree as evidence of partition. Such supplemental decree having been treated as valid, and subsequently acquiesced in for several years by the parties interested, may possibly be regarded as written evidence of an agreement to partition, upon the terms specified in the decree. Id.

57. Partial rescission not allowed. Where A. as principal and B. as surety gave a note on an executory contract for the purchase of a copper mine, in which contract a fraud was practised on A., it was *held*, that a bill filed by B. alone, praying for an injunction to stay execution on a special judgment at law, obtained on the note, the bill setting up no other equity and failing to pray for any disposition of the original transaction, was defective in substance. *Emmons* v. *McKesson*, 5 Jones' Eq. (N. C.) 93.

58. Idem—Decree for rescission. In an action in equity for the rescission of a contract for the sale of land on the ground of fraud, and also to have a mortgage and notes for purchase money released and cancelled, a judgment which does not provide for an absolute rescission of the contract, but treats it as valid in part and void in part, and cancels such note and mortgage, permitting the purchaser to hold on to the land, can not be sustained. *Grant* v. *Law*, 29 Wisc. 99; see *Law* v. *Grant*, 37 Id. 548.

See PLEADING.

PRESCRIPTION.

1. Distinguished from ownership. The right to a given stratum of coal under a certain close, is a right to land, and cannot be claimed by prescription: *Aliter*, of a right to take coal in another man's land. *Wilkinson* v. *Proud*, 11 M. & W. 33; B. & W. L. C. 23.

2. Profit aprendre. A right to carry away the soil (i. e., to quarry and take away stone) without stint, cannot be claimed by prescription; nor can the claim be sustained by "evidence" (presumption) of a lost grant. *Attorney-General* v. *Mathias*, 5 Kay & J. 579; 27 L. J. Ch. 761.

3. Tin streaming ditch—User by consent—Custom of Cornwall. The rights of tin bounders under the customary law of Cornwall, to the use of water within their tin bounds, for the purpose of streaming for tin, will not prevent, *per se*, the acquisition by another, of a prescriptive right to the enjoyment of the water by twenty years user; but the use of the water by assent of the tin bounder for a consideration, is not an adverse user. *Gaved* v. *Martyn*, 19 C. B. N. S. 732.

4. Right to dig clay or minerals. One who by lease or by license from the owner of the soil, has the right of digging and working clay (or minerals thereunder), has such an interest in the soil as will entitle him to claim, under the Prescription Act, 2 & 3 W. 4 c. 71, unless the circumstances under which the cut was made show that it was intended to be of a permanent character. *Gaved* v. *Martyn*, 19 C. B. N. S. 732.

5. Mines under church lands. The coal under parts of the glebe of a vicarage had, at different times since 1756, with the consent of the vicars, for the time being, been gotten by the persons working adjoining collieries, and royalties had been paid to the vicars, for the time being, the working being conducted by underground passages from the adjoining collieries, without entering on the surface of the glebe: *Held*, that no presumption could be drawn from these facts that there had been any grant authorizing the vicars to open mines. *Bartlett* v. *Phillipps*, 4 DeG. & J. 414.

6. Lease—Copyhold. The first section of the Prescription Act (2 & 3 Will., 4 c. 71), applies only to cases where a person claims by custom, prescription or grant, a profit or benefit from the land of another, and has no application to the case of a right claimed by a copyholder on his own tenement, according to the custom of the manor. Consequently, where copyholders claimed a customary right to dig and carry away sand from their tenements, and the evidence was such that an inference of the existence of the custom might be readily drawn therefrom, it was *held*, that it was not necessary to prove that the right had been enjoyed for a period of thirty years. *Hanmer* v. *Chance*, 34 L. J. 413; 11 Jurist N. S. 397.

7. Qualified—Pleading. A prescription to enter and dig for minerals, making compensation, is an entire prescription, and will not support the affirmative of an issue taken upon a plea justifying under a prescription to enter and dig for minerals, omitting the qualification as to making compensation. But in a plea stating such prescription correctly, it is not necessary to allege that compensation has been made or tendered. *Paddock* v. *Forrester*, 3 M. & G. 903.

8. Wears. A man cannot injure another by laying the ends of his wears on his land; but an agreement permitting such act may be supposed from lapse of time. Accordingly upon proof of user for over sixty years, a grant was presumed; but as to another wear, proof of user for twenty-seven years, *held*, not sufficient. *Falmouth* v. *Innys*, Mosely, 87.

PRINCIPAL AND AGENT.

1. Distinction between ministerial and fiduciary agents. It is a well-established rule of equity that an agent can not make himself an adverse party to his principal while the agency continues. He can neither purchase where employed to sell, nor sell where employed to purchase. In either case he is but a trustee for his principal. But the rule applies only to agents who are relied upon for counsel and direction, and whose employment is rather a trust than a service—not to those who are employed as mere instruments in some appointed service, *e. g.*, a party who had been the general agent, but who after such relation ceased, was employed to take care of the mine for the sum of one hundred dollars per annum, and all proceeds, who had obtained judgment upon suit for arrears due him while agent, and become purchaser of the mine under such judgment. *Deep River G. M. Co.* v. *Fox*, 4 Iredell Eq. (N. C.) 61.

See AGENT.

PROSPECTING CONTRACTS.

1. Execution of. Where plaintiffs, mine owners, conveyed an interest in their mines to defendants, in consideration of a contract signed by defendants, to open the mines, etc., it is a contract executed by the plaintiffs, executory by the defendants, and such contract is valid against the defendants, though not signed by the plaintiffs. *Luckhart* v. *Ogden*, 30 Cal. 547.

2. Statute of Frauds. A verbal contract between A. and B., by which A. agrees to go upon the public domain and search for mineral deposits, being supplied at the cost of B., the discoveries to be located for the joint benefit of the two, violates no provision of the Statute of Frauds. *Murley* v. *Ennis*, 2 Colorado, 304.

3. Legal relation of owner and adventurer. A. who claimed to be in possession of a tract of coal-bearing land, made a verbal agreement with B. and C. by which they were to prospect for coal until they struck a particular seam or ledge, and before they struck this ledge they were to do all the work and have two-thirds of the claim; but after the ledge was struck, the work was to be prosecuted by the parties jointly; A. to bear one-third of the expenses, and B. and C. two-thirds: *Held*, that this agreement did not create the relation of landlord and tenant between A. and B. and C., but that it made them tenants in common, or partners in mining; and that the action of unlawful detainer was not the proper remedy for A. if excluded from the premises by B. and C. *Henderson* v. *Allen*, 23 Cal. 519.

4. Specific performance—Demand. A prospector locating mining ground in his own name while under contract to locate for the joint benefit of himself and his co-adventurers or outfitters, so locates under an implied promise to convey to his co-adventurers "upon request," and specific performance may be decreed "without a previous request," the matter of the demand going only to the question of costs. *Welland* v. *Huber*, 8 Nev. 203.

5. Successful adventurer entitled to specific performance. Where a person claiming an undeveloped mine, agrees with another, that if he will devote his labor and skill in its development, the former will furnish him with tools and provisions, and give him an equal interest in the mine, in case it shall prove valuable, the latter is entitled to an equal interest in the mine when it becomes valuable, if he devotes his labor and skill until that time. *Settembre* v. *Putnam*, 30 Cal. 490; B. & W. L. C. 514.

6. Adequate consideration—Conditional sale—Risk. When one owning a tract of land supposed to contain minerals entered into a contract with another, in which it was stipulated that the other might enter upon the land, and test it at his own expense, and should the land contain the mineral (copper) as hoped for, the person testing should have the right to buy, at a fixed price, if the mine was equal in value to the Ducktown mines, the price to raise or fall accordingly as the mine was better or less valuable than said mines, and the testing was made and a valuable mine found, believed by the parties to be equal to the Ducktown mines, and the parties thereupon formed a joint-stock company, the owner of the land taking one-fourth of the stock in full discharge of the amount agreed to be paid to him: *Held*, that in considering whether the consideration agreed to by the owner of the land, to wit, one-fourth of the stock, was a fair and adequate consideration, the cost of testing together with the risk of losing the whole expenditure in case of failure, was the test of the consideration paid by the person testing, and if that was equal, under the circumstances, to three-fourths of the value, the consideration was fair and adequate. *North Georgia M. Co.* v. *Latimer*, 51 Ga. 47.

7. Sale in disregard of outfitter. If one who is in possession of a lode, holding for himself and another engaged in the acts required to perfect the location, make sale of the property, the latter may bring ejectment against the purchaser for his part, or he may affirm the sale and sue his associate in *assumpsit* for his part of the purchase money. *Murley* v. *Ennis*, 2 Colorado, 300.

8. Default of outfitter. If two persons agree with a third to furnish necessary supplies to the latter as the same shall be required, for discovering and locating lodes for the joint benefit of all, the latter may treat this as a condition precedent, and upon failure to furnish the supplies he may abandon the enterprise, or he may proceed to discover and locate lodes in his own right without regard to the contract. *Murley* v. *Ennis*, 2 Colorado, 300.

9. Time. An agreement to convey land if the vendee should find oil upon it is to be construed to mean that oil must be found in a reasonable time. *Dark* v. *Johnston*, 55 Pa. St. 164.

10. Authority to Locate. No writing is necessary to vest or divest a title on taking up a mining claim. A verbal authority is sufficient to authorize an agent to locate. The Statute of Frauds has no application to the case; it is not a transfer of title. *Gore* v. *McBrayer*, 18 Cal. 583; B. & W. L. C. 191.

11. Adventurer outfitted for California quits mining — Account of profits of new business—Following assets. Smith agreed with plaintiffs, in consideration of advances of money made to him for his expenses, to sail for California on a day certain; to procure provisions for two years, and to commence digging for gold as soon as possible after his arrival, remitting the proceeds of his mining to the plaintiffs, who were to share with him in the profits: *Held*, that this agreement, which was in writing, bound defendant to continue in the business of gold digging for two years, and that plaintiffs were entitled to a discovery of all the defendants proceedings during that time. And the defendant answering that he went to California in pursuance of said agreement, in 1849, but ceased digging for gold and engaged in other business about December 1st of the same year; and that as he construed the contract and as his counsel advised him, he had procured no gold under the agreement, although he did not deny that he had during the said period of two years obtained large sums of money in some other way, it was *held* that he was bound to make further discovery, showing the facts both as to his expenditures of the money received and as to his accumulations, leaving it then to the court to pass upon his accountability. *Hoyt* v. *Smith*, 23 Conn. 177.

The same case, after further answer, being again appealed, the court *held* that defendant was acountable only for the profits of gold digging, and not for any sum gained by him while in California in the lightering business which he subsequently pursued, he not having been shown to have used the advances of plaintiffs in making his subsequent investments, and it further appearing that he had not abandoned the gold digging until he had worked at it faithfully for six months, expended all his funds, and found that it was not remunerative. *Hoyt* v. *Smith*, 27 Conn. 63.

The bill was then amended by averments connecting his lightering business with the equities of the original contract, which amendments were adjudged proper in *Hoyt* v. *Smith*, 27 Conn. 468.

The same case coming before the Supreme Court for the fourth time, it was *held* that the consent of plaintiffs to the abandonment of the gold digging, during the period which defendant had undertaken to work, was a sufficient consideration to support the promise of the defendant to account for the profits of the new business, and it was so adjudged after defendant had refunded the whole amount of the original advance, with interest. And Newman, a co-defendant with Smith, who had secretly received the sums representing such profits, was adjudged to pay the same to plaintiffs, notwithstanding the fact that he had refunded them to Smith before the hearing. *Hoyt* v. *Smith*, 28 Conn. 466.

12. Substitute—Disbanded company—Subsequent earnings—Admissions. The defendant agreed in writing to go to California with a mining association "as a substitute for the plaintiff, and work with the company two years," and remit "one-half of his share of the profits, if any, at the expiration of the association." The company disbanded within the two years. The defendant accounted for plaintiff's share of the profits to the time of the dissolution, and continued to work after such period on his own account: *Held*, that he was not liable for any share of his earnings after such dissolution. *Goodel* v. *Smith*, 9 Cushing, 592.

Held, further, that admissions of defendant's liability under his written contract were not admissible against him. Id.

13. Outfitters and adventurers—Profits after disbanding—Mining season—Distribution. Scott, in 1849, paid money into the treasury of a company outfitting for California, to entitle Clark to membership therein, upon agreement that he, Scott, "should have a full half share of all that Clark is entitled to by being a member of said company." The company proceeded to California, where, on April 10, 1850, just one year after starting, they dissolved by unanimous vote, their original rules providing that they should not dissolve until after one year, nor until return to the "United States," but also providing for

amendment by a two-thirds vote. Upon dissolution a dividend of $1780 per man was declared. The various members then took up new claims, more or less in concert but not as a company. Clark made a profit also out of these claims. Upon his return Scott claimed one-half of what Clark had received both before and after the dissolution: *Held*, that the dissolution was valid under the amendment clause, and that plaintiff was entitled to one-half of the $1780 only, after deducting $500, to cover defendants return expenses. *Scott* v. *Clark*, 1 Ohio St. 382.

While the company was in existence and working an old claim, they located a new claim, but were only able to do enough work to hold it, the season not permitting active mining; after the dissolution, Clark worked this claim and cleared $1000, which was *held*, not within the contract. Id.

In 1849 complainants, defendant and others formed an association, dividing the stock into 32 shares, each share contributing so much money; and out of the members eight were selected to go to California, mine for gold, and divide the proceeds, after deducting expenses, one-half to those who were to make the adventure, and the remaining half to the holders of the shares representing the money advanced. Over $200 apiece was expended to outfit the party. On the plains the party quarreled, and immediately after reaching California, divided the property of the company among them and disbanded, each man going to work on his own account. In 1851, Wertsberger returned with a small amount of gold dust, which he divided under the contract; Bucher, another of the eight, also returned with a large amount of gold dust, which he refused to share with his associates: *Held*, that the refusal of the parties when arrived in California to co-operate, and their appropriation of the property of the association, did not release them from their obligations to the shareholders, though it might as to each other. That the association could compel an account and payment from either of the eight, or sue either of them for a breach of contract at its election, but that in taking a decree against either of the adventurers, all of the eight, except those who render an account, should be excluded from the distribution. Decree, that Bucher be allowed to retain one-half of the sum found in his hands ($12,130, net), and that the remaining half be distributed among the shareholders, excluding all who went to California except Wertsberger. *Eagle* v. *Bucher*, 6 Ohio St. 296.

14. Profits — Disbanded company — Reckoning by shares. An association was formed in Rhode Island for the purpose of mining and trading in California, in 1849. Each member was to contribute $300 and his personal services, or an outside party furnishing the money might send a man in his place and so own a share. The defendant sent out a man, and in consideration of $300, sold a fourth interest in the profits which his own share might produce. On the voyage the association dissolved, sold the common property and divided the proceeds upon the understanding that each man would go on and mine on account of the man who sent him out. The man sent out by the defendant, sent home to him eighteen ounces of gold-dust, worth about three hundred dollars, and the defendant receipted for it as "one-half the proceeds of his engagement for defendant in California for two years." The plaintiffs sued the defendant for one-half said gold-dust as being one-fourth part of the profits of the adventure: *Held*, that the word "profits," in the defendants guaranty, did not mean simply returns, but profits in the strict sense of the term, exclusive of the capital; that no dividend of profits having been made according to the form of co-partnership, the plaintiffs were not entitled to recover under said guaranty, and that the defendant was not bound by his receipt of the eighteen ounces of gold to account to the plaintiff for one-half thereof, he being entitled, as the owner of the share, to an account of the proceeds of said share and the profits made thereon upon equitable principles, and such accounting was irrespective of the agreement between the plaintiffs and the defendant, and was founded upon property in the defendant. *Fletcher Brothers* v. *Hawkins*, 2 R. I. 330.

15. Agreement to work, return, and share profits — Delay — Expenses — Time. The defendant, in consideration of $500 paid to him by the plaintiff, promised to go to California and labor there as much of the year 1851 as could be used, giving him reasonable time to reach home by the first of December of that year, and there equally divide with the plaintiff the avails of the expedition: *Held*, that under this contract the defendant was not entitled to retain from said avails the expenses of his journey home if he did not return until long after the time specified; but that the time to which he was obliged to make a division of his earnings was only to such a period prior to said first of December as would have been reasonably sufficient to have enabled him to have returned by that day. *Thompson* v. *Prouty*, 27 Vt. 14.

16. Amounting to partnership — Claims located for the furnishing members. An agreement made between parties, by which some of them prospect for gold, and the others furnish money and provisions,

for which they are to receive interests in the mining grounds that may be discovered, constitutes a prospecting partnership, and those who furnish the money and provisions, are entitled to pre-empt and hold mining claims under the laws of a district, which provide that claims shall be allowed the discoverers for their prospecting partners. *Boucher* v. *Mulverhill*, 1 Mont. 306.

17. Partnership assets—Gold dust—Adventure abandoned. A partnership was formed, under the terms of which A., the complainant, furnished money to carry his associates to California, where they were to mine for gold for two years, and divide the net proceeds. Immediately upon reaching the mines, the funds of the party were exhausted, and each person was compelled to seek employment on his own account. They scattered, and never worked together as a company. B., the defendant, one of the associates, sought employment in his business as a pile driver, and within two years returned to Philadelphia with over $11,000 in gold dust, which he deposited in the mint: *Held*, that plaintiff could claim no lien upon such gold dust or the proceeds of defendant's labor; that it was not partnership assets, and that complainant's only remedy, if any, was by action for damages on account of abandoning the association. *Waring* v. *Cram*, 1 Pars. Eq. Ca. 516.

18. Conditional arrangement—License to search for oil. An agreement was made between plaintiffs, owners of mineral lands and the assignor of defendants, of a two-fold character, including a license to mine, and a lease for ten years in case of successful discovery. The defendants lost all rights thereunder by the lapse of time, no workable quantity of petroleum having been discovered within a period limited by the contract. The plaintiffs then agreed to refrain from declaring a forfeiture of this contract for ten years from its date, provided the defendants would carry on the search for petroleum constantly and without cessation: *Held*, that the latter agreement was conditional; that its condition was suspensive and "potestive," and that when the defendants failed to carry on their search for petroleum the plaintiffs were entitled to declare the forfeiture of the contract by suit, and claim possession of their lands without a formal putting in default. *Escoubas* v. *Louisiana C. O. Co.*, 22 Lou. Ann. 280.

19. Abandonment of adventure by associates. The defendant, by indenture, in consideration of an outfit furnished by plaintiff, covenanted to join a party about to start for California, and that plaintiff should receive one-half of all the net earnings of defendant for two years, and to remain with the company, subject to its rules, etc., for that time. The defendant did go to California with the company, March 10, 1849, and remained with it until July 1, 1849, when the company was dissolved by a formal vote of the majority of its members, without any fault on the part of defendant, and against his consent. Until dissolution, defendant had faithfully observed his contract, and deposited one-half of his earnings with the company for the benefit of his outfitter, according to the terms of the agreement. After dissolution, defendant worked on his own account, but, as the plea stated, earned nothing beyond his living: *Held*, that there was no undertaking on the part of defendant that the company should exist two years, and that upon its disbanding he was released from further obligation, the breaking up of the company not being chargeable to his fault. *Harvey* v. *Coffin*, 44 N. H. 563.

20. Covenant affected by conduct of associates. Defendant, by articles of agreement, dated October 23, 1849 (which articles are set forth in full in note to the case), covenanted with the plaintiffs to proceed to California as a member of a joint stock company, and there to labor in gold digging and other adventures, and agreed to remit to the plaintiffs one-half of the net proceeds of one share in said company as often as dividends should be declared. The other members of the company, while on the way to California, contrary to the wishes of defendant, abandoned the joint enterprise and sold their vessel and cargo: *Held*, that the defendant was not liable on his covenant to proceed to California. *Field* v. *Woodmancy*, 10 Cush. (Mass.) 427.

PUBLIC DOMAIN.

1. The U. S. Government as a proprietor or owner. The United States, holding as they do, with reference to the public property in the minerals, only the position of a private proprietor, with the exception of exemption from State taxation, having no municipal sovereignty or right of eminent domain within the limits of the State, cannot, in derogation of the rights of the local sovereign to govern the relations of the citizens of the State, and to prescribe the rules of property and its mode of disposition, and its tenure, enter upon, or authorize an entry upon private property for the purpose of extracting minerals. The United States, like any other proprietor, can only exercise their rights to the mineral in private property, in subordination to such rules and regulations as the local sovereign may prescribe. Until such rules and regulations are established the landed proprietor may successfully resist in the

courts of the State all attempts at invasion of his property, whether by the direct action of the United States or by virtue of any pretended license under their authority. *Boggs* v. *Merced Mining Co.*, 14 Cal. 279; B. & W. L. C. 131.

2. Sovereignty—Territory. A territory cannot acquire or hold the possessory title to a mining claim the paramount title to which is still in the United States. *Territory* v. *Lee*, 2 Mont. 124.

3. Claim of State sovereignty. The United States, as owner of land within the limits of a State, only occupies the position of any private proprietor, with the exception of exemption from State taxation. *Hicks* v. *Bell*, 3 Cal. 219; compare 17 Cal. 199.

The mines of gold and silver in the public lands are as much the property of the State, by virtue of her sovereignty, as are similar mines in the hands of private proprietors. Id.; overruled, 17 Cal. 199.

The State has the sole right to regulate the working of mines on the public domain, to license miners, and fix the conditions under which their use may be enjoyed. Id.; overruled, 17 Cal. 199.

4. State sovereignty. A State cannot complain of the letting of the mineral lands on the public domain, nor lay any claim to such lands. *U. S.* v. *Gratiot*, 1 McLean, 453; S. C., 14 Pet. 526.

The mines of gold and silver in this State are the property of the State, and the policy of her legislation permits all persons to work for these metals. *Stoakes* v. *Barrett*, 5 Cal. 36; overruled in *Moore* v. *Smaw*, 17 Cal. 200.

Although the State is the owner of the gold and silver found in the lands of private individuals as well as the public lands, yet to authorize an invasion of private property in order to enjoy a public franchise would require more specific legislation than any yet resorted to. Id.

5. Gold and silver mines belong to United States. The gold and silver found on the public domain within the limits of California are not the property of the State. *Moore* v. *Smaw; Fremont* v. *Flower*, 17 Cal. 200; B. & W. L. C. 52; overruling *Hicks* v. *Bell*, 3 Cal. 219.

6. Government ownership. The United States occupy, with reference to their lands within the limits of a 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 the conveyances of individuals. *Moore* v. *Smaw*, 17 Cal. 200; B. & W. L. C. 52.

7. No title accrues against government. No title to the public lands, whether mineral or otherwise, can accrue against the United States by prescription, adverse possession or estoppel *in pais*. Its grant or letters patent will not be presumed. *Doran* v. *Central Pacific R. R. Co.*, 24 Cal. 245.

The title of the United States can only pass from the United States, by means of an Act of Congress making a grant or authorizing a grant to be made through some person or officer. Id.

8. Power of United States to lease. Congress has power to allow mines on the public domain to be leased, whether such mines are situate within the limits of a State or territory; and more especially in a State, when the act authorizing such leases was enacted while the State was a territory. The Act of 1807, authorizing the president to lease lead mines in the Indiana territory, is valid and within the constitutional powers of Congress. *United States* v. *Gratiot*, 14 Pet. 526.

9. Lease of United States lead mines. The president of the United States has no power by virtue of his office, without statutory authority, to lease the lead mines on the United States lands in Iowa. *Lorimier* v. *Lewis*, 1 Morr. (Iowa) 253.

And there is (1843) no Act of Congress which will authorize such leasing. Id.

The Act of Congress of March 3, 1807, entitled "An Act to prevent settlements being made on lands ceded to the United States until authorized by law," authorizing the president to lease lead mines and salt springs, is limited to the benefit of occupants of the public land at that date. Id.

10. United States reservations—Lead mines. It has been the policy of the United States at all times (1840) to reserve the mines (referring to the lead mines in the north-west territory). *United States* v. *Gratiot*, 14 Pet. 526; S. C., 1 McLean, 453.

In the land districts made by Act of June 26, 1834 (4 Statutes at Large, 686), lead mine lands were not subjected to sale, nor opened to pre-emption rights. *United States* v. *Gear*, 3 How. 120.

11. District rule excluding Chinese miners. Article 6 of the Burlingame treaty, in effect, secures to Chinamen the right to reside in the United States upon the same terms as the subjects of Great Britain and France, and this implies the right to follow any lawful pursuit not prohibited to subjects of those two powers. It would seem therefore, that a district regulation forbidding Chinese to mine on that portion of the public domain embraced in the district, would be void. *Chapman* v. *Toy Long*, 3 Sawyer, 36.

12. Permit of U. S. officer—Trespass—Lead mines. The permit of an authorized officer to a defendant in trespass, for taking ore from lead mines on the United States land, to enter upon such land, is evidence that the entry was not tortious. *U. S.* v. *Gear*, 3 McLean. 571.

13. State license. The states have no power to interfere with the public domain of the United States, nor to grant a license to occupy the same. *Doran* v. *Central Pacific R. R. Co.*, 24 Cal. 245.

14. Nevada.—The legislative act of Nevada of February 13, 1867, recognized the validity of the claim of the United States, to the mineral lands within that state. *Heydenfeldt* v. *Davey G. & S. M. Co.*, 93 U. S. 634; affirming S. C., 10 Nev. 290.

15. Gold and silver mines—U. S. title—Mexican cession. The minerals of gold and silver which passed by the cession of California to the United States, were not held in trust for the states to be carved out of the ceded territory and their ownership did not vest in the State of California, upon its admission into the union. The ownership of the United States in such minerals, is not an incident of sovereignty, and the United States hold them just as they hold other public property or land acquired from Mexico. *Moore* v. *Smaw*, 17 Cal. 200; B. & W. L. C. 52.

16. Relations of United States to the Pacific mineral lands. The United States has recognized the possessory rights of miners on the Pacific States by its statutes (Rev. Stat. secs. 2318–2352), but has not parted with its title to the land, except where the land has been sold in accordance with the law on that subject. *Forbes* v. *Gracey*, 94 U. S. 762.

But the mineral when severed, is free from any lien, claim or title of the United States. Id.

17. No dedication. The United States has not conveyed or dedicated the minerals in the public lands to individuals or the public. *U. S.* v. *Parrott*, 1 McAll. C. C. 271.

18. No government license. The statement of the existence of a general license from the United States to work the mines which the public lands contain, is inaccurate, as applied to the action or want of action of the government. There is no license in the legal meaning of that term. The supposed license of the government consists in its simple forbearance (1859). *Boggs* v. *Merced M. Co.*, 14 Cal. 281; B. & W. L. C. 131.

19. Paramount title of the United States immaterial between occupants. In California, although the largest portion of the mineral lands belong to the United States, yet defendant cannot defeat an action for mining claims, water privileges and the like, by showing the paramount title of the government. Our courts, in determining controversies between parties thus situated, presume a grant from the government to the first appropriator. This presumption, though of no avail against the government, is held absolute in such controversies. *Coryell* v. *Cain*, 16 Cal. 567.

20. Mineral lands, what are not. The mere fact that land contains particles of gold or veins of gold-bearing quartz, does not necessarily impress it with the character of "mineral land," within the meaning of Acts of Congress granting lands to a railroad, but reserving from the grant, mineral lands. *Alford* v. *Barnum*, 45 Cal. 482.

21. Property in claim on public domain taxable. The right conceded by Acts of Congress of the United States to develop and work the mines on the public domain is property, and as such the subject of bargain and sale, of inheritance and of taxation, and may be sold for such taxes without infringing upon the title of the United States. *Forbes* v. *Gracey*, 94 U. S. 762.

22. Recognition of miners' rights. The whole course of legislation and judicial decisions in this State, since its organization, has recognized a qualified ownership of the mines on the public domain in private individuals. *State* v. *Moore*, 12 Cal. 56.

23. Mining claim on land entered as agricultural—Patent. Plaintiff's grantors located six claims on a quartz lode, gold-bearing, in 1865. The Mining Act of July 26, 1866, confirmed the possession which they had taken under the local laws, and gave them the further benefits of that Act. The land was returned by the government surveyors as agricultural, and in 1870 the defendant, having entered it as agricultural land, obtained the patent of the United States, the plaintiff being at all times in notorious possession of his lode claims: *Held*, that such patent was void as against the plaintiff's mining claims. *Gold Hill Q. M. Co.* v. *Ish*, 5 Oregon, 104.

24. Right of appropriation. The public mineral lands of this State are open to the appropriation of any one, and the one first occupying any portion of the same makes it his by the act of occupancy, and once his, it continues his until he manifests his intention to part with it in some manner known to law, to wit, by sale, gift or abandonment. *Richardson* v. *McNulty*, 24 Cal. 339; B. & W. L. C. 206.

25. Primary disposal of water. Neither state nor territorial legislation, nor mining customs, unless recognized by Congress, can limit or control the right which the government has to the primary disposal of the water as parcel of its public lands. *Union M. Co.* v. *Ferris*, 2 Saw. 176.

Appropriation confers no title in water against the United States or its grantee, although such appropriation be recognized by local legislation and judicial decisions of the State where the land lies, in the absence of congressional legislation upon the subject. Id.

26. Mining Act of 1866. By the Act of Congress of July 26, 1866, the general government extended to all in possession of mining claims and all subsequently locating and denouncing mines containing the precious metals, a guaranty of protection in their occupancy so long as the mines are operated. *Gold Hill Q. M. Co.* v. *Ish*, 5 Oregon, 104.

27. General Incidents of Possession. Possession of public land carries with it the privileges and incidents of ownership against every one but the government, subject only to rights antecedently acquired. *Crandall* v. *Woods*, 8 Cal. 136.

28. Status of mining claim upon. A prior appropriation of the public domain establishes a *quasi* proprietorship which entitles the owner to be protected in its quiet enjoyment against all the world, except the true owner, and excepting also the case of agricultural and grazing lands which are made by statute of California subject to the privileges granted to miners. *Tartar* v. *Spring Creek Co.*, 5 Cal. 395.

29. Presumed license. The right to be protected in the possession of the public mineral lands in California is founded on the presumption of a license from the owner. *Conger* v. *Weaver*, 6 Cal. 548.

The United States, in the face of the notorious occupation of her public lands in California for the purpose of gold mining, has asserted no right of ownership to any of the mineral lands in said State. Id.

The State government has acquiesced in this appropriation of public lands, and by its legislation, as construed by the court, has established the policy of permitting all who wish, to work the mines with or without conditions. Id.

30. Statutory presumption — California — Trespasser. A party entering upon mineral land for the purpose of mining cannot be presumed to be a trespasser; for if the land be not private property he has the right to enter upon it for such purpose; and until it is shown that the title has passed from the government, the statutory presumption that it is public land applies. *Smith* v. *Doe*, 15 Cal. 101.

31. Statutory precedence of miners' rights. By statute of California all persons have permission to work mines upon public lands, notwithstanding such lands may be in the possession and enjoyment of other persons using them for agricultural purposes. *Stoakes* v. *Barrett*, 5 Cal. 36.

A person who settles for agricultural purposes upon any of the mining lands of the State, settles upon such lands subject to the rights of miners, who may proceed in good faith and extract any valuable metals there may be found in the lands so occupied by the settler in the most practicable manner in which they can be extracted, and with the least injury to the occupying claimant. *McClintock* v. *Bryden*, 5 Cal. 97.

32. Jurisdiction of Supreme Court — Assertion of the license of the U. S. to extract minerals. In a suit to recover mineral lands on the Pacific Coast, with the mines therein, an allegation of record avering prior possession of the land for the purpose of taking out the minerals without an allegation that such possession is had under authority, or by some treaty or statute of the United States, does not give this court jurisdiction to re-examine the case under the twenty-fifth section of the Judiciary Act of 1789. And this although such possession was claimed as the exercise of a supposed license from the United States to extract the precious metals from the public domain, especially where it had been found as a fact, and the decision then merely followed the finding of fact—that no such license from the United States existed. *Boggs* v. *Merced M. Co.*, 3 Wall. 304.

33. Right of appropriation — Improvements. As a general rule, the public mineral lands in California are open to the occupancy of every person who in good faith chooses to enter upon them for the purpose of mining. *Smith* v. *Doe*, 15 Cal. 101.

But this rule has its limitations; valuable permanent improvements, such as houses, orchards, vineyards, growing crops, etc., will be protected. Id.

34. Franchise. The right of mining for the precious metals on the public domain is a franchise. *Gold Hill Q. M. Co.* v. *Ish*, 5 Oregon, 104.

And a franchise which will be protected by the courts. Id.

35. Location of School warrants. There is no prohibition against locating school land warrants on the mineral lands in California. They are not reserved in the Act of May 3, 1852. *Nims* v. *Johnson*, 7 Cal. 110.

36. Severance—Trust. Where W. and C. each claimed to hold the possessory right in a lot of mineral land of the United States in Iowa, and C. and the administrator of W. entered into an agreement by which C. agreed to give to the estate of W. one-sixth of all mineral raised upon the land, "to enter said described property from the United States, and said C. has to receive the surface or soil of said property." If the administrator worked or discovered any mineral, the estate "to have the privilege to do so without paying any part to any person whatsoever." The agreement was construed to the effect: 1. That C. was to hold the soil or surface to the extent of its agricultural uses; 2. The estate of W. was to have the minerals; 3. That C., upon his purchase of the land from the United States, held the mineral in trust for the heirs of W. *Stewart* v. *Chadwick*, 8 Iowa, 463.

37. Railroad grant. Mere occupants, who have entered upon mineral lands for mining purposes, have no right or title under which they can maintain possession against the United States or its grantee. *Doran* v. *Central Pac. R. R. Co.*, 24 Cal. 245.

38. Smelting, under lease of the United States. The letting of mines or the including of terms in the lease requiring defendants to deliver ore at smelting works also let by the government, is not an engaging in traffic by the United States, nor an interference with the state sovereignty. *United States* v. *Gratiot*, 1 McLean, 459; S. C., 14 Pet. 526.

39. Smelting works incident to letting the lead mines. The president of the United States, having power to lease the lead mines of Illinois, has power to grant a lease for smelting the ore, and to require the other lessees to sell the ore to the smelting works holding such lease or license. Smelting is one of the branches of the mining for the mineral. *United States* v. *Gratiot*, 1 McLean, 453; S. C., 14 Pet. 526.

40. Indian title. Lands to which the Indian title has not been extinguished, not considered open to pre-emption. *Hot Springs Cases*, 92 U. S. 698.

See MINERAL LANDS; U. S. STATUTES; APPROPRIATION.

QUARRY.

1. Face. The face of a quarry is its perpendicular sides, and not its bottom. *Keeler* v *Green*, 21 N. J. Ch. 27.

2. Special contract—Parties—Time to carry away stone quarried. Conrad had contracted with Clemens to sell a tract of land containing a stone quarry, and to convey the same by deed, to be signed by himself and certain other persons, within ten days, and in the agreement Conrad reserved the right to continue to quarry stone for three months: *Held*, in an action by Conrad against Clemens, for refusing to allow him to take away the stone quarried, according to the reservation, that it was immaterial why such third persons were made parties to the deed, and that there was no presumption that they were owners of the stone, and were not required to be joined as plaintiffs: *Held, further*, that the neglect of Conrad to remove the stone within the time limited, created no forfeiture of his property therein. *Clemens* v. *Conrad*, 17 Mich. 170.

3. Face of, as boundary. A contract to convey lands, bounded on the south by a line ten yards north of the quarries on them. The face of the quarries, as worked, being toward the south, must be held to mean lands bounded on the south by a line ten yards north of the face of the quarries as worked, without regard to the extent toward the north of the stone that constitutes the quarries. *Huffman* v. *Hummer*, 18 N. J. Ch. 83.

When a line by which land is to be conveyed is described as a line ten yards north of the face of quarries upon the tract, and that face is jagged, and at one extremity much to the north of the general line of the face, the line must be a straight line in every part, distant at least ten yards from the face of the quarry. Id.

4. Distinction between mine and quarry. In order to determine whether an excavation in the earth constitute a mine or a quarry, we are to look to the mode in which the article is obtained, and not its chemical or geological character. *Rex* v. *Brettall*, 3 B. & Ad. 424.

Whether an excavation be a mine or a quarry is a question of fact; a stone working where the stone is won by sinking the shafts perpendicularly to the stratum which lies considerably below the surface, and the working the stratum by roads and gateheads and raising the stone to the surface by machinery; or carrying it underground through a tunnel, in the same way as coal is usually got, as well as iron ore, constitute the working a mine. *Rex* v. *Sedgley*, 2 B. & Ad. 65.

5. Winning stone by mining—Reservation. In a conveyance of land in Northumberland, a reservation was made to the grantor of all "mines or seams of coal, and other mines, metals or minerals" under the land granted, with liberty to dig, bore, work, lead and carry away the same, and to make pits, etc.: *Held*, varying the decree of Kindersley, V. C., that the term "min-

erals" included freestone, but that the grantor had only liberty to get the freestone by underground mining, and not by working in an open quarry. *Bell* v. *Wilson*, L. R. 1 Ch. App. 302; 1 Dr. & Sm. 395.

6. Reservation including quarries. A reservation of "all mines and minerals lying and being within or under the said lands or grounds, includes every species of mineral which is *within* the land, as distinguished from *under* it, and clearly includes quarrying as well as mining, using both of those words in their special sense. *Midland R. Co.* v. *Checkley*, L. R. 4 Eq. 25.

7. Reservation of "mines" and "minerals." A reservation of "mines," when combined with the more general word minerals, carries a surface working for the mining of China clay. *Hext* v. *Gill*, L. R. 7 Ch. App. 700; 41 L J. Ch. 765; 3 Moak, 574.

A reservation of mines and minerals, construed as a reservation of substances of a mineral character, which could only be worked by means of mines, as distinguished from quarries, and that limestone quarries out of the surface were not within the exception. *Darvil* v. *Roper*, 3 Drew, 294; 24 L. J. Ch. 779.

8. Stone. Stones got from quarries are minerals. *Micklethwaite* v. *Winter*, 6 Exch. 644; 20 L. J. Exch. 313.

9. Lime works. Lime works are not a mine. *Rex* v. *Alberbury*, 1 East, 534.

10. Severance. It is competent for the proprietors, being the owners of the entire fee, to separate the quarry of stone from the surface of the earth, and make distinct possessions and different inheritances of the soil and its products, and of the stone which underlaid them; and when so separated, the quarry retains all the qualities of real estate, so as to be held and transmitted in like manner. *Green* v. *Putnam*, 8 Cush. 27.

11. Dower.—A widow is dowable of a lime quarry which was owned by her husband, and had been opened and wrought during her coverture. *Moore* v. *Rollins*, 45 Maine, 493.

12. Dowager extending quarry. A husband died seised of a tract of land of four acres in extent, consisting of a slate quarry, mostly below the surface of the ground, but partially above ground. One quarter of an acre of the quarry had been dug over, and the practice was to take a section of ten or twelve feet square on the surface, and go down to a certain depth, and then begin on the surface again: *Held*, that not only that portion of the quarry which had been actually dug, but the whole extent owned by the husband must be considered as opened, and so the widow was entitled to a dower in the same. *Billings* v. *Taylor*, 10 Pick. 460.

13. Quarrying amounts to possession. Quarrying stone from time to time, within a lot of fifty acres, for a space of 25 years, and a claim of title by deed: *Held*, a sufficient adverse possession to maintain a recovery in ejectment. *Jackson* v. *Olitz*, 8 Wend. 440.

See MINES; STONE.

QUARTZ.

1. Excludes placers. The word quartz, used in a deed of a mining claim, treated incidentally as descriptive of a lode claim, as distinguished from a placer or "surface mining" claim. *Kinney* v. *Con. Virg. M. Co.*, 4 Saw. 407.

QUICKSILVER.

1. New Almaden quicksilver mine case. For decisions upon title and boundaries, see *U. S.* v. *Fossatt*, 20 How. 413, S. C., 21 How. 445; and the *Fossatt Case*, 2 Wall. 649; but these cases involve no mining points.

History and title of the New Almaden quicksilver mine, with review of Spanish system of mine grants. *U. S.* v. *Castillero*, 2 Black, 17.

2. New Idria Mine. Validity of proceedings to confirm the Mexican grant of the rancho containing the New Idria quicksilver mine. *McGarrahan* v. *New Idria M. Co.*, 49 Cal. 331.

QUIETING TITLE.

1. Possession—Complaint. In an action to quiet title to a mining claim, under section 254 of the Practice Act, a possessory title in the plaintiff is sufficient. *Pralus* v. *Pacific G. & S. M. Co.*, 35 Cal. 30.

An averment in the complaint filed in such action, that plaintiffs were greatly embarrassed in the use and disposition of the mining claims, and that their interest therein was depreciated "by reason of the possibility of title in this defendant," is a sufficient allegation of injury under the statute, to maintain the action. Id.

2. Possession of claim necessary. To maintain an action under section 254 of the Practice Act, to quiet title to mining claims on the public domain, there must be possession, actual, or at least constructive, in the plaintiff at the time of commencing the action, and a complaint which fails to aver such possession, is demurrable. *Pralus* v. *Jefferson G. & S. M. Co.*, 34 Cal. 558.

3. Water—Possession—Practice. A party who is not in the possession of water

cannot maintain an action under section 254 of the Practice Act to determine an adverse claim to it. *Nevada Co.* v. *Kidd*, 37 Cal. 283.

4. Possession got by force — Nevada practice. In an action to quiet title to a mining claim, brought under section 256 of the Nevada practice act, the fact that plaintiff acquired his possession *vi et armis* cannot be inquired into. *Scorpion S. M. Co.* v. *Marsano*, 10 Nev. 370.

In such action the burden of proof is upon the defendant, if he admit possession in plaintiffs, to plead and prove good title in himself. Id.; overruling *Blasdell* v. *Williams*, 9 Nev. 161.

5. Division of Drainage Water. A bill may be brought to quiet the enjoyment of mines before the decision of an issue at law, otherwise the mine might be ruined in the meantime. And the rule was in this case extended to the protection of an ancient stream of water, supplied by mines, which defendants threatened to divert by driving new adits. *Falmouth* v. *Innis*, Mosely, 87.

6. Ditch—Defective lien proceedings. Bill to quiet title under section 254, Cal. practice act, applied in case of ditch sold under alleged illegal proceedings under the mechanics' lien act. *Head* v. *Fordyce*, 17 Cal. 149.

7. Outstanding lease—Cloud on title. An outstanding lease of the right to mine coal, procured by fraud, is a cloud upon the title which a court of equity will decree to be cancelled. *Stewart's Appeal*, 78 Pa. St. 88.

QUO WARRANTO.

1. Use of abbreviated name. The use of an abbreviated name, "Ophir Copper, Silver and Gold Mining Company," instead of the real corporate name, "Ophir Copper, Silver and Gold Mining Company of Placer county, California," is not a usurpation, and will not support a proceeding to oust it of its franchises. *People* v. *Bogart*, 45 Cal. 73.

2. Ministerial Officers. Courts cannot remove the private or ministerial officers of a mining corporation. *Neall* v. *Hill*, 16 Cal. 146.

The power of the court to remove corporate officers applies only to those who are entrusted by law with the management of its affairs, and a motion in such cases belongs only to the law side of the court. Id.

RAILROAD.

1. Surface Support. A grant to a railroad for railroad purposes carries the right of support, although the minerals are reserved. *Caledonian R. Co.* v. *Sprot*, 2 Macqueen Sc. app. 449.

And for a case where the mine owner was restrained from working under the road until he gave security against damages, see *Caledonian Co.* v. *Belhaven*, 3 Id. 56.

2. Surface support to heavy masonry. A vendor of land having sold it under an act of Parliament to a railroad for railroad purposes, the minerals being reserved, cannot work the minerals reserved to the injury of a superstructure placed by the railway above, although such structure be a bridge built so as to require more than usual support. *Elliot* v. *Northeastern R. W. Co.*, 7 H. L. Ca. 333.

3. Extent of. The right of support to a railroad (over mines) when the surface is sold for railroad purposes, attaches even beyond the limits of the land sold. Id.

4. Bridge — Support — Eminent domain. The right of lateral support belongs to a railroad and to a bridge of extraordinary weight, against a party who has sold land to the railroad company, although such sale was made as the result of the compulsory power given to the company. And the owner of the adjoining land may be restrained from working mines to the threatened injury of such lateral support. *North-eastern R. R. Co.* v. *Elliott*, 30 L. J. Ch. 160; 32 Id. 402.

5. Support—Purchase of minerals. A railway act providing for the purchase of lands for railroad purposes, with reservation of the minerals to the owner of the lands so purchased, must be construed to give both lateral and vertical support, although the sale to the railway was compulsory, and an injunction was awarded to restrain the working of minerals of great value underneath in any such manner as to occasion damage to the railroad. *North-eastern R. R. Co.* v. *Crossland*, 32 L. J. Ch. 353; affirming S. C., 2 Jo. & H. 565.

6. Sale of surface to, reserving minerals. A railroad company was empowered by special act to take lands, the act providing for compensation to parties owning mines interfered with. The owner of the surface, subsequently, by private sale, without regard to the act, sold the land adjoining his mine to the railroad, reserving the minerals. Afterwards, upon attempting to extend his mine underneath the surface sold, it was found that the railroad interfered with its extension in that direction. But there being no reservation or provision for such inconvenience at the time of the sale of the surface, it was *held*, that the owner of the mine was not entitled to damages, and was bound so to work as not to interfere with the road. *Rex* v. *Leeds & Selby R. W. Co.*, 3 A. & E. 686.

7. Mine injured by railroad excavations—Porous strata uncovered—Damage not reached by original award. The plaintiffs were owners and occupiers of a coal mine, which, as well as the surface-land, formerly belonged to the same owner. A railway company to whose rights and obligations the defendant succeeded, purchased under the powers of their act of Parliament, the surface-land for the purpose of their railway, and constructed it thereon. The company cut and removed upwards of twenty feet in thickness over the plaintiffs' mine to get the level at which they laid their rails. The soil was clay, impervious to water; by removing it a porous rock was reached. The soil was in a like manner cut away by the company along the length of their line to a lower district of country through which a brook flowed. The railway was carried over the brook by a flat bridge. The line of railway sloped downwards from the bridge to the part over the plaintiffs' mine. The bridge was sufficient to let the ordinary water of the brook pass, but was an impediment to the passage of water in large floods. The company were required by their act of Parliament to make and maintain sufficient drains. At the time the railway was made the plaintiffs' mine was not worked within forty yards of it, and drains were made at the side of the railway sufficient to carry off the water. Subsequently the plaintiffs gave the defendant notice of their intention to work the mine under the railway. The defendant having declined to purchase the mine, the plaintiffs worked under the track, when, from no fault or negligence of theirs, but as a natural consequence of fair and lawful working, the railway sank and continued to do so from time to time. The defendant threw materials of a porous character on the sunken parts, but did not repair or puddle the drains. In the year 1860, a flood happened and the water, part of which would have escaped but for the bridge, flowed down the railway and in consequence of the high ground between the brook and the surface over the mine being removed, it reached that spot, and together with the water falling there and the springs arising in the cutting, penetrated into the mine for want of efficient drains: *Held*, in the Exchequer Chamber (affirming the judgment of the court of exchequer), that the defendant was liable in an action for the damages sustained by the plaintiffs, and that the claim was not one which could have been enforced under the compensation clauses of the Railway Clauses Consolidated Act, 1845. *Bagnall* v. *London & N. W. R. Co.*, 1 H. & C., 544; 7 H. & N. 723.

8. Must pay for minerals or take consequences. The obvious intent of a legislative act allowing a railroad to pass over mineral lands, giving the railroad an option to buy the mine is, that in case they decline to buy, the mine owner shall possess his property intact. Declining to purchase they are liable to damages ultimately caused by the working of the mine and the operation of the road, aside from the original compensation. *Bagnall* v. *London & N. W. R. Co.*, 1 H. & C. 544, affirming 7 H. & N. 723.

9. Mining Co. holding R.R. charter—Construction. A company being authorized to hold land and "mine for coal, oil and other minerals," and to construct a railroad to connect with some other road, or with a navigable stream: *Held*, that if they held no land they could construct no road, and that their charter only authorized a road to carry off their own products. *Warren & F. R. W. Co.* v. *Clarion Land Co.*, 54 Pa. St. 28.

10. U. S. grants to Pacific R.R. The Pacific Railroad companies take the lands granted to them by the acts of Congress of 1862 and 1864, subject to ditch rights vested prior to the mining act of Congress of July 26, 1866, where, under the provisional terms of those grants, their equity had not vested; and such equity did not vest before the certificate called for in the acts had been made by the President or Commissioners as to the completion of each section of 40 miles. *Broder* v. *Natoma W. Co.*, 50 Cal. 621.

11. Mineral lands under road bed of Pacific Railroad. The right of way over a strip of land two hundred feet in width on each side of its road, granted to the Central Pacific Railroad company by the second section of the act of Congress passed July 1st, 1862, extends to and covers all public lands, whether mineral or not. The proviso to section 3 of said act, excepting mineral lands from its operation, refers to the alternate sections granted to said company, and has no reference to the grant of the right of way in section 2. *Doran* v. *Central Pacific R. R. Co.*, 24 Cal. 245.

12. Mining company abandoning its railroad. A mining company holding a special charter, wherein is conferred the right of building a railroad, with the privilege reserved to others to send their products over the same, is not bound to maintain such road, nor prevented from employing any cheaper means of transportation which will dispense with the necessity of maintaining such railroad. It is not bound to operate such road after its own interests cease to require it. *Montell* v. *Consolidation Coal Co.*, 45 Md. 16.

13. Expert testimony on railroad construction. The judge, in his instructions to the jury, is not required to settle questions of science. Therefore, in a contest about railroad work, when two engineers, examined as witnesses, adopted different modes of measurement—one by the "average of end areas," the other the "prismoidal formula"—it was not error to leave it to the jury to adopt either in their discretion. *Sewanee M. Co.* v. *Best*, 3 Head, 701.

14. Negligence. Defendant, in order to get his coal to the river, built a railroad from his mines to the landing. This road crossed a turnpike. By consent of the turnpike company, the defendant raised the road-bed and built a bridge over his railway, making it part of the turnpike: *Held*, that it was the duty of defendant to keep such bridge in repair. *Hays* v. *Gallagher*, 72 Pa. St. 136.

The bridge was 18 feet wide and 10 feet in length, and originally had rails on each side, which defendant had allowed to decay: *Held*, that he was liable for an accident, where a foot passenger had fallen from want of sufficient side protection to the bridge. Id.

RECEIVER.

1. Discretion. The appointment of a receiver is a matter of sound discretion, and the court must be convinced that it is needful. It is a strong measure and cannot be exercised doubtingly. *Chicago Oil Co.* v. *U. S. Petroleum Co.*, 57 Pa. St. 83.

Where a party has title and possession under a lease in writing, enjoying rights apparently legal, a receiver will not be appointed, unless under urgent and peculiar circumstances. The plaintiff must show a clear right or a *prima facie* right, with such circumstances of danger or probable loss as will move the conscience of a chancellor to interfere. Id.

2. Discretion—Prima facie showing. The exercise of the power to appoint a receiver rests very much in the discretion of the court, exercised in view of the circumstances of the case, one circumstance being the probability of the plaintiff being ultimately entitled to a recovery, and the party asking for a receiver must first show a *prima facie* case. *Copper Hill M. Co.* v. *Spencer*, 25 Cal. 11.

3. Jurisdiction. A receiver may be appointed to preserve the property of a mining partnership. *Sheppard* v. *Oxenford*. See 1 Kay & J. 491.

And to carry on its workings in foreign countries. Id.

4. Practice—Jurisdiction. After verdict and judgment for plaintiff, in an action to recover possession of real estate, and while a motion for a new trial is pending, a receiver of the rents and proceeds of the property in dispute may be appointed, if the facts of the case are such as warrant it. *Whitney* v. *Buckman*, 26 Cal. 447.

5. Practice. The entry of a non-suit upon the trial of a case to try title to a mine, pending which trial a receiver had been appointed, does not operate *per se* to discharge the receiver; neither does the filing of motion for a new trial operate as a stay of proceedings so as to prevent an order by the court for the discharge of the receiver. *Copper Hill M. Co.* v. *Spencer*, 25 Cal. 11.

6. Jurisdiction—Rights of third parties. It is competent for a court of chancery, by an interlocutory order, to take possession of a mine which is the subject of litigation, pending the proceedings; but when the rights of third persons, in no manner parties to the suit, and who have purchased in good faith, have intervened, such power should not be exercised. *Lexi* v. *Karrick*, 13 Iowa, 344; 8 Id. 150.

7. Appointment without prayer. If notice is given of an application for an injunction, and the petition prays for an injunction, the judge, on the hearing, may appoint a receiver, if the facts make out a proper case for a receiver, where no objection is made on the ground of want of notice of the application. *Whitney* v. *Buckman*, 26 Cal. 447.

8. Partnership—Inconvenience considered. The expenditure made and the hazard run by defendant in opening a coal mine, considered upon application for receiver, based on a claim of partnership not made until the success of the adventure was assured, and the motion denied. *Norway* v. *Rowe*, 19 Ves. Jr. 144.

9. Partnership mine — Dissolution. Where tenants in common of a mine have been working it in partnership, or where the mine itself is the partnership property, the court will not appoint a receiver or manager at the instance of one of the partners, in a suit which does not seek to dissolve the partnership. *Roberts* v. *Eberhardt*, 1 Kay, 148; S. C. 23 Eng. L. & E. 245; 23 Law J. Rep. (N. S.) Ch. 201.

Nor even in a suit to dissolve the partnership will the court appoint a receiver on an interlocutory application, merely upon evidence that the partners do not co-operate in the management of the business; but to sustain such an application, it must be shown that one partner has interfered so as to prevent the business being carried on. Id.

10. Partner appointed. Upon appointment of a receiver of a colliery about to be sold, the decree allowed any partner to propose himself for such office, but without salary. *Wild* v. *Milne*, 26 Beav. 504.

11. Tenants in common—Disagreement. The parties were tenants in common, of lands and mines, and the defendant was in the possession and had the management of the mines. The parties not agreeing in the management, a receiver was appointed by the court. *Wynget* v. *Heathcote* cited, 4 Y. & C. 187.

12. Mortgagee and partner—Accounts—Mismanagement. Upon motion for a receiver by mortgagee of mines in possession, who had become a partner by purchasing shares in them, the motion being based on alleged mismanagement, and excluding the mortgagor from interference: *Held*, that a mortgagee in possession of mines is not bound to expend more than a prudent owner; 2. That if deprived of possession on the ground of mismanagement, it must be of a clear and specified nature; 3. That the mortgagor has a right to insist on the keeping of regular accounts, and to have constant access to the accounts; 4. That the mortgagor had a clear right to control the working of the mines, subject to the equities of the mortgagee; 5. That the mortgage relationship did not extinguish the duties of the parties as partners, nor *vice versa;* 6 Upon the facts of the case, motion to appoint a receiver denied. *Rowe* v. *Wood*, 2 Jac. & W. 553; S. C. 1 Id. 315.

13. Continuing the work—Partners disagreeing. If it is shown to the court that a sudden stoppage of the working of the mines would work material injury to the interest of the partners, the court may direct a continuance of the same by the receiver, until such time as the work may be advantageously stopped, or until the partners may make some arrangement for the sale or disposition of their interests which will allow a continuation of said work. *Levi* v. *Karrick*, 8 Iowa, 155; S. C. 13 Id. 344.

14. Appointment, pending suit, to prevent flooding. In a suit by the purchaser of a coal mine to rescind the contract on the ground of fraudulent misrepresentations, it being essential that the mine should be kept at a going state (to avoid flooding), the court, upon the application of the purchaser, who was in possession of the colliery, appointed a receiver and manager until the hearing. *Gibbs* v. *David*, L. R. 20 Eq. 373.

Such receiver appointed on the principle that the ownership was uncertain, and upon the particular facts of the case. Id.

15. Disposition of ore—Garnishment—Creditors. Howard contracted to sell Warner a stock of goods and a lot of land, to be paid for in iron ore delivered in installments. Before payment, T., a creditor of H., attached the land and garnisheed W., who then brought suit against H. and T. to obtain conveyance, and had a receiver appointed for the ore. Afterward McCombs, another creditor of Howard, garnisheed W. and the receiver, and both creditors having obtained judgments, the latter brought this suit to subject the ore in the hands of the receiver to his claim: *Held* (without passing upon the validity of the garnishments at all), that T., by virtue of his attachment of the land, had the prior equity as against McCombs to have the ore appropriated on his judgment. *McCombs* v. *Howard*, 18 Ohio St. 422.

16. During period for redemption. The purchaser at judicial sale of a mining claim may, where the judgment debtor remains in possession, working the claims, and is insolvent, have a receiver appointed to take charge of the proceeds during the period allowed by statute for redemption. *Hill* v. *Taylor*, 22 Cal. 191.

The complaint stated that at a foreclosure sale plaintiff purchased an undivided one-third interest in a tract of mining ground; that the mortgagor was in possession and insolvent, and in connection with the owners of the other interests was working the claim and taking the proceeds; that before the expiration of the period of redemption the claim would be worked out and its value destroyed, and prayed judgment for the amount already received by the debtor since the sale, and that during the period of redemption a receiver be appointed to take charge of the proceeds: *Held*, that on the facts stated, plaintiff was entitled to the relief sought, and that an order sustaining a general demurrer to the complaint was erroneous. Id.

17. Carrying out existing contract—Partner's liability. Defendants by written contract agreed to pay for six tons of iron ore per day at three dollars per ton for twelve months. During this period, at the instance of one of the defendants, a receiver was appointed to take charge of the furnace. The plaintiffs continued to furnish ore under the contract to the receiver. There was evidence to show that the business was managed in the interest of the defendant, who secured the appointment of the receiver: *Held*, in a suit against the firm, that the defendants were liable for the price of such ore. *Curtin* v. *Munford*, 53 Ga. 168.

18. Oil wells—Forfeiture—Doubtful case. A receiver of the produce of oil wells will not be appointed in a doubtful case. The

right to be protected must be clear and definitely established. It will not be granted in aid of a party seeking to enforce a supposed forfeiture, denied and contested by the defendant, and not apparent to the court. *Oil Co.* v. *Petroleum Co.*, 6 Phila. 521.

19. Title—No funds—Stoppage of mine—Insolvency—Practice. A receiver ought not to be appointed, in a suit involving the title of mining property, where, on account of there being no funds in his hands, it involves a stoppage of the works, in a case where there is no allegation of the insolvency of the defendants, or that the property is being injured by their mismanagement. *Carter* v. *Hoke*, 64 N. C. 348.

20. Presumption in favor of his acts. On an application to the court after final judgment, for an order for a receiver to pay over to the prevailing party money in his hands as receiver, it will not be presumed that the receiver has transcended his duties and taken possession of property to which he was not entitled. *Whitney* v. *Buckman*, 26 Cal. 448.

21. Notice—Emergency. It is a general rule that notice should be given of an application for a receiver, but there are exceptions to the rule, as where immediate action must be taken to prevent great injury, *e. g.*, the threatened removal of engines from oil wells in active operation; and especially where it is not sought to dispossess a party of his own property, *e. g.*, the interfering party being a constable with a distress warrant. *Oil Run Co.* v. *Gale*, 6 W. Va. 526.

22. Mineral springs. Plaintiff sued in ejectment for the recovery of a tract of land containing soda springs, and had a verdict in his favor. Pending a motion for a new trial, he filed his petition, averring that the springs were of a monthly value of $500 when the water was bottled and sold, for which purpose buildings had been erected at such springs by the plaintiff; but that defendants had cut a tunnel near the springs and just outside the plaintiff's buildings, tapping the "vein of water," resulting in its escaping, so that it became wholly wasted and of no use to either; that the defendants were insolvent, etc.; praying for an injunction. There was no prayer for a receiver. Among other things, the defendants denied that the spring was embraced in the recovery.

But the judge refused the injunction and appointed a receiver, with directions to collect the water, bottle and sell it, and retain the proceeds: *Held*, on appeal, a proper case for a receiver, and that a receiver might be appointed without a prayer to such effect. *Whitney* v. *Buckman*, 26 Cal. 447.

23. Colliery. A colliery is to be considered in the nature of a trade; and where persons have different interests in it as a partnership, and where the part owners cannot agree, the court will appoint a receiver to manage it. *Jefferys* v. *Smith*, 1 Jac. & W. 298.

24. Mismanaged corporation. A court cannot appoint a receiver or decree the winding up of the affairs of a company and sale of its property on allegations of mismanagement by its trustees, for its jurisdiction in such case is over the officers personally. *Neall* v. *Hill*, 16 Cal. 146.

25. Mine in defendant's possession. The 11 and 12 Geo. II, c. 10, does not authorize the appointment of a receiver over mines in the respondent's possession. *Frere* v. *Hibernian M. Co.*, 2 Hog. 30.

26. Appointment in another State. Where the property of a mining corporation organized in one State consists of real property (mines) in another State, the title to such property cannot pass to a receiver appointed in the court of a State where the property is not situate. *Simpkins* v. *Smith & Parmelee G. M. Co.*, 56 How. Pr. (N. Y.) 56.

27. Co-owner may act. A co-owner in a mine may be appointed the receiver by the master. *Jefferys* v. *Smith*, 1 Jac. & W. 298.

28. Order vacated. The court has power to vacate the improvident appointment of a receiver. *Copper Hill M. Co.* v. *Spencer*, 25 Cal. 11.

29. Expenses of. A receiver of a colliery being appointed, the court decreed that the out-goings should be paid out of the proceeds, the plaintiff to supply any deficiency, reserving the taxing of the expenses ultimately against the losing party. *Gibbs* v. *David*, L. R. 20 Eq. 373.

30. Costs. Where a mine had been put in possession of and worked by a receiver pending the trial of the title: *Held*, that in the absence of any exceptional facts, the costs of the receiver should be charged to the losing party, and could not be taken out of the proceeds of the mine. *Ervin* v. *Collier*, 2 Mont. 605.

31. Preferred to injunction. Courts of equity should be very cautious in granting injunctions to stop mining operations, because such stoppage is alike opposed to public policy and to private justice due to the party, who might ultimately be found to be the owner. The better course is not to prevent the working of the mine, but to appoint a receiver. *Deep River G. M. Co.* v. *Fox*, 4 Ired. Eq. (N. C.) 61.

RECORD.

1. Possessory claim. Where the title of all parties rests upon possession alone, and A. sells land to B. by a conveyance not recorded, and afterwards, and while B. is in possession, claiming the entire property under his deed, which has not been recorded, A. sells to another party, by a deed which is at once placed on record, the second purchaser will be deemed to have purchased with notice, and will not be considered as a subsequent purchaser in good faith. *Partridge* v. *McKinney*, 10 Cal. 181.

But if B. has left his possession, and at the time when he is out of possession, A. sells to another, the second vendee would be considered as an innocent party purchasing without notice. Id.

2. Priority. One Clarke, in 1832, conveyed the coal under his land, to Kennedy. The deed was recorded December, 1834. In February, 1834, Clarke sold his land generally to Neel, by articles which were not recorded; but Neel took possession and paid all the purchase money before he had any notice of Kennedy's title. Neel received a deed under the articles in 1835, and recorded it in 1836: *Held*, that Kennedy had the better title to the coal. *Pa. Salt Co.* v. *Neel*, 54 Pa. St. 9.

3. Notice of prior deed. A person being about to purchase land (a mining claim), was told by the recorder that the vendor had given a deed to another person, which had been brought to the office for record, but withdrawn without being recorded: *Held*, that this was sufficient to put the intending purchaser upon inquiry as to the prior deed. *Lawton* v. *Gordon*, 37 Cal. 202.

4. Notice by possession. Possession of a mining claim by working or superintending work, under an unrecorded deed, is sufficient to put a subsequent purchaser upon inquiry; and the recorded deed of such subsequent purchaser is not conclusive against the prior purchaser in possession. *Fair* v. *Stevenot*, 29 Cal. 486; see *Kinney* v. *Cons. Virginia M. Co.*, 4 Saw. 450.

5. District record—Transfer of claim. The entry of the sale of a mining claim made by the recorder of a mining district, in a book kept for the record and transfer of mining claims, and authorized by mining customs and laws in force in the district where the claim is situated, is admissible in evidence to prove the sale of the claim, unless objected to. Such entry is at least secondary evidence of the sale. *St. John* v. *Kidd*, 26 Cal. 263.

6. Second record after records burnt. Where the original records of a mining district had been burnt, and the miners had passed a resolution requiring claims to be again recorded, such second record is admissible, at least for the purpose of showing compliance with the rules of the district. *McGarrity* v. *Byington*, 12 Cal. 427.

7. Custom—Original notice—Admission of record. Where the plaintiff's title to a quartz mining claim depended upon an alleged custom to record quartz claims in the office of the recorder of the county, the record from such office is admissible to show the fact of plaintiff's claim having been recorded, and as tending to prove the existence of the custom. And if such record is itself the original notice of location, it is admissible to prove the contents of plaintiff's notice. *Pralus* v. *Pacific G. & S. M. Co.*, 35 Cal. 30.

8. Mining district—Record not necessary. Proof of a record is irrelevant without proof of some regulation making a record obligatory, or giving it some effect. The public law does not of itself create any such office as mining recorder, nor does it make the recording of claims obligatory, so as to give a record any effect. *Golden Fleece M. Co.* v. *Cable Con. Co.*, 12 Nev. 312.

The record is to be provided for, and its effect determined by local laws or regulations of miners in the respective mining districts; and if they fail to provide for a record, then none is required. Id.

RELATION.

1. Junior and senior patents and locations. The doctrine of "relation" cannot be applied so as to cut off the right of the earlier patentee under a later location. *Eureka Con. M. Co.* v. *Richmond M. Co.*, 4 Saw. 302.

RELOCATION.

1. Same as new discovery. The relocation of an abandoned claim by a prospector, outfitted by another under an arrangement to share equally in all discoveries, etc., treated the same as if the prospector had located a new discovery. *Murley* v. *Ennis*, 2 Colorado, 300.

2. Second location by same locator. If a party relocate upon his own claim, under a new name, he cannot acquire title by this means to more than the law allows him to locate, but that which he has a right to relocate would pass by his deed, notwithstanding the nullity of the relocation as to the excess. *Phillpots* v. *Blasdel*, 8 Nev. 61.

3. Several owners—Forfeited claim. If several, as tenants in common, locate a mining claim on the public lands, and, by failure to comply with the local mining

laws, forfeit the same, it may be relocated by a part of the first locators, along with others who were strangers to the first location; and the tenants in common, whose names are left out in the notice of relocation, cease to have any interest in the mine. *Strange* v. *Ryan*, 46 Cal. 33.

4. While in possession of others—Instruction construed. An instruction of the court below directed the jury to find for the defendant if they believed that a certain company located the claims "at a time when they were open and subject to appropriation under the local usage of the district:" *Held*, that this instruction did not imply that a relocation on account of failure to perform work under the rules, could be made while a party was in actual possession of the claim. *Bradley* v. *Lee*, 38 Cal. 362; Sprague, J. filing dissenting opinion, p. 368.

5. Forfeited claims. Mining claims, which are forfeited, can be relocated by any person who complies with the rules and customs of the district in which they are situated. *King* v. *Edwards*, 1 Mont. 235.

6. By aliens. When the first claimant who takes up the claim is not a citizen, or has forfeited his right by non-compliance with the mining laws, or abandoned his claim, the mining ground staked off by him is open to location by any citizen of the United States. *Golden Fleece Co.* v. *Cable Con. Co.*, 12 Nev. 312.

See LOCATION.

RENT.

1. Installments distinguished from. The owner in fee of lands disposed of the mines under them to B. for the term of ninety-nine years by indenture, for the sum of 7998 pounds, payable in twelve annual installments to the vendor or his executors, reserving right of distress and of re-entry for non-payment with forfeiture of the previous payments. The same indenture contained a covenant that at the end of an outstanding term B. should have the surface also, at the yearly rent of 110 pounds reserved to the lessor and his heirs: *Held*, the instrument obviously made a distinction between rents and purchase money, and that the annual payment of a twelfth of the consideration was not a rent but a personal debt. *Hatherton* v. *Bradburne*, 13 Sim. 599.

2. Advanced rent—Appropriation of payments. On the eleventh of July, 1840, N. O. leased to E. & G. a granite quarry, called the Fox Rock Quarry, for six years, to commence the tenth of November, 1840. The lessees stipulated to quarry and get out at least 40,000 cubic feet of stone, and to pay therefor one and one-quarter cents per foot, amounting to $500, or to pay for that quantity annually, by quarterly installments. Before the execution of this lease, on the fifth of July, 1840, the lessor gave to the lessees a receipt, acknowledging that he had received from them $866, "to be returned them in granite stone to the amount of 69,300 feet, between the tenth of November, 1840, and the tenth of November, 1846, from my quarry, known by the name of the Fox Rock Quarry:" *Held*, that the true interpretation of the agreement between the parties requires these two papers to be taken together as one contract; they are to be construed with mutual reference to each other, and the amount mentioned in the receipt must be considered as advanced on acconnt of rents to accrue under the lease. *Owings* v. *Emery*, 7 Gill. (Md.) 405.

The intent of the parties, no doubt, was that these advances should be applied chronologically to the rents as they became due; but upon proof that only a part had been so applied, and that the lessees had paid other moneys in liquidation of prior rents, it was *held*, that they were entitled to have such advances set off against rents accruing subsequent to the time when, by chronological application, prior rents would have extinguished them. Id.

3. Advance rent against damages. Where the lessor of a quarry has received money in advance, upon agreement to apply the same upon the rents as they become due, the lessor cannot apply such money, against the will of the lessee, upon any other indebtedness, although arising out of the same premises; *e. g.*, he cannot hold it as payment for rubble stone taken by the lessee, whose lease only called for dimension stone. *Emery* v. *Owings*, 6 Gill. (Md.) 191.

4. Coal rent — Lien — Pennsylvania. Rent due on a coal lease is not a prior lien under the Act of April 6, 1830, relating to mortgages. A mortgage of the leasehold will not be discharged by a sheriff's sale of the term on execution against the lessee. *Miner's Bank* v. *Heilner*, 47 Pa. St. 451.

5. Misuser of the term "rent." A stipulation in a lease for the repayment of an improvement fund by "an additional rent of ten cents per ton on all coal taken out," is a provision for the repayment of a loan simply, and the amount becoming thereby due is not rent properly so called. Id.

6. Construction—Sale of coal demised. A demise of a coal bank for a term of years in which the rent reserved is a fixed price per bushel for the coal to be taken from the bank, amounts to a sale of so many bushels

as the tenant shall take during the term for the price fixed in the lease. *Tiley* v. *Moyers*, 43 Pa. St. 404.

7. **Reserved in Russian iron.** Commutation of rent payable in iron is not to be presumed from the payment and receipt as rent of a sum of money equivalent to the value of the iron, though such payment has been uniform and has continued for more than twenty years. *Lilley* v. *Fifty Associates*, 101 Mass. 432.

8. **Devise of.** The owner of a stone quarry, after having mortgaged and leased the same, devised it to his son, and directed that "the rents arising from the quarry be applied to discharge the incumbrances on the same:" *Held*, that the rents due at testator's death passed to the devisee for the purpose of paying the incumbrances, and that said clause in the will did not separate the rents from the reversion. *Emery* v. *Owings*, 6 Gill. (Md.) 191.

9. **Bequest of—Installments.** A testatrix demised the minerals under certain lands, in consideration of a surface rent and of a sum of £5,039 1s. 3d, to be paid by half-yearly installments at the rate of £750 per acre for such parts of the minerals as should be gotten by the lessees, until the whole sum was completely paid, with powers of distress and re-entry in default of payment. At the death of testatrix one installment was due and unpaid: *Held*, that it was in the nature of rent, and passed under a residuary bequest in favor of charities. *Brook* v. *Badley*, L. R. 4 Eq. 106.

10. **Distress—Construction.** Upon a demise of mines, a power of distress for the rent reserved was granted to the lessor over "any lands in which there shall be, for the time being, any pits or openings by or through which the coal or culm by the said deed demised shall, for the time being, be in course of working by the lessees, their executors, administrators and assigns." The plaintiffs, being assignees of the lease with notice, under a trust deed made by the lessees for the benefit of creditors, sued the defendants for a distress made under the above-mentioned power, after the assignment, at pits not included in the demise, but referred to in it, and then worked by the lessees: *Held*, that whether the power was or was not a valid power of distress against strangers, the plaintiffs, taking as assignees with notice, were bound by it. *Daniel* v. *Stepney*, L. R. 9 Exch. 185.

11. **Certainty—Distress.** The rent of a quarry at a certain number of cents per perch (the amount varying with the kind or quality of stone quarried) is a certain money rent within the meaning of the Act of 1834, relating to distress for rent. *Cross* v. *Tome*, 14 Md. 247.

12. **Lessees enjoined—Recoupment of damages.** Where ejectment had been brought by the lessors to try the question of forfeiture, under a provision of the lease which forbade the tenant to let the mine stand idle for a year, in which they failed, damages therefor could not be allowed by the jury in an action for the rent, but for the estrepement brought by them, which interrupted mining operations, damages were properly allowed and assessed by the jury under the charge of the court. *Tiley* v. *Moyers*, 43 Pa. St. 404.

13. **Fraud, to reduce conditional rent.** Where the lessee of a colliery, under covenant to pay a rent commencing the first quarter day after he had digged 1,000 stacks of coal, and to dig such coal without delay, etc., commenced work and dug that amount, "wanting only a small quantity," and then employed his workmen in other works until the approaching quarter day had elapsed, with the expressed intent of saving the rent of one quarter: *Held*, that such fraudulent contrivance should not defeat the running of the rent from the first quarter day thus elapsed. *Green* v. *Sparrow*, 3 Swanst. 408.

14. **Composition in money—Reasonable time to procure the iron for rent—Forfeiture.** A lease for a thousand years, made in 1817, reserved a yearly rent, payable in quarterly installments of ten tons of Russia old sables iron, and gave a right to the lessor to enter on failure to pay the rent fifteen days after demand. At the time of making the lease the parties agreed in writing that until 1840 a certain amount of gold bullion should be received, in lieu of the iron, as rent. On every quarter day, from 1840 to the end of 1862, $212.50 were paid, and described in the receipts as rent due according to the conditions of the lease; but during this period the value of Russia old sables iron did not vary greatly from $85 a ton. Said iron has not been imported into this country for many years. On December 12, 1862, the lessor notified the lessee that the rent due on March, 1863, must be paid in iron. On a bill in equity by the lessee, to enjoin the forfeiture of the lease for failure to pay the rent in iron: *Held*, that the lessor had still the right to demand iron for rent, but that the lessee had the right to a longer notice of his intention to do so. *Lilley* v. *Fifty Associates*, 101 Mass. 432.

15. **Accounting—Adjusting the measurement—Stacks.** Bill for account of the rent of a mine retained for a year to suffer plaintiff to try an issue as to the quantity

of coal which, by the custom of the country, constituted a "stack," the reservation being one shilling per "stack," claimed by plaintiff to consist of no more than seventy-two cubic feet, and by defendant to contain eighty-six cubic feet. *Geast* v. *Barker*, 2 Bro. C. C. 61.

16. Winding-up act—Practice. A company which had taken a lease of a quarry, and covenanted for payment of the rent, was ordered to be wound up, and the leasehold interest was sold under the winding-up. On the application of the lessor for leave to enter a claim for future rent, which had been refused by the master of the rolls, it was ordered that a claim should be entered for the whole value of the future rent, with the qualification that the lessor should not receive more than the amount which the company might become liable to pay under the covenant; the order to be without prejudice to any application to dissolve the company, but no order of dissolution to be made without notice to the lessor. *In re Haytor Granite Co.*, L. R.; 1 Ch. app. 77; reversing L. R. 1 Eq. 11.

17. Rent assigned as dower. Where a widow seised of one-third interest in mineral land makes an agreement with the heir seised of the other two-thirds, that each shall receive one-half of the rents or profits of the mines before they are opened, the agreement may be regarded as an assignment of dower out of the other two-thirds; and such assignment, made by giving the dowager such distinct portion of the rents, will bind the heir and all privies in estate. *Lenfers* v. *Henke*, 73 Ill. 405.

REPLEVIN.

1. Description—Ore. A writ of replevin for "about four hundred tons of iron ore, commonly called bog ore," is so indefinite as to justify a refusal to execute it. *De Witt* v. *Morris*, 13 Wend. (N. Y.) 496.

To what amount the word "about" would limit or extend the number of tons considered. Id.

Such a writ does not justify the taking of a lot of 720 tons. Id.

2. Recaption of ore. The recaption of ore replevied may be shown in mitigation of damages, upon a writ of inquiry. Id.

3. Unwashed ore. The plaintiffs, having a mining lease, raised iron ore, which, being unwashed, and remaining mixed with the earth which adhered to it, was left in piles at the bank to dry: *Held*, that replevin would lie for its possession unwashed, notwithstanding the adhesion of the earth. *Green* v. *Ashland Iron Co.*, 62 Pa. St. 97.

4. Second replevin for ore. Where DeWitt had replevied 350 tons of bog or iron ore which Morris caused to be seized on a second writ of replevin, such second writ was quashed on motion, and the court refused to hear affidavits of ownership filed by the party suing out the second writ. *Morris* v. *De Witt*, 5 Wend. 71.

5. By licensee. A licensee cannot maintain replevin for ore severed from the land which he is working under license, by a stranger or trespasser. *Gillett* v. *Treganza*, 6 Wis. 343.

6. Against adverse occupant. Replevin will not lie by one not in the actual exclusive possession of land, whatever title he may claim, against one who is in the actual visible notorious occupation and possession thereof, claiming the right, for the recovery of slates taken out of a quarry on the land. *Brown* v. *Caldwell*, 10 S. & R. 114.

7. Title to land disputed. Title to land cannot be tried, but may incidently arise and be heard in a transitory action. The mere assertion of title is nothing if the title be not in fact in controversy; but when it appears that there is necessitated a trial of title to determine the right to the chattel, replevin will not lie. *Green* v. *Ashland Iron Co.*, 62 Pa. St. 97.

8. Ore severed after action brought. Replevin will not lie for ore before it is severed. And if the writ is levied upon ore not severed until after the writ issued the action must fail. And in such case it may be inquired as to what hour the ore was severed when the writ was issued, and the ore broken and raised on the same day, and the rule that parts of a day are to be disregarded, cannot apply to validate a writ of replevin issued at a time when the ore was not broken. *Knowlton* v. *Culver*, 1 Chand. (Wis.) 214.

9. Mining on Sunday. In replevin for lead ore: *Held*, that the working and carrying away of the mineral on a Sunday is not pertinent to the plaintiff's right of possession, or to prove a wrongful taking by the defendant. *Ecker* v. *Moore*, 2 Chand. (Wis.) 85.

RESCISSION.

1. Shareholder—Departure from prospectus. A. was induced by the statements contained in the prospectus, to apply in April, 1865, for shares in a company, and, in answer to his application, received a letter of allotment. A. made the further payment required by the prospectus, and in June, 1865, received in exchange for the banker's receipt, a certificate that he was proprietor of fifteen shares in the company,

"subject to the provisions of the memorandum and articles of association, and to the rules and regulations of the said company." The objects of the company, as stated in the memorandum and articles of association, were more extensive than those stated in the prospectus. A. never attended any meeting of the shareholders, and did not see the memorandum or articles of association until May, 1866: *Held*, that he was entitled to have his name removed from the register, as the terms of the certificate did not amount to notice that he had entered into a new contract, or that the objects of the memorandum and articles were more extensive than those of the prospectus, on the faith of which he had applied for shares. *Webster's case*, L. R. 2 Eq. 741.

2. Departure from prospectus — Extending works. The prospectus of an iron company set forth a project of acquiring and extending certain well known iron works at Vuicksa, in Russia, referring to an estate of over 400,000 acres, with the mines, etc., setting forth details as to such estate. The memorandum of association authorized the purchase of any iron works in the empire of Russia, and also contained clauses authorizing the dealing in the purchase and sale of real estate: *Held*, that a party purchasing shares on the faith of the prospectus had a right to have his name removed from the register on account of fatal variance between the prospectus and the memorandum of association. *In re Russian Vyksounsky Ironworks Co.*, L. R. 1 Ch. 574; 35 L. J. Ch. 738.

3. Outstanding mining right an incumbrance, though declared rescinded in suit between other parties—Time—Non-user. Mensch in 1840 sold to Hughes the exclusive right to mine, etc., on part of his land, at a named rate per ton of ore; in 1851 Mensch sold his whole tract to Youngman, and took a mortgage for the purchase-money, part of which was payable on a day named, "upon consideration that the title to the land be by that time assured and confirmed;" and particularly that the above mentioned agreement with Hughes be rescinded, otherwise not to be payable till the title was fully assured. A *scire facias* upon the mortgage was sued out May 2, 1864, and tried Dec. 22, 1864: *Held*, that no presumption of abandonment of Hughes's right under the agreement by reason of non-user, had arisen either at the commencement of the suit or at the trial. In 1840 the right began, but as it was in 1851 by the terms of the mortgage treated as a subsisting incumbrance, the court must consider whether there has been a lapse by non-user since the last mentioned date. And it must be treated as still not "rescinded," as required by the terms of the mortgage, notwithstanding the judicial construction given to this same agreement of Hughes, wherein it was declared lapsed in a case between other parties (*Clement* v. *Youngman*) in this same court. *Youngman* v. *Linn*, 52 Pa. St. 413.

4. Mistake — Shaft not on property sold. A party acting as agent for the sale of a gold-bearing tract in Virginia, took the agent of a party who was considering upon the purchase, to the property, where a hurried and superficial examination was made, the agent of the purchasing party being shown a place where gold washing had been conducted, and an abandoned shaft which was supposed to be on a vein included in the tract to be sold. A bargain was at once concluded, and after examination of title, but without survey, half of the purchase-money was paid. The vendee afterwards discovered that the shaft was not within the lines of the purchase, to which fact the vendor at once assented, but the vendee, upon some prospecting being done, found a vein upon the premises purchased which he declined to explore, and it appeared that as far as examination had gone that the tract was valuable for its gold production, and that no fraud had been practiced, and that all parties were innocent in acting upon the supposition that the shaft originally examined was upon the premises, and that no particular examination of that shaft had been made, and apparently no estimate of value based thereon, and that it had not been treated as a ground of rescission until a considerable period after the mistake had been discovered; it was *held*, no such matter of mistake as to allow of a rescission of the contract by the purchaser. *Grymes* v. *Sanders*, 93 U. S. 55.

5. Abandonment of contract. Equity will not cancel a contract against a vendee which was fair in its origin, upon the score merely of a default or abandonment which had not previously been accepted as a rescission. *Falls* v. *Carpenter*, 1 Dev. & Bat. (N. C.) Eq. 267.

6. Saltpeter cave—Rescission after report of expert. Perkins sold to Rice a saltpeter cave, telling him before the sale that the nitrous earth in the cave would yield a much greater quantity of saltpeter than from actual experiment it was afterwards found capable of; stating that it would yield from three-quarters to two pounds of saltpeter to the bushel of dirt, whereas, in fact, the cave had become greatly exhausted, and was not capable of producing "anything nigh the quantity" of saltpeter represented. At the same time, he informed him that he, the vendor, was

not a judge of saltpeter caves, and advised him to not trust to his representations, but to get a competent person and have the cave examined, which the plaintiff, Rice, accordingly did, and after such examination and report became the purchaser: *Held*, that notwithstanding such inspection of the premises, it by no means followed that the false statements of defendant had no effect in inducing the purchase; 2. That the assertions of defendant were of specific facts, distinguishing the case from those instances where the defendant had merely overstated the value of premises, and amounted to a misrepresentation of that character which would authorize a rescission of the contract. *Perkins* v. *Rice*, 6 Litt. (Litt. Sel. Ca. Ky.) 218.

7. Interest allowed in cases of fraud. The contract being rescinded on account of fraud, a repayment of the purchase-money was decreed, with interest from date of payment until refunded. Id.

8. Exchange of farm for worthless stock of fraudulent company—Third parties. Daniels purchased of Warner a farm worth $6000, paying him in stock of the Cleft Ledge Granite Company, which stock he represented to be worth the price of the farm. The quarry of the company had been bought for $4500 by persons who became its organizers, transferring it to the corporation for $53,000, paid in the company's notes, the original purchase-money ($4500) or a part of it remaining still unpaid, and a mortgage standing to secure the same. The stock was, in reality, worthless. Defendant represented that it stood at par. The parties had met, apparently by accident, but really upon a concerted scheme of the defendant. Defendant pretended an unwillingness to sell his stock; made false representations as to persons who had become purchasers of the stock, and as to supposed contracts held by the company to furnish stone; but, on the other hand, the fact that the stone of the company had been rejected by contracting purchasers, that work had been suspended for want of funds, as well as the presence of other stone in quantity in the vicinity, although known to defendant, was concealed, the latter fact having been suppressed in the geologist's report shown to plaintiff. The sale was made in 1836, and complainant took no steps for relief till 1840, not knowing that he had a remedy, but neither the stock nor the farm had changed materially in value during the meantime: *Held*, that the difference between the supposed and real value of the stock was not of itself sufficient to support a rescission, but that being accompanied by false representations and fraudulent concealments, the contract should be rescinded, and it was decreed accordingly that the shares be reconveyed to defendant and the farm to plaintiff, but in case neither property was in state to be conveyed, as by reason of a *bona fide* conveyance of the farm to third parties, the master should report the damages to be decreed against the defendant. *Warner* v. *Daniels*, 1 Woodb. & M. C. C. 92.

9 Fraud—"Jumped" claim—General allegations. Plaintiff's petition stated that the defendant had falsely and fraudulently represented that plaintiff had "jumped" a certain claim in Deadwood, Dakota territory, "whereby he was at that time the lawful owner thereof, according to the mining laws of said district, all of which statements," etc., were false and fraudulent. And upon such false representations had sold his interest in the claim to the defendant, who was at the time an owner of a fourth interest in the same claim: *Held*, that while a contract procured by fraud may be rescinded, at the election of the injured party, a general allegation of fraud is not sufficient; the particular circumstances which constitute the fraud must be stated. The allegation that defendant was not at any time the "lawful" owner, according to the mining laws of said mining district, is not such a statement of facts as would authorize a rescission. *Arnold* v. *Baker*, 6 Nebraska, 134.

10. Partial disaffirmance. A party cannot disaffirm a contract in part on the ground of fraud, and affirm it as to the residue. He must make his election either to rescind it *in toto*, by restoring all he has obtained by it, in which case he may recover back what he has paid on it, or he may retain the property and sue for the fraud. The rule is the same in respect to both personal and real estate. *Grant* v. *Law*, 29 Wisc. 99; see *Law* v. *Grant*, 37 Id. 548.

11. Fluctuations in oil—Laches. Petroleum being an article subject to speculation with the varying market price, a rescission of a contract for its delivery must be made within a reasonable time after grounds of rescission arise. Parties cannot take the chance of a rise in the price and elect to deliver or not deliver accordingly; a month's delay in such case upon a series of contracts for monthly deliveries of oil is an unreasonable time. *Morgan* v. *McKee*, 77 Pa. St. 228.

See FRAUD, MISTAKE.

RESERVATION.

1. Extent of—Construction. Vendor conveyed certain lands, including buildings, and a homestead tract, excepting all mines and coals under the said lands and here-

ditaments, with liberty to enter and sink pits for getting all such coal, and to erect engines, etc., except as to such lands as lie within 150 yards of the messuage and buildings, and except any homestead: *Held*, that the exception reserved to the vendor the right to dig coal under the messuage buildings and homestead, and within 150 yards of the same respectively, but that he was not entitled to sink pits, erect engines, etc., within 150 yards of the messuage or buildings, or within the homestead. *Bowler* v. *Wolley*, 15 East, 444.

2. Necessary incidents implied. Where there is a right reserved, as of minerals, all things depending on that right, and necessary for the obtaining it, are reserved also. *Earl of Cardigan* v. *Armitage*, 3 Dow. & Ry. 414; 3 B. & C. 197; 2 Id. 207; *Dand* v. *Kingscote*, 6 M. & W. 174.

3. Exception. The distinction between a reservation and an exception stated. *Ryckman* v. *Gillis*, 57 N. Y. 68.

4. Distinguished from Exception. A landlord cannot reserve a component part of the land demised or granted (turf pits), though it is the subject of exception. *Fancy* v. *Scott*, 2 Man. & Ry. 335.

A deed reserving to the grantor "the right of mining on the above granted premises for the use of said company" an amount of ore, not exceeding 7500 tons annually, at a rate of 37½ cents per ton, including all the facilities needful for doing the same: Construed to contain a reservation as distinguished from an exception. *Stockbridge Iron Co.* v. *Hudson Iron Co.*; *Hudson Iron Co.* v. *Stockbridge Iron Co.*, 107 Mass. 290.

5. Construed as an exception. Words of reservation in a deed may operate by way of exception, and have effect, when the subject of the reservation is a thing corporeal and *in esse* when the grant is made, and not something newly created, as a rent or other incorporeal interest. *Whitaker* v. *Brown*, 46 Pa. St. 197.

6. Construed as a grant. A reserve of minerals is construed as an actual grant thereof. *Marvin* v. *Brewster Iron Co.*, 55 N. Y. 538; 14 Amer. R. 322.

A reservation in a deed of a right or privilege, should be construed in the same way as a grant by the owner of the soil, of a similar right or privilege. *French* v. *Carhart*, 1 N. Y. 96.

7. Construction—"Mines and minerals"—Asphaltum. Asphaltum is included in the exception in certain royal grants in the province of New Brunswick of "all coals, and also all gold, silver and other mines and minerals." *Gesner* v. *Gas Co.*, 1 James (Nova Scotia) 72.

The words "mines and minerals" in the exception are to be understood in their popular and ordinary, and not in any scientific, meaning. Id.

8. Mines not intended. Where by the terms of an act for inclosing the wastes of a manor, a certain portion was to be made to the lord in lieu of his right and interest in the soil, and the residue was to be allotted to the said several tenants in fee, discharged from all customary tenures, etc., a saving clause, reserving to the lord all seigniories incident to the manor, and all rents, fines, services, etc., and all other royalties and manerial jurisdictions whatever, will not reserve mines under those allotments to the tenants, though it appear there was a subsisting lease of such mines at the time the act passed, granted by the lord of the manor. *Townley* v. *Gibson*, 2 Term, 701.

9. All mines and minerals "under" distinguished from "within." The reservation of all "mines and minerals lying and being within or under the said lands or grounds," includes every species of mineral which is *within* as distinguished from *under* the land, and clearly includes the right of quarrying as well as mining. *Midland R. Co.* v. *Checkley*, Law Rep. 4 Eq. 24.

10. Construction—Whether restricted to mining purposes. A conveyance of real estate contained a clause referring to and adopting the reservations and conditions in a former conveyance of the same premises, and the reservation in such former conveyance was in these words: "Saving, and always excepting to the said parties of the first part, their heirs and assigns, out of this present grant and release, all mines and minerals that are now or may be found within the premises hereby granted and released, and all the creeks, rills, runs and streams of water, and so much ground within the same premises as they, the said parties of the first part, their heirs and assigns, may think requisite and appropriate at any time hereafter, for the erection of the works and buildings, whatsoever, for the convenient working of the said mines; and also such wood, firewood, and timber, as they may think proper to use in building, repairing, accommodating, and working the said mines, with liberty to them, their heirs and assigns, and their and each of their servants to dig through and use the ground for either of the said purposes, and to pass and repass through the premises with their and each of their horses and cattle, carriages and servants, and to lay out roads therefor;" and the *habendum* clause contained a condition that the grantee, his heirs, etc., should not erect, or permit to be erected, any mill

or mill-dam upon the stream of water on the premises granted: *Held*, that the reservation of the stream was for all purposes, and not for mining purposes merely. *French* v. *Carhart*, 1 N. Y. 96.

11. The grant controls—Springs. Mines reserved cannot be worked so as to drain springs granted. *Whitehead* v. *Parks*, 2 H. & N. 870.

12. Construction—Evidence—Special use of water. Where a perpetual lease of land reserved the mines and minerals, and contained also a reservation relating to streams of water, and the issue arising out of the ambiguity of the instrument was, whether such latter reservation was limited to the use of the water in connection with mining, or was general for all purposes; it was *held*, that to ascertain the intention of the parties at the time, the court would inquire into the situation of the parties, the subject-matter and the circumstances surrounding the parties, the use of the water at the time, and the subsequent use of it, the language of prior reservations adopted in the later deed, the erection of mills and mill-dams, and the fact that no minerals had ever been discovered on the land. *French* v. *Carhart*, 1 N. Y. 96.

13. Construction—Life estate. A clause in a deed as follows: "reserving to myself the privilege of entering said tract, and taking and carrying away stone from" a certain portion of the tract containing a granite ledge, construed not a reservation of a mere personal privilege, but of a right and interest in the use of the land, which the grantor might assign. *Munn* v. *Stone*, 4 Cush. 146.

The reservation being to the grantor generally, without words of enlargement or limitation, is a reservation for a period of the grantor's natural life: Id.

14. Construction—Heirs and assigns. Where an exception of the coal in the lands granted was made in favor of the grantor and his heirs, with special liberty as to mode of extracting it and of assessing damages caused to the surface in the getting of the coal, the clause expressing the right of entry to get the coal, being restricted by the words "during the time that he and his heirs should continue owners of the demesne lands," etc.: *Held*, 1. That under the general exception contained in the grant, the coal remained in the grantor and his heirs, and would pass to assigns under the word heirs; 2. That the special liberty as to the manner of taking the coal was not restrictive, but in furtherance of the previous exception of the coals out of the grant, and would enure to the benefit of the owner by purchase of the said demesne lands; 3. That the word "heirs" used in the excepting clause includes "assigns," and that it will not exclude "assigns," because assigns are needlessly repeated after heirs in parts of the indenture and omitted in others. *Earl of Cardigan* v. *Armitage*, 3 Dow. & Ry. 414; 2 B. & C. 207; 3 Id. 197.

15. Construction of—Freestone—Right to mine held not to include right to quarry. The reservation in a conveyance of "all mines or seams of coal and other mines, metals or minerals" under the land granted, with liberty to dig, bore, work, lead, and carry away the same, and to make pits, etc.: *Held*, to include a bed of freestone under the term minerals with the liberty of getting at the same by underground mining, but not by working in an open quarry. *Bell* v. *Wilson*, 1 Law Rep. Ch. App. 303; S. C., 35 L. J. Ch. 337; reversing S. C. as reported in 2 Drew & Sm. 395, and 34 L. J. Ch. 572.

The words of a reservation in a conveyance are not to be construed or interpreted by reference to what was ordinarily gotten by a miner in the particular county at the time of the execution of the deed. *Bell* v. *Wilson*, 1 Law Rep. Ch. App. 303; S. C., 35 L. J. Ch. 337.

16. Construction, where ore reserved was the property of grantor and other parties. A person seised of the title to the undivided two-thirds of a tract of land subject to the right of the heirs of S. P. to four-fifths of all stone and fossil coal found thereon, sold his interest by deed, "excepting and forever reserving the liberty and privilege for the heirs and representatives of S. P., deceased, to dig, take and haul away all the stone coal that is or may hereafter be found on the above described tract of land: It was *held*, that no part of the stone coal passed to the grantees under the said deed. Whether the words used in the deed would estop the grantor or those claiming under him from claiming any part of the coal as against the heirs of S. P., not decided. *Benson* v. *Miners' Bank*, 20 Pa. St. 370.

17. Construction—Reservation out of land of third parties. S. and L. being tenants in common of Huntingdon Furnace and the lands appurtenant thereto, and at the same time owners of a right to dig, take and carry away ore to be used at Huntingdon Furnance, from a tract of land which belonged to a third person—L. conveyed to S. all his right, title and interest in the said furnace, lands and ore-banks, excepting and reserving "the full undivided half part of all the iron ore which may at any time be found on any of the land now belonging to Huntingdon Furnace" as

hereinafter described within not less than the distance of two miles from said Huntingdon Furnace: *Held*, that this was not a reservation of the right to take ore from the bank on the land which then belonged to the third person, although it was not within two miles of the said furnace. *Shoenberger* v. *Lyon*, 7 W. & S. 184; B. & W. L. C. 227.

B. seised of a tract of land subject to an outstanding title to one-half of all iron ore found on the premises, conveyed the same to H. in fee, excepting and reserving to the said B., his heirs and assigns, one-half of all iron ore found on the premises: *Held*, to be a reservation to the grantor himself of that half of the ore which was vested in him, and not a mere notice or reservation of the other half which was outstanding. *Baker* v. *McDowell*, 3 W. & S. 358.

18. Construction of ambiguous reservation in lease. The description of the particular tracts demised was followed in the lease by the words "and all manner of mines and minerals of coal, lead, iron, tin, and other mines, and kelp-weed whatsoever, upon said lands, and bog-timber, forest trees, and young saplings of oak, ash, yew, and elm, and all timber and other trees; the benefit of fishing, fowling, hunting and hawking on the premises, always excepted, and reserved out of said demise for the use and benefit of the said Peter Browne, his heirs and assigns: *Held*, by a majority of the court that the mines, etc., were demised, and that only the liberty of fishing, etc., was excepted. Jackson J., holding contra, that the whole clause was an entire exception. *O'Donnell* v. *Ryan*, 4 Irish C. L. 44.

19. Reservation construed as to surface support. A reservation of "all and all manner of coals, seams and veins of coal, iron ore, and all other mines, minerals and metals, etc., with free liberty of ingress, egress and regress, etc.; to dig, delve, search for and get, etc.; the said mines and every part thereof, and to sell and dispose of, take and convey away the same at their free will and pleasure, and also to sink shafts, etc.; making a fair compensation to P. for the damage to be done to the surface of the premises, and the pasture and crops growing thereon," does not allow the grantor to take out all the underlying coal, but only so much as he could get, leaving a reasonable support to the surface. *Harris* v. *Ryding*, 5 M. & W. 60.

20. Quarry. A reservation of all mines, minerals and royalties whatsoever, does not include an opened limestone quarry. *Brown* v. *Chadwick*, 7 Irish C. L. 101.

21. Quarries of limestone. A reservation of "all royalties, with all mines and minerals, coals, coal pits, and liberty to search," does not cover limestone quarries. *Listowell* v. *Gibbings*, 9 Irish C. L. 223.

22. Loose stone — Evidence of ledge not being intended. Where one conveyed a piece of land on which there was a large quantity of freestone disconnected from any fixed ledge, and partly imbedded in the earth, and by the deed reserved all the freestone on said land to himself, his heirs, and assigns, with the privilege of carrying off said stones, it was *held*, that the reservation did not extend to the ledge of freestone under ground, and not known to the parties at the time of conveyance; and that parol evidence was admissible to show the situation and quantity of stones upon the surface at the time of the conveyance, and that the ledge under the surface was not then known to the parties. *Putnam* v. *Smith*, 4 Vt. 622.

23. Stratum of stone—Fossils. When by an inclosure act certain waste lands were taken away from the lord, and allotted to commoners, except as saved by a clause which reserved "all mines and minerals," etc., "with full liberty of digging, sinking, searching for, and working the said mines and minerals, and carrying away the lead ore, lead, coals, iron, stone and fossils," and providing that in working the land for minerals the lord should keep the first stratum of earth separate without mixing the same with the lower strata: *Held*, that the act must be construed with reference to the title in the lord, and that a stratum of stone was within the reserving clause, either as a mineral, or by force of the word "fossils." *Earl of Rosse* v. *Wainman*, 14 M. & W. 859; S. C., 2 Exch. 800; S. C., 15 L. J. Exch. 67; B. & W. L. C. 1.

Held, *further*, that the object of the act was to give to the commoners the surface for cultivation, and leave what was not requisite for that purpose; that, therefore, the word minerals was to be construed not in its general sense as a substance containing metals, but in its proper sense, as including all matters dug out of quarries or mines. Id.

24. By Implication— Stone included. Where an inclosure act recognized the lord as owner of the minerals, by a provision for making satisfaction to the proprietors of the lands inclosed, in case the lord entered for the purpose of digging for any coals or other minerals: *Held*, that by necessary implication, the act reserved to the lord his right to all mines and minerals, although there was no express clause of reservation, and that he was entitled to work them upon paying compensation to the owners of the surface for any damage done. *Micklethwait*

v. *Winter*, 6 Exch. 644; S. C. 5 Eng. L. & E. 526; S. C., 20 L. J. Exch. 313.

Held, further, that stones dug from quarries were minerals within the implied reservation.

25. Ledge—"Scattering rock." A reservation in a conveyance of a ledge of lime rock of "all the scattering rock which is or may be found upon my farm," does not authorize the grant of the deed of the rock in place, to be construed as extending to all the rock in place under the farm beyond the limits ascribed to it in the granting part of the deed. *Dexter Lime Rock Co.* v. *Dexter*. 6 R. I. 353.

26. Surface injury—Implied rights—Mineral owner may sink or drift. A grant of the minerals in lands, or an exception thereof in a grant of the lands, carries with it as an incident of the grant or exception a right to mine, unless there is a positive restriction in the grant itself; and with it a right to penetrate to the minerals through the surface of the lands for the purpose of digging out and removing them; and to do so in such manner as is convenient and advantageous to the owner of the right, so that the surface is not wholly destroyed. *Marvin* v. *Brewster Iron Co.*, 55 N. Y. 538; 14 Amer. R. 322.

He has the right to sink a shaft vertically, or to drive a way horizontally, or to do both, in different places, so that he may reach and remove the minerals; with the restriction, however, that what he does must be necessary for the reasonable use and enjoyment of his property in the minerals, and that he leave sufficient support for the surface in its condition at the time of the grant, or as then contemplated by the parties that it should be put, and for the purpose of which the grant was made. Id.

27. Destruction of surface. Where a landowner sells the surface reserving the minerals, if he intend to retain the power to get them in a way that will destroy the surface, the reservation must be so framed as to show clearly that he reserved such power: *Hext* v. *Gill*, Law R. 7 Ch. App. 699; S. C., 3 Moak, 574.

28. China clay—Destruction of surface. A conveyance reserved "all mines and minerals within and under the premises, with full liberty of ingress, egress, and regress to dig and search," etc. Under the tenement was a bed of China clay, whose existence did not appear to have been contemplated by either party. This bed could not be worked without destruction of the surface, but the mode of streaming for tin which may have been contemplated was almost equally destructive. There was no provision for compensation for surface damages: *Held*, that the China clay was included in the reservation, but that the surface owners were entitled to restrain the owners from getting it in such a way as to destroy or seriously injure the surface. *Hext* v. *Gill*, Law R. 7 Ch. App. 699; S. C. 3 Moak, 574.

29. Of minerals—Magnesia and chromate of iron. B. by deed conveyed to F. a tract of land in fee-simple, "excepting and reserving for himself, his heirs, executors, administrators, and assigns, all mineral or magnesia of any kind, and to convey the same away through the premises intended to be sold, so as to do as little damage to the holder as possible, with all bricks and blocks of soapstone as I, the said Vincent may want for my own use:" *Held*, that this was such a reservation as entitled the grantor to chromate of iron afterwards found. *Gibson* v. *Tyson*, 5 Watts, 34.

30. "Coal" includes asphaltum. An exception in a crown grant of "all coals, and all gold and silver and other mines and minerals," extends to all carbonaceous minerals; and, therefore, asphaltum, though not strictly coal, is excepted. *Gesner* v. *Cairns*, 2 Allen (N. B.) 595.

31. Salines—State grant. Under the act of congress of April 19, 1816, all salt springs within the limits of Indiana were vested in the state. But in a general grant without description, the state must prove that the land in controversy is within the grant. *Indiana* v. *Miller*, 3 McL. C. Ct. 151.

32. Patent—Government reservation of salines—Land office records—Construction. In 1831, a patent was issued for certain land claimed by the state as coming within the United States grant under an act of 1816, as containing a salt spring. This section not having been entered as a reserve in the general land-office, nor at the local land-office, and not coming within the thirty-six sections conveyed to the state: *Held*, that the title had never vested in the state, but in the patentee. Id.

33. Governmental reservations of mines. The ordinance of 1785 dedicated the section No. 16 for the maintenance of public schools, and in each sale of the public lands there was by the same ordinance a reservation of one-third part of all gold, silver, lead or copper mines within the township or lot sold. No reservations were afterwards made of gold, silver or copper mines until the acts of March, 1847. By the act of March 26, 1804, and the act of March, 1807, every "grant of a salt spring, or a lead mine, thereafter to be made, which had been discovered previously to the purchase from the United States, was to be

considered as null and void:" 2 Stats. at Large, 279, s. 6. These statutes indicate a policy to withdraw from sale, lands containing these minerals. But the compacts have been made without such a reservation, nor has the usage of the land-office interpolated such an exception to the general grant of the section No. 16 for the use of schools. No statute prior to the admission of Michigan to the Union contains an appropriation or reservation of other mineral lands. *Cooper* v. *Roberts*, 18 How. (U. S.) 178; 20 Id. 467. *Minnesota Co.* v. *National Co.*, 3 Wall. 332.

34. State reserve of salines. Where an act directs the reservation of salt licks as public property they are not open to sale upon entry under the land system of the state to which they belong. *Edwards* v. *Darly*, 12 Wheat. 206.

35. Railroad Grant—United States reservation of minerals. In ejectment against a defendant in possession of a portion of land described in the United States patent to a railroad, which reserves mineral lands, the defendant is entitled to show that the demanded premises are mineral lands, and therefore not parcel of the grant. *McLaughlin* v. *Powell*, 50 Cal. 64.

36. St. Albans Grant. In patent of Car. II, to Earl St. Albans and others in Virginia, is reserved one-fifth part of all gold, and one-tenth part of all silver mines. *Fairfax's devisee* v. *Hunter's lessee*, 7 Cr. 604.

37. In Patent — Pennsylvania. One-fifth part of all gold and silver ore for the use of this commonwealth to be delivered at the pit's mouth clear of all charges. (1799) *Com.* v. *Coxe*, 4 Dall. 179.

38. Reservation in Texas grants construed as severance of minerals from surface. The proviso in an act of the legislature of the republic of Texas of June 3, 1837, reads as follows: "Provided that no lands granted by this government shall be located on salt springs, gold or silver mines, copper or lead or other minerals, or any island of the republic:" *Held*, that the statute must be construed by its object rather than its letter. That the object was simply to reserve to the republic islands, salt springs and mines, but not to prohibit the survey and patenting of lands until its mineral character was ascertained. That a patent issued for lands of the class mentioned (a 640-acre tract containing a saline) was good, but did not pass the saline. That by the act the mineral estate was severed from the surface, and the right to enter and get the minerals went with the reservation. *Cowan* v. *Hardeman*, 26 Tex. 217.

39. Absolute reservation without regard to buildings. Where by the words of a reservation of minerals it is expressed that grantor is not to enter upon the surface to get the minerals, it follows that a clause of compensation in the reservation must refer to injuries caused by the removal of the minerals, and such reservation gives the right to remove all the minerals, though damage result to the buildings. *Aspden* v. *Seddon*, L. R. 10, Ch. App. 394.

40. Conditional reservation — Prospecting contract. The grantee of a right to mine under an agreement containing a clause that he is "to give up said claim" if at the end of a year he does not find it worth working, must either abandon it without intention of returning, or do some affirmative act showing that he does give it up, otherwise he will be presumed to have retained it. *McBee* v. *Loftis*, 1 Strobh. (S. C.) Eq. 90.

41. Power to get at pleasure—Support. The reservation of minerals and right to get them "at pleasure" is not sufficient to take away the surface owner's right of support. *Aspden* v. *Seddon*, L. R. 10, ch. 304.

42. Of right to prospect for a certain time. If the vendor in selling a lot of land, retain the right to test it for gold within eighteen months, and if found profitable to work it, he must make the examination and give notice of the result within the time limited, otherwise the reservation, which must be strictly construed, will be forfeited. *House* v. *Palmer*, 9 Ga. 497.

43. Variance from former reservations —Power—Exception. Distinction between reservation and exception considered and query whether a lease with an exception of all mines of tin, toll tin, tin works, copper, lead and all other mines, minerals and metals whatsoever, is good under a power to lease with the accustomed reservations, the ancient leases excepting all mines and quarries of stone and slate, and all other mines. *Doe* v. *Lock*, 2 Ad. & El. 705.

44. Access to lower coal seam. A reservation of underlying seams of coal gives the right of going through the upper seams to get at them. *Goold* v. *Great Western D. C. Co.*, 2 De G. J. & S. 600.

45. Carries right of access. Texas republic reservation. It is a well established doctrine, that the right to minerals reserved carries with it the right to enter, dig and carry them away, and all other incidents necessary to getting them. So held in case of a reservation contained in a general statute of Texas. *Cowan* v. *Hardeman*, 26 Tex. 217.

46. Engine and tramway incidental to use. The owner of mines reserved may, if necessary to their use, erect on the sur-

face a tramway or maintain an engine. *Marvin* v. *Brewster Iron M. Co.*, 55 N. Y. 538; 14 Amer. R. 322.

47. Right to mine, no title to land. In a deed poll of land containing an ore-bed, a clause "reserving to" the grantor "the right of mining on the granted premises" a certain quantity of ore annually, at a certain duty per ton, licenses him to enter and mine, but secures to him no title in the land, or in the ore before it is mined and separated from the land; does not restrict the grantee from mining at the same time, even to exhaustion of the ore; and may be reformed in equity for variance through mutual mistake, from the previous oral contract of the parties, as a reservation, and not an exception from the grant, and, therefore, not within the statute of frauds. *Stockbridge I. Co.* v. *Hudson I. Co.*, 107 Mass. 290.

48. Conveyance of land subject to reservation — Compensation to grantee for exercise of powers reserved—Mode of assessment — Compensation. A conveyance of land in fee was made subject to a reservation to the grantors of the mines and minerals, and extensive powers of occupying and using the surface for the purpose of working the same. It was provided thereby, that it should not be lawful for the grantee to do, or suffer anything to be done, whereby the grantors should be prevented, hindered, or obstructed, in the exercise of the powers reserved, and also, that the grantors should make to the grantee annually reasonable compensation for damages or spoils of ground, to be occasioned by the exercise of the reserved powers. Previously to the date of the deed of conveyance the premises were leased to the grantee, subject to similar reservations to those in conveyance, and workings already existed which had taken place under such reservations: *Held*, that no restriction was placed by the words of the conveyance on the use by the grantee of the land for any purpose to which it was applicable so long as it did not touch or interfere with the minerals, and the compensation for damages or spoil of ground, occasioned by the exercise of the powers reserved, must be estimated with reference to the value of the land for any purpose to which an ordinary owner might put it; and that compensation was due in respect of damage arising from the use subsequently to the conveyance of land included therein, that had been previously occupied and used for mining purposes, but not in respect of the mere existence of workings in being at the time of the deed, or their subsequent uses without any fresh damages. *Mordue* v. *Durham*, L. R. 8 C. P. 336.

49. Limited by deed. The rights of a grantor reserving minerals must depend upon the terms of the deed. *Aspden* v. *Seldon*, L. R. 10 Ch. App. 394; *Rowbotham* v. *Wilson*, 8 H. L. Ca. 348; S. C. 3 E. & B. 752; affirming 6 El. & Bl. 593, and 8 Id. 123.

50. Too large, void. A reservation as large as the grant is void. This rule applied to the construction of a deed reserving the right to take ore. *Shoenberger* v. *Lyon*, 7 W. & S. 184; B. & W. L. C. 227.

51. Insufficient power to sever. An absolute power of sale or exchange of "all or any part" of lands does not authorize a severance of the minerals by the trustees; a sale with a reservation of the minerals. *Buckley* v. *Howell*, 29 Beav. 546.

52. Reservation though doubtful, affects title. The fact that a vendor's title deeds contain a reservation of the freestone and limestone shows a valid objection to accepting the title. And this although the validity of the present reservation may be in doubt, which doubt could not be settled without litigation. *Mawson* v. *Fletcher*, L. R. 6 Ch. App. 91; affirming S. C., L. R. 10 Eq. 212.

53. During outstanding lease. The owner of land having leased a marble quarry thereon for ten years, afterwards conveyed the land to a third party, "reserving the use of the quarry until the expiration of the lease." The lease was canceled within the ten years by the parties to it: *Held*, that the reservation was not thereby extinguished, but that it would remain in force till the end of the ten years. *Farnum* v. *Platt*, 8 Pick. (Mass.) 339.

54. Mining usage at date of. A plea that an act is done in accordance with the approved practice of mining must be taken to refer to the practice at the date of the reservation. *Smart* v. *Morton*, 30 Eng. L. & E. 385; 5 El. & B. 30; S. C. 34 L. J. Q. B., 260.

55. Assignment. In a deed by a corporation of land containing a bed of iron ore, a right reserved to the grantor "of mining on the granted premises, for the use of said company," a certain quantity of ore, is assignable, and is not subject to limitation or suspension by extrinsic evidence that the corporation was chartered to manufacture iron only in certain furnaces, and work mines only for its own use, and that at the time of the deed it expected and intended to discontinue business. *Stockbridge I. Co.* v. *Hudson I. Co.*, 107 Mass. 290.

56. Inclosure act—Freehold. The reservation of mines and quarries *inter alia* in an allotment of customary lands: *Held*, not

to operate to prevent the allotment creating a freehold estate. *Doe* v. *Davidson*, 2 M. & S. 175.

RIPARIAN RIGHTS.

1. Stone under river. The easement or right of using a navigable river as a highway does not give the right to quarry rock or remove the gravel or soil, except so far as is necessary for the enjoyment of such easements. *Braxon* v. *Bressler*, 64 Ill. 488.

2. Nominal injury—Homestead Act. There may be an actionable invasion of rights in water, without actual damage; but where the invasion is in the exercise of riparian rights by a proprietor, it is not actionable except actual damage be shown. *Union M. Co.* v. *Dangberg*, 2 Saw. 450.

The holder of a certificate of entry, or one who has entered land under the homestead act has all the rights of a riparian proprietor. Id.

3. Pennsylvania—Act of 1848. A warrant issued under act of April 11, 1848, with a survey thereon of the bottom of the Monongahela river passes no title to the soil but "the right to dig and mine for iron, coal, limestone, sand, gravel and fire clay." The warrantee does not acquire the right to the sand deposited on the bottom of the river by the current; the right to that remains in the commonwealth, and a patent upon the warrant and survey would not convey the land absolutely under the act. The warrantee cannot maintain trespass against a party who has so taken sand from the bed of the river. *Brandt* v. *McKeever*, 18 Pa. St. 70.

4. River bed, Pennsylvania. The beds, gravel and sand-bars of the navigable rivers of Pennsylvania are not subject to private appropriation under the ordinary land laws. *Poor* v. *McClure*, 77 Pa. St. 214.

ROYAL MINES.

1. Great case of mines. In the great case of mines wherein the right of the crown to a mine in lands granted to the subject was argued before "all the judges of England," the mine being of copper, wherein some gold was found, decided in 10 Elizabeth, A. D. 1566, the report containing divers opinions of the judges, and a learned note upon the theory of the crown's right in mines of gold and silver, and a statement of the alchemic idea of metals; it was *held*, all the justices and barons agreed that by the law all mines of gold and silver within the realm, whether they be in the lands of the queen or of subjects, belong to the queen, by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore; also, they all agreed, that if the ore or mine in the soil of a subject be of copper, tin, lead, or iron, in which there is no gold or silver, in this case the proprietor of the soil shall have the ore or mine, and not the crown by prerogative, but in such barren base metal no prerogative is given to the crown; also, they all agreed that a mine royal, whether of base metal containing gold or silver, or of pure gold or silver only, may, by the grant of the king, be severed from the crown, and be granted to another, for it is not an incident inseparable to the crown, but may be severed from it by apt and precise words. *Reg* v. *Northumberland*, Plowden, 336.

But as to the case then before them, the base ore containing minute quantities of gold, not sufficient alone to allow of working for the royal metal, three of the judges held that there must be gold in value exceeding the base metals, but the nine other judges held that its mere existence made the prerogative to attach, and that the mine was a mine royal, and judgment was given for the crown. Id.

2. King's Prerogative—Saltpetre. It is a part of the king's prerogative to enter the lands of the subject and dig saltpetre to make gunpowder for the defense of the realm. *The Saltpetre case*, 12 Coke R. 12.

But the right of entry must be exercised with as little injury as possible to the subject, and without disturbance of buildings. Id.

Nor can he restrain the owner from digging it, for the right of the purveyance in the saltpetre is not an interest in it such as the king has in gold and silver. Id.

3. Reservation, without right of entry. There is no instance upon a bare reservation of royal mines without any right of entry, of a grant of a license to enter upon the soil of another and search for minerals under such reservation: *Doubted*, whether even by the royal prerogative of mines there is such power. But if the mine be once opened, the crown may restrain its working by the surface tenant, or may grant a license for others to work it. *Lyddal* v. *Weston*, 2 Atk. 19.

4. Mexico. Under Mexican law the interest in the royal minerals was conveyed under the mining ordinances by registry of discovery in case of new mines, and by denouncement in case of abandoned mines. *Moore* v. *Smaw*, 17 Cal. 200; B. & W. L. C. 52.

5. Various nations. The general policy of the British, Spanish, Mexican, and in-

cidentally, of the French governments, to their mines of the royal metals, stated. Id.

See SOVEREIGNTY, KING'S PREROGATIVE, PUBLIC DOMAIN.

ROYALTY.

1. Is quasi rent. A royalty of ore reserved in a mining lease is quasi rent. *Campbell* v. *Leach*, Amb. 740.

2. Tin Tolls. When the lessee of tin tolls, by grant *bona fide*, licenses another to search for tin in a certain mine, rendering one shilling in the pound after the sale of the tin gotten, such reddendum is a rent and not a virtual share of the produce of the mine, and the original lessee is not ratable in respect to it as an occupier. *Reg.* v. *Crease*, 11 A. & E. 677; 3 Per. & D. 434.

Aliter as to tin toll reserved in kind. Id.

3. Screened coal. McKee sold the coal on his farm to defendant, reserving a perpetual royalty of ten cents for each ton "of screened coal mined and removed from said lands." The defendants mined and screened and removed both lump and nut coal: *Held*, that evidence was inadmissible to show that "screened coal" is understood among coal merchants and miners to include only "lump coal;" that "nut coal" is not "screened coal" in the common acceptation of the words; or that at the time of the sale there was no market for "nut coal," and that it was removed from necessity and did not pay the expense of mining and marketing. *Mercer M. & M. Co.* v. *McKee's Adm'r*, 77 Pa. St. 170.

The coal in this case was in fact "screened," and the court applied the words of the contract to the fact of screening, and not as a technical term applying to a certain kind of coal. Id.

4. Rent—Clean mineral—Poor rate. Where a rate was imposed upon the owner of lead mines in respect of the royalty reserved in a lease, of one-fifth share of the lead to be smelted from the ore: *Held*, that this reservation was in the nature of a rent, and therefore not ratable to the poor. *Rex* v. *Pomfret*, 5 M. & S. 139.

5. Royalties payable in installments—Apportionment of—Time. The lessees of coal mines covenanted to deliver two-thirteenths of all coal raised during the term, or to pay quarterly the value thereof in money, and that in case at the end of the first quarter of any year such quarterly deliveries should not have equaled in value, or such quarterly payments should not have equaled in amount the sum of £38 10s., the lessees should also pay at the end of every such quarter, such additional rent or sum as should make up the sum of £38 10s.; and in case, at the end of the second quarter, such deliveries or payments for that and the preceding quarter should not have equaled in value or amount the sum of £75, then the lessees should also pay at the end of the second quarter, such further sums as would make up £75; and in case at the end of the third quarter, such deliveries or payments for that and the two preceding quarters should not have equaled in value or amount the sum of £111 10s., then the lessees should pay, at the end of the third quarter, such further sum as would make up £111 10s.; and in case on the twenty-fourth June, in any year, the deliveries or payments for that and the three preceding quarters should not have equaled in value or amount the sum of £150, the lessees should pay on the twenty-fourth June such an additional sum as would make up £150; it being the intent and meaning of the parties that the royalties thereby reserved should always amount to £150 per annum at the least: *Held*, that in calculating the amount of royalty due to the lessor at the end of each year, the lessees were not entitled to set off the excess of royalty accruing in any quarter against a deficiency in the previous quarter; but that the lessor was entitled, at the end of each quarter, to the full sum of £38 10s. *Bishop* v. *Goodwin*, 14 M. & W. 260.

6. Custom—Analogy to oyster banks. The proprietor's profit in mines by receiving a part of the produce is upon the same principle as the profit of fisheries and oyster banks; and custom may be shown to prove the proportion usually paid. *Allen* v. *Barkley*, 1 Speer S. Car Eq. 264.

7. Receipt of—Affirmance of lease by widow. T. made a voluntary conveyance of a farm to his wife in 1867, but remained in possession of the property till his death in June, 1873. In April, 1873, he granted to McD. the right to mine coal on a part of this farm. McD. worked a mine under the lease during T.'s life-time, and after his death, with the widow's knowledge. McD. never knew of the existence of this deed until July, 1874. It was not recorded until August, 1874. After the husband's death, the widow received payments of royalty under the lease, but afterwards filed a bill to restrain McD. from entering upon the property to mine coal: *Held*, that she had ratified and confirmed the lease, and was bound by it. *Trout* v. *McDonald*, 83 Pa. St. 144.

8. Royalty kept for the lessor by the smelter. Plaintiff and defendant were owners of adjoining mineral lands. A. went upon the land of defendant, sunk a shaft and drifted upon the land of plaintiff, and sold the mineral raised from plaintiff's

land to the defendant without retaining the royalty due to plaintiff. The mining was by permission of both owners. It was a proved custom in that locality for the ore buyer, at least if a smelter, to retain the royalty due to the owner of the land: *Held*, that even if defendant were not a smelter, there was such privity between the parties as would create a liability, and that A. should be treated as the agent of the plaintiff in the sale of the mineral to the defendant. *Alderson* v. *Ennor*, 45 Ill. 128.

9. Goes to remainder-man. Toll reserved on a lease of a mine made by a tenant for life, under a power, will go to the remainder-man. *Basset* v. *Basset*, Amb. (appendix) 843; cited in *Campbell* v. *Leach*, Amb. 740.

See RENT.

SALE.

1. Opportunity of inspection—Warranty. Where the purchaser of personal property (iron) saw the same before taking possession, had every opportunity of inspection and no concealment was used on the part of the seller, or representations made respecting the quality to induce the purchaser not to examine the same, the purchaser cannot recover the price paid, on the ground either of warranty or fraud. *Carondelet Iron Works* v. *Moore*, 78 Wisc. 65.

2. Mixed iron. Where a contract for the purchase of all the iron manufactured up to a certain date by a company, provided that the proportion of white and mottled iron should not exceed ten per cent. of the quantity of gray mill iron, and in case of such excess the purchaser should have the option to reject such excess: *Held*, that the purchaser was bound to accept and pay for all the iron manufactured, except as to such excess, and also such excess unless the option to reject it was manifested in a reasonable time after the quantities were ascertained and notice thereof given. Id.

3. Time—Delay in making demand for delivery. By the terms of an auction sale of coal, the coal was to be taken away by the purchaser in October, and if he failed so to do defendants had the option to discontinue further delivery and to retain the earnest money, or to re-sell on account of the purchaser. Plaintiff did not demand the coal until February, when defendant's stock of coal was exhausted; they refused to deliver and plaintiff sued to recover therefor: *Held*, that the stipulation as to time was to be deemed of the essence of the contract, and a condition precedent which must be observed by plaintiff to enable him to enforce it; and that defendants were not limited to the remedies prescribed, but had the right to hold themselves absolved from the contract upon the failure of plaintiff to perform. *Higgins* v. *Delaware R. R. Co.*, 60 N. Y. 553.

See VENDOR AND PURCHASER.

SALINES.

1. Reserved by the United States. The policy of the government since the acquisition of the north-west territory and the inauguration of our land system, to reserve salt springs from sale, has been uniform. This policy has been applied to the Louisiana territory, acquired from France in 1803, and probably would apply to Nebraska without the act of July, 22, 1854; but that act applies, at least, so far as to render void an entry where the salines, at the time, had been noted on the field-books, were palpable to the eye, and were not first discovered after entry. *Morton* v. *Nebraska*, 21 Wall. 660.

2. Patent contrary to reservation, void. A patent for a saline which was under the general law reserved from sale, is void. Id.

3. Patent—Reservation. A grant upon entry and survey, of lands reserved by law as salines, is void. *Edwards* v. *Darby*, 12 Wheat. 206.

Where a state act directs the survey of certain lands, and the reservation of salines thereon, although there be no specific direction in the act to survey and set apart the salines, such direction is implied from the necessity of the case. Id.

"French lick," on site of Nashville, Tennessee—case deciding whether the same had been reserved, or was open to entry under statutes of North Carolina and Tennessee. Id.

4. U. S. State grants — Springs not practically workable. The acts of congress granting salt springs to the state, construed as intending only salt springs which could be made of value in the manufacture of salt; and held not to apply to a case where a well known saline existed, but all attempts to make it of any value had failed. *Indiana* v. *Miller*, 3 McL. C. Ct. 151.

5. Missouri. The act of December 30, 1824, relating to distress for rent of the state salines, does not apply to leases made prior thereto. *Craig* v. *Barcroft*, 1 Mo. 656.

6. Salt lick—Salt spring. A salt lick and a salt spring mean the same as used in the act of congress, "lick" being a western term applied to a salt spring on account of the deer resorting to it to lick the salt. The distinction cannot be made referring spring to a fountain of salt water, and lick to a

place where salt water appears on the surface of the ground. *Indiana* v. *Miller*, 3 McL. C. Ct. 151.

7. Not waste to dig new wells. Tenant for life may dig a new salt well communicating with the same fountain, without restraint. *Findlay* v. *Smith*, 6 Munf. 134.

8. Idem—Timber. Devise of salt works for life, remainder over, construed to allow the devisee to make unlimited use of the salt works, saline water, and the wood land supplying them with fuel. *Findlay* v. *Smith*, 6 Munf. (Va., 134.

9. Salt contract—Place of delivery. Where the plaintiff sold his interest in certain salt works in consideration of a certain amount to be paid in salt, the salt to be packed by defendant by a specified time in barrels to be furnished by plaintiff: *Held*, that no place of delivery being specified, defendant was bound to deliver at plaintiff's residence. *Goodwin* v. *Holbrook*, 4 Wendell, 377.

10. Salt, as a necessity of life. Cases considering statutes of the legislature of Virginia passed during the war, in relation to the purchase of salt as a necessity of life, for distribution among the people. *Dinwiddie County* v. *Stuart*, 28 Gratt. 526; *Pulaski County* v. *Stuart*, Id. 872.

SCHOOL LANDS.

1. Lease of—U. S. legislation reviewed. A lease by the secretary of war, made in 1845, under the operation of subsequent acts of 1847 and 1850 (9 Stat. at Large, 146 and 472) conferred no right upon the lessee or his assigns, to subsequently enter and pay for school sections embraced in the mineral lands covered by the lease. *Cooper* v. *Roberts*, 18 How. 179; reversing S. C., 6 McLean, 93; and see *Roberts* v. *Cooper*, 20 How. 467; and *Minnesota Co.* v. *National Co.*, 3 Wall. 332, all concerning the same property.

The grant of sixteenth sections to the State of Michigan for school purposes, contains no express or implied reservation of salt springs, lead mines, or minerals of any kind. Id.

The existence of a mining lease made by the secretary of war, Including the *locus in quo*, did not affect the grant after the expiration of the lease. Id.

The legislation of Congress upon reservations of mines in school sections reviewed and acts cited. Id.

2. California—Mineral lands not excepted—Subject to miner's entry. Mineral lands are not excepted from the operation of the grant of the sixteenth and thirty-sixth sections in each township, made to California for school purposes by the act of Congress of March 3, 1853. *Higgins* v. *Houghton*, 25 Cal. 252.

The fact that sections sixteen and thirty-six contain mines of the precious metals does not prevent the state from selling the same and issuing patents therefor to the purchaser. The state may, however, by the passage of laws to that effect, prohibit the sale of such lands or the issuance of patents for the same. Id.

Persons who hold certificates of purchase from the state for the sixteenth or thirty-sixth sections, or portions thereof, hold the land as the state held it before the certificate was issued, subject to the right of miners to enter upon and work it for mining purposes. Id.

3. Michigan. Legislation of State of Michigan on the swamp and school lands of the state, containing mines and minerals, reviewed. *Houghton County* v. *Com. of State Land Office*. 23 Mich. 270

4. Michigan—Entry. State lands in the mineral region of the upper peninsula withheld from market as mineral lands prior to the act of 1863, must be offered at public auction before they are subject to private entry at the land office. *Attorney-General* v. *Smith*, 31 Mich. 360.

5. Mineral lands, Nevada. The state not entitled to its sixteenth and thirty-sixth sections on mineral lands. *Wall* v. *Blasdel*, 4 Nev. 246.

6. Minerals reserved—Nevada—Reservation. Assuming that by sec. 7 of the enabling act for the admission of Nevada as a state the grant of the 16th and 36th sections (school lands), took effect absolutely from the date of admission, and that mineral lands were not at that time excepted, the state nevertheless, by its subsequent legislation, has assented to and made valid the reservation to the United States of the mineral lands included in such sections. *Heydenfeldt* v. *Daney G. & S. M. Co.*, 10 Nev. 290; B. & W. L. C. 656; affirmed 93 U. S. 634.

The patent of the state of Nevada issued for a school section since the act of Congress of July 4, 1866, and the act of the Legislature of Nevada of February 13, 1867, by which legislation the title of the United States to mineral lands on the school sections was conceded, did not convey mines of gold, silver, quicksilver or copper. So *held* as against a party claiming a United States patent of 1874, granted under the mining acts of Congress of 1866, 1870 and 1872, upon a possessory title which accrued in 1867. Id.

The act of Congress of July 4, 1866 (14 U. S. Stat. p. 85, sec. 5), applies to all

grants of then unsurveyed lands, and includes the grant mentioned in the enabling act. Id.

7. Nevada—Exception of mineral land. The Nevada enabling act, approved March 21, 1864, (13 Stat. 30), granting sections 16 and 36 in each township to the state, is qualified by the act of July 4, 1866 (14 Stat. 85), the state having accepted the conditions of the latter act. Under these acts construed together (aside from other reasons reaching to the same result), excludes from the operation of the grant any mineral land which had been duly located prior to the survey. *Heydenfeldt* v. *Daney M. Co.*, 93 U. S. 634; affirming S. C., 10 Nev. 290.

SEA SHORE.

1. Crown grant. Grant by letters patent of the Crown as lord of the manor of E, of "all those coal mines found or to be found within the commons, waste grounds, or marshes within the said lordship of E," etc., with a *proviso* that the grant should be construed strictly against the crown, and most strictly and beneficially for the grantees: *Held*, to pass coal lying under the foreshore of the estuary of the river Dee, between high and low water marks, and forming part of the manor of E. *Attorney General* v. *Hanmer*, 27 L. J. Ch. 837.

2. Crown rights—Tide lines. The crown is entitled to "the soil of the sea;" to coal lying under the sea and adjoining the coasts of England, and in the absence of usage to the contrary, the average medium high tides in each quarter of a lunar revolution during the whole year is the limit to the rights of the crown on the sea shore. *Attorney-General* v. *Chambers*, 2 Eq. Rep. 1195; 23 L. J. Ch., 635; *Same* v. *Rees*, Id.

3. Description of land under water—Grant of soil. The grant of "sea grounds, oyster layings, shores and fisheries," commonly called the "Middleton hall and Prittlewell priory shores or sea grounds," containing by estimation 800 acres, as marked and stubbed out, from the lord of the manors to tenants, to have and to hold subject to such services as were due from the freehold tenants of the same manor, although containing special reference to planting oysters and to fisheries: *Construed* to pass the right of soil in the sea shore to the grantees. *Scratton* v. *Brown*, 4 B. & C. 485.

4. Injunction. Injunction granted to restrain defendants from taking valuable clay found in masses between high and low water mark and below low water mark, in the sea and within limits of plaintiff's manor and estate, upon the ground of irremediable mischief in the nature of waste. *Earl Cowper* v. *Baker*, 17 Ves. Jr. 128.

5. Asphaltum. Case of mining for asphaltum between high and low water mark on the Pacific ocean, where the line of a Mexican grant called for the "sea shore." Title to the minerals not decided. *More* v. *Massini*, 37 Cal. 432.

6. Asphaltum between tide marks. For case of mining for asphaltum between high and low tide mark on the Pacific ocean holding that such land, including the asphaltum, belongs to the state by virtue of its sovereignty: see *People ex rel. Dead Whale M. Co.* v. *Morrill*, 26 Cal. 336.

Such land treated as open to location of mining claims under the general law the same as other lands of the state. Id.

SEVERANCE.

1. How effected. A conveyance of "the full right, title and privilege of digging and taking away coal to any extent he, the grantee, may think proper under the land of" the grantor, effects a severance of the right to the surface from the right to the underlying coal, and makes them distinct corporeal hereditaments. *Armstrong* v. *Caldwell*, 53 Pa. St. 284.

2. By deed. The minerals beneath the surface of land may be conveyed by deed, distinct from the right to the surface. *Caldwell* v. *Fulton*, 31 Pa. St. 474; See 32 Pa. St. 241; affirmed, 53 Pa. St. 229.

A deed may convey a distinct inheritance in mines, the fee to the surface remaining in the grantor. *Hartwell* v. *Camman*, 2 Stock. (N. J.) Ch. 128.

3. Deeds after severance, ignoring such fact. After minerals have been once severed, the fact that subsequent deeds by the surface owners contain no reservations of the minerals, cannot affect the rights of the owner of the minerals or his mode of exercising such right. *Marvin* v. *Brewster Iron M. Co.*, 55 N. Y. 538. 14 Amer. R. 322.

4. By lease. Unopened veins or beds of minerals contained in and below the surface of the soil may be demised as if they were separate pieces of land. *Massot* v. *Moses*, 3 S. Car. 168; 16 Amer. R. 697.

5. Crown grant. The crown may grant land and except the base mines and minerals therein. *McMahon* v. *Berton*, 2 Allen (New Brunswick), 321.

6. Between several kinds of minerals. The title to different kinds of minerals (*e. g.* tin and copper) under the same land may be in different owners. *Curtis* v. *Daniel*, 10 East. 273.

7. Loose block of stone left 30 years on land—Deed—Parol exception. A stone, split out and slightly removed, and laid up for the purpose and with the intention, by the owner of the farm upon which it was quarried and left, of using it in the construction of a tomb elsewhere, would not pass by a deed of the farm. It would be governed by the same principles that are applicable to timber, fence rails, and the like that are severed from the freehold; if intended for use on the farm they pass by the deed in a sale of it; if to be used elsewhere they do not pass. *Noble* v. *Sylvester*, 42 Vt. 146.

As there was nothing about the stone or its position to indicate the use to which it was to be put, this was a proper subject of explanation between the seller and the purchaser at the time the deed was executed, and such explanation, though accompanied by a formal parol exception of the stone which was unnecessary, might well be by parol; and whether there was a parol exception was a question of fact for the jury. Id.

The stone in question having remained on the premises over thirty years, the lapse of time was an element proper to be considered by the jury in determining the question submitted to them, but it was not an error in the court to omit to give special instructions in respect to this fact, there having been no request to that effect. Id.

8. Incidents of, drainage. In a case in which mines were altogether excepted out of a demise of the surface: *Held*, (reversing the judgment of the court below) that the rights of the owner of the surface and the owner of the mines, did not in any way differ from those of the owners of adjoining closes who are strangers in title, each of whom is entitled to the water found upon his land, but neither of whom is entitled to complain of the loss of that water by natural percolation set in motion by his neighbor's excavations; for it makes no difference whether the respective closes are adjacent vertically or laterally, and the grant of the surfaee cannot carry with it more than the ownership of the entire soil would. *Ballacorkish M. Co.* v. *Dumbell*, 29 L. T. N. S. 658; S. C., L. R. 5; App. P. C. 49.

9. Evidence. In the construction of a contract inferring the severance of the surface and subsoil rights, extrinsic evidence is admissible to show the use to which the land is or may be applied. *Stewart* v. *Chadwick*, 8 Iowa, 463.

10. By trustees. Trustees may make sale of lands reserving the minerals, and an order of court ordering further sales on parcels of the same estate can only reach the minerals under a tract which had been theretofore sold by the trustees reserving minerals. *Cadwalader's app.*, 64 Pa. St. 293.

11. Parties—Cestui que trust. The *cestui que* trust ought to be made party to an application under 25 and 26 Vict. c. 108 s. 2., for sale of the surface apart from the minerals. *In re Palmer's will*, L. R. 13 Eq. 408.

12. Practice—Trust estates. Upon an application to the court by trustees or other persons under sec. 2, 25 and 26 Vic. c. 108 (for the sale of lands reserving minerals) the appearance and consent of the beneficiaries is necessary. *In re Brown*, 1 New R. 13.

Under said section the court will make an order, on petition, authorizing the sale of land with a reservation of the minerals, or of the minerals apart from the land, in general terms without reference to any particular sale. *In re Willway's trust*, 32 L. J. Ch. 226.

13. Settled estates act. Under the settled estates acts, 19 and 20 Vic. c. 120, the court has jurisdiction to direct the sale of minerals beneath the surface separately from the land. *In re Mallin's Settled Estates*, 3 Giff. 126.

The court has jurisdiction under the leases and sales of settled estates act, to order a sale of mines apart from the surface with rights of using the surface for the workings, reserving a rent in respect of the surface damaged from time to time. *In re Milward's estate*, L. R. 6 Eq. 248.

14. Settled estates act—Lease—Convenient surface. The court in making an order for a lease of mines under the settled estates act, will, in a proper case, authorize a lease not only of the mines themselves, but also of so much land as may appear necessary for the convenient and effective working of the minerals. *In re Reveley's Settled Estates*, 32 L. J. Ch. 812.

15. Confirmation of sales act—British. The court has power under the confirmation of sales act, 25 and 26 Vict. c. 108, to give a general direction that persons having powers of sale and exchange in a settlement or will, which do not expressly authorize the reservation of mines and minerals, on the sale of the settled property, or the sale of minerals apart from the land, may exercise the powers as if they did authorize such reservation or separation. *In re Wynn's Devised Estates*, 16 L. R. Eq. 237.

16. Mortgage—Confirmation of sales act. Mortgagees are within the confirmation of sales act, and may have liberty to sell under their power of sale, with a reservation of the mines and minerals in the land sold, and incidental powers of working

them. *In re Beaumont's Mortgage Trusts*, L. R. 12 Eq. 86.

17. No equity jurisdiction between surface and mine owners. A bill filed by one claiming an estate in three undivided fourths of the mines in a certain tract of land, with the right to pass and re-pass, to dig for and carry away the ores; against the owner in fee of the whole of the soil for digging and carrying away ore and wasting and destroying the same, and forcibly resisting the complainant in the exercise of his rights, is not within the equity jurisdiction of the court, either on the ground of a nuisance by a disturbance of the use of a right of way, (such disturbance being alleged only as an incident to the trespass by digging ore) or as showing the parties to be tenants in common of the mines. *Adam* v. *Briggs Iron Co.*, 7 Cush. 361.

Complainant in this case being allowed to amend, alleged himself to be owner of three undivided fourths and defendant to be owner of one undivided fourth of the mines, whereupon it was held that such action was within the jurisdiction of the court. Id.

18. Relationship of surface to mine owner. When the minerals have been severed from the surface ownership the owner of the surface is not a tenant in common with the mine owner. *Canfield* v. *Ford*, 28 Barb. 336.

19. Presumption affected by severance. The *prima facie* evidence of title to the mines which possession of the land affords, is rebutted by proof of severance by grant. *Hodgkinson* v. *Fletcher*, 3 Doug. 31.

20. Mineral owner allowing expenditures by surface owner. The fact of the owner of minerals reserved allowing the surface proprietor to sink for and get them at great expense, after an ancient reservation unknown to the surface proprietor, does not alone authorize the presumption of a grant. *Adair* v. *Shafloe*, cited 19 Ves. Jr. 156.

21. Minerals the servient tenement—Support. Mining property is servient to the surface to the extent of sufficient support to sustain it, and on default the operators are liable for damages. *Jones* v. *Wagner*, 66 Pa. St. 429; *Horner* v. *Watson*, 79 Pa. St. 242. 21 Amer. R. 55.

22. Sic utere tuo. Upper and underground estates are governed as other estates by the maxim *sic utere tuo ut non alienum lædas*. Id.

23. Construction as to surface support—Coal mining. Where, the deed which granted the surface reserving the minerals, contained only the provision that the grantor should have the collieries and coal mines, veins and seams of coal, together with full and free power and liberty at all times to work, sink, dig for or win the same, and to drive drift or drifts, make water-courses, or do any other act necessary, needful, or convenient for the working, winning, obtaining, or getting the same, paying to the grantee treble damages for loss or damage sustained by reason of the working of the mines:

Held, 1. that the terms of this reservation did not authorize the grantor to work the mines in such manner as to leave the surface without support; 2. Also that the entire removal of all the coal, so as to deprive the surface of support, was not an act necessary for the working and winning of the mines; 3. Also, upon the evidence, that it was contrary to the approved practice of mining in the county of Durham at the date of the reservation, 1671, to leave the surface without support; and that a plea which alleged that the defendants had done the acts complained of in accordance with the approved practice of mining, must be taken to refer to the practice at the date of reservation. *Smart* v. *Morton*, 5 El. & Bl. 30; 30 Eng. L. & E. 385; 3 Com. L. R. 1004.

24. Right of lateral support, how acquired. A right of lateral support can have its origin only in grant; nor ought the grant to be presumed where the necessity of the support arises from mining the subjacent support from under the improvements, until the lapse of twenty years after the adjoining owner knew or had means of knowing that the subjacent strata had been removed; and if within such period the adjoining owner work his mine to his border and cause the fall of the house, he is not liable in case for the injury. *Partridge* v. *Scott*, 3 M. & W. 220; S. C., 1 Horn & H. 31.

25. Mine owner entitled to surface necessary for working. One who has the exclusive right to mine coal upon land is entitled even as against the owner of the soil, and so certainly against an intruder, to the possession of the land so far as is necessary for the enjoyment of such right. *Turner* v. *Reynolds*, 23 Pa. St. 199.

26. His possession presumed rightful. Where the portion of land necessary for mining purposes did not appear in the case it was *held*, that the court of review would presume as against an intruder that the possession of the soil over the vein in dispute was necessary for the purpose of mining. Id.

27. Poor rate—Mines in one township, surface in another. An act for the inclosure of a common provided that the allotments should be deemed situate in the lands in respect to which the allotments

were made. The coal under the lands was reserved: *Held*, that the coal mines were still ratable in the township where actually situate. *Rex* v. *Pitt*, 5 B. & Ad. 565; 2 Nev. & M. 363.

28. Shaft through surface to severed minerals. Case of joint ownership of the underlying coal and separate ownership of the surface, holding that a shaft sunk to work the mines held in common belongs to the owners of the mines, and is not the separate property of the surface owner. *Clegg* v. *Clegg*, 3 Giff. 322.

29. Surcharge. When the entire estate in the mines is severed and conveyed, there can be no surcharge; it can made no difference to the rights of the surface owner whether few or many are employed to work and win them. *Canfield* v. *Ford*, 28 Barb. 336.

30. Property in minerals without right of entry. Though the property in mines be in the lord, it does not follow that he can enter and take it without consent of the tenant. *Grey* v. *Duke of Northumberland*, 17 Ves. Jr. 281.

31. Stones severed but left on the farm. A sale of stones by the owner of a farm, accompanied by a payment for and removal of the same by the vendee to another part of the premises, constitutes a severance and vests the title in the purchaser. *Fulton* v. *Norton*, 64 Me. 410.

A second sale of such stones by a grantee of the farm, under a deed subsequent to the first sale by his predecessor in ownership of the farm, vests no title; and if the second purchaser removes them from the place where they were deposited by the first vendee, he becomes liable in an action of trespass for the value of the stones thus removed.

See PARTITION.

SHARES.

Shares of members owning the mine treated as paid up. Nine persons bought a moiety of a collery from P. for £10,000, and the ten, after working it for some time, agreed to form a company for carrying it on, and a company was accordingly registered, the memorandum of association of which was subscribed by the owners of the colliery for numbers of shares proportioned to their respective interests; the nominal amount of shares subscribed for being £20,000. The memorandum stated nothing as to the shares being treated as paid up shares, but the articles provided that all the shares subscribed for in the memorandum should be treated as fully paid up. The colliery was made over to the company, but no other payment was made by any of the subscribers of the memorandum. No other shares than those subscribed for by the memorandum were ever allotted: *Held*, that the subscribers of the memorandum of association were not liable as contributories, for that the shares must be taken as having been fully paid up by the handing over the colliery. *In re Baglan Hall Colliery Co.*, L. R. 5 Ch. 346.

Paid up shares, attempted transfer of credits. A person who subscribes the memorandum of association of a company for a certain number of shares is bound to take that number of shares from the company, and pay for them, either in money or money's worth. P. signed the memorandum of association of a company for 1350 shares, and F. and J. for 50 shares each. P. sold a business to the company, part of the price of which was to be paid by 1500 paid up shares. By his direction fifty of these paid up shares were allotted to F. and fifty to J.: *Held*, that the obligation into which F. and J. had entered by subscribing the memorandum, was not thus satisfied, and that each was a contributory in respect of fifty shares, on which nothing had been paid: *In re Heyford I. Co.*, L. R. 5 Ch. 270.

3. Purchase-money shares. P. subscribed the memorandum of association of a company for 1350 shares. By the articles it was stated that the company would issue 1500 shares to P., which were to be credited as fully paid up shares, and that P. would accept them as the purchase-money of the good-will and stock in trade of a business which P. had sold to the company; 1350 fully paid up shares were allotted to P., and 150 to his nominees. No money was paid for the shares. The company was afterwards wound up: *Held*, that P. was not liable as a contributory. *In re Heyford Co.*, L. R. 5 Ch. 11.

4. Purchaser liable for existing liabilities. A person who buys shares in a trading company is to be taken to have bought them subject to their existing liabilities, and, on the winding up of the company, is liable to contribute, as well towards debts incurred before as those incurred after the purchase. *In re Mexican & S. A. Co.*, 4 De G. & J. 544; 28 L. J. Ch. 769.

5. Transfer to avoid future liability. A transfer of 250 shares in a mining company purchased for £1750 was made by a shareholder to his clerk for £1. It was not disputed that this transfer was made to escape liability, but the court was satisfied on the evidence that it was an absolute and *bona fide* transfer, without any trust or reservation: *Held*, that the transferor was not a contributory. *In re Mexican & S. A. Co.*, 4 De G. & J. 544; 28 L. J. Ch. 769.

6. Consent to transfer—Reputed ownership. Where a shareholder in a company where there is a printed notification on each share certificate that no transfer can be made without consent of the directors, agrees with the managing director that his shares shall be security, and the shareholder retains the shares, they are not in his reputed ownership. *Ex parte Harrison*, 3 Mont. & Ayr. 506.

7. Money paid to buyer to induce purchase — Consideration. A transfer of shares, which is otherwise *bona fide*, can not be set aside at the instance of the company, either because the vendor paid money to the purchaser to take his shares, or because the certificate of transfer contains a false statement as to the consideration paid. *In re Hafod Lead M. Co.*, 12 Jurist, N. S. 242; 35 L. J. Ch. 304.

8. Abandoning Shares, no transfer. In a company on the cost-book principle, the regulations were that any person who was the holder of share certificates could cause himself to be registered as a shareholder, and could not receive any dividend, unless he was the registered holder, and on registration the former holder was freed from all liability: *Held*, that a registered shareholder who had disposed of his shares and handed over the certificates, where no other person had registered himself in respect of those shares, remained liable to be a contributory. *Humby's case*, 28 L. J. Ch. 875, 5 Jur. N. S. 215.

9. Running contract—Repudiation. P. applied for shares according to a form of application which bound him to pay, in addition to the £1 per share which he had paid on application, £4 per share "on allotment." On the 6th of September, he received a letter stating that the directors had allotted him eighty shares, "on which £5 per share must be paid on or before the 15th inst." September 10, before anything further had been done, P. wrote to the company, refusing to accept the shares: *Held*, that the application and the letter constituted a complete contract, and that the repudiation of the 10th of September was ineffectual. *In re Aberaman Ironworks*, L. R. 4 Ch. 532.

10. Mortgage — Forfeiture — Former owner. After a transfer of shares in a company has been made, and after the recognition of the transferee by the company, they cannot make any claims for calls, which ought to have been paid by the previous owners; neither can the company declare such shares forfeited on the refusal of the transferee to satisfy such demand, though he was only a mortgagee of the shares. *Watson* v. *Eales*, 23 Beav. 294, 26 L. J. Ch. 361.

11. Slaves. Slaves with other property being owned by a British mining company operating mines in Brazil, a special order of reference was made "to inquire in what manner it is fit and proper to deal with the slave property of the association." *Sheppard* v. *Oxenford*, 1 Kay and J. 491.

12. Delivery after winding-up order. G. and S. bought shares in a company, whose shares passed by the delivery of the certificates. Some of the certificates were not delivered until after an order for winding up the company had been made: *Held*, that G. and S. were contributories in respect of such shares, as well as in respect of those the certificates of which had been delivered before the winding-up order. *In re Mexican & S. A. Co.*, 4 De G. & J. 544; 28 L. J. Ch. 769.

See STOCK.

SHAREHOLDER.

1. Advances by shareholders. By the deed of settlement of an unincorporated mining company, the capital of the company was to be £50,000, and it was provided, "that the affairs and business of the company should be under the sole and entire control of the directors." The deed empowered the directors, if they thought it desirable, to create new shares, by vote at a special general meeting. New shares were accordingly created, but the capital arising from these, as well as from the original £50,000, having been exhausted, certain of the directors and other shareholders, upon the application of the managing body of directors, made advances of money for the use of the company, which were applied in paying wages of miners and other debts which had been incurred at the date of the advances, for the necessary purposes of the proper working of the mines: *Held*, that the advances should be credited, with interest, to the shareholders who made them. *In re German M. Co.*, 17 Jur. 745; S. C., 4 De Gex, M. & G. 19.

2. Shares held in another name for personal reasons. K., the secretary of an unregistered company, carried on upon the cost-book system, purchased shares in the company and had them transferred to a nominee, who was a man of small means; his object being to prevent its being generally known that he was trafficing in shares of the company. The transfer was registered, and about three years afterwards the company was wound up by an order of the court of stannaries: *Held*, reversing the decision of the vice warden of the stannaries court, that the transaction was a *bona fide* purchase of shares in the name of a trustee, and that K. could not be put on the list of contributories

in respect of them. *Semble*, that, even if K. had purchased the shares in the name of a nominee for the purpose of escaping liability, yet, as K. was never under any obligation to the company in respect of those shares, he could not be made a contributory. *In re Great W. B. M. Co.*, L. R. 6 Ch. 196.

8. Attending meetings—Proof of being shareholder. Certain persons formed themselves into a company to raise a fund for working mines in America, and £6000 was subscribed in shares of £100 each. The deed by which the company was formed was dated November 1, 1833, and provided that the directors should have the power of creating and issuing new shares from time to time, and that the shares should be assignable. Bills of exchange having been drawn on the company by their agent in America, which they required funds to meet, an engagement dated December 24, 1835, was entered into by three of the directors with the plaintiffs, for borrowing £5800 from them, which sum was accordingly advanced by the plaintiffs. In an action by them against A., a shareholder, to recover the sum so advanced: *Held*, that the fact of A. having, on the seventeenth of December, 1835, attended a special meeting of the company, at which resolutions were passed relating to the sale of certain of the company's mines, in order to provide for the payment of the bills, was sufficient evidence to go to the jury to fix him with liability as a shareholder, though A. did not sign the deed, nor was he proved to be the proprietor of any shares, or to have attended any other meeting, or to have done any other act in connection with the company. *Harrison* v. *Heathorn*, 6 Scott, N. R. 735; 12 L. J., C. P. 282.

See PARTNERSHIP, COST-BOOK CO., JOINT STOCK CO.

SLATE WORKS.

1. Not a Factory. A slate quarry, a large open space extending over an area of 400 acres, the works of which are carried on in the open air, the only buildings being sheds, and in which more than fifty persons are employed in splitting the rock into slates and shaping them for sale, is not "a factory" within the meaning of 30 and 31 Vict. c. 103, s. 3, sub-s. 7. *Kent* v. *Astley*, L. R., 5 Q. B. 19.

SMELTING WORKS.

1. Crushing and amalgamating—Separate business. The business of crushing ore in a stamp mill, and the business of carrying on amalgamating works, are distinct from each other, and an arrangement between a stamp mill and an amalgamating mill, by which the former is to crush all the ore of the latter at a certain rate per ton, establishes no partnership relation. And the fact of the amalgamating mill leasing part of its ground from the quartz mill, does not affect the case; nor the fact that one of the quartz-mill owners is admitted to be a partner in the two firms by special arrangement. *Jones* v. *O'Farrell*, 1 Nev. 354; *Mears* v. *James*, 2 Nev. 342.

2. Timber. A tenant who has leased a lead mine, with liberty to smelt ore, is entitled to use so much timber as may be necessary for that purpose. *Wilson* v. *Smith*, 5 Yerger (Tenn.) 379.

SOIL.

1. Construction. Where, in an inclosure act, one-fifth of the common lands was alloted to the lord of the manor for his "interest in the soil," the remainder to be divided among the commoners and held in severalty, there being a saving of the lord's right in minerals, "as if the act had not been passed:" *Held*, that the word soil referred to the surface alone, and that the lord took all the minerals under both the common and other lands. *Pretty* v. *Solly*, 26 Beav. 606.

2. Judicial notice. Judicial notice taken of the character of the soil and the topography of the state. *Follmer* v. *Nuckolls County*, 6 Nebraska, 211.

See LAND.

SOVEREIGNTY.

1. Precious metals. Mines of precious metals belong to the eminent domain of the political sovereignty. *Gold Hill Q. M. Co.* v. *Ish*, 5 Oregon, 104.

See KING'S PREROGATIVE, PUBLIC DOMAIN, ROYAL MINES, SEA-SHORE.

SPECIFIC PERFORMANCE.

1. Remedy at law. Specific performance of covenant to fill up a gravel pit refused, the remedy being adequate at law: *Flint* v. *Brandon*, 8 Ves. Jr. 159.

2. Remedy by entry. A right of re-entry (upon a quarry) gives a complete legal remedy so as not to make specific performance a matter of course. *Rutland M. Co.* v. *Ripley*, 10 Wall. 339.

3. Discretion—Coal not worth getting. Specific performance is a matter of discretion to be exercised, however, according to fixed and settled rules, and the mere inadequacy of consideration is not a ground for

exercising such discretion by refusing a specific performance. Decree accordingly under this statement of the rule, for specific performance of an agreement for a coal lease, when, after prosecuting work for some time, under possession given, the coal seams were found to be "absolutely not worth getting," and the agreement called for a lease with £100 minimum rent, besides royalties: *Haywood* v. *Cope*, 25 Beav. 140.

4. Defective title excuses vendee of land. A vendee of an interest in iron-works, entering and acting as a partner, although charged with gross mismanagement and destroying the value of the property, cannot be decreed to accept specific performance and to take a defective title and will not be presumed to have accepted such title; nor can an account of damages be taken and decree for compensation made upon bill framed only for specific performance. *Stevens* v. *Grippy*, 3 Russ. 171.

5. Title to minerals wanting. Specific performance refused upon a finding that the vendor could not give title to the minerals under the surface. *Pretty* v. *Solly*, 26 Beav. 606.

6. Vendor must trace title. On a bill for the specific performance of a contract to purchase shares in a mining concern (cost-book) it is not sufficient for the vendor to show a title to the specified share of the mine as between himself and co-adventurers without showing some title in himself and his co-adventurers to the mine of which he had contracted to sell a share. *Curling* v. *Flight*, 6 Hare, 41; compare S. C. 2 Phillips, 613

7. Outstanding reservation of non-existing minerals. There was a reservation in a grant of an estate by the crown, of tin lead and all royal mines within the premises. There was no pretense of any search for royal mines within one hundred and eleven years, and the chancellor considered it probable that there were no such mines. The existence of such reservation was therefore *held*, no excuse for the purchaser to refuse to take the title of the vendor. *Lyddal* v. *Weston*, 2 Atk. 19.

In such case a moral certainty of there being nothing which may be feared from the reservation is sufficient without demonstration. Id.

8. Minerals found reserved—Title defective—Time for rescission. Upon a sale of freehold land described as containing valuable limestone and freestone, one of the conditions provided that the purchaser should be considered to have accepted the title, unless he should within a certain time deliver to the vendor some valid objection to the title, and that if any objection or requisition should be delivered and persisted in, the vendor might rescind the contract; and another condition provided that if any mistake should appear to have been made in the description of the property or the vendor's interest therein, it should not vitiate the sale but compensation should be given. The vendor's title-deeds contained a reservation to the lord of the manor of the right to the mines and minerals under part of the property; but the vendor asserted that by the custom of the manor, the lord's right did not extend to limestone and freestone and that there were no other minerals under the property. The purchaser having claimed compensation, the vendor rescinded the contract: *Held*, that the purchaser's objection involved a question of title between the vendor and the lord of the manor, and that the vendor was entitled to rescind the contract, and a bill by the purchaser for specific performance with compensation was dismissed. *Mawson* v. *Fletcher*, L. R. 6 Ch. app. 91; affirming S. C., L. R. 10 Eq. 212.

9. Time. A., on the fourth of October, contracted to grant a mining lease to B., and no time was mentioned for completion. On the tenth of December, B. gave notice to A. that unless he completed the contract within a month he would rescind the contract: *Held*, on A.'s default, that B. was justified in giving the notice, that the time was reasonable, and a bill by A. for specific performance was dismissed with costs, although there were matters essential for the completion which did not depend on A., but on third parties. *Macbryde* v. *Weekes*, 22 Beav. 533.

10. Delay resulting in loss. Bill for the specific performance of an agreement to take a lease for forty-two years, of iron and coal mines and machinery for the purpose of trade, dismissed on account of delay on the part of the lessor in making out his title and in giving possession at the time stipulated in the agreement, to the extent of defeating the benefit of the purchase. *Parker* v. *Frith*, 1 Sim. & Stu. 199.

11. Laches—Iron Mountain. Bill for specific performance praying conveyance of one-seventh of the "Iron Mountain tract," Missouri, an account of ores, etc.; dismissed on the ground of non-performance by complainant, laches, etc.; but without any distinction as to the law with reference to the property as a developed mine except incidentally. *Boone* v. *Missouri Iron Co.*, 17 How. 341.

12. Sudden rise in value—Oil discovered. A contract fair at the time when made will be specifically enforced notwithstanding unforeseen circumstances, as the

sudden discovery of oil in great quantity, have immensely enhanced its value since the agreement was made. *Cady* v. *Gale*, 5 W. Va. 547.

Delay—Award. W. agreed with the owners of a colliery to take a lease of the same, the terms of which were to be settled by the award of two persons, who were named as arbitrators. The award was made on the thirteenth of April, 1848, and on the tenth of June it was first brought to the knowledge of W. who, on the eighth of August, objected to its validity, but offered to enter into an arrangement. Subsequently the agents of both parties went down into the mines, with a view to revalue them, for the purpose of the arrangement: W., who was in possession of the mines before the date of the reference, worked them until February, 1849, when he abandoned them. In 1852 the lessors filed their bill for specific performance of the agreement. *Held*, upon appeal, reversing the decree below, that the delay of the plaintiffs was a bar to the special relief sought, but that they were entitled to an account of coal raised by W. *Eads* v. *Williams*, 24 L. J. Ch. 531.

Proof—Indefinite contract—Tenant in common—Moiety. One of two tenants in common in fee, of lands containing mines of coal and iron, entered into a negotiation for the lease of minerals, and wrote a letter stating his willingness to grant a lease on the terms of a paper referred to in the letter. There were two papers, each of which in some respects answered the description in the letter. One of these purported to be terms for letting and taking coals, "etc.," under the lands in question, but contained no more definite description of the minerals which were the subject of it. In a suit by the proposed lessee, for specific performance as to the moiety belonging to the tenant in common, who had written the letter; *Held*, that the paper to which the letter referred was not sufficiently identified; 2. That even if as the plaintiff contended, it was shown to be the above paper, its terms were too indefinite to be capable of being enforced specifically; 3. That the contract being for a lease of the entirety, and the defendant not having been shown to have made any misrepresentation as to his title, or otherwise, it could not be enforced against him, as to one moiety only: *Price* v. *Griffith*, 1 De G., M. & G. 80.

15. Misrepresentations as to Vein. Misrepresentations by a vendor of an occult quality, in land, *e. g.*, as to the presence nature, and quality of a vein of iron ore, although such misrepresentation be made in ignorance of the truth, and although the vendee agrees to run the risk of this, is, in an action for specific performance of the contract for sale, a decisive objection to the plaintiff's recovery. *Fisher* v. *Worrall*, 5 Watts & S. 478.

16. Collusion with strikers. When upon contract (relating to a marble-quarry), reserving right of entry upon failure of vendee to supply stone, the vendor, by collusion with strikers, makes an unconscionable entry upon the premises in the absence of any fact justifying any sort of entry, it is such an act as to forfeit all his right to claim specific performance of any part of the contract. *Rutland Marble Co.* v. *Ripley*, 10 Wall, 339.

17. Non-communication of facts. The plaintiff had worked the coal under his estate but abandoned it as unprofitable. Twenty years afterwards the defendant cleared the pit and examined the coal in the shaft with other persons, and subsequently contracted for a lease. The colliery turned out to be worthless: *Held*, that the defendant could not resist a specific performance, on the ground of the plaintiff not having communicated the fact of his having worked the mine and found it unprofitable. *Haywood* v. *Cope*, 25 Beav. 140.

18. Secret mining before purchase. The owners of a colliery entered into a contract with an adjoining land owner for the purchase of his estate without disclosing the fact of which he was ignorant, that they had without authority gotten a considerable quantity of coal from under it: *Held*, that the court would not enforce the contract at the suit of the purchasers, though the sale was not shown to be at an undervalue. *Fothergill* v. *Phillips*, L. R. 6 Ch. 770.

19. Ignorance of Mining. A person contracting for the lease of a mine cannot resist its performance on the ground of his ignorance of mining matters and of the mine turning out worthless. *Haywood* v. *Cope*, 25 Beav. 140.

20. Coal taken—Purchase-money. Upon bill for specific performance of an agreement for the purchase of a colliery, the answer admitting the substance of the bargain and the possession of the vendee and his working the coal bed, and so destroying the estate, defendant ordered to pay installments due, before final decree or the execution of a conveyance. *Buck* v. *Lodge*, 18 Ves. Jr. 450.

21. Prospecting contract. On a bill filed for specific performance (of a contract to sell a mineral vein to the discoverer) if the contract be in writing, is fair and just in all its parts, is certain and for an adequate consideration, and capable of being performed, it is as much a matter of course for

a court of equity to decree a specific performance, as it is for a court of law to give damages for breach of it; and it was error in the judge to refuse to charge this as the law, in a case where the contract was in writing and in a case where under the evidence it was competent for the jury to have found the contract fair, just, certain, and for an adequate consideration, and capable of being performed. Warner, Chief Justice, dissented. *North Georgia M. Co.* v. *Latimer*, 51 Geo. 47.

22. Prospecting contract—Discovery claim. Welland, Gross and Koch in 1871 entered into a verbal prospecting contract with Huber; they agreed to furnish money, a horse and provisions, and Huber agreed to prospect for deposits, one equal fourth of which should belong to each party; they complied with their agreement, and Huber prospected for and discovered the Huber ledge, on which he located 1000 feet, 400 feet in his own name, and 200 feet in the name of each of his associates, styled copartners in the opinion. Koch afterwards sold out his entire interest in the claim, and Welland and Gross sold each his 200 feet to Huber, their associate, the defendant: *Held*, that the plaintiffs, Welland and Gross, were entitled to a specific performance by conveyance from Huber of their interest in the 400 feet located in the name of Huber. *Welland* v. *Huber*, 8 Nev. 203.

23. Contract requiring continuous performance — Way — Steam power — Award—Estoppel. By an award made in June, 1863, under a reference at *nisi prius* the arbitrator awarded that the defendant, the owner of a colliery, should execute to the plaintiff a lease of the right to use such part of a certain railway made by the plaintiff as was upon the land of the defendant, the lease to be in the words set out in the award, and that the defendant should have a right of running carriages over the whole line on certain terms, and might require the plaintiff to supply engine power while the plaintiff should have an engine on the railway; and that the plaintiff should during the term keep the whole railway in good repair. The lease did not provide for these privileges awarded to the defendant. The plaintiff applied at law to set aside the award, and ultimately, in April, 1864, the application was refused. In July, 1864, the plaintiff filed his bill for specific performance of the award: *Held*, that specific performance could not be decreed, inasmuch as the provisions in favor of the defendant could not be enforced at once, but gave the defendant a right to have certain duties continuously performed by the plaintiff for a number of years, and the court could not undertake to see to such performance: *Semble*, that even if the award had been one of which specific performance could have been decreed, the plaintiff could not, after taking proceedings to set it aside, have enforced specific performance. *Blackett* v. *Bates*, L. R. 1 Ch. 117.

24. Construction — Laches — Special value of particular Coal Mine to particular Iron Works. Bill by a company for smelting and manufacturing iron, against proprietors of coal mines adjoining their works, for specific performance of an agreement to sell to the company, at a fixed price per ton, all of certain beds of coal, estimated to contain from 120,000 to 150,000 tons, to be raised and delivered by defendants at the rate of 500 tons per week, and the company to drain the beds; and for an injunction to restrain defendants from selling any part to other persons. The bill averred that the coal was very conveniently situated with reference to the company's iron works, which adjoined thereto; and that the company had the power, by means of their engines and pits, to drain the beds, and had occasion for a large quantity of coal of that particular description. Demurrer allowed: 1. On account of laches in delay of eleven months after performance refused, the contract having reference to a commodity of fluctuating value as to which unusual vigilance is expected from parties seeking specific performance; 2. Such a contract is a positive contract, and does not give jurisdiction to restrain sale to other parties. *Pollard* v. *Clayton*, 1 Kay and J. 462.

Leave to amend and account for laches refused on the ground that a court of equity could not interfere to see to the execution of a contract of that character, due in installments and requiring peculiar supervision, and the benefit to be derived from the particular location of the beds relative to the iron works not of itself being sufficient ground for specific performance. Id.

25. Contract to cancel shares. A valid agreement between a company and a shareholder for the cancellation of shares when the shareholder has performed his part of the contract will be specifically enforced, and the shareholder's name struck from the list of present contributors, proceedings having been commenced to wind up the company. *Marshall* v. *Glamorgan I. C. Co.*, L. R. 7 Eq. 129.

26. Stock. Where stock is of a peculiar and uncertain value, and where compensation in damages will not afford a party a full and adequate remedy, a court of equity will decree a specific performance. In this state courts of equity will decree a specific performance of contracts for the transfer of mining stocks, owing to their fluctuating and uncertain value in market, and the

difficulty of substantiating, by competent evidence, what would be a proper measure of damages. *Treasurer* v. *Commercial C. M. Co.*, 23 Cal. 391.

27. Stock—Vendor's title—Practice. To a vendor's bill for specific performance of a contract to purchase shares in mines, insisting that the plaintiff was not bound to give other evidence of his title to the shares than attested extracts from the cost books, or registers of the mines, and that the defendant had refused to accept such evidence, but not alleging that the plaintiff was unable to give other evidence of his title, the defendant demurred: *Held*, that, as the plaintiff was not precluded from giving other evidence of his title, if necessary, the demurrer must be overruled. *Curling* v. *Flight*, 5 Hare, 244. See S. C. 6; Id. 41; 2 Phillips, 614.

28. Lease—Fault taken as dividing line—Possession. The owners of land agreed to demise to A. the minerals under it to the west of a certain fault, supposed to run through the land in the direction of a line, drawn on a certain plan, the quantity of the land being described, as supposed to be eighty-three acres, or thereabouts. The owners made a similiar agreement with B. as to the minerals under the land to the east of the fault, supposed to contain ninety-eight acres, or thereabouts. The fault was afterwards found to run so as to leave on the west eight acres only: *Held*, on a bill filed by B. to restrain A. from working coal to the east of the fault; that the court would not, in a suit by B. for specific performance against the owners, have decreed a demise of all the minerals to the east of the fault, and that he could not be deemed in constructive possession so as to maintain his suit against A. *Davis* v. *Shephard*, L. R. 1 Ch. App. 410.

29. Lease—Work Abandoned—Delay. In March, 1850, the defendant agreed to grant the plaintiff a lease of a coal mine. Three months after the defendant gave notice to the plaintiff that unless he commenced working in a month he should consider the agreement abandoned. Two years after the plaintiff entered and commenced working, but was resisted by the defendant; the working, however, proceeded, but was abandoned in February, 1853. Five years afterwards the plaintiff attempted to resume the work and filed a bill for specific performance. It was dismissed with costs on the ground of delay. *Sharp* v. *Wright*, 28 Beav. 150.

30. Lease—Trial of land—Undefined area—Security to lessor. The plaintiff, by letter, offered to work the iron stone lying under the lands of the defendant, at P. and to pay a fixed rent and a royalty. The land steward, by letter, accepted the offer, and agreed to grant a lease for twenty-one years, if after a year's trial, it was asked for. The plaintiff applied for the lease, but he refused to give any security that the undertaking would be carried out and the covenants in the lease observed, or to join any responsible person with him in the undertaking. The land steward, accordingly, declined to proceed with the lease, or to assign the area over which the ironstone was to be worked. Upon a bill for the specific performance of the agreement: *Held*, that the agreement was indefinite, that the land-steward in the absence of assurance that the understanding would be carried out, and the covenants in the lease observed, was not bound to assign the area for the mineral workings; and the bill was dismissed, but under the circumstances without costs; 2. Also, that the plaintiff, having stipulated for a trial year without rent, with liberty to abandon the working, was not entitled under the 21 and 22 Vict. c. 27, to damages for his outlay: *Lancaster* v. *De Trafford*, 31 L. J. Ch. 554.

31. Purchaser holding lease as well as agreement—Payment into court. The purchasers of a mining property, subject to leases, were in possession of part as lessees, and a part under an agreement with the lessees, and were working and disposing of the minerals, but they had paid no rent since the time when, according to the agreement, possession was to be given. Upon motion, after answer, in a suit for specific performance by the vendors, for payment into court of the balance of the purchase-money; *Held*, that the defendants could only be required to pay into court the rent in arrear. *Robertshaw* v. *Bray*, 35 L. J. Ch. 844.

32. Sufficient description—Lease of coal veins. A., by contract in writing, agreed with B. to take a lease of those seams of coal, known as the two feet coal, and the three feet coal lying under lands, hereafter to be defined in the Bank End Estate, and B. agreed to let to A. "the aforementioned seam of coal:" *Held*, that the contract was sufficiently definite to enforce, and that the true construction of it was that the boundaries of the estate which consisted of about twenty-seven acres, were to be thereafter defined: *Haywood* v. *Cope*, 25 Beav. 140.

33. License—Assignment—Fiduciary relation. A. being the owner of a tract of land supposed to contain minerals, on January 21, 1839, by a written instrument, granted liberty to B. to dig or mine on such land, and to carry away any mineral which he might dig thereon within one year, and

B., on May 11, 1839, by a writing signed by him on the back of such instrument assigned to C. all his interest, right and privilege in the land therein mentioned, with the appurtenances and all the benefit and advantage derivable from such instrument; after which B. brought a bill in chancery against A. and others, for a specific performance of the agreement: *Held*, 1. That the agreement was not of a fiduciary character or in the nature of a personal confidence so as to be incapable of assignment; 2. That the interest of B. was not of that uncertain and contingent description that it could not on that account be transferred, and consequently, B. having parted with all his interest in the subject of the bill, it ought for that reason to be dismissed. *Gaston* v. *Plum*, 14 Conn. 344.

84. Parties. A person to whom a portion of the purchase-money has been assigned, is a proper party defendant to a bill to compel the purchaser to a bill for specific performance of a contract for sale of oil-land. *Davis* v. *Henry*, 4 W. Va. 571.

85. Parties—Escrow. A person holding a deed in escrow (oil property) is a proper party defendant in a suit for specific performance. *Davis* v. *Henry*, 4 W. Va. 571.

86. Seeking benefit of discovery made by others. In a contract to lease a mine for twelve months, in order to encourage search for minerals, it was agreed that the lessor should make a good title to the lessees of one half the minerals discovered. The lessees lay by and allowed other parties, claiming a right so to do, to make explorations, resulting in the discovery "of a valuable and rich copper mine," which added greatly to the value of the property, and, further, it did not appear that such lessees were either able or ready to do the necessary work, although in their bill for specific performance they alleged that such discovery had been made "at the very point at which they intended to commence work:" *Held*, that they were not entitled to a specific performance. *Cabe* v. *Dixon*, 4 Jones Eq. (N. C.) 436.

87. Contract giving partner the refusal of co-partner's interest. By agreement Smith was to furnish funds to purchase sundry tracts of land containing plumbago, and convey an interest to Weisman, under a contract of partnership, one of the terms of which was, that neither should convey his interest without allowing his co-tenant and partner the refusal or first opportunity of purchase. After some years Weisman, with Smith's consent, sold half his interest in the mines to a third party. After one or more transfers this third party's interest was represented by a company, formed to work the mines. Weisman then filed a bill stating tender under the refusal clause, and seeking a conveyance of the entire premises from the then various owners: *Held*, that it might be doubted whether in any case a specific performance would be decreed on a contract tending to monopoly; but that the sale of an interest by consent of all parties to a third party since the making of the contract without provision for the partner's right of pre-emption, justified the inference that such right of pre-emption was not further to be insisted upon. *Weisman* v. *Smith*, 6 Jones Eq. (N. C.) 124.

88. Gold discovered after contract made. Discovery of gold on premises under executory contract of sale is an accession to the value of the estate of the purchaser. It will not defeat specific performance, even after delayed payments, where the delay has been acquiesced in. *Falls* v. *Carpenter*, 1 Dev. & Bat. Eq. 265 (N. C.)

SPRINGS.

1. Drained by mine. An owner of land who, in mining iron ore upon it, drains water from land of an adjoining owner, thereby destroying a spring upon it, is not liable in damages therefor if there be no evidence of malice or negligence. *Hackleman* v. *Bruckhart*, 45 Pa. St. 514; B. & W., L. C. 784.

A land owner may not negligently or maliciously divert even an unknown subterranean stream to the damage of a lower proprietor, but he may mine or quarry, though in so doing he interferes with the flow of water in hidden, unknown underground channels. Id.

The loss of springs to the owner of the surface by reason of the ordinary working of the mines, does not render the owner of the minerals liable for damages. *Coleman* v. *Chadwick*, 80 Pa. St. 81; *Chadwick* v. *Coleman*, Id.

2. Drained by lessee of the mines. The fact that a lessee of mines drains a "wet weather" spring is not important. "Were it otherwise, if its destruction was a necessary incident of mining under the lease, it would be *damnum absque injuria*." *Trout* v. *McDonald*, 83 Pa. St. 126.

3. Drained by quarry. The maxim *sic utere tuo ut alienum non lædas* does not apply to the case of opening a quarry whereby the underground sources of a spring or small stream upon lands of adjoining owner are partially cut off. *Ellis* v. *Duncan*, 21 Barb. 230; 11 How. Pr. 515, affirmed in ct. of app. 26 How. Pr. 601.

4. Injury to spring. The owner has a

right to open or work a quarry upon his own land, although the opening or working of such quarry result in draining or cutting off the supply of water in a spring situate upon adjoining lands. *Ellis* v. *Duncan*, 21 Barb. 230.

See MINERAL SPRINGS.

STAMPS.

1. Gold-dust contract. A county recorder is not authorized to determine the value of gold-dust described in a mortgage which is presented to him for record, and cannot know what stamp shall be affixed thereto before he records it. *Griffith* v. *Hershfield*, 1 Mon. 66.

2. Cost-book transfer. A transfer of shares in a cost-book mine need not be stamped. *Walker* v. *Bartlett*, 18 C. B. 844; S. C., 17 Id. 446.

3. Deed—United States revenue act. Where a party, while the acts of congress requiring conveyances to be stamped were in force, made a conveyance without affixing a stamp thereto; and the grantee in such unstamped conveyance conveyed, subsequently by deed duly stamped, and in all respects valid; the grantee under such latter deed properly stamped, takes the title unaffected by the failure to stamp the prior deed. *Kinney* v. *Con. Virginia M. Co.*, 4 Saw. 383.

STANNARIES.

1. Jurisdiction. The jurisdiction conferred by the thirty-fifth section of the company's act, 1862, to rectify the register of companies within the district of the stannaries does not exclude the jurisdiction of the superior courts of common law and equity for the same purpose. *In re Penhale M. Co.* L. R. 2 Ch. 398.

Where a company has been established for working mines within the district of the stannaries, the fact that some of the objects of the company are to be carried out beyond the district does not exempt the company from the jurisdiction of the stannaries court. Id.

Cases going to the jurisdiction of the court of the vice warden of the stannaries, cited in the case of *Vice* v. *Thomas*, and collected in appendix to Smirke's Report of the same, *Oppy* v. *De Dunstantville*, p. 38; *Hall* v. *Vivian*, p. 37; *Glanville* v. *Courtney*, p. 45.

The stannary court is a court of law, and it seems not a court of equity. In any event, if its jurisdiction is pleaded to oust the jurisdiction of a court of chancery, it must be pleaded specially. *Trelawny* v. *Williams*, 2 Vernon, 483.

Defendant having a tin-set in the plaintiff's land was by agreement to have the ore set out in eight heaps, upon the grass, a barrow full to each heap, and so round again, and then plaintiff, owner of the land, was to take his heap by lot. Defendant had put seven barrows to one heap, and the owner's eighth to another heap, insisting he had plaintiff's leave. Plaintiff insisted that the barrows which went to his heap were not as full as the others, and denied the leave claimed. Account decreed in chancery, and the sole jurisdiction of the stannary court not admitted. Id.

2. Equity jurisdiction—Legal remedy. The existence of an original court of equity of the vice-warden of stannaries, of Cornwall, can not be questioned since 6 and 7 Wm. 4, c. 106; but, in absence of conclusive precedents or solemn decisions to the contrary, the jurisdiction must conform to the first principles of equity, as administered in the high court of chancery. Therefore, in a case where ejectment lies for a mine, a petition to the vice-warden, for delivery of possession to the plaintiff, without alleging any impediment to a recovery in a court of law, is bad on demurrer. Nor will a petition lie for an account of mesne profits, merely because the subject is a mine, where it is not shown that any difficulty exists in taking the account, or that such account may not be taken as conveniently at law as in equity. *Vice* v. *Thomas*, 4 Y. & C. 538; Smirke's Rep. 1.

3. "Engaged in mining"—Jurisdiction. A company, established for working mines in Cornwall, was registered in the stannaries court, but had its registered office in London. It never commenced business, and never possessed or worked any mine: *Held*, under the 25 and 26 Vict. c. 89, s. 81, that it was a company engaged in working a mine in the stannaries, and that the stannaries court, and not the court of chancery, was the proper jurisdiction for winding it up. *In re East Botallack C. M. Co.*, 34 Beav. 82.

4. Practice—Jurisdiction. The leave of the court, required by 20 and 21 Vict. c. 78, s. 12, may be granted on the ground that the stannaries court has no jurisdiction to stay proceedings by creditors against individual shareholders. *In re South Lady Bertha M. Co.*, 2 Johns. & H. 376.

5. Smelting, etc., Co.—Jurisdiction. A company, established for the purpose of acquiring and working mines in Cornwall, and carrying on the business of a smelting and refining company, and, as auxiliary thereto, the purchase and erection of buildings, jetties, piers, railways, etc., and the

freighting of vessels, is subject to the jurisdiction of the court of the stannaries. *In re Penhale M. Co.*, 2 L. R. Ch. 398; 36 L. J. Ch. 515.

6. Privilege of the stannaries—County court's act. By charter of 33 Edw. 1 (confirming the common law), working tinners within the stannaries of Cornwall have the privilege of being sued only in the court of the vice-warden of the stannaries in certain causes there mentioned; and the same charter also contains a grant that the warden or vice-warden may hold pleas between the persons, and in the causes there specified. By the county court's act "no privilege (except as therein excepted) shall be allowed to any person to exempt him from the jurisdiction of the county court;" and by section 141, "nothing in the act contained shall be construed to affect the courts of the lord or vice-warden of the stannaries in Cornwall; but this provision shall not be deemed to prevent the establishment of any court under this act within the said stannaries, or to limit or affect the jurisdiction of any court so established:" *Held*, that the effect of these enactments was to take away the personal privilege of the tinner to plead to the jurisdiction of the county court; but to preserve to the court of the vice-warden of the stannaries a concurrent jurisdiction in cases which were cognizable by him under the charter. *Newton* v. *Nancarrow*, 15 Q. B. 144; 19 L. J. Q. B. 314.

7. Customs, etc. Ancient charters, customs and records of the stannaries: *Vice* v. *Thomas*, Smirke's R., App. 1.

8. Mine courts, Somersetshire. Bill for an account of the profits of Mendip mines. Plea of special jurisdiction overruled, it not appearing that the special jurisdiction extended to equitable relief. *Strode* v. *Little*, 1 Vern. 59.

9. Jurisdiction—Prohibition. The jurisdiction of the stannaries is only for tin matters, and where the persons who sue, or one of them, is a tinner; and where they proceed beyond their jurisdiction a writ of prohibition may issue from the king's court. *Adams' Case*, Cro. Car. 333; Rol. 114, and see 1 Roll. 265, 2 Id. 44, 253.

See TIN BOUNDS.

STATE BOUNTY.

1. North Carolina act. Where a grant of 3000 acres of land was made as a bounty under the act of 1788, entitled "an act concerning iron and gold mines" in respect to a particular seat for iron-works, it was *held* that such grant was appendant to the seat, and exhausted the bounty intended by the state; so that one who afterwards became owner of the seat, and rebuilt the works after the original works had gone down and were abandoned, had no rights under the act and a second grant of another tract of 3000 acres was void. *Attorney General* v. *Osborn*, 6 Jones Eq. (N. C.) 298.

STATUTE.

1. Penal legislation as to accidents—Void act. An act of parliament (18 and 19 Vic. 108) provides that the owner of a coal mine in case of accident resulting in serious personal injury or in loss of life, shall within twenty-four hours after such loss of life send notice to the inspector of the district, or be subject to a penalty: *Held*, that the court could not interpolate words in the act so as to make it operative in cases of personal injury, and could not therefore cure the obvious omission in the act. *Underhill* v. *Longridge*, 29 L. J. C. C. 65.

STATUTE OF FRAUDS.

1. Parol conveyance of claim. The right to mining ground acquired by appropriation rests upon possession only, and rights of this character not amounting to an interest in the land are not within the statute of frauds, and no conveyance other than a transfer of possession is necessary to pass them. *Table Mountain T. Co.* v. *Stranahan*, 20 Cal. 198; *Gatewood* v. *McLaughlin*, 23 Cal. 178.

2. Grant of right to get ore—Parol License. The right to dig and carry away ore from the mine of another is an incorporeal hereditament or easement, and any contract for the sale of such a right to be binding in law, under the statute of frauds, must be in writing. *Riddle* v. *Brown*, 20 Ala. 412.

A verbal contract conferring such right, though not binding under the statute of frauds, will nevertheless operate as a parol license, and while unrevoked, will protect the person to whom it was given from trespass *quare clausum fregit*, for digging ore, and vest in him the property in the ore that is actually dug under it. Id.

Such a verbal license given by A. to B., and by B. afterwards transferred to C., will not justify C. in entering by force the inclosure of A. in which the bank or mine of ore is situated, A. being at the time the owner of the freehold and warning C. not to attempt to enter. C. in such a case becomes himself a trespasser and he may be repelled by A. with all the force necessary to protect his possession. Id.

3. License — Compensation. Under a parol license to work upon and prove mineral land for a share of the minerals raised, where the occupant has made expenditures in sinking a shaft and running drifts, the license cannot be revoked without refunding the expenditure or giving the party at least six months' notice. And although such parol license is within the statute of frauds, still when connected with such improvements to prove the ground, it is voidable only upon such compensation or notice. *Bush* v. *Sullivan*, 3 Green (Iowa), 344.

4. License proved by licensor's evidence. A parol license to dig for and remove mineral under which the licensee enters into possession, and established by the testimony of the licensor, is valid within the meaning of the statute of frauds. *Anderson* v. *Simpson*, 21 Iowa, 399.

5. License—Possession. A parol license to mine must be accompanied by possession to exempt it from the operation of the statute of frauds. *Anderson* v. *Simpson*, 21 Iowa, 399.

6. Insufficient memorandum. A memorandum in these words: "Sold 100 'Mining Purdy's' at 17s. 6d. J. Green," is not a sufficient note in writing within the statute of frauds, the name of both parties to the contract not being mentioned in it, these shares having been held to be interests in lands. A second paper, containing the names of both parties, having been sent by the defendant to the plaintiff a few days after: *Held*, not admissible in aid of the former, inasmuch as the former writing did not refer to it, and because (in this instance) there was a variance between the papers. *Boyce* v. *Green*, 1 Batty, 608.

7. Contract collateral to deed. When a deed to real estate has been executed, or title in any other way passed, subsequent agreements between vendor and vendee as to the pecuniary liabilities growing out of the transaction, which do not take away or confer any interest in the land, but only determine the time when the purchase-money becomes due, are not affected by the statute of frauds. *Negley* v. *Jeffers*, 28 Ohio St. 90.

The same as to waiver of conditions precedent. Id.

8. Part Performance—Acquiescence in the reservation of minerals. Defendant agreed by parol to sell to plaintiff certain wild, uncultivated land several miles distant from a highway. He delivered to plaintiff's agent a deed, who then paid the whole consideration. Plaintiff, on examining the deed, discovered that the consideration was not truly expressed, and that certain reservations were made not authorized by the agreement (mines, minerals, and a logging right); he therefore returned it to defendant, who agreed to have it corrected and returned. Plaintiff cut a road from the land to the highway, made roads on the land, underbrushed it, cut up fallen trees preparatory to clearing about a quarter of an acre, erected a brush shanty, drew from the lot wood and timber, and paid the taxes. In an action to compel a specific performance of the agreement: *Held*, that this was a sufficient part performance to take the case out of the statute of frauds. *Miller* v. *Ball*, 64 N. Y. 286.

9. Estoppel, improvements and expenditures. When a party entered upon mining land in consequence of the parol promise of the owner to exchange for other land, and made improvements, with the knowledge of the owner, the latter cannot take advantage of the want of a contract that would bind him to convey the land. *Big Mountain Co.'s App.*, 54 Pa. St. 361.

10. Sand contract. The following agreement, "Hudson city, January 1, 1868. $650. Contract. I to-day made the agreement with Edward O'Donnell to let him take the sand out of the pit, fifty feet wide, the entire length, for the sum of $650, and give him one year's time to take it out, from the date above." (Signed) "Edward Brehen, jr.": *Held*, an agreement "for the sale of an interest in lands," and void as against O'Donnell under the statute of frauds, because not signed by him. *O'Donnell* v. *Brehen*, 36 N. J. L. 257.

11. Partnership agreement — Sublease. An agreement between A., a lessee of a mine, and B. to become partners in the mine, paying the reserved rent, subletting the mine at a royalty, and dividing the profits: *Held*, to be within the statute of frauds, as an agreement relating to the purchase of lands, and not sufficiently proved by a receipt signed by A. and given to B. for a sum as B.'s share of the head of the rent of the mine, the sum being exactly half of that rent. *Caddick* v. *Skidmore*, 2 DeG. & J. 52.

12. Ditch completed under promise by mortgagee. E. contracted to build an extension to a ditch upon which a mortgage existed. After work commenced, the holder of the mortgage instituted a foreclosure suit, whereupon E. refused to complete the extension. The holder of the mortgage then verbally promised E. that he should be paid out of the receipts for the sale of water by the receiver, E. having originally agreed to be paid out of the proceeds of sales. Under this promise E. completed his work: *Held*, that the contract was within the statute of frauds, as a

promise to pay the debt of another. *Ellison* v. *Jackson W. Co.*, 12 Cal. 543.

13. Stock contract. A contract to sell and deliver at a future day 100 shares of mining stock for the sum of $1,350, is void under the statute of frauds, if no part of the stock is delivered and no portion of the purchase-money is paid, and no note or memorandum of the sale or transaction is made or signed by the parties. *Mayer* v. *Child*, 47 Cal. 142.

14. Corporate debt—Promise by stockholder. Where goods are sold, and credit given to a corporation, an officer and stockholder cannot be held personally liable for the debts thus created, upon a promise to pay or see them paid, unless such promise be in writing. *Searight* v. *Payne*, 2 Tenn. Ch. 175.

15. Cost-book shares—Interest in Land. Shares in a mine worked on the cost-book principle do not constitute an "interest in land," within the fourth section of the statute of frauds, in the absence of evidence that the shareholders take a direct interest in the freehold. *Powell* v. *Jessopp*, 118 C. B. 335.

16. Promise to pay miners' board. The promise of a mining company to pay for board of its miners, the company controlling the fund out of which it was to be paid, is not a collateral but a primary contract, and is not within the statute of frauds. *Chicago Co.* v. *Liddell*, 69 Ill. 639.

No time being specified such a contract may be determined by notice. Refusal to pay the board agreed to be paid will not of itself destroy the contract, and the company may be liable for board furnished after such refusal of payment. Id.

17. Assignment of dower. As dower is not created but only ascertained by an assignment, it may be assigned by parol, and livery of seisin is not required. The statute of frauds, therefore, does not apply to such assignment. *Lenfers* v. *Henke*, 73 Ill. 405.

18. Principal and agent. The statute requiring contracts for the sale or leasing of mines to be in writing does not apply to an agreement between principal and agent, by which the agent agrees to procure a lease for his principal. *Hargrave* v. *King*, 5 Iredell, Eq. (N. C.) 430.

19. Sale by transfer of receiver's receipt. Bean delivered his receiver's receipt for an eighty-acre tract, indorsed as below stated, to Keemle, telling him to sell the land to J. & V. Valle for one hundred dollars if he could get it. J. & V. Valle agreed to take the land, paid the sum stated, and Keemle delivered to them the receiver's receipt with the indorsement "transferred to Valle, Janis & Valle," signed "J. S. Bean." The purchase money was paid to Bean by Keemle, who expressed himself well satisfied; the purchaser was put in possession, and in a short time developed valuable lead diggings: *Held*, that the contract was not within the statute of frauds, and specific performance was decreed. *Bean* v. *Valle*, 2 Mo. 127.

20. Contract supplanted by fraud of third party. Reaves entered into a parol contract with Lea, the plaintiff, for the leasing of a moiety of a copper mine for the term of three years, with the privilege of purchase, and in order to enable him to secure the other moiety so that he could lease and dispose of the whole by one set of conveyances, the arrangement was not at the time put in writing, but was to be put in writing in three weeks' time. During this period one McKenzie was informed by Lea of the bargain, whereupon McKenzie stated to Reaves that Lea and his associates had abandoned the project, and that Lea was then, in fact, leaving the state. Upon the faith of these representations, which were false, Reaves, at McKenzie's solicitation, conveyed the premises to him. To the bill filed by Lea against McKenzie for a conveyance of the property to him, for an accounting, etc., the defendant demurred: *Held*, that the original contract being void under the statute of frauds, and not enforceable against Reaves, it could not be enforced against his assignees, although they had become such assignees by fraud upon the plaintiff.* *Lea* v. *McKenzie*, 3 Jones Eq. (N. C.) 232.

For contrary holding on similar case, see *Falls* v. *Carpenter*, 1 Dev. & Bat. Eq. (N. C.) 271.

STATUTE OF LIMITATIONS.

1. Adverse possession by mining. Mining treated incidentally as good to sustain adverse possession under the statute of limitations. *McEwen* v. *Bulkley*, 24 How. 242, *Kille* v. *Ege*, 79 Pa. St. 15.

Same as to possession under Pennsylvania improvement laws. *Adams* v. *Jackson*, 4 Watts. and S. 58.

Same as to both copyhold and freehold estates. *Curtis* v. *Daniel*, 10 East, 273.

2. Adverse holder may quiet title. A bill to quiet title will lie in favor of the occupant of a mining claim whose title accrues by adverse possession under the statute of limitations against the holders of the

* The decision cites no authorities, and does not refer to the maxim that "no man shall profit by his own wrong."

patented title. *420 Mining Co.* v. *Bullion M. Co.*, 3 Saw. 634.

3. Adverse holding after severance. More than seven years' notorious peaceable and adverse use and occupation of gold mines, where the party has gone into possession of land under deed, will give a statutory right, notwithstanding the vendor has reserved the exclusive privilege of working said mines. *House* v. *Palmer*, 9 Ga. 497.

4. Adverse possession after severance-entry. Possession of the surface for more than twenty-one years does not carry with it the possession of the coal below it, where the title to the mineral right has been severed from that surface by deed. *Caldwell* v. *Copeland*, 37 Pa. St. 427.

Title to mines, distinct from title to the surface, may be shown by documentary evidence, or, in the absence of such evidence, or in opposition to it, by proof of possession and acts of ownership under the statute of limitations. Id.

When the owner of the surface seeks to establish title to a mine by adverse possession under the statute of limitations, in opposition to his deed, he must prove possession of the mine as such, independently of his possession of the surface, or there can be no question of adverse holding to submit to the jury. Id.

An entry, to exercise the privilege of mining coal, granted by deed, must be made or authorized by some person having rights under it, in order to toll the running of the statute of limitations. Id.

5. Adverse claim. The act of congress of 1872, in relation to the location of mining claims and the determination of the right thereto, in case of conflict (sec. 7), does not prevent the application of the state statute of limitations. *420 M. Co.* v. *Bullion M. Co.*, 9 Nev. 240.

The act of congress of 1872, in relation to mining claims and the determination of the right between claim and adverse claim, R. S. s. 2326, does not prevent the running of the state statute of limitations; on the contrary, an actual exclusive and uninterrupted adverse possession for the statutory period constitutes a complete bar. Id.

6. Wisconsin — Continuous occupancy—Tenant in common. Whether mining, even if continuous, would constitute adverse possession under the statute of Wisconsin, doubted. *Sydnor* v. *Palmer*, 29 Wisc. 226; *Stephenson* v. *Wilson*, 37 Wisc. 482.

Proof of working mines by tenants, from time to time, with the personal residence of the tenants on the surface ground while tenants, and running a pump a considerable portion of the time, does not show a continual occupancy. Id.

When one tenant in common seeks to hold adversely against his co-tenants under an invalid or merely colorable title, he must show knowledge of such adverse claim or of his intention so to hold, in his co-tenants, for from that time only will his possession become adverse. Id.

7. Spring—20 years' enjoyment. After twenty years' uninterrupted enjoyment of a spring of water an absolute right is gained to it by the occupant of the closes in which it issues above ground, and the owner of an adjoining close cannot lawfully dig a ditch for the purpose of draining his quarry, if he thereby diminishes the supply of water to the spring. *Balston* v. *Bensted*, 1 Camp. 463.

8. Title in the U. S. The statute of limitations cannot begin to run while the title to the land remains in the United States. *Union M. Co.* v. *Ferris*, 2 Saw. 176.

9. Title in the State. When the title to certain school lands had been held by the state of Ohio, in trust, during the period in which defendant had trespassed thereon by taking iron ore, and the state had afterwards authorized civil suits relative to such lands, to be brought by the beneficiaries or for their use: *Held*, that the statute of limitations did not run while the lands were held by the state and did not commence to operate until the passage of the act referred to. *Greene Township* v. *Campbell*, 16 Ohio St. 11.

10. Patent—California Act. Where, to ejectment on a patent to plaintiffs for land from the United States, defendants pleaded possession in themselves and the parties through whom they claim, for five years before the commencement of the action on the fourth of March, 1860, but admitted the issuance of the patent on the nineteenth of February, 1856: *Held*, that the plea is of no avail because the admission shows plaintiffs were seised of the premises within five years. *Fremont* v. *Seals*, 18 Cal. 433.

11. Burden of proof. The burden of proving an adverse, uninterrupted use of water for five years, with the knowledge and acquiescence of the person having a prior right, is upon the party claiming it, and if he leaves it doubtful whether the use was adverse, known to the owner and uninterrupted, it is not conclusive in his favor. *American Co.* v. *Bradford*, 27 Cal. 360.

12. Burden of proof on underground trespasser. Where coal is taken by underground mining across the boundary into

the coal of another, he, who has so trespassed, is in a situation to produce evidence, while the injured party is not, and the case is to be taken most strongly against the wrong-doer. So held upon the question of limitations, it being put on the defendant to show that coal was not taken within the statutory period. *Dean* v. *Thwaite*, 21 Beav. 621.

18. Underground trespass—Pleading. Defendants were sued in respect of coal taken from lands not included in their demise of two certain acres of coal. Defendants, in their plea, averred that the matters and things stated in the bill were well known to the plaintiff for more than six years (the statutory limitation), and that no fraud or concealment thereto was practiced by the defendants: *Held*, that the latter allegation could not be treated as surplusage, but tended to raise an issue not tendered in the bill. Plea overruled. *Emmott* v. *Mitchell*, 14 Sim. 432.

14. Secret mining across boundaries—Practice. In an action in substance for the value of coal wrongfully taken from the plaintiff's land by underground working through adjoining coal mines, a replication sought to be supported under an act allowing equitable pleas to be interposed at law, to a plea of the statute of limitations, that the wrongful taking was fraudulently concealed from the plaintiff until within six years before suit, was disallowed, on the ground that a court of equity would not restrain the defendant from setting up the defense, and that, if there was any right to equitable relief, it could only be by a bill for an account, in which the amount allowed would be different from the amount recoverable at law. *Hunter* v. *Gibbons* 26 L. J. Ex. 1; 1 H. & N. 459.

15. Interval between the wrongful act and the result—Undermining. The statute of limitations, upon an action for injuries resulting to the surface by reason of mining underneath and removing the support, does not begin to run until the damage is occasioned. It does not run from the date of the mining, which ultimately resulted in the injury. *Backhouse* v. *Bonomi*, 9 H. L. Ca. 503; S. C., below; 1 El. Bl. & El. 622; Id. 646.

The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property, and till that is interfered with he has no legal ground of complaint; although, in fact, something may have been done, which (without his knowledge) has occasioned results that will afterwards affect his property. A. was the owner of certain houses standing on land which was surrounded by the lands of B., C., and D. E. was the owner of mines running underneath the lands of all these persons. He worked the mines in such a manner (without actual negligence) that the lands of B., C., and D. sank in, and after more than six years' interval, their sinking occasioned an injury to the houses of A.: *Held*, that a right of action accrued to A. when this injury actually occurred, and that his right was not barred by the statute of limitations. *Backhouse* v. *Bonomi*, 9 H. L. Ca. 502; S. C. below; 1 El. Bl. & El. 622; Id. 646.

16. Non-user. Mere non-user of minerals reserved, for more than forty years, no other person having worked or been in possession of the minerals, is not sufficient under 3 and 4 Will. 4 c. 7, secs. 2 and 3, to bar the right of entry to get the minerals. *Smith* v. *Lloyd*, 9 Exch. 562; 2 Com. L. R. 1007.

There must be both absence of possession by the person who has the right and actual possession by another to bring the case within that statute. Id.

Reservation of salt works, mines, etc., in 1704, with a right of entry, though no instance of its having been exercised or asserted, and the title had been transferred in 1761 without such reservation. There was no claim of adverse possession. Action brought in 1810: *Held*, that the reservation held good. *Seaman* v. *Vawdrey*, 16 Ves. jr. 390.

Where such reservation existed in case of land as to which specific performance was claimed against purchaser, the defense was considered good, and specific performance being waived, compensation was allowed. Id.

In the case of a grant by deed of the right to dig ore in the land of another, the mere neglect of the grantee for forty years to exercise the right, without any act of adverse enjoyment on the part of the owner of the land, will not extinguish such right; and the occupation and cultivation of the land by the land-owner during such period, are not evidence of adverse enjoyment of the right to dig the ore. *Arnold* v. *Stevens*, 24 Pick. 106.

17. Non-user after reservation—Possession. If mines or quarries be excepted in a grant, the grantor's right and title to them is not barred if he omit to work them for twenty years. *McDonnell* v. *McKinty*, 10 Irish L. R. 514.

Nor is such failure a discontinuance of possession within the meaning of 3 and 4 W. 4, c. 27, s. 3. Id.

18. Ouster of tenant in common. The taking possession of the whole mining claim

by one tenant in common under a conveyance hostile to the title under which the cotenancy exists and excluding the co-tenant, is an ouster, from the date of which ouster the statute of limitations begins to run in favor of the tenant so taking exclusive possession and against his co-tenant. *420 Mining Co.* v. *Bullion M. Co.*, 3 Saw. 634.

19. Tenant in common—Knowledge. If one tenant in common receive more than his just share of the proceeds of gold washings, the statute of limitation does not commence running in his favor, so as to bar an action of account by the co-tenant, until the tenant begins to hold such surplus adversely to the co-tenant and knowledge of that fact comes to the co-tenant. *Huff* v. *McDonald*, 22 Ga. 131.

20. Joint arrangement—Demand. In an action by Hill to recover one-half his advances made under a contract between him and Haskin, whereby they agreed to buy and sell on joint account certain mining stock; Hill to advance all the money and Haskin to repay one-half with interest, and Hill to hold all the stock purchased as security for his advances, but without specifying any time within which the repayment was to be made: *Held*, that an offer to account and a demand for repayment by Hill were conditions precedent to his right to maintain the action, and that the statute of limitations would not commence running against him until such offer and demand. *Hill* v. *Haskin*, 42 Cal. 159.

21. Special act for mining claims—Montana. The general law of limitation of actions for the recovery of real estate is limited by special provisions applicable to placer mines and quartz lodes. The specific and not the general law must control such cases. *Davis* v. *Clark*, 2 Mont. 310 and 394.

22. Mining claim—Plea. An answer which avers that if plaintiffs ever had any right or title to their claims or to any portion thereof, they are barred by the statute of limitations, as they, the defendants, have been in quiet and peaceful possession of the same adversely to the plaintiffs for a period of over five years, is not a good plea of the statute of limitations. *Table Mountain Co.* v. *Stranahan*, 31 Cal. 387.

23. Foreign corporation—Nevada. A foreign mining corporation cannot plead the statute of limitations in Nevada. *Robinson* v. *Imperial M. Co.*, 5 Nev. 74.

This decision has become a rule of property. *Barstow* v. *Union Consolidated M. Co.*, 10 Nev. 386.

24. Warranty—Injury after sale from mining before sale—Support. As to the time when action accrues and the time when the statute of limitations begins to run upon a case of subsidence of land caused by mining coal prior to the purchase, in an action upon the warranty. See remarks of Bramwell, B., and Kelly, C. B., in *Spoor* v. *Green*, L. R. 9 Ex. 99.

25. Stockholder's liability—Probate. The defendant's testator was a stockholder of a mining corporation, and as such became individually responsible to plaintiff for a portion of its liabilities for which a right of action accrued against the testator in his life-time. The claim thus arising was not presented to defendants, his executors, for allowance, as a demand against their testator's estate, until after the expiration of the ten months prescribed by the one hundred and thirtieth section of the probate act for the presentation of claims against estates. Thereafter it was so presented by plaintiff and was rejected by defendants, whereupon plaintiff brought action for its recovery, to which defendants pleaded said section of the probate act in bar: *Held*, that under the statute the action was barred. *Davidson* v. *Rankin*, 34 Cal. 503.

26. Personal liability of corporate officers. The liability of a trustee for the omission of his corporation to make an annual report is in the nature of a penalty, and the statute of limitations referring to penalties applies. *Nimmons* v. *Tappan*, 2 Sw. (N. Y.) 652.

27. Amalgam for the mint—Mutual credits. The crediting of a lump of amalgam sent through plaintiff to the mint for coinage against an account for supplies furnished a company engaged in mining, does not make the case one of "mutual account" so as to affect the statute of limitations. *Weatherwax* v. *Cosumnes Co.*, 17 Cal. 345.

28. Secretary's account—Mutual credits. The claim of the secretary of a company for compensation for services, the items being all on one side, is not a mutual account and does not come within the exception of the statute of limitations. *Traylor* v. *Sonora M. Co.*, 17 Cal. 594.

29. As to receipts of royalty. Where the rents of mines of lead ore are reserved by means of payment of produce in specie (clean lead), the profits will be considered as accruing to the lessor at the time of receiving such produce, and not at the time of the sale of it; and therefore the statute of limitations will run from the time of such receipt and not from the time of such sale. *Denys* v. *Shuckburgh*, 4 Y. & C. 42.

30. Use of water. The use of water in any particular way for a period corresponding to the time limited by statute within which an action must be commenced to de-

termine the right to it raises a presumption of title to the same, in the person enjoying the same, as against a right in any other person, which might have been, but was not asserted; but in order that this presumption of title may be conclusive, the right to the use of the water must have been asserted under a claim of title, with the knowledge and acquiescence of the person having a prior right and must have been uninterrupted. *American Co.* v. *Bradford*, 27 Cal. 360.

31. Appropriated water. Rights to the use of water become fixed after five years' adverse enjoyment of the same. *Crandall* v. *Woods*, 8 Cal. 136.

32. Presuming grant of water. In an action for the wrongful diversion of water, if the jury are satisfied, from the evidence, that the defendants have been in the continued, adverse, uninterrupted possession, use and enjoyment of the water in dispute for five years preceding the commencement of the action, they are justified in presuming a grant to the defendants. *Yankee Jim's U. W. Co.* v. *Crary*, 25 Cal. 504.

33. Amended bill—Same subject-matter. Where an account between tenants in common of certain ore banks, described by metes and bounds, was prayed and seven years afterwards the bill was amended, charging that ores had been taken beyond the limits of the property originally described as the property in common, and praying an account co-extensive with what the court should decide to be the ground held in common: *Held*, that the statute of limitations, (six years) was not a defense to the bill as amended and that the cause of action was not changed. *Wilhelm's appeal; Grubb's appeal*, 79 Pa. St. 120.

34. Quarrying and burning lime. The operations of building a shed, quarrying rock, erecting a lime-kiln, and cutting wood to burn it for the purpose of making lime on the land in dispute, continued uninterruptedly for more than seven years, constitute such a possession as will give a good title to the person claiming adversely under it. *Moore* v. *Thompson*, 69 N. C. 120.

35. Mining amounts to complete possession. Occupation of land under paper title, by mining operations, continuous, notorious and visible, may constitute actual adverse possession. Mining, though a less general and important industry (in Wisconsin), is entitled to protection as well as agriculture. *Wilson* v. *Henry*, 40 Wisc. 594; S. C. 35 Id. 241.

36. Mining during alternate seasons—Complete adverse possession. A party openly occupying land for mining purposes, by himself, his agents or tenants, the acts of mining not being merely occasional, fugitive or desultory, but as continuous as the nature of the business and the customs of the country permit or require, although such customs required work during alternate seasons, constitutes such an adverse possession as will interrupt the running of the statute of limitations in favor of a tax-title claimant. *Sydnor* v. *Palmer*, 29 Wisc. 228, overruled; *Stephenson* v. *Wilson*, 37 Wisc. 482.

The carrying on of mining operations, and the digging and carrying away of ores and minerals, are as unequivocal acts of ownership or possession as the cultivation of the soil and the raising of crops. Id.

37. Mining during the mining season—a complete adverse possession. In an action brought by one claiming under a tax deed recorded in 1858, to bar the title of the original owner, defendant offered to show that from 1858 to the commencement of the action during the mining season of each year, from two to ten miners had constantly worked and mined for lead ore upon said land, they being usually farmers, working their farms during the summer and mining during the winter, and working the land under verbal leases from defendants or their agent to whom they paid rent; also, that a custom exists where this land is situate, making it obligatory upon the land owner to hold mineral diggings for the miner operating them during the summer season, though the miner does not work during such summer season; also, that said mining "was mostly near the surface and in open cuts, so as to be plainly visible to all," etc.: *Held*, that it was error to reject this evidence, as the facts stated would have shown the action to be barred by the statute. *Wilson* v. *Henry*, 35 Wisc. 242; S. C. 40 Id. 594.

38. Mining confined to particular quarter-section. The actual adverse possession of A. by lead mining confined to one forty-acre tract of the quarter-section included in a deed under which he entered, will not oust B.'s actual or constructive possession of the remainder of such quarter-section under a tax deed, or disengage the bar of the statute in B.'s favor, or create a bar against him as to such remainder. *Wilson* v. *Henry*, 40 Wisc. 594; S. C. 35 Id. 241.

39. Account—Deceased partner. After the death of one of the members of a mining partnership, the statute of limitations begins to run in favor of his personal representatives against a claim to have an account of the profits received by him in his life-time. *Weisman* v. *Smith*, 6 Jones Eq. (N. C.) 124.

STAY-LEAVE.

1. Definition. The term stay-leave, according to the custom and understanding of miners and other persons conversant with coal mines, means a right in the coal owner of having a station where he may deposit his coals for the purpose of dispensing them to the purchaser. *Dand* v. *Kingscote*, 6 M. & W. 182.

STOCK.

1. The title to, in corporation, before issue—Personal liability. Until the division into shares of the capital stock, fixed and limited by the articles of association of a corporation organized under the general statutes, c. 61, the associated members of the corporation hold the whole capital stock in common; and by reason of such a holding, may be individually liable under the statutes of 1862, c. 218, for the debts of a manufacturing corporation. *Hawes* v. *Anglo-Saxon Petroleum Co.*, 101 Mass. 385.

2. Identity. Where certificates of stock of a corporation issued by P. were surrendered by H., to whom they had been assigned, and new certificates issued to H. in his own name: *Held*, that this did not affect the identity of the stock. *Hawley* v. *Brumagim*, 33 Cal. 394.

3. One share equivalent to another. When a bailee of mining stock is at all times able, ready and willing to transfer to the bailor the same number of shares of similar stock, of the same company and of the same value, the sale or conversion of the identical shares pledged, only constitutes a technical breach of trust, and presents a case of *damnum absque injuria*. *Atkins* v. *Gamble*, 42 Cal. 86; B. & W. L. C. 577.

Shares of stock in a corporation stand upon a different footing from other personal property, as regards the right to the recovery of the specific property, because they are mere evidences of interest in the business of the corporation, and if all the shares are of equal value, there can be no reason for preferring one share to another. Id.

4. Real estate by charter. When the charter of a mining company has made its stock personal estate, but provided that its real estate should only be conveyed as other real estate, the legal title can pass only by deed. *Barksdale* v. *Finney*, 14 Grat. 338.

5. Negotiable qualities. Stock in a mining company incorporated under sec. 7, c. 55, revised statutes of Michigan, is assignable by indorsement and delivery, and it seems the holder of stock so indorsed is entitled to the same rights which the law confers upon the holder of negotiable paper. *Mandlebaum* v. *North American M. Co.*, 4 Mich. 465.

6. Nature—Not negotiable. Certificates of stock in a corporation are not negotiable securities in a commercial sense, but are mere evidences of the holder's title to a given share in the property and franchises of the corporation. *Sherwood* v. *Meadow Valley M. Co.*, 50 Cal. 412; B. & W. L. C. 594.

7. Passes by delivery. In this state mining stocks properly indorsed pass by delivery; and if the true owner places them in the hands of another on some secret trust between them without anything on the face of the certificate to show his ownership, he and not an innocent purchaser or pledgee must bear the loss. *Thompson* v. *Toland*, 48 Cal. 99.

8. Lost certificate. If a corporation issues to an owner of shares of stock a certificate transferable on the books of the company by indorsement and surrender of the certificate, and he indorses the same and then loses it and it comes into the hands of a *bona fide* purchaser for value, such purchaser acquires no right to the stock. *Sherwood* v. *Meadow Valley M. Co.*, 50 Cal. 412; B. & W. L. Ca. 594.

9. Stolen—Diligence to notify. The question whether a party who has lost stock by theft, as alleged, has used due diligence to prevent loss to third parties cannot arise before defendant shows himself to be an innocent purchaser for value. *Sierra Nevada M. Co.* v. *Sears*, 10 Nev. 347.

10. Theft—Blank power—Estoppel. Where a share of mining stock with a blank power of attorney thereon indorsed, signed with the name of the original holder, was lost or stolen and afterwards came to the hands of an innocent purchaser, in whose favor the company entered a transfer and issued a new certificate, but after notice of loss from the holder at time of loss: *Held*, that after issuing a new certificate the company were estopped from denying its validity at a subsequent time and could not refuse to allow of its transfer as a valid certificate. (1857.) *Mandlebaum* v. *North Am. M. Co.*, 4 Mich. 465.

11. Stolen—Broker. Where a broker received, in due course of trade, a transfer in blank of mining stock in a California company, which stock had in fact been stolen, and sold it: *Held*, that he was liable to the true owner for its value and damages; and this notwithstanding he acted under the authority of one claiming to be the owner, and was ignorant of such person's want of title. *Bercich* v. *Marye*, 9 Nev. 312.

12. Broker—Identical shares. In

transactions between principal and broker, the principal is not entitled to the identical shares of mining stock purchased on his order, but only the requisite number of shares; there is no special value in any particular share, unless issued in the name of a party, and charged to him upon the books of the company. *Boylan* v. *Huguet*, 8 Nev. 345.

13. Receipt for margin. A receipt in a broker's contract for the sale of stock, acknowledging the receipt of the first payment, or the margin on the contract, is only *prima facie* evidence of the payment of the money, and may be explained by parol testimony. *Winans* v. *Hassey*, 48 Cal. 635.

14. Margin—Delivery—Rule of board. In an action brought to recover a sum of money alleged to be due as the first payment or margin on a written contract for the sale of stock by a member of the board of brokers, to be delivered to the buyer in thirty days, if the contract acknowledges the receipt of such first payment, the plaintiff may give evidence of what the custom of the board of brokers was with regard to making and delivering such contracts, for the purpose of accounting for the delivery of the contract without receiving the money. *Winans* v. *Hassey*, 48 Cal. 634.

15. Pledge. The pledgee of mining stocks, upon a redemption of the pledge, is not obliged to return to the pledgor the identical certificates pledged, but may return certificates corresponding to those received. *Thompson* v. *Toland*, 48 Cal. 100.

16. Purchasing with notice of pledge. A party purchasing at sheriff's sale, stock of a mining company, knowing the certificates to have been previously hypothecated, is chargeable with notice of the fact, and takes subject to the claim of the pledgee. *Weston* v. *Bear River Co.*, 6 Cal. 245.

17. Pledge - Sale in gross. Different parcels of stock pledged as collateral at different times, for the security of different debts, cannot be sold in gross for the satisfaction of the entire amount for which judgment was given. *Mahoney* v. *Caperton*, 15 Cal. 314.

18. Ratification of sale of pledged stock. If a sale of mining stock pledged as security for money is made without notifying the pledgor to make his bargain good and without sufficient notice of time and place, still if the pledgor knew of the time and place of sale, and made no objection, and after the sale approved of it, and promised to pay a balance claimed by the pledgee, he by these acts ratifies the sale. *Child* v. *Hugg*, 41 Cal. 519.

19. Act of bankruptcy by pledgee. A pledge of mining stock amounting to a fraud under the bankrupt act is nevertheless valid against a rightful owner of the stock who placed it in the power of the pledgor to use it as his own. *Thompson* v. *Toland*, 48 Cal. 99.

20. Trustee. The addition of the word "trustee" in a certificate of stock to the name of the person to whom it is issued, does not show that said person has not the full right to deal with it as his own, nor give the person dealing with him notice that any other person has any interest in the same. Id.

21. Secret trust. Where stock has been pledged by the holder in breach of a secret trust, the *cestui que trust* must advance or tender the amount secured by the pledge before he can assert any claim to the stock. Id.

22. Gift. A gift of mining stock is not perfect, nor does any interest pass to the proposed donee, until there has been a delivery by the donor and an acceptance by the donee. *Dow* v. *Gould & Curry S. M. Co.*, 31 Cal. 630.

23. Certificate-Purchaser in good faith. A stock certificate, issued by a corporation having power so to issue, is a continuing affirmation of the ownership of the specified amount of stock by the person designated therein, or his assignee, until it is withdrawn in some manner recognized by law; and a purchaser in good faith has a right to rely thereon, and to claim the benefit of an estoppel in his favor as against the corporation. *Holbrook* v. *New Jersey Zinc Co.*, 57 N. Y. 616.

24. Contract for—Form of action. Upon failure to deliver stock, *assumpsit* or covenant will lie as the case may be, but not debt unless the promise be to pay a certain sum of money in stock. *Weiss* v. *Mauch Chunk Iron Co.*, 58 Pa. St. 295.

25. Assignment of void contract. The assignment of a contract for the sale of mining stock which is void under the statute of frauds, does not constitute a good consideration for a promise to pay. *Mayer* v. *Child*, 47 Cal. 142.

26. Purchaser of indorsed certificates. If the owner of mining stock allows his broker, who purchases for him, to hold the certificates in such a manner that they will pass by delivery on the indorsement of the broker, with nothing on the face of the certificates to indicate that the real owner has any interest in the stock, a purchaser in good faith from the broker, without notice of the rights of the real owner, ac-

quires a good title to the same, even if the broker, by a contract with his principal, had no right to sell or hypothecate the stocks without the consent of his principal. *Thompson* v. *Toland*, 48 Cal. 99.

27. Transfer on books—California. Under the laws of California the legal title to mining stock, except as between the parties, can only be transferred upon the books of the corporation. *Bercich* v. *Marye*, 9 Nev. 312.

Under sec. 12 of the act of April 22, 1850, concerning corporations, no transfer of stock is good against third parties unless the transfer be made upon the books of the company. *Weston* v. *Bear River Company*, 5 Cal. 186.

28. Legal title only by transfer on books. The legal title to mining stock, except as between the parties, can only be acquired by transfer upon the books of the corporation. *State* v. *Pettineli*, 10 Nev. 141.

29. "Transferable only on books of company." A sale and assignment of shares of the capital stock of a corporation, attended by a delivery of the certificate, vests in the vendee the title to the stock, notwithstanding a provision contained in the certificate that the stock was transferable only upon the books of the company. *De Comeau* v. *Guild Farm Oil Co.*, 3 Daly, 218.

30. Impeaching the books—Refusal to accept shares. If the entries in the stock and transfer book of a corporation are regarded as presumptive evidence that a person therein named a stockholder was such, the books are impeached and the presumption is overcome if the evidence given orally by witnesses shows that he never accepted, but refused to accept any stock in the company. *Mudgett* v. *Horrell*, 33 Cal. 25.

31. Transfer not entered. A transfer of stock which has not been entered on the books of the company as provided by the statute, is nevertheless valid as against all the world, except a subsequent purchaser in good faith without notice. *Parrott* v. *Byers*, 40 Cal. 614.

32. Transfer not made on books—Notice equivalent—Attachment. B., who was president and one of the directors of the Francestown Soapstone Company, on the twenty-fourth day of May, 1867, sold and transferred to the plaintiff a certificate for forty-five shares of the capital stock of said company, for which the plaintiff paid him $95 per share, the par value being $100 per share. The certificate provided that the shares were "transferable in person or by attorney only on the books of the company, on the surrender of this certificate." B. continued to act as president and director up to January 27, 1868. On the twenty-eighth day of January, 1868, the shares, not having been transferred on the books of the company, were attached on a writ in favor of the company against B., as the property of B.: *Held*, that the company were chargeable, under the circumstances, with notice of the sale and transfer of the shares by B. to the plaintiff; and that, in the absence of fraud in fact on the part of the plaintiff, he was entitled to hold the shares against the attachment. *Scripture* v. *Francestown S. Co.*, 50 N. H. 571.

33. Transfer—Title need not be traced. A purchaser from one other than the original stockholder, who receives a certificate of stock with the usual assignment and power of attorney thereon executed in blank by said stockholder, in an action against the corporation for refusal to transfer the stock on its books is not bound to show affirmatively the title of his immediate transferor. The presumption is that the stock was transferred and certificate delivered in the course of business, in the absence of evidence to the contrary. *Holbrook* v. *New Jersey Zinc Co.*, 57 N. Y. 616.

34. Refusal to transfer—attachment. An attachment against stock served on the company at the suit of a creditor of an assignor after the assignment is of no validity, although the company has refused to make the transfer on its books. And such refusal makes the company liable to the vendee for the value of the stock. *DeComeau* v. *Guild Farm Oil Co.*, 3 Daly (N. Y.) 218.

35. Sale in writing—Parol evidence. Oral testimony offered with evident intention of varying and controlling the plain terms of a stock sale in writing and not to establish an equity superior to the writing, is not admissible. *Menzies* v. *Kennedy*, 9 Nev. 152.

36. Transfer of capital stock instead of transfer of mines—Fraud. The Sussex Zinc Co. agreed, under seal, to transfer to complainant all their stock, and all their property, real and personal. The legislature ratified the contract. The Sussex company then transferred all its unissued stock to the complainant, and the stockholders transferred all shares held by them, except thirty, out of the total number of 48,000 shares. A year afterwards three of the directors of the Sussex company, who held these thirty shares, applied to the legislature, and obtained the name of the Sussex company to be changed to that of Franklinite company, which was authorized to increase its capital stock, which stock so increased, was divided by, or among, the holders of the thirty shares of the former

company: *Held*, 1. That by these proceedings the complainant became entitled in equity to all the property of the Sussex company; 2. That the Franklinite company, as to the property of the Sussex company, at the time of the transfer of stock, was a new corporation, and as such had no title legal or equitable to the property, which the Sussex company had agreed to transfer; 3. That the withholding of the thirty shares, out of the 48,000 shares of the Sussex company, was a fraud upon the rights of complainant, and a mere pretense for the organization of the company afterwards chartered upon those thirty shares as a basis, and that if such Franklinite company was not in fact a new corporation, the increased stock issued in its name should be held, either at law or in equity, as the property of complainant. *New Jersey Z. Co.* v. *Boston Franklinite Co.*, 15 N. J. Ch. 418; overruling same case in 2 Beas. 13 N. J. Ch. 322.

37. Specific performance. The general rule that a court of equity should not enforce a specific performance of an agreement for the transfer of stock, applied particularly to public stocks, such as are commonly bought and sold in the market, and where exact compensation in damages could be awarded by a court of law. *Treasurer* v. *Commercial C. M. Co.*, 23 Cal. 391.

38. Conversion. Shares of mining stock may be the subject of conversion; and an allegation that defendant "took the shares," is a sufficient allegation that he converted the certificates, under the code. *Kuhn* v. *McAllister*, 1 Utah, 273.

39. Conversion—Restoring similar shares. The mere fact that the pledgee of mining stocks sells the particular certificate pledged, does not render him liable as for a conversion of the pledge, provided the pledgee upon a redemption, restores similar certificates, and has been at all times ready so to do. *Thompson* v. *Toland*, 48 Cal. 100.

40. Payment of judgment for value of. The payment of a judgment for the value of mining stock gives title in the stock to the defendant. *Thompson* v. *Toland*, 48 Cal. 99.

41. "Purchase" instead of "issue." Stockholders having directed the creation and sale of new stock, and the directors having instead of so doing, acquired original stock and sold it, such sales will be valid if subsequently ratified by the stockholders. *Crump* v. *United States M. Co.*, 7 Gratt. Va. 362.

42. Exchange for land—Paid up shares. The holders of shares which by agreement are to be paid for in land, the agreement being accepted and the land in possession of the mining company, must be considered as the holders of paid up shares. *In re Bosworthen* v. *Penzance M. Co.; Jones' case*, L. R. 6 Ch. 48.

43. Paid up by land at fraudulent valuation. The acceptance of real estate as full payment upon stock, the actual value being much less, is void as to creditors of the corporation. The acceptance is lawful only to the extent of the actual value. *Tallmadge* v. *Fishkill Iron Co.*, 4 Barb. 387.

44. Stock not paid up by grant of mining lease. An act authorizing lands as well as money to be considered as payment upon the capital stock of a mining company does not authorize a leasehold interest to be treated as such payment. *Bashorr* v. *Dressel*, 34 Maryland, 503.

45. Demand—Tender. Where a contract is made for the delivery of certain shares of mining stock at a future day, it is not necessary for the purchaser to make an actual offer or tender of the money at the time and place, in order to sustain an action for breach. If the demand be properly and sufficiently made, and the purchaser be prepared to pay at the time and place, this is sufficient. *Wheeler* v. *Garcia*, 40 N. Y. 584.

46. Company not responsible for stockholder. Where stock is purchased from a stockholder, no action will lie against the company for the recovery of money paid for such stock. *Kelsey* v. *Northern Light Oil Co.*, 45 N. Y. 505.

47. Shares bought in by company. An oil company having bought in shares of its own stock, afterwards divided them among the then stockholders *pro rata;* a stockholder who, between the time of the purchase and the time of such distribution, had assigned a part of his stock, sued the company for a *pro rata* of the shares on the basis of the number held by him at the time of pnrchase: *Held*, that his action is an affirmance of the purchase, and he cannot allege that the company's funds were misapplied: and that as to him the distribution on the number of shares held by him at the time of distribution was equitable. *Coleman* v. *Columbia Oil Co.*, 51 Pa. St. 77.

48. Insolvent corporation buying stock—N. H. An insolvent corporation cannot purchase a portion of its capital stock. Such a transaction would be in conflict with Gen. Stat. ch. 135, sec. 3. *Currier* v. *Lebanon Slate Co.*, 56 N. H. 262.

A corporation whose capital stock as fixed and limited has not been fully paid in, cannot relieve a delinquent stockholder from payment of assessments upon his stock by

a purchase of the same, especially against the objection of another stockholder. Id.

49. Reputed ownership — Printed notice. Where a shareholder in a company where there is a printed notification on each share certificate that no transfer can be made without consent of the directors, agrees with the managing director that his shares shall be security, and the shareholder retains the shares, they are not in his reputed ownership. *Ex parte Harrison*, 3 M. & Ayr. 506.

50. Law of place of delivery. If a contract for the sale and consignment of certificates of stock of a corporation is entered into in another state, but the certificates are afterwards delivered in this state, the legality of the sale and assignment must be determined by the laws of this state. *Dow* v. *Gould & Curry S. M. Co.*, 31 Cal. 630.

51. Contract warranting value to a day certain. A plain agreement to keep stock till a certain date warranting that it shall be worth a certain sum by that date cannot be construed to compel the party to sell at a prior date at which the stock had reached a higher figure. *Hawley* v. *Brumagim*, 33 Cal. 394.

52. Warranty—Personal liability acts. The statutory personal liability of stockholders in mining corporations does not affect the stock itself; and such liability does not, therefore, amount to a breach of warranty against incumbrances, upon a sale by a stockholder by whom such liability has been incurred. *Williams* v. *Hanna*, 40 Ind. 535.

53. Individual liability after forfeiture. A stockholder in a mining company, incorporated under the act of 1853, whose stock has been forfeited, and sold for neglect to pay an assessment, as allowed by such act, for a sum less than the amount of the deficiency, is personally liable to the company, in assumpsit, for the deficiency. *Carson* v. *Arctic M. Co.*, 5 Mich. 288.

The case of *Carson* v. *Arctic M. Co.*, *supra*, declared the liability of an original stockholder; the same rule applies to a stockholder by purchase. *Merrimac M. Co.* v. *Bagley*, 14 Mich. 505.

54. Individual responsibility for calls. The transferee of shares of stock of an incorporated mining company, subject to the payment of future calls, is not personally liable for such unpaid installments, in the absence of a provision so requiring in the act of incorporation. *Palmer* v. *Ridge M. Co.*, 34 Pa. St. 288. Denied, *Merrimac Co.* v. *Levy*, 54 Pa. St. 227.

55. Pro rata—Assessable and non-assessable. Upon final distribution of the proceeds of a mining corporation, the holders of assessed shares, have, in the absence of any provision for distribution, no right to have their assessments returned before a *pro rata* distribution is made; but the holders of assessable and non-assessable stock, must take equally. *North A. M. Co.* v. *Clarke*, 40 Pa. St. 432.

56. Fraudulent over-issue. When the officers of a mining corporation fraudulently over-issue certificates of stock, and it is satisfactorily proved that they did not represent genuine stock, the officers of the company issuing such false certificates are liable therefor to the assignee of the certificates, when they have been purchased and held in good faith. *Bruff* v. *Mali*, 36 N. Y. 200.

57. Issue to defaulting contractor. The issue of the stock of a mining company to a firm which had subscribed to stock of a railroad company, and had entered into a contract with the railroad company to build a part of its road, at the request of the mining company, the issue being approved by both directors and stockholders, is valid although the contract to build the road was never carried out, and although the company may be in equity entitled to a return of its stock. *Savage* v. *Ball*, 17 N. J. Ch. 143.

58. Implied contract to pay assessments. The obligation of a stockholder to pay assessments on his stock is an implied contract upon which an affidavit of defense cannot be required under rule of court calling for such affidavit upon contracts for the direct payment of money. *Woodwell* v. *Bluff M. Co.*, 25 Pa. St. 365.

59. Calls paid by payments to creditors. Payments to *bona fide* creditors of a corporation by stockholders, credited to such stockholders on the books of the company, are good payments upon their stock and constitute such stock paid up to the extent of such payments to creditors, and no resolution of the board of directors can afterwards invalidate such payments. *Carr* v. *Le Fevre*, 27 Pa. St. 413.

60. Dividends. The plaintiff, in order to recover from a corporation the dividends on its stock, must be the owner of the stock at the time the dividends accrued. Mere possession of the stock or a special property therein is not sufficient. *Dow* v. *Gould & Curry S. M. Co.*, 31 Cal. 630.

61. Dividends on sale — Time—Construction. Plaintiff assigned to defendant September 22, two shares of stock in a mining company, stating in the assignment

"I authorize the transfer to him (defendant) with all the dividends made after the morning of the twenty-third of September." Both parties expected a dividend on Monday, the twenty-second, but the trustees did not, in fact, declare dividends until between noon and one o'clock on Tuesday: *Held*, that the dividends belonged to plaintiff and that parol evidence was admissible to explain the transaction and point its meaning: *Brewster* v. *Lathrop*, 15 Cal. 21.

62. Forfeiture of shares—Notice—Presumption. The articles of association of a joint stock company provided that if a shareholder should fail in paying any call, the company might give him notice that in default of payment within a specified time his shares would be forfeited; that if the requisition of any such notice were not complied with, the shares might be forfeited by a resolution of the directors to that effect; that when any share has been so forfeited, notice of such forfeiture should be given to such shareholder, and an entry should be forthwith made in the register of shareholders stating the date of such forfeiture, and that any share so forfeited should become the property of the company. K., a shareholder in the company, made default in payment of his calls, and notice was sent to him in due form that unless he paid the calls by the second of September, they would be forfeited. The time having elapsed without payment, the secretary made entries in the books on the third of September, and the shares were forfeited and had been transferred to the company. But there was no entry in the minutes of any resolution having passed by the directors, nor any evidence of any notice of the forfeiture having been sent to K.: *Held*, that there was a valid forfeiture of the shares and that K. could not be placed on the list of contributaries as a member of the company. As the entry of forfeiture on the books could not have been properly made without a resolution of the directors, the court was bound to assume that such a resolution had been passed. 2. That the forfeiture was complete on the third of September, without sending a notice of it to the shareholders, the provision in the articles as to sending the notice being mandatory only, and not of the essence of the forfeiture. *In re North Hallenbeagle M. Co.; Knight's case*, L. R. 2 Ch. App. 321.

63. Shares forfeited between sale and suit. Where, after a fraudulent sale of mining shares and after demand to rescind and suit brought to set aside the sale, the shares become forfeited, both vendor and vendee, plaintiff and defendant, having full notice of the calls, the loss will fall upon the party against whom the decree ultimately goes. There is no engagement on the part of a plaintiff to maintain such property during a suit to set aside a fraudulent sale thereof. *Maturin* v. *Treddenick*, 10 Law Times, N. S. 331. See S. C. 9 Id. 82.

64. Rescission after sale of stock—Fraud. A plaintiff seeking to set aside as fraudulent a sale of mining shares made to him by the defendant, cannot have a rescission after he has sold such shares; but the sale of certain shares does not deprive him of the right of rescission as to others not sold, where the property is all of one sort. (In this case shares in different companies). Id.

65. Seizure by sheriff on the person. Where a defendant in an attachment suit was examined under section 131 of the practice act, and on its appearing that his only property subject to attachment consisted of mining stock which he had upon his person, the district judge ordered it to be delivered to the sheriff, to be held subject to the result of the suit: *Held*, that such order was not in excess of the jurisdiction of the district judge. *Bivins* v. *Harris*, 8 Nev. 153.

66. Lis pendens. The pendency of an action in another state to determine the title to corporate stock is not constructive notice to a purchaser in this state of a defect in the title of his assignor, and does not affect the title acquired by him. *Holbrook* v. *New Jersey Zinc Co.*, 57 N. Y. 616.

67. Chattel mortgage—Cal. Under the chattel mortgage act of 1857, a mortgage of shares of stock in an incorporated company is valid without a transfer on the books of the company, as is required by the corporation act of 1853, relative to pledges of stock by delivery of the certificates. The act of 1853 had no effect on the act of 1857. *Ede* v. *Johnson*, 15 Cal. 53.

68. U. S. Bonds held by corporation. The effect of holding United States stock upon the assessable value of corporate stock considered. *Oliver* v. *Cornwell Copper Co.*, 12 Allen, Mass., 298.

69. Attachment. It seems that shares of stock in an incorporated mining company belonging to a non-resident are effects or estate owned by him here, and that they cannot be attached at law. *Evans* v. *Monot*, 4 Jones' Eq. (N. C.) 227.

70. Appropriation of payments. Where plaintiff held several promissory notes against defendant, all but one being valid, and also held certain shares of mining stock belonging to defendant: *Held*, that in the absence of any showing to the effect

that the defendant ever authorized plaintiff to appropriate the proceeds derived from the sale of such stock toward the discharge of the fraudulent note, the law compelled plaintiff to credit the money upon the valid notes. *McCausland* v. *Ralston*, 12 Nev. 195.

71. Equitable power to compel issue—Practice. Where the board of directors of a corporation, in issuing new stock to the stockholders generally, refuse to issue to a particular stockholder his due proportion of such new stock, he may compel its issue to him by suit in equity against the corporation, there being sufficient of such stock undisposed of, notwithstanding his remedy at law for damages. *Dousman* v. *Wisconsin M. & S. Co.*, 40 Wis. 418.

But in such case the interest of each shareholder in like condition is several, and they cannot bring an action in the name of one on behalf of himself and others. Id.

STOCKHOLDERS.

1. Legal owner. In determining who are stockholders, the court will not inquire beyond the legal title, except where there has been a fraudulent transfer. *Adderly* v. *Storm & Bailey*, 6 Hill, N. Y. 624.

2. Collateral holder. In 1837 one B. being indebted to the defendants, transferred to them certain stock in the Rossie galena company, delivering the certificates and assigning them upon the books of the company. By cotemporaneous writing the defendants were authorized to dispose of the stock at a certain rate, and apply the proceeds upon them in payment of B.'s debt, as it became due, but if the debt was paid before the stock was disposed of, they were to return it. The debt was paid in September, 1838, whereupon the certificates were returned, indorsed with a power of attorney for the re-transfer of the stock. This power being deficient, a more formal authority was afterwards given, but the re-assignment was not made either upon the books of the company or otherwise until March, 1840. *Held*, that the defendants were stockholders, and liable for debts contracted by the company in January, 1840. Id.

3. Relation of stockholder to the corporation. Where the stock of a corporation is declared to be personal estate, and the certificates are made transferable on the books of the corporation, and it is authorized to acquire real estate, such estate is vested in it as a corporation, and not in the individual shareholders. The certificate of stock is evidence of the right of the owner to his proportion of the profits or dividends, and on the expiration of the charter, to his proportion of the assets remaining after the payment of the debts; and every purchaser of the stock takes it subject to the same liabilities. *Barksdale* v. *Finney*, 14 Grattan, 339.

4. Relations to corporation—Buying up corporate paper. A shareholder or officer of a mining company organized under the general incorporation laws, has the right to deal with the company in the same manner as strangers; he may lend or advance money to it, may purchase and hold against it drafts and notes, may sue and be sued; and when he contracts with such company, or holds its paper assigned to him, he acquires the same rights and incurs the same liability as in the case of a contract with a stranger. *Merrick* v. *Peru Coal Co.*, 61 Ill. 472; S. C., 79 Ill. 113.

5. Implied ratification of directors' acts. A joint stock company was formed to work mines in the Brazils. The prospectus announced a capital of £100,000, and the first annual report announced to the shareholders that all the shares had been appropriated, which was contrary to the fact, the number of shares really disposed of being 2000, while 3000 shares had been colorably divided amongst the directors. The defendant was a shareholder, had attended a shareholders' meeting, and had called several times at the office of the company for information. *Held*, that notwithstanding the non-fulfillment by the directors of the contract upon which the defendant agreed to become a partner in the undertaking, he having knowledge or means of knowledge of all the facts, and not objecting, the jury were warranted in inferring that he assented to the course pursued by the directors, and consequently that he was liable in respect of contracts necessarily entered into by them for the working of the mines. *Steigenberger* v. *Carr*, 3 Scott, N. R. 466; 3 Man. and G. 191.

6. Acquiescence in acts of directors. Where a mining company was formed, the capital to be £30,000, in 3000 shares of £10 each; and 2000 shares only were actually subscribed for, of which the defendant took 100: *Held*, that letters subsequently written by the defendant to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go to the jury to show that he authorized the directors to proceed in the management of the concern, with the smaller amount of capital, so as to render him liable for the price of articles supplied for the use of the mines, on the order of the directors. *Tredwen* v. *Bourne*, 6 M. & W. 461.

7. Parties—Stockholder claiming title against his company. One who sets up a title to a mine, adverse to the claim of a

mining company, may be properly made a defendant in a suit relative to the premises, (bill for specific performance,) although he also sustains the position of a stockholder. *Taylor* v. *Salmon*, 4 My. 8 Cr. 134.

8. No power to sell corporate property. The stockholders of a corporation have no power, as such, to authorize the sale of the corporate property, or to sell the same, either when collectively assembled as such in a stockholders' meeting, or when acting individually. *Gashwiler* v. *Willis*, 33 Cal. 11.

9. Right to redeem the mine—Collusion between corporation and creditor. A. transferred mining ground to a company formed to work it, in consideration of a little less than half the shares, (990) the other stockholders holding a majority (1010), but the company agreed to levy assessments and work the mine. Instead of so doing, they allowed a debt to be contracted and the mine to be sold, making no effort at redemption, the president himself being interested in such debt: *Held*, that such conduct amounted to gross fraud upon the vendor. *Wright* v. *Oroville M. Co.* 40 Cal. 20.

And that the stockholder having redeemed the land from the sale, the corporation should refund to him the purchase-money, within a set time with interest, and that otherwise the title should vest in such redeeming stockholder. Id.

10. Stock books not admissible to prove. The stock book of a corporation is not admissible in evidence in an action by a creditor of the corporation against one claimed to be a stockholder, for the purpose of proving that he is such stockholder. *Mudgett* v. *Horrell*, 33 Cal. 25.

11. Refusal to accept shares. One who never accepts but refuses to accept any stock in a corporation is not a shareholder even though the secretary enters his name in the books as such. *Mudgett* v. *Horrell*, 33 Cal. 25.

12. Liability for calls. By the act of subscription to the stock of a corporation, each associate undertakes to raise his proportion of capital as it may be called for by the directors. *Merrimac M. Co.* v. *Levy*, 54 Pa. St. 227.

A purchaser from an original subscriber is substituted to his obligations as well as his rights, and being accepted by the corporation, privity arises between them. Id.

13. Lending good name—Contributory. J. C. took three hundred shares in a cost-book mining company, and in order to increase the apparent number of shareholders and thereby cause the mining scheme to be more favorably regarded in the share market, caused 100 of them to be transferred into the name of A. and 100 to be transferred into the name of B. who, notwithstanding the transfers, neither attended meetings nor paid calls nor took any part in the affairs of the company: *Held*, that having regard to the absence of any *bona fide* trusteeship on the part of A. and B. and to the extended definition of the word "contributory" in the two hundredth section of the companies' act, 1862, (25 & 26 Vict. c. 89) J. C. was properly inserted on the list of contributories in respect of the whole 300 shares. *Cox's case*, 33 L. J. Ch. 145.

14. Fraud in original organization—Evidence. The fraudulent organization of an oil company or a fraudulent prospectus or misrepresentations will give no cause of action to a person purchasing stock, without proof that he ever saw the prospectus or acted on the faith of the representations made, and without connecting his purchase with any act of the company as an inducement to his purchase: *McAleer* v. *McMurray*, 58 Pa. St. 126.

15. Departure from prospectus. Notice of an immaterial departure from the original prospectus of a mining company with acquiescence therein, does not hold a purchaser of shares to acquiesce in a departure authorizing a change of the place of operations or other material variation: *In re Russian Vyksounsky Iron Works*, L. R. 1 Ch. 574; 35 L. J. Ch. 738.

16. Rescission—Departure from prospectus. A company was formed for mining purposes; the prospectus referred to the memorandum and articles, and described in favorable terms a mine for the purchase of which a contract had been entered into. This mine was afterwards found to be worthless, and the directors rescinded the contract and agreed to purchase another mine: *Held*, that a shareholder who had subscribed on faith of the prospectus was entitled to an injunction against an action for calls, although the directors had been themselves deceived and had been guilty of no willful fraud. *Smith* v. *Reese R. Co.*, Law R. 2 Eq. 264.

17. Relation of prior agreement of organizers to subsequent stockholders—Paying up capital by land. B. H. and S. were promoters of an association, under the act of July 18, 1863, (mining corporations) with a capital of $200,000. F. and M. united with them; afterwards, September 29, coal land was purchased by B., H. and S. for $125,000. A subscription book for stock was opened about October 1; B., H. and S. subscribed for stock to the extent of $50,000; the subscription of the

others, with a sixth name amounted to $133,000, which B., H. and S. certified under the act had been paid in. The land was taken by the company; afterwards subscriptions were made by other persons. In a suit by the company, against B. for his subscription, he alleged that the company about October 1, had agreed to take the land at an advance of $50,000, to be paid in stock, subject to the whole purchase-money, and that his interest in the land, by the authority of the then corporators, was appropriated to pay his stock. *Held*, that such agreement for the advance was no defense as against subsequent stockholders, not apprised of the facts at the time of their subscription. *Held*, further, that such arrangement was not a valid payment of the stock, and that the act contemplated payment in money. *Bailey* v. *Pittsburg C. Co.*, 69 Pa. St. 335.

18. Combination of majority to control the company. Three persons owning a majority of the stock of the Chicago Carbon and Coal company, incorporated for mining upon the lands of the company, leased the premises from the company, formed a partnership and agreed among themselves that they would elect all the directors of the company, ballot among themselves for directors and officers, and cast their votes and use their stock as a unit, so as to control the elections. *Held*, that this agreement was not void as against public policy, the holder of a majority of stock having a right to combine so as to secure the elections, and the management of the property. *Faulds* v. *Yates*, 57 Ill. 417.

19. Majority of stock owned by fraudulent directors—Collusive meeting. The ratification by stockholders of the action of directors in the sale of lands of an iron and coal company, at a meeting where the majority of the stock present was in the interest of the fraudulent directors, the resolution informally passed and done in gross ignorance of their rights. *Held*, no such action as to prevent a rescission of the contract or a decree for reconveyance to the company. *Cumberland C. & I. Co.* v. *Sherman*, 20 Md. 118.

20. Equitable interference against collusive action of officers. A court of equity will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts even within the scope of the corporate authority, if such acts would amount to a breach of the trust upon which the authority had been conferred, and will interfere to relieve the stockholders from loss, after such an act has been done, providing no superior equity has intervened, nor the rights of innocent third parties attached. *Wright* v. *Oroville M. Co.*, 40 Cal. 20.

21. Innocent shareholders in fraudulent company. The defendants had purchased the scrip of a mining company originated in fraud, and had attended a meeting of the company; but they never signed the partnership deed, were innocent of the fraud, and transferred their scrip before the plaintiff commenced an action for goods furnished to the company after defendants had purchased their scrip: *Held*, that the defendants were liable. *Ellis* v. *Schmoeck*, 5 Bing. 521.

22. Fraud, a defense to action for calls. It is a good plea to an action by a company against a shareholder for calls, that the defendant was induced to become a shareholder by the fraud of the plaintiffs, that he had never recognized, since notice of the fraud, any rights or liabilities in him as such shareholder, nor received any benefit from his shares, and that within a reasonable time after notice of the fraud he had repudiated the shares and given notice to the plaintiffs of his repudiation. *Buxley-Plwm Lead M. Co.* v. *Baynes*, L. R. 2 Ex. 324.

23. Practice—Parties—Action against directors. A portion of the shareholders in a joint stock company may sue on behalf of themselves and the other shareholders, for the purpose of compelling directors of the company to refund moneys improperly withdrawn by them from the stock of the company and applied to their own use. A demurrer to such a bill on the ground that all the shareholders are not parties cannot be sustained. *Hichens* v. *Congreve*, 4 Russ. 562.

A clause in an act of parliament, passed for the regulation of a joint stock company, provided that all proceedings, whether at law or in equity, to be carried on by or on behalf of the company against any person or persons, whether such person or persons should be a member or members of the company or not, should be instituted and carried on in the name of the chairman or of one of the directors as the nominal plaintiff. Such a clause does not apply to a case in which directors appropriate to their own use part of the joint stock by charging the company with a much larger sum, as the price of the property purchased by them, than was actually paid. Id.

24. Practice—Suit against trustees. When a suit is brought by several stockholders, as such, against the trustees of a corporation, proof that either one of the plaintiffs is a stockholder is sufficient to maintain the action. *Parrott* v. *Byers*, 40 Cal. 614.

25. Liability for costs—Disqualified as juror. A stockholder under the Nevada act of 1862 being liable personally for his

proportion of all debts incurred by the corporation while he is a stockholder, would be responsible for costs, and therefore not competent as a juror where the corporation is a party in a suit commenced before he parted with his stock. *Fleeson* v. *Savage S. M. Co.*, 3 Nev. 159.

But a contract to purchase stock, made after suit commenced but assigned before trial, would not render him incompetent. Id.

26. Lis pendens. A corporation whose certificate of stock is outstanding, cannot defeat the title of a purchaser in good faith, without actual notice, by proof of the pendency of an action in a competent court of this state, to determine the title of the orignal holder to the stock. Its own positive statements in the certificate cannot be overcome by such a constructive theoretical notice. *Holbrook* v. *New Jersey Zinc Co.*, 57 N. Y. 616.

27. Notice of annual meeting—Election—By-laws. A notice of the day, hour and place of the annual meeting of the stockholders of a corporation to elect a board of trustees must be given, or such meeting cannot be legally held, unless the stockholders are all present and consenting either in person or by proxy. *San Buena Ventura M. Co.* v. *Vassault*, 50 Cal. 534.

The fact that one of the by-laws of the corporation fixes the day upon which such meeting shall be held, is not a sufficient notice of the time and place at which the meeting will be held. Id.

28. Abatement. A complaint in equity against stockholders of an incorporated mining company does not abate by death of one of the complainants. *Berry* v. *Mathewes*, 7 Ga. 457.

See CORPORATIONS; SHAREHOLDER.

STONE.

1. Loose block—Question of severance. A particular stone, loosened from the ledge, if so loosened or severed for the purpose of removal) would not necessarily pass with the land. The matter would be open to parol testimony. *Noble* v. *Sylvester*, 42 Vt. 146.

2. Loose boulders—Falling masses—Accretion. Where large masses of stone had from time to time fallen from some cliffs above upon the field of the copyholder, had become partially imbedded in the soil and had so remained immemorially, although one fall was shown to have occurred at a particular time many years before, it was *held*, that they were parcel of the soil and as minerals belonged to the lord and not to the copyholder. *Dearden* v. *Evans*, 5 M. & W. 11; 2 H. & H. 4.

3. Quarried under privilege—Property. A privilege in a lease to the lessee of doing such quarrying on the demised premises as was necessary to carry on his business as a boat builder: *Held*, to confer a property in the rock so quarried. *McKee* v. *Brooks*, 20 Mo. 526.

4. Property in contractor subject to execution. A. purchased from B. the right to quarry and remove certain stone for the purpose of constructing certain locks, the quantity to be estimated in the locks and paid for at forty cents per perch by A. when the canal contractors should be paid. A. has a property in the stone quarried by him for the purpose of delivery under his agreement with the canal contractors, which may be sold by the sheriff. *Watts* v. *Tibballs*, 6 Pa. St. 447.

5. Grant of—Right to dig for. In a lease of 999 years of certain premises, with the privilege of taking "all the rocks and stones on my land," the lessee is not liable for digging to any extent for rocks, provided he does not wantonly under a bare pretense, dig the land to the injury of the lessor. *Leonard* v. *Judd*, 1 Brayt. (Vt.) 230.

6. Property in trespasser after change of nature and attachment to the realty. The defendant quarried, dressed, sold and delivered to the garnishee, (trustee) a quantity of granite and laid it down for a permanent walk on the garnishee's premises. He obtained the stone without right from the quarry of a third person, who, after the walk was laid, claimed them as his property: *Held*, that the property in the stone was in the garnishee after they were laid into a walk, and that the garnishee was indebted to the defendant and liable, as his garnishee, at least for the increased value of the stone which was produced by their being quarried, dressed, and delivered. *Jackson* v. *Walton*, 28 Vt. 43.

7. Contract—Measurement. Plaintiff contracted to furnish stone from his own quarry and build walls to be paid for upon measurement in the wall. Contract rescinded after plaintiff had quarried stone but before delivery. *Held*, a contract to build a wall rather than to deliver material and must be declared on specially. *Curtis* v. *Smith*, 48 Vermont, 116.

8. Limitations—Left on land after sale. In 1861 plaintiff bought a piece of land on which were lying some split stones quarried from a large rock under contract with the previous owner of the land. The stones lay there without assertion or acts of ownership for many years and until the owner of the land attempted to remove them, whereupon the purchaser sued in

trespass; *Held*, that the statute of limitations did not avail the owner of the land, but that the defendant, the owner of the split stones, was liable in nominal damages for his entry upon the land, he not having removed them in a reasonable time. *Baker* v. *Chase*, 55 N. H. 61.

STRIKE.

1. Conspiracy. Combination of workmen for the purpose of dictating to masters what workmen they shall employ. Indictment for conspiracy to prevent the workmen of J. G. from continuing to work in his colliery, is supported by evidence of a conspiracy to prevent any of the workmen from continuing, etc. *Rex* v. *Bykerdike*, 1 Moody & R. 179.

2. Riot—Strikers—Demolishing buildings. Every man has a right to work for the best price he can get, but if others choose to work for less than the usual prices the law will not permit that violence should be committed towards them or towards those by whom they are employed or those with whom they are connected. Where a party of coal whippers having a feeling of ill will to a coal lumper who paid less than the usual wages, created a mob and riotously went to the house where he kept his pay-table, and cried out that they would murder him, and began to throw stones, brick-bats, etc., and broke windows and partitions and part of a wall, and continued after his escape throwing stones at the house till they were compelled to desist by the threats of the police: *Held*, that they might be convicted of beginning to demolish, under the statute 7 & 8 Geo. 4, c. 30, s. 8, though their principal object was to injure the lumper, provided it was also their object to demolish the house, either on account of its being used by him or his men, and although they had not any ill will against the owner of the house personally. *Rex* v. *Batt*, 6 Car. & P. 329.

SUBSCRIPTION.

1. Oil adventure. When an agreement to become stockholders in specified shares in a partnership (oil adventure), and to pay the amount subscribed, is signed by a number of persons with the number of shares and the aggregate amount thereof annexed to their names, though no promise is named in the agreement, in effect each party promises to the others to pay the amount; and the promises of the others are a consideration for the promises of each, and the parties are sufficiently definite. *Kimmins* v. *Wilson*, 8 W. Va., 584.

When such subscribers organize a company and appoint a treasurer, and by agreement of the parties one makes a promissory note, payable to the person appointed treasurer, for his unpaid share, the previous liability and agreement constitute an adequate consideration for the note. Id.

2. Mutuality. A subscription to the erection of a quartz mill can be recovered only upon pleadings showing a mutuality between the parties, and that the conditions of the subscription have been complied with. *Wheeler* v. *Floral M. and M. Co.*, 9 Nev. 254.

SUNDAY.

1. Appropriation of water. If water for mining purposes has been appropriated and used during the daytime of the six secular days, other persons may lawfully appropriate it for use at nights and on Sundays. *Smith* v. *O'Hara*, 43 Cal. 371.

SURFACE.

1. Injury to surface defined. The reservation of mines to A. in a lease of the surface to B., giving A. the right of sinking for and carrying away the minerals, "making compensation for any injury thereby done to the surface or otherwise," applies only to acts done upon the surface, such as sinking pits, etc., or other measures in order to obtain access to the minerals, and not to underground workings. *Richards* v. *Jenkins*, 18 Law Times, N. S. 438.

2. "Surface damage" construed. The expression, "surface damage," as used in an act regulating the workings of mines in the Forest of Dean, construed to include damage done to the surface by reason of the working under it. *Allaway* v. *Wagstaff*, 4 H. & N. 307.

3. Convenient distinguished from necessary. The owner of the minerals cannot claim as an incident that which is convenient simply: he can only have, as to the surface, that which is necessary; but that which is necessary he may have in a convenient way. *Marvin* v. *Brewster Iron Co.*, 55 N. Y. 538; 14 Am. R. 322.

4. Rights of mine owner subservient. The owner of a mine beneath the surface, though he have a right of way through the surface soil, has no right so to exercise the same as to interfere with the power of the owner of the land to make any lawful use thereof. The latter may sink a cess-pool on his land, though it interfere with a tunnel constructed by the mine owner under the lot. *Park Coal Co.* v. *O'Donnell*, 7 Leg. Gaz. 149; 4 Luz. L. Reg. 127.

5. Storing ore. Ordinarily the mine owner cannot justify the use of the surface for the lengthened keeping of his ore, the

long-continued deposit of the rubbish from the mine, or the erection of buildings for the storage of materials, the housing of animals or the use of artisans. *Marvin* v. *Brewster Iron Co.*, 55 N. Y. 538; 14 Am. R. 322.

6. Implied rights. The necessary incidental rights of a mineral owner with respect to the surface are not confined by a power or privilege expressly mentioned in the grant or reservation: and as to the mode of exercise, it matters not whether the right comes in terms or by implication. *Marvin* v. *Brewster Iron Co.*, 55 N. Y. 538; 14 Am. R. 322.

7. Covenant running with land. A covenant for compensation for surface injury by licensees of mines: *Held*, a covenant running with the land the same as if they were lessees. *Norval* v. *Pascoe*, 34 L. J. Ch. 82.

8. Evidence of like results in vicinity. Upon a question of the effect of coal mining upon the surface, evidence of the injurious effect of mining coal on other lands in the neighborhood is admissible. *McMahon* v. *Breton*, 2 Allen (N. B.) 354.

9. Compensation. The rights of a mine owner as to the surface do not require or depend upon a covenant for compensation. *Marvin* v. *Brewster Iron Co.*, 55 N. Y. 538. 14 Am. R. 322.

10. Departure of vein from side lines. The surface of a lode location allowed under the mining act of congress of 1872, is a dependent grant; if the vein leave the side lines of the survey the location of the surface beyond such point of departure is void. *Patterson* v. *Hitchcock*, 3 Colorado.

Under the act of 1866, surface was granted only for convenience of working the lode and for no other purpose. Id.

SURFACE SUPPORT.

1. The right in general. When the surface and the minerals belong to separate owners, the owner of the surface is *prima facie* entitled to the support of the subjacent strata; and the owner of the minerals is bound so to work the mines as to leave sufficient support for the surface; but these rights may be varied by express stipulation. *Smart* v. *Morton*, 5 El. & Bl. 30; 30 Eng. L. & E. 385; 3 Com. L. R. 1004.

2. Natural right. Of natural right the surface land is entitled to support from the strata below. When the owner of the whole fee grants the minerals, reserving the surface, his grantee is entitled only to so much of the minerals as he can get without njury to the surface. A custom contrary to such right would not be reasonable and therefore would be invalid. *Coleman* v. *Chadwick*, 80 Pa. St. 81; *Chadwick* v. *Coleman*, Id.

3. Statutory Limit of "Protection." An inclosure act vested the surface of the land in allottees, and the mines in the lord of the manor, and prohibited the lord from working the mines within forty perpendicular yards of the foundation of buildings on the surface: *Held*, by the Exchequer Chamber, confirming the judgment of the queen's bench, that this prohibition did not affect the common law right of the owner of the surface to support, and that he might maintain an action against the lord for working the mines so as to cause the buildings on the surface, belonging to the owner of the surface, to give way, though the mines had been worked with ordinary care and not within forty perpendicular yards of the foundation of the buildings. *Haines* v. *Roberts*, 7 El. & Bl. 625; affirming *Roberts* v. *Haines*, 6 El. & Bl. 643; S. C., 37 Eng. L. & E. 1.

4. After severance. When the surface of land belongs to one man and the subjacent strata belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, independent of the question of buildings, the owner of the minerals is "bound to leave support sufficient to maintain the surface in its natural state." *Humphreys* v. *Brogden*, 12 Q. B. 739; S. C., 1 Eng. L. & E. 241.

5. Right of support after reservation. The principle of law to be deduced from the authorities is that a grant or reservation of mines in general terms confers a right to work the mines, subject to the obligation of leaving a reasonable support to the surface, as it existed at the time of such grant or reservation; and in the absence of any express stipulation enlarging or diminishing the right, the surface owner is entitled to such reasonable support from the adjacent strata for the surface in the state in which it existed at the time when the titles to the mines and to the surface came into different hands. *Richards* v. *Jenkins*, 18 Law Times, N. S. 438.

6. Severance with right. In 1770 a private act of Parliament was passed to provide for the allotment of commons and commonable lands, etc. These lands were described as having mines under the surface. Commissioners were appointed to allot (having due regard to the mines) according to the rights of the various persons interested in the lands, some of which were divided into small parcels. The commissioners, by their award, allotted the lands

so that some of the mines allotted to A. were situated under portions of the land allotted to B. The persons interested executed this award, which (reciting that this mode of allotment had been necessary) contained a clause declaring that the proprietors agreed with each other and their heirs that the lands so allotted should be lawfully held and enjoyed by the allottees without molestation, and without any mine owner being subject to any action for damages on account of working and getting the mines, or by reason that the lands might be "rendered uneven and less commodious to the occupiers thereof, or by sinking in hollows, and being otherwise defaced and injured where such mines shall be worked...the several proprietors having agreed with each other, and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject to any inconvenience or incumbrance which may arise from the cause aforesaid." The mines were worked by the assignee of A., and the surface of the land thereby (but without negligence) injured. *Held*, that whatever is the general right in the surface to support, this clause in the award operated as a grant to disturb the surface of the land, and B., therefore, could not maintain an action for damage on that account. *Rowbotham* v. *Wilson*, 8 H. L. Ca. 348; S. C., 3 E. and E. 752; 6 El. and Bl. 593; 8 Id. 123.

7. **Right implied in lease.** There is a *prima facie* inference at common law upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words showing clearly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et formâ*, and with the natural support which it possessed before the demise. *Dugdale* v. *Robertson*, 3 Kay & J. 695.

8. **Lease waiving surface support.** A *feu* (lease) of land was granted reserving the subjacent materials, and stipulating that the *feuar* should have no claim against the superior or his tenants in respect of any damage that might arise from the working of the minerals. Damage having arisen, the *feuar* obtained from the court of sessions an interdict prohibiting the mineral workings complained of: but the house of lords revoked the interdict—holding that the *feuar* had made a contract which bound him to submit to its consequences, and that the mine tenant was not bound to work so as to leave support. Per the Lord Chancellor: This interdict imposes on the superior an obligation which it was the express object of the contract to relieve him from. The fact that the contract was improvident cannot alter the construction of a special stipulation. Per Lord Chelmsford: It is the safest and best mode of construction to give to words free from ambiguity their plain and ordinary meaning. *Buchanan* v. *Andrew*, L. R., 2 Sc. App. 286; 5 Moak. 125.

9. **Lessee as affected by way leave.** Though a lease reserves to the lessor the minerals with way leave so extensive that it allows the carriage of minerals not under the demised property, it does not deprive the lessee of the right of support to the surface of the land as incident to the demise. *Proud* v. *Bates*, 34 L. J. Ch. 406, S. C. 13 L. T. N. S. 61.

10. **Lessor's liability.** A grantor of the surface is responsible to his grantee for the undermining of the premises granted, by act of his lessees, who at the time of the grant held a lease of the underlying minerals. *Berkley* v. *Shafto*, 15 C. B. N. S. 79.

11. **Action by Reversioner.** The owner of the reversion who has let the land to a tenant cannot maintain trespass against a party who works under the land and takes away the coal causing the buildings to sink because *he is not in possession*, but may maintain case for the injury. *Raine* v. *Alderson*, 1 Arnold, 329.

12. **Copyhold.—Covenant not running with land.** The owner of freehold and copyhold lands, adjoining each other, surrendered the copyhold lands to a grantee, who covenanted for himself, his heirs, and assigns, with the grantor, his heirs, and assigns, that the grantor should have full power to mine under his own freehold lands without paying compensation for any injury which might be sustained by the copyhold portion, and buildings erected thereon, in consequence of the removal of the support. Compensation was sought by the assignee of the grantee for damage resulting from the sinking of his land, in consequence of the mines excavated under the land of the assignee of the grantor: *Held*, that the grantee had no power to disclaim the right to compensation so as to bind the lord of the manor without his consent, and that the covenant did not run with the land. *Richards* v. *Harper*, 4 H. & C. 55: 1 L. R., Exch. 199.

13. **Right of support yielded by grant.** The right of support to the surface may be divested by grant to the party working the minerals: and the subsequent purchaser of the surface will take subject to such grant. *Smith* v. *Darby*, L. R. 7 Q. B. 716.

14. **No support for buildings.** A pre-

scription or a custom to work mines, paying to the owner of the surface a reasonable compensation for the use of it, but without compensation for buildings or improvements on the surface destroyed in the course of mining, is unreasonable and void: and a plea averring such custom or a prescription to such effect is bad. *Hilton* v. *Granville*, 5 Q. B. 701; S. C., D. & M. 614; see *Blackett* v. *Bradley*, 1 B. & S. 940.

15. Affected by terms of statute. A special inclosure act (1 & 2 G. 4, C. 10) *construed* to reserve the mines under lands sold to pay the expenses of the act to the utter destruction of the land above, subject only to the liability to pay compensation for damage done. *Duke of Buccleuch* v. *Wakefield*, Law R. 4 H. L. 377; reversing *Wakefield* v. *Buccleuch*, Law R. 4 Eq. 613.

An inclosure act *construed* to enlarge the power of the mine owner to get minerals beyond that which he had by custom existing at its passage. Id.

16. Support to canal. The prohibition contained in the Dudley Canal acts against working within twenty yards of a tunnel, is subject to the exception expressed in that part of the act relating to work within twelve yards of the canal: and if the company refuse to allow the owner of the minerals to get them they must give him the value thereof. *Birmingham Canal Co.* v. *Dudley*, 7 H. & N. 969; *Same* v. *Swindell*, 7 H. & N. 980, note.

17. To railroad. A clause in a railroad act requiring notice to the company of the working of a subjacent mine when approaching within twenty yards of the line, does not limit the company's right of support to its superstructures to the limit of such distance. *Elliot* v. *North-eastern R. Co.*, 7 H. L. Ca. 333; 30 L. J. Ch. 164; 32 Id. 402.

18. Excavations. The owner of land, excavating the same for clay to make brick, may not destroy the lateral support of adjoining ground by digging up to his line and necessitating the fall of the soil of the adjoiner into the clay pit: and is liable in damages for injury so occasioned to the adjoining lot. *Farrand* v. *Marshall*, 21 Barb. 409; S. C. 19 Id. 380.

19. Under Inclosure Acts. An inclosure act gave power to allot commons and waste lands in the manor of W. It recited that J. was lord of the manor, and entitled to the soil of the commons and waste lands, and enacted that it should be lawful for J., and the lord of the manor for the time being, and his agents, etc., to come upon the commons and waste lands, to search for and get coal, making compensation to any person whose allotment should be damaged: *Agreed*, that this conferred no power on the lord so to work the mines as to destroy the support of the surface. *Roberts* v. *Haines*, 6 El. & Bl. 643; affirmed 7 Id. 625; S. C., 37 Eng. L. & E. 1.

20. Negligence immaterial. When the surface is entitled to support the question of negligence in the mode of getting the minerals underneath is immaterial. *Brown* v. *Robins*, 4 H. & N. 186.

21. Reservation. A full reservation of all the coal and the right to get it leaves title to *all* the coal in the grantor, but does not allow him to take it all out of the ground if he cannot get it without leaving sufficient support to the surface. *Harris* v. *Ryding*, 5 M. & W. 60.

22. Land sold in lots. The conveyances of an estate in a mining district, sold in lots, contained an exception of all mines and minerals under the land included in the lot conveyed, with full power for the grantor to work, get, and dispose of them, without entering upon the land sold, and without being answerable for any injury to the land, or any buildings on it, by reason of working or getting the excepted mines or minerals, and without being liable to any action or suit for any such injury: *Held*, that a purchaser of two of the lots was not entitled against the grantor to either vertical or lateral support for the surface of his land. *Williams* v. *Bagnall*, 12 Jurist, N. S. 987.

23. Mines severed. By partition the surface was severed from the underlying coal: *Held*, that the owner of the coal could not remove it without leaving sufficient support for the surface. *Jones* v. *Wagner*, 66 Pa. St. 429; B. & W., L. C. 608, 5 Am. R. 385.

24. Distinction between liability of adjacent and subjacent mines. The rights and obligations of the owner or occupier of adjacent and subjacent mines are not the same. The surface owner is entitled as against the occupier of adjacent mines or surface, to that support only which the adjacent land and mines afford to his property in its natural condition, and can acquire a right to support for buildings on his land, only by possession or enjoyment for twenty years. The occupier therefore of the adjacent mines, working them so as to subvert buildings on the surface, is not liable to an action unless the buildings have existed for twenty years before the working which has caused the injury: whereas the surface owner may maintain an action against the subjacent mine occupier for an injury to buildings on the surface, however recently erected, if it be before the commencement

of the title and possession of the occupier of the mines. *Richards* v. *Jenkins*, 18 Law Times, N. S. 438.

25. Lateral—Natural condition. Where A. and B. are adjoining land-owners, A.'s land being in its natural state, and supported by the adjacent soil of B., and having always been thus laterally supported, it is the right of A. that he may enjoy his land in the condition in which it was placed by nature; and B. will not be permitted to render his enjoyment of it insecure, or destroy it altogether, by removing its natural support. *Farrand* v. *Marshall*, 21 Barb. 409; 19 Id. 380.

26. Lateral—Falling bank. A man may dig on his own land, but not so near that of his neighbor as to cause the land of the latter to fall into his pit, thus transferring a portion of another man's land to his own. *Farrand* v. *Marshall*, 21 Barb. 409; 19 Id. 380.

27. Adjacent support to reserved clay pit. When a tract of 12 acres of land was conveyed by deed reserving the right of taking brick clay out of a certain parcel of the larger tract: *Held*, that the right of adjacent support of the surface did not belong to the larger tract surrounding the reservation, but that clay might be taken out of the smaller tract without giving cause of action although it caused the caving in of the surface of the adjoining land (Campbell J. dissenting). *Ryckman* v. *Gillis*, 57 N. Y. 68, reversing 6 Lansing, 79.

28. Additional weight of buildings. The surface owner has a right to build as he thinks fit upon his land upon the assumption that sufficient support will be left to bear the burden of the soil itself, by the adjacent proprietor. The damage to such buildings becoming a consequence of the removal of the lateral support is the subject of compensation. *Hunt* v. *Peake*, 1 Johnson (Eng.) 705.

When the owner of land is entitled to lateral support of the soil of his land he may recover damages, not only for the soil, but for the buildings thereon, where the subsidence of the soil is occasioned by the removal of the lateral support and not by the superadded weight of the buildings. Id.

29. Buildings. A party building a house on his own land, which had previously been excavated to its extremity for mining purposes, does not acquire a right of support for the house from the adjoining land of another; at least until twenty years have elapsed since the house first stood on excavated land (and was therefore in part supported by the adjoining land) so that a grant by the owner of the adjoining land of such right to support can be presumed. *Partridge* v. *Scott*, 3 M. & W. 220; S. C., 1 Horn & H. 31.

Where the owner of a lot builds upon his boundary line, and the building is thrown down by reason of excavations (gravel workings) made upon the adjoining lot, in the absence of improper motive and of carelessness in the execution of the work, no recovery can be had for the injury done to the building. *McGuire* v. *Grant*, 1 Dutch. (N. J.) 356.

30. Lateral support. A land owner has a right, independent of prescription, to the lateral support of his neighbor's land, so far as it may be necessary to sustain his soil in its natural state, and also to compensation for damage caused either to the land or to the buildings upon it by the withdrawal of such support; *Semble*, also that he may acquire by twenty years' enjoyment the right to lateral support for the additional weight of buildings erected on the land. *Hunt* v. *Peake*, 1 Johnson (Eng.) 705.

31. Buildings—Prescription—Contentious enjoyment. The plaintiff in the year 1824 built a house on certain wastes, and in the following year obtained a grant from the Crown of the surface, excepting mines. The house was about thirty yards from the quarry. In the year 1840 the tenant of the owner of the minerals, who claimed a right to take the minerals without making compensation for damage to the surface, began to get stone from under the house; in consequence of which, and of the blasting operations, the house became untenantable. In 1853 the defendant cut away certain supports which had been left under the house, and the house fell in. The judge left the question to the jury, who found that the plaintiff had enjoyed the right of support for his house on the foundations on which it stood, without interruption for twenty years. On motion for a new trial, on the ground that the judge ought to have told the jury that the enjoyment was contentious and not as of right: *Held*, that the question was properly left to the jury. *Rogers* v. *Taylor*, 2 H. & N. 828.

Quære, whether, independently of prescription, the owner of the surface has not a right to the vertical support of the subjacent strata, for the surface and for all reasonable buildings put upon it. Id.

32. Measure of damages. There is incident to land, in its natural condition, a right to support from the adjoining land; and if land, not subject to artificial pressure, sinks or falls away in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained. *McGuire* v. *Grant*, 1 Dutch. (N. J.) 356.

The measure of damages in such case, is not the cost of restoring the lot to its former situation, or of building a wall to support it, but it is the diminution in value of the plaintiff's lot, by reason of the acts of the defendant. Id.

33. Buildings erected after severance. When there is a severance of the mineral from the surface, ownership, with a right by the terms of the award or grant in the mine owner to disturb the surface, the erection of buildings subsequent to the vesting of the right to disturb the surface cannot vary the rights of the parties. *Rowbotham* v. *Wilson*, 8 H. L. Ca. 348; S. C., 3 E. & E. 752; 6 El. & Bl. 593; 8 Id. 123.

34. Buildings. Where the workings of mines, in however careful a manner, have caused a subsidence of the adjacent land, the owner is entitled to recover in respect of damage to buildings thereon, although erected within twenty years, provided their weight did not contribute to the subsidence. *Hamer* v. *Knowles*, 6 H. & N. 454.

35. Incidents of severance. All that can be claimed by the owner of the surface, under the right of subjacent support, is that no physical injury be wrought to the surface in its natural state, or as contemplated at the time of the grant. The mine owner is not bound to support buildings subsequently erected. *Marvin* v. *Brewster Iron Co.*, 55 N. Y. 538; 14 Am. R. 322.

Whatever, also, is necessary for the latter to do for the profitable and beneficial enjoyment of his own possession, and which he may do with no ill effect to the surface in its natural state, he may do, though it harm erections lately put thereon. Id.

36. Implied to buildings by construction. A deed of the surface which contemplates the erection of buildings (by covenants of the grantee as to certain uses to which he will not put the buildings, etc.) reserving the minerals and the right to win them, gives a right of support not only to the land but the buildings; and the covenant referring to buildings "now or hereafter to be erected thereon," such right of support extends to buildings afterward erected. *Berkley* v. *Shafto*, 15 C. B. N. S. 79.

37. Injuries to building. Declaration: that the plaintiff was lawfully possessed of certain messuages, belonging to and supporting which were certain foundations, which, by reason of his possession of the messuages, the plaintiff of right had enjoyed and was enjoying, and still of right ought to enjoy for the support of the said messuages, which foundations the plaintiff was of right entitled to have supported by certain land in which quarries were worked: that the defendant negligently worked the quarries near to the said messuages, whereby the foundations were weakened and the messuages fell. On motion in arrest of judgment: *Held*, that the declaration was sufficient. *Rogers* v. *Taylor*, 2 H. & N. 828.

38. Injury to Surface. A declaration alleging that the defendant wrongfully and improperly, and without leaving any proper or sufficient pillars or supports in that behalf, worked certain coal mines under and contiguous to the close of the plaintiff, and dug for and got and moved the coals, minerals, earth, and soil of and in the said mines, and that by reason thereof the soil and surface of the said close sank in, cracked, swagged, and gave way, is sufficient, without an express allegation that the plaintiff was entitled to have his close supported by the subjacent strata. *Humphreys* v. *Brogden*, 12 Q. B. 739; S. C., 1 Eng. L. & E. 241.

39. Idem—Support of buildings. A declaration in case by reversioners stated that certain buildings and closes of land were in the occupation of A. and B. as tenants to the plaintiffs, the reversion belonging to them. That the defendant negligently, and without leaving proper support, worked certain mines near and contiguous to the said premises, and dug minerals out of the mines near and contiguous to the said buildings and closes, whereby large portions of the buildings became injured and the ground on which the buildings stood and the said closes swagged, and gave way: *Held*, on motion in arrest of judgment, that the declaration was good: that as it did not appear that the soil in which the mines were, belonged to the defendant, or that the defendant had all the right to get the mines that the owner of the adjoining soil had, the defendant was *prima facie* a wrong-doer, and that it was unnecessary to aver in the declaration that the plaintiffs had a right to have the buildings supported by the soil under which the defendant worked. *Jeffries* v. *Williams*, 1 Eng. L. & E. 433; S. C., 5 Ex. 792; 20 L. J. Ex. 14.

40. Pleading—Grounds of right. In a declaration in case, each count alleged that plaintiff was possessed of a dwelling-house, and defendant of coal mines lying near to and under it: and that the dwelling-house was supported in part by land between the same and the mines; and that the plaintiff "of right was entitled to and of right ought to have had his said dwelling-house so supported in part by the said land, without the hindrance or disturbance of any person." The first count alleged that defendant "wrongfully and injuriously, in so unskil-

ful, careless, negligent, and improper a manner worked and excavated" the mines that the land by which the house was in part supported was disturbed and withdrawn, and the support of the house injured and destroyed, and the foundations of the house gave way, etc. The second count alleged that defendant "wrongfully and injuriously made divers holes, excavations and cuttings in and loosened and disturbed and removed a great part of the said land" by which the dwelling-house was in part supported, whereby the support of the house was injured, etc. (as before): *Held*, after verdict, a bad declaration for not stating the grounds on which plaintiff was entitled to have his house supported by the land above the mines. *Hilton* v. *Whitehead*, 12 Q. B. 733.

41. Construction — Compensation. A clause of compensation to the surface owner in a deed reserving minerals must be construed to refer to damages caused by the rightful acts of the mine-owner in the getting of the minerals although not to wrongful acts to be committed. It cannot therefore be construed to the prevention of injury by undermining buildings, but must be taken as a contemplation that such injury would be committed. *Aspden* v. *Seddon*, L. R. 10 Ch. App. 394.

42. Covenant for compensation. A piece of land on which a cotton-mill was to be built was conveyed, the grantor reserving to himself a chief rent and reserving all mines and minerals under a piece of land and power to take the same at pleasure, making compensation for damages to be done to the cotton-mill. The grantee covenanted to build and keep in repair the cotton-mill: *Held*, that the grantor would not be restrained from working and taking the minerals under the piece of land, though the buildings on the piece of land would necessarily be thereby injured. *Aspden* v. *Seddon*, L. R. 10 Ch. 395.

43. Old and new excavations. The plaintiff was owner of a house, erected in 1834, on solid ground. Previously to the building of the house a portion of the minerals had been gotten under a garden which adjoined the house. In 1838 a portion of the minerals was gotten under the defendant's land which adjoined the garden. In 1855 the defendant commenced getting out the rest of the minerals under his land. In 1857 the plaintiff's land sank and the house was injured by the defendant's mining operations. It was found by the jury that the sinking of the plaintiff's land was caused by the defendant's workings: that some damage would have happened, but not to the same extent, if the garden ground had been left solid; that the defendant knew of the excavations under the garden; that the land would have sunk in just the same whether there was a house on it or not; and, lastly, that the damage to the plaintiff's house by the sinking was £300, £250 occasioned solely by the defendant's workings, and £50 damages caused in part by the excavation under the garden: *Held*, 1. That inasmuch as the sinking of the plaintiff's land was in no way caused by the weight of the house, the plaintiff was entitled to recover whether he had acquired a right to support for his foundations by the defendant's soil or not; 2. That although the excavation under the garden contributed to the extent of £50 to cause the damage, the plaintiff was entitled to the whole £300, because if the defendant had not done the wrongful act complained of, no part of the damage would have occurred. *Brown* v. *Robins*, 4 H. & N. 185.

44. Injury—Further mining. Plaintiff was tenant of the surface and buildings. Defendants were lessees of the underlying minerals by a subsequent lease. The defendants' workings having caused a subsidence of the surface and consequent injury to the plaintiff's buildings, the latter brought an action to recover damages; in the first count of his declaration, alleging possession of land with buildings on it, and a right to support for the surface and buildings, and that the defendants took away such supports; and in the second count alleging no right to support, but stating generally his possession of land, and that the defendant so wrongfully worked the mines that the land fell and the buildings thereon were damaged. The defendants pleaded not guilty and not possessed to both counts; and also to the first count a traverse of the right to support as alleged. The jury found specially "that the building had been erected on ground honeycombed by mining operations prior to the workings of the defendants; that the workings of the defendants increased the defective nature of the grounds and a subsidence of the surface was the consequence; that from this cause and from the buildings not having been constructed with sufficient solidity; considering the nature of the ground, the damage to the plaintiff's buildings ensued;" whereupon Channell, B., directed the verdict to be entered for the plaintiff, giving the defendants leave to move to set it aside: *Held*, discharging the defendant's rule to set aside the verdict, or for a new trial, that the plaintiff was entitled to keep the verdict entered for him upon both counts, and to recover compensation for all the damage which he could prove that he had sustained; the defendant being bound to have left a sufficient support to both lands and buildings in the state in which they found them when they entered upon the

mines in 1861. *Richards* v. *Jenkins*, 18 Law Times, N. S. 437.

45. Rights of reversioner. In 1833 a manufactory was erected on a close, and in 1841 and between that time and 1849, the buildings were enlarged. In March, 1842, the close and buildings, which were leased for a term which expired in October, 1851, were conveyed in fee by S., the owner, to C. C. died in 1849, and in November, 1851, the devisees under his will conveyed the close and buildings to the plaintiff in fee, who, before 1849, was assignee of the term and occupied the buildings. In 1849 and 1850 the defendants, in getting coal from their mines, near but not immediately adjoining the close, caused the surface to subside, by which the buildings were injured. The devisees of C. did not thereby in fact sustain any damage, inasmuch as they incurred no expense, and continued to receive the full rent for the premises, and upon the sale thereof obtained the full value without reference to any injury thereto (of which they were ignorant) by the mining operations. Subsequently to the sale to the plaintiff, the working of the mines under lands near to, but not adjoining the close on which the buildings stood, occasioned a further subsidence. No damage was done by the working of the mines subsequent to July, 1852; but the subsidence of the ground continued as the consequence of the previous mining operations. The mining was skillfully conducted, and the buildings did not contribute to the subsidence. In August, 1855, the plaintiff brought an action against the defendant: *Held*, that he was entitled to recover damages in respect of the deterioration in value of the manufactory, the machinery broken, the increased expense of keeping it in repair and working order, and the diminished profits both in respect of his occupation before and after the purchase. *Hamer* v. *Knowles*, 6 H. & N. 454.

Upon the same facts: *Held*, that the devisees of C. might maintain an action for the injury to the reversioner during the subsistence of the lease as trustees, and for the benefit of the vendee. *Stroyan* v. *Knowles*, 6 H. & N. 454.

46. Further damages from original act. The withdrawal (by mining coal under an adjoining close) of any part of the stratum to the support of which the owner of the adjacent soil or house thereon is entitled, is a cause of action as an injury to the right, although no immediate damage ensues; and no fresh cause of action accrues by the occurrence of subsequent damage. Therefore, to an action for damage caused by such withdrawal, it is a good answer that a prior action has been brought for damage consequent upon the wrongful act, and an accord and satisfaction agreed to and performed between the parties. *Nicklin* v. *Williams*, 26 Eng. L. &. E. 549; 10 Ex. 259.

47. Gas tank over old mines—Liability of Gas Co. An act of parliament *temp.* Geo. IV, incorporated the company defendant for the purpose of supplying the town of Birmingham with gas. By 8 and 9 Vic., chap. 66, sec. 160, it is enacted, "That if the company shall at any time cause or suffer to be conveyed or to flow into any stream, reservoir, aqueduct, pond, or place for water, within the limits of said act, any washing, substance, or thing which shall be produced by making or supplying gas," they shall forfeit £200. In 1854, the company erected a gas tank about forty-five yards from the plaintiff's well. The site was selected by an engineer on behalf of the company, and the tank was erected on solid sandstone and with proper materials. The company knew that mines in the neighborhood had been worked, but they did not know that mines had been worked under or near to any part of their land. In 1838 there were workings under half the company's land, and from 1848 to 1855 these workings were brought to within about sixty yards of the tank, in consequence of which the floor of the tank cracked, and the washings in it flowed out and percolated to the plaintiff's well, thereby rendering the water of the well unfit for domestic purposes: *Held*, in the exchequer chamber, (affirming the judgment of the court of exchequer) that the company had suffered the washings to flow into the plaintiff's well within the meaning of 8 and 9 Vict. c. LXVI., and consequently were liable to the penalty of 200l. *Hipkins* v. *Birmingham & S. G. L. Co.*, 6 H & N. 250; 30 L. J. Ex. 60; affirming S. C., 5 H. & N. 74.

48. Where canal company refuses to purchase. A canal company having the privilege of purchasing the subjacent minerals under act of parliament cannot hold the owner of the minerals responsible in damages for injuries occasioned by his mining for them upon the refusal of the company to purchase under the act. *Wyrley Can. Co.* v. *Bradley*, 7 East, 368.

And so though the working may cause the surface to subside. *Fletcher* v. *Great W. R. Co.*, 4 H. & N. 242; *Great W. R. Co.* v. *Fletcher*, 5 H. & N. 689.

49. Case. Case is the proper form of action for injuries done to the surface owner by the acts of the mine owner in not leaving sufficient support. *Harris* v. *Ryding*, 5 M. & W. 60.

50. Flooding to mines below. The same ruling applied between adjoining owners of coal tracts where by reason of

non-sufficient support the surface sank and let the surface water into the underlying mine and thence into the mine of the adjoiner. *Horner* v. *Watson*, 79 Pa. St. 242; 21 Am. R. 55.

51. Hydrostatic pressure. The effect of flooding a shaft and connecting works by an accidental overflow considered with regard to the additional support thus given to the surface and heavy masonry erected on the surface. *Elliot* v. *North Eastern R. Co.*, 7 H. L. Ca. 333.

52. Hydrostatic pressure—Railroad bridge. For case where the "Victoria Bridge" had been built near land containing old coal works, long before abandoned and filled up with water, where such water was estimated as contributing by hydrostatic pressure 12.2 per cent. to the support of the surface and an injunction sought against the mine owner after the erection of the bridge to prevent the pumping of such water. See *Northeastern R. Co.* v. *Elliot*, 30 L. J. Ch. 160; S. C. 32 Id. 402, 7 H. L. Ca. 333.

SURVEY.

1. Departure of vein from side lines. The survey of a mining claim for the purpose of applying for a patent from the United States, is the act of the claimant and not of the government, and if he has applied for patent before sufficient development has been made to show the strike of his vein, and if thereupon after the patent issues the vein is found to depart from the survey lines it is lost to the patentee. The surveyor acts for the claimant and he is not required either to discover or show the course of the vein. *Wolfly* v. *Lebanon M. Co.*, 4 Colorado, 1878.

See INSPECTION.

TAILINGS.

1. Abandonment. To suffer tailings to flow without attempt to confine them within some limit, is conclusive evidence of abandonment unless there is some peculiarity in the locality which would do away with the reason of this rule. If no artificial obstruction is required to keep them within the proper limits, then none is necessary. *Jones* v. *Jackson*, 9 Cal. 237.

2. Property in. The pay-dirt and tailings of a miner which are the productions of his labor, are property. *Jones* v. *Jackson*, 9 Cal. 237.

3. Ownership. Where a plaintiff was found to have the possession of certain land upon which tailings were deposited and defendant to have intruded and removed a portion of such tailings: *Held*, that plaintiff's right to the tailings was co-extensive with his right to the land. *Rogers* v. *Cooney*, 7 Nev. 213.

4. Right of deposit—Upper and lower claims. Plaintiffs owned mining claims below and defendants above in the bed of the same stream. Defendants' claims were located first but plaintiffs' claims were located before the working of the claims above affected those below. Defendants constructed a flume extending down to and upon plaintiffs' claims, which carried a large quantity of tailings down upon plaintiffs' claims: *Held*, that defendants had no easement or right to enter upon plaintiffs' land and erect such structure. *Esmond* v. *Chew*, 15 Cal. 137; see *Logan* v. *Driscoll*, 19 Cal. 623; and *Lincoln* v. *Rogers*, 1 Mont. 217.

The fact of the relation of the mining claims to each other on the same stream does not give the upper claimant a right of way of necessity over the lower claims. Id.

If there is any local mining custom giving an upper claim the right to carry a flume and dump tailings upon a lower claim, such custom must be averred and proved. Id.

Each person mining in the same stream is entitled to use in a proper manner both the channel of the stream and the water flowing therein; and where from the situation of different claims the working of some will necessarily result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be *damnum absque injuria*. Id.; but see *Logan* v. *Driscoll*, 19 Cal. 623.

5. Use of channel. Miners are entitled to the free use of the channel of a creek, so that the water will flow from their ground; but they have no right to fill the channel with tailings that will flow down upon the claims of other miners. *Nelson* v. *O'Neal*, 1 Mont. 284.

6. Settling on claim of another. Where tailings are allowed to flow upon the ground of another, the owner of the ground upon which they flow is entitled to them. *Jones* v. *Jackson*, 9 Cal. 237.

7. Obstructing tail race. A party mining upon a ravine which runs into another ravine is not clothed by virtue of a supposed right to use the ravine upon which he is mining as an outlet for his tailings, with the general right to break in at any point he may select upon the tail race of another constructed upon the other ravine. *Gregory* v. *Harris*, 43 Cal. 38.

8. Tailings from several claims. In an action based upon the filling up of a dam

by miners' tailings, a witness was asked "what effect did the running in of slum, etc., by defendants and other miners above have upon plaintiff's race?" *Held*, that the question was proper; that it was impossible to individuate the effect of defendant's acts and the like acts of other miners on the same stream, and that proper cross-examination and instructions would protect the defendant from any responsibility, except what he had incurred by his own acts. *Bell* v. *Shultz*, 18 Cal. 450.

9. Locating dump for. When a place of deposit for tailings is necessary for the working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be necessary for this purpose, provided he do not interfere with pre-existing rights. His intention to appropriate such ground must be clearly manifested by outward acts. Mere posting notices is not sufficient. He must claim the place of deposit as such or as a mining claim. *Jones* v. *Jackson*, 9 Cal. 237..

10. Location of tailings claim. If land be valuable only for the metals to be found on it, as land upon which tailings have been deposited, and it is not claimed for any other purpose, the acquisition of a possessory title thereto is governed by the same rules ordinarily controlling possessory titles to mining claims. *Rogers* v. *Cooney*, 7 Nev. 213.

11. Location, subject to easement. A party may take up a claim for mining purposes which has been and still is used as a place of deposit for tailings by another; but in that case his mining right may be subject to the prior right of deposit. *O'Keiffe* v. *Cunningham*, 9 Cal. 589.

12. Negligence immaterial where right affected. The fact that a miner, working a claim above the head of the ditch, conducts his mining operations in such a manner as to cause the least possible injury to the ditch and water flowing in the same, does not excuse his responsibility for injuries caused by working the same. It matters not how cautiously or carefully the miner works, for if the ditch owner is in fact injured, the miner is none the less liable. *Hill* v. *Smith*, 27 Cal. 476.

13. Tin streaming. The privilege of washing sand, stone, and rubble, dislodged in the necessary working of a tin mine, and having the same sent down a natural stream running through the plaintiff's land, may be the subject of a grant, and may be pleaded as a prescriptive right, under the 2 & 3 Will. 4 c. 71, to a declaration charging the defendants with throwing such stone, sand, and rubble into the stream, and thereby filling up its bed within the plaintiff's land, and causing the water to flow over it. Such privilege may also be well pleaded as a local custom.

The privilege of sending the tailings from tin streamings down a natural water course and over lands of other persons may be allowed by local custom. *Carlyon* v. *Lovering*, 40 Eng. L. & E. 448; 26 L. J. Ex. 251.

14. Reclamation of. The owners of a mining claim and flume who have allowed their tailings and water to go to the benefit of another flume connecting at the foot of their flume and so induced the expenditure of money by parties seeking the benefit of such water and tailings are not precluded from taking any measures they see fit by sale or otherwise to get a benefit from what they had been accustomed to abandon. *Dougherty* v. *Crary*, 30 Cal. 290.

15. Coal washings — California practice. If a party who is engaged in mining for coal causes water, sand and clay, in a flowing mass, to descend upon the land of another so as to destroy its value for cultivation, and such descent is the direct result of the act of such party, and not the mere result of the law of gravitation, the person whose land is thus injured may recover damages and enjoin the future commission of said acts. *Robinson* v. *Black D. C. Co.*, 50 Cal. 460. (Decided on the pleadings.)

16. Pleading. In an action for flooding tailings on plaintiff's land where the answer denies the plaintiff's title and asserts a right to flow tailings upon the land, the title to the land is put in issue. The admission that tailings were flowed upon the land does not admit that the land belonged to the plaintiff. *Wood* v. *Richardson*, 35 Cal. 149.

TAXATION.

1. Mining claim. The interest of the United States in "mining claims" occupied under the Revised Statutes, secs. 2318–2332, is not such as to prevent the taxation of the proceeds or of the possessory rights or property of the miner in such claims. *Forbes* v. *Gracey*, 94 U. S. 762.

The interest of the occupant of a mining claim is property, and under the constitution it is in the power of the legislature to tax such property. *State* v. *Moore*, 12 Cal. 56.

2. California enabling act — Exemption. A mining claim on the public lands of the United States is taxable to the claimant without violation of the clause of the act admitting California into the Union which prohibits taxation of the lands of the United States. *People* v. *Black Diamond C. M. Co.*, 37 Cal. 54.

The general revenue act of California, in so far as it attempts to exempt possessory claims and improvements upon the public mineral lands from taxation, is void. Id.

3. Mining claims on public domain. The possession by the citizen of, and his possessory interest in, the public lands, for mining, agricultural, or other purposes, constitutes a species of property recognized by law, and is subject to taxation by the state. *State* v. *Moore*, 12 Cal. 56, as to power of state to tax the possessory right to a mining claim, affirmed. *People* v. *Shearer*, 30 Cal. 645.

4. "Mining ground"—Nevada. Possessory rights to mining claims are property, and as such are taxable. Taxation of such possessory rights is not in violation of the organic act of Nevada territory, which prohibits taxation of the property of the United States. The object of such provision in the organic act was to protect the government, and not to prevent the taxation of such interests as settlers might acquire upon the public lands. The words "mining ground," when used in a deed, have a technical meaning. They refer to the interest of the occupant. They are not the words used when a fee-simple or leasehold interest in real estate is to be conveyed; and, when used by the assessor, are a proper description of the taxable interest. 1865, *Hale and Norcross G. & S. M. Co.* v. *Storey County*, 1 Nev. 105.

5. Description of mine. Where the assessment called for "one mine of four thousand and four hundred feet on Last Chance Hill" it is a sufficient description of the possessory right, and does not include the fee of the United States. *State* v. *Real del Monte M. Co.*, 1 Nev. 524.

Where the complaint filed to enforce such assessment enlarged the description so that it read "those certain mining claims situate on Last Chance Hill in said county and known as the 'Real del Monte' 'Aurora' Last Chance...., containing in all forty-four hundred feet, more or less, and being the same property described in the assessment roll," etc., there is no variance between the two descriptions. Id.

Where many claims are consolidated in one mine in the hands of one company there is no impropriety in calling it one claim or one mine. Id.

6. Minerals severed. Minerals removed from the land and converted into personal property may be taxed as such. *Palmer* v. *Conwith*, 3 Chand. (Wis.) 297.

7. After severance. Where the owner of coal land has sold the right to take all the coal that is in the land and retained the land itself, the owner of the land and the owner of the coal, are each taxable according to their several interests. But this principle does not justify a higher valuation of the two interests taken separately than would have been made if both had continued in the same person. *Logan* v. *Washington County*, 29 Pa. St. 373.

8. Ore tax. The statute of March 10, 1865 imposing a specific tax upon corporations and companies engaged in mining smelting and refining ores in Michigan, which provides for the payment of a tax of one and a half cents per ton on all iron ore or mineral obtained and exported from the state before being smelted, but exempts from taxation all that is smelted within the state is void, as an attempt in effect to impose a tax upon inter-state commerce. *Jackson M. Co.* v. *Auditor-Gen.*, 32 Mich. 488.

9. Bullion. A state tax upon bills of lading for the transportation of gold and silver out of the State is void, being in conflict with that clause of the constitution of the United States prohibiting or limiting the laying of imports or duties on exports or imports. *Brumagim* v. *Tillinghast*, 18 Cal. 266.

10. Proceeds—Nevada. A statute which directs a tax upon the proceeds of mines upon an assessment of three fourths of their value, is unconstitutional under the usual provision for equal taxation: and when by special clause in the constitution the proceeds of mines are liable to tax, instead of the real estate, the whole of such proceeds and not a fraction, must be the basis of taxation. *State* v. *Eastabrook*, 3 Nev. 173.

11. Income—Proceeds. An oil company was incorporated with a capital $1,000,000, which was invested in oil land. Their dividends were only from the products of oil wells and were credited to the capital stock invested. The company claimed that they were not liable to tax on net income until the proceeds from oil had repaid all the capital: *Held*, that the income from their works after deducting expenses, was the net income to be taxed. *Com.* v. *Ocean Oil Co.* 59 Pa. St. 61.

Same holding in case of Coal Co. *Com.* v. *Penn. Gas Coal Co.*, 62 Pa. St. 241.

12. Sundry statutes—Nevada. Where the revenue act of 1866 was supplied by a new act in 1867, held that the proceeds of mines for the quarter prior to the date of the act of 1867 could be taxed under it; the latter statute being construed as affecting only the manner of collection of a tax already imposed by the previous act. *State* v. *Manhattan Co.*, 4 Nev. 332.

13. Tax on proceeds—Nevada. Art. X of the Nevada constitution which requires the taxation of "all property real, personal and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed," means that the entire annual proceeds shall be taxed and not the mere proceeds on hand when the assessor happens to visit the mines. *State* v. *Kruttschnitt*, 4 Nev. 198.

The requiring of quarterly payments of taxes on proceeds of mines, the times of payment being so arranged that the interest and discount are about equal so that it is the same as to interest as if all were payable on the day fixed by law for payment of taxes on other sorts of property, does not render this species of taxes unequal. Id.

Taxation of the proceeds of mines is more favorable to mining interests than a tax upon the mines themselves as real estate. Id.

The valuation of the ores and the deductions for cost of working are both to be made upon a currency basis (1868). Id.

The assessor may call for sworn statements of the amount and value of ores but is not bound by such statements. Id.

An assessment must include both the amount and the value of the ore; the assessment is made after treatment, but referred back to the value on the dump; if the return is made as bullion of $— value, it should be considered to mean value in gold or silver, and a proper percentage added for premium. Id.

Lewis J. in a special opinion held that the words "amount or value" used in the statute should be construed as requiring the weight of bullion; arguing that the value would then be a matter of simple calculation. Id.

14. Proceeds—Nevada—Commissioners. The county commissioners have no power to except the proceeds of mines from levy for tax purposes, where a statute is in force for their taxation. *State* v. *Gracey*, 11 Nev. 235.

15. Ore tax—Nevada. Ore is personal property, and, as such, liable to taxation for municipal purposes. An assessment of the proceeds of mines which deducts $20 per ton from the assay value, and 25 per cent. from the remainder, and treats the balance as the taxable value, is an equal and uniform taxation of that class of property under the constitution. Where on refusal of the owner to list all his ore, is rated at $500 per ton, it may seem a harsh rule, but is for refusal to list, no more than a just penalty. The fact that ore had been removed from the city before the passage of the ordinance but during the annual period or fiscal year for which the tax was levied, is no cause for deduction of such ore from the total of annual proceeds. *City of Virginia* v. *Chollar Potosi G. & S. M. Co.*, 2 Nev. 86.

The constitution of Nevada exempts mines and mining claims from taxation, and says that the proceeds alone shall be taxed. Id.

16. Quarterly assessments—Nevada. The quarterly assessments and collection of taxes on the proceeds of mines is not unconstitutional. *State* v. *Manhattan S. M. Co.*, 4 Nev. 332; *State* v. *Kruttschnitt*, 4 Nev. 198.

17. Income—Profits. A duty paid a municipal corporation under an act of parliament of a certain sum on every chaldron of coals, is "property or profits," and the town must pay an income tax thereon. *Att'y-Gen.* v. *Black*, L. R. 6 Eq. 78 and 308.

18. Royalty—Installments. Where a mine is sold for a consideration, payable in half-yearly installments (through a period of thirty years), such installments are not annuities, annual profits or gains, or annual payments of a personal obligation and therefore not subject to income tax. *Foley* v. *Fletcher*, 3 H. & N. 769.

19. Exemptions—Nevada. The Act of February 28, 1871 for the taxation of net proceeds of mines in providing "that an additional exemption of fifteen dollars per ton may be allowed on all ores worked by Freiburg or dry process," does not authorize an exemption of fifteen dollars per ton on all ores so worked in addition to the actual cost of working them, but allows the maximum of actual cost deducted in case of ores so treated to reach seventy-five per cent., instead of the limit of sixty per cent., allowed upon ores otherwise treated; the legislative intent was to ascertain and tax the gross yield less the actual cost; but a limitation of the deduction for cost of working was placed at sixty per cent. of the gross value; and in case of a certain class of ores, intended to be designated in the act by reference to the mode in which they were reduced, the deduction for cost of reduction may, if still within the actual cost, be as high as seventy-five per cent. *State* v. *Eureka Con. M. Co.*, 8 Nev. 14.

20. Bounty on salt. The legislature of Michigan enacted a statute exempting the property of companies organized for the manufacture of salt out of water procured by boring in that state from taxation, and granting a bounty of ten cents per bushel on the salt so to be produced: *Held*, that such a law did not create a contract between the state and a company organized under its encouragement in such a sense as to forbid its repeal. *East Saginaw Co.* v. *City of*

East Saginaw, 13 Wall. 373; affirming S. C., 19 Mich. 259.

21. Possessory claim—Value. The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include an usufructuary interest whether it be a leasehold or a mere right of possession. Several persons may have in the same land a property which is subject to taxation, and it is not perceived that the fact that the property of the government is exempt from taxation affects the right to tax the interest which private individuals have acquired in the same property. Exemption from taxation is a privilege from the government, not an incident to the property. *State* v. *Moore*, 12 Cal. 56.

There is no force in the objection that the value of a mining claim, which depends upon the amount of the precious metals it contains, must necessarily be left to conjecture. Id.

The universal standard of value is the amount of money which can be realized by the sale of the property, and this will apply as well to mining claims as other lands. Id.

The legislature having expressly exempted mining claims from the operation of the revenue act, it cannot be presumed that it intended indirectly to subject them to taxation by levying a tax on the price paid for them. Id.

Money invested in the purchase and opening of mining claims is not within the provisions of that portion of the revenue act which provides for the levy of a tax on "all capital loaned, invested, or employed in any trade, commerce, or business whatsoever." Id.

22. Iron—Pennsylvania. Sec. 94, A. C. June 30, 1864, imposing taxes on pig iron and railroad iron construed. Pig iron is "used by the manufacturers thereof," when they advance it into railroad iron. *Phila. & R. R. R. Co.* v. *Waterman*, 54 Pa. St. 337.

23. Franchise—Pennsylvania. Taxation of coal companies under Sec. 7, Act of April 24, 1874, according to the number of tons mined (three cents per ton) is constitutional. Such a tax is a tax on the franchise, not on the coal, and is uniform. *Kittaning Coal Co* v. *Com.*, 79 Pa. St. 100.

24. Special tax on ore carried. An act (April 14, 1868) provided that in addition to other taxes the owners of ore beds in Saucon Township should pay to the road supervisors one and one half cents for every ton of iron ore mined and carried over the road by teams, payable at the end of each six months, and to be collected as debts of like amount: *Held*, constitutional (Agnew, J., dissenting): *Held*, further, that the owner and not a lessee was liable for the tax. *Weber* v. *Supervisors*, 73 Pa. St. 370.

25. Mining corporations—Michigan. One half the specific tax on mining corporations is by the state specifically appropriated to the county where it has been paid. 1861. *People* v. *Auditor-general*, 9 Mich. 141.

26. Corporate stock. A mining corporation may be lawfully required to pay a tax upon the market value of its stock in excess of the total value of its real and personal property. *Oliver* v. *Cornwall Cop. Co.* 12 Allen (Mass.) 298.

27. Stock of non-residents. A mining corporation may be compelled to pay a tax on its stock although part of such stock be owned by citizens of other states. *Oliver* v. *Cornwall Co.* 12 Allen (Mass.) 298.

28. Dividends—Increase of Stock. Where a corporation began with a capital of one hundred thousand dollars, which was increased out of the profits to one million, but the increase was not formally divided among the stockholders—the nine hundred thousand is liable to tax as *dividends*. The dividend is not the real subject of taxation although made the legal standard under act of April 29, 1844. The tax is upon the stock and the dividend is used only as the measure of its value. *Lehigh Crane Co.* v. *Com.*, 55 Pa. St. 448.

29. Flume. A flume under construction and not delivered by the contractor being nevertheless the property of the company is taxable to the company its owner, and not to the contractor. *Hart* v. *Plum*, 14 Cal. 148.

30. Smelting works. Chattels employed about a smelting business are of that description which may be taxed to the person in possession although not the owner—under the tax law of Wisconsin. *Palmer* v. *Conwith*, 3 Chand. 297.

31. Assessment—Machinery. In a rate laid upon buildings to which machinery is attached for the purpose of manufacture, the real property ought to be assessed according to its actual value as combined with the machinery, without considering whether the machinery be real or personal property. *Reg.* v. *Guest*, 7 A. & E. 951.

32. Poor rate. An exhausted coal mine is not ratable to the poor, although the lessee may be liable on his lease to keep up the annual rent therefor. *Rex* v. *Bedworth*, 8 East, 387.

33. Adit into mines in several parishes. A coal mine lying in several parishes is ratable to the relief of the poor in each

of those parishes, although the adit and the machinery be in one parish only. *Rex* v. *Foleshill*, 4 N. & M. 360; 2 Ad. & E. 593; 1 H. & W. 71.

34. Foreign Miners' Tax, Cal. Sec. 64 of the revenue act of 1860, which declares that no person not a citizen of the United States, or a person who has declared his intentions to become such, shall be allowed "to take gold from the mines of this state or hold a mining claim therein" without a license, etc., does not refer to mines which are the property of individuals but simply to mines in the public lands of the state or United States. *Ah He* v. *Crippen*, 19 Cal. 492.

The same as to the revenue act of 1861. *Ah Yew* v. *Choate*, 24 Cal. 562.

35. Highway rates. The proviso in the 27th section of the 5 and 6 Will. 4, c. 50, which extends the liability to highway rates to "such woods, mines, etc., as have heretofore been usually rated to the highways," is not limited to the identical mines before actually rated, but applies to mines of the same class and description as those usually rated in the parish before the act passed, though opened and worked for the first time since the passing of the act. *Reg.* v. *Saunders*, 24 L. J. M. C. 57.

36. Tax on assaying. A mining company assaying its own ores, is required to pay a special tax as assayer under div. 48, sec. 79, internal revenue act of June 30, 1864, as amended in 1866. *Yellow Jacket S. M. Co.* v. *Gage*, 1 Sawyer, C. C. 494.

37. Division of county. The act creating the county of White Pine went into effect on the first of April, 1869; the assessor of the new county assessed the proceeds of mines for the quarter ending the day before the new county was created: *Held*, that as no assessment could be made till the expiration of the quarter, the taxes were properly collectible by the newly erected county, which began its existence coeval with the time when assessments could first be equally made. *White Pine* v. *Ash*, 5 Nev., 279.

38. Mandamus. For procedure upon mandamus to compel the collection of taxes upon proceeds of mines. See *State* v. *Gracy*, 11 Nev., 235.

39. Stock—Place of business. The stock of a mining company is to be taxed as of the place where its works are situate or the greater part of its operations conducted. Where it was disputed as to which county had the right to tax, and the company has sought to enjoin its collection against one of those counties, the bill must allege affirmatively that the company is liable to taxation in the other county. *Garrett County* v. *Franklin Coal Company*, 45 Md. 473.

40. Fraudulent assessment. An excessive valuation of lands (mineral), intentionally made for the purpose of compelling the owner to pay more than his just proportion of taxes is a sufficient ground for declaring the assessment void. *Milwaukee Iron Co.* v. *Hubbard*, 29 Wisc. 51.

41. Assessment—Mode of ascertaining value. The principal value of the lands of the Dickerson Suckasunny company consisted in the mines of iron ore found upon them. They were assessed for the year 1854 at two hundred and eleven thousand five hundred dollars, from which assessment the company appealed. It appeared that for some years previous the lands, including some other property, had been assessed, with the owner's consent, at seventy-five thousand dollars. That in the spring of 1854 they had been bought by the appellant at public sale for the amount of the assessment, two hundred and eleven thousand five hundred dollars, upon which fact the assessor had based his valuation. That there were six other mining properties in the same township valued by the same assessor at sixty-eight thousand five hundred dollars, which other properties were not, however, as valuable in the aggregate as the property of the company. To ascertain the additional value by reason of the mines in the land, evidence was given to show the amount of ore raised per year, the cost of raising and the price per ton after being raised. No witness testified that in his opinion the lands were not worth the sum at which the assessor had valued them: *Held*, that the law required the property to be assessed at its value and the amount bid at the public sale was a fair criterion of value, not conclusive, however, even against the purchaser, but which could not be overcome by the valuation made by the assessor with the consent of the owner in the previous years; 2. That the fact of other mining lands in the same township being assessed at lower rates than their actual value was not ground for reducing the assessment against the appellant; 3. That the evidence as to the annual production of ore from the mines, was, in the first place, too indefinite, but that in any event the income is not a criterion of value. *State* v. *Randolph*, 1 Dutch. (N. J. L.), 428.

42. Mines—Wisconsin. In determining the value of lands by statute of Wisconsin, assessors are to consider the "mines, minerals, quarries or other valuable deposits known to be available therein." *Hersey* v.

Barron County, 37 Wisc. 79; see *Milwaukee Iron Co.* v. *Hubbard*, 29 Id. 51.

See ALIENS; CHINESE.

TENANTS IN COMMON.

1. Legal rights. A court of equity has no jurisdiction of a bill in equity, brought by one tenant in common against an alleged co-tenant to obtain the possession and enjoyment of mining rights and privileges founded on legal title, until those rights have been established by law. *North Penna. C. Co.* v. *Snowden*, 42 Pa., 488.

The remedy of the complainant is at law, whether his rights are corporeal or incorporeal, and amounting to an interest in the coal and minerals in the land charged in the bill. Where the title is legal, the case is within the jurisdiction of a court of equity. Id.

The act of April 22, 1856, giving a tenant in common in coal or iron mines whose right is denied or resisted, the power to apply by petition in equity to the court of common pleas of the county where the lands may lie, which shall adjudicate and determine the rights of the several parties according to the course of a court of chancery, conflicts with the constitutional right of the citizen to have controverted questions of fact in common law causes decided by a jury; and it is applicable only in cases in which the rights of the complainants are equitable. Id.

2. Claim of co-tenancy in severalty. When it was at issue whether defendant was tenant in severalty of a small lot or tenant in common in a larger lot, and the defendant at first claiming to hold the smaller lot in severalty had taken all the coal out of it: *Held*, that under such circumstances he must be enjoined from taking coal out of the larger tract upon the plea of being a tenant in common of the larger tract. *Maden* v. *Veevers*, 5 Beav., 503.;

3. Shaft to get the common minerals opening on several land. The owners of contiguous estates who were tenants in common of the mines beneath are equally entitled to the landing rent paid on foreign coal raised through a shaft which had been constructed by their joint lessee for the working of the mines held in common, but which opened upon land which was the separate estate of one of the tenants in common of the mines. *Clegg* v. *Clegg*, 3 Giff. 322; 31 L. J. Ch. 153.

4. Owning in two claims—Sale of Tailings. The plaintiffs and the defendant were tenants in common of a mining claim. Defendant was also one of the tenants in common of an adjoining claim. The first mentioned claim was let to the owners of such adjoining claim, and after the lease expired the defendant sold the tailings and accounted for the proceeds to his co-tenants, the owners of such adjoining claim. *Held*, without reference to the property in the tailings, that defendant had done no act as a co-tenant of plaintiffs, and that the action against him as a co-tenant to account for the sum received for the tailings could not be sustained. *Clark* v. *Jones*, 49 Cal. 618.

5. Relation created by deed—New Jersey. A general conveyance (of mines) to two or more, whether in their own right or as trustees, without affirmative words expressly creating a joint tenancy, must be construed, under the New Jersey statute of 1812, as creating a tenancy in common. *Boston Franklinite Co.* v. *Condit*, 19 N. J. Ch. 394.

But the statute of 1812 has been repealed as to trust estates not already vested. Id.

6. Discovery after contract. *Dictum*, where tenants in common by agreement continued their tenancy in common, and arranged for the enjoyment of their respective rights in a certain manner of all the iron ore in certain deposits, their rights in copper or other more valuable ore subsequently discovered in the same tract would remain unchanged; or at least they would still be tenants in common therein. *Blewett* v. *Coleman*, 40 Pa. St. 45.

7. Unequal interests—Covenants joint. Several tenants in common of mines, owning unequal interests, uniting in a joint lease, the covenants are joint and not several, and suit for breach of covenant must be brought by all, or the survivors, and this though the demise was according to their respective interests, and the rents were to be rendered according to their respective interests. *Bradburne* v. *Botfield*, 14 M. & W. 559.

8. Estate.—Power of one co-tenant. Tenants in common of a coal mine are seised of each and every part of the estate, but it is not in the power of one to convey the whole of the estate or the whole of a distinct portion, or to give a valid release for injuries done thereto, or to give a license to take the coal. *Murray* v. *Haverty*, 70 Ill. 318.

9. Lessee becomes co-tenant. A lease for a term of years by a tenant in common of his interest in the estate held in common (an iron ore bed), makes the lessee, who takes possession under the lease and receives the rents and profits, a co-tenant with the other tenants in common, and as such

liable to account to them. *Barnum* v. *Landon*, 25 Conn. 137.

10. Injury to joint owner. If one of two joint owners of a flume used for mining purposes consents to and directs the opening of a water ditch above the flume, by means whereof the water from the ditch flows over and injures the flume, the other joint owner cannot recover damages for such injury. *Crary* v. *Campbell*, 24 Cal. 634.

If one of two joint owners of a flume used for mining purposes brings an action to recover damages for an injury to the joint property, caused by opening a water ditch above the flume, it is error for the court to reject evidence that the other joint owner gave his consent to having the ditch opened. Id.

11. Right of one co-tenant against trespasser. The owner of an undivided interest in a mine is entitled to the possession of the whole mine as against one who has not title to any portion of the mine. *Melton* v. *Lambard*, 51 Cal. 258.

12. Action by co-tenant. Where a tenant in common of an ore bed is sued by his co-tenant, to compel him to account for rents and profits received by him from the common estate, it is not necessary to allege in the declaration that he has taken more than his share of the rents and profits, for the plaintiff has an interest in all the rents and profits, and the defendant is accountable for the plaintiff's share of whatever rents and profits he has received. *Barnum* v. *Landon*, 25 Conn. 137.

13. Contract of one co-tenant. A contract for a lease of the entirety of a coal mine, the defendant appearing to be the owner of a moiety only, and his co-owner refusing to conform, in the absence of fraud or misrepresentation, cannot be enforced as to such moiety. *Price* v. *Griffith*, 1 De G. M. & G. 80.

14. Right of one co-tenant. For case decided on the proposition that one of several co-tenants has the right to open and work a mine if he account to his co-tenants, see *Job* v. *Potton*, L. R. 20 Eq. 84.

15. Account—Misjoinder. Bill for an account between tenants in common of a mine, charging defendant with diverting ore to his sole use, trespass upon mining improvements, negligent and improvident use of the premises, and failure to pay his proportion of moneys expended by plaintiffs, and for the fraudulent procuring of an injunction against the plaintiffs: *Held*, a misjoinder of causes of action. *Hall* v. *Fisher*, 20 Barb. (N. Y.) 443.

16. Occupation by one. One tenant in common may maintain a suit in equity against his co-tenant, who has occupied the whole of the common property (salt works), for an account of rents and profits. *Early* v. *Friend*, 16 Grat. (Va.) 21.

17. Exclusive claim—Assumpsit. One tenant in common cannot maintain assumpsit against his co-tenant to recover the price of certain ore paid by the former to the latter under a mistaken supposition that the latter had an exclusive title to the land from which the ore was dug; the proper remedy is account render. *Irvine* v. *Hanlin*, 10 S. & R. 219.

18. Action against co-tenant. A tenant in common of a water ditch can maintain an action to recover his share of the rents and profits received by his co-tenant in possession and collecting the same. *Abel* v. *Love*, 17 Cal. 234.

19. Tenant in common—Executor of co-tenant. A tenant in common of a mine, being also administrator of another tenant in common, cannot sue the remaining co-tenants for an accounting, in his personal and representative capacity at the same time, by the same bill; or at least his personal claim should be stated separately from his claim as administrator. *Hall* v. *Fisher*, 20 Barb. 443.

20. One co-tenant conveying. Where the owner of land from which mineral rights have been severed is a tenant in common with others of such rights, and conveys a portion of such land by metes and bounds, and also his share of the mineral rights therein, the deed, so far as such easement is concerned, is inoperative as against his co-tenants. *Hartford & S. O. Co.* v. *Miller*, 41 Conn. 130.

21. Deed of one co-tenant Inoperative. M. owned a tract of land in fee, subject to certain undivided ore-rights, of which he owned one seventh, the other six sevenths being owned by other parties. He conveyed a portion of the land by metes and bounds, and his one seventh of the ore-rights in the land conveyed: *Held*, that the conveyance of the ore-right was inoperative against the other tenants in common of the easement. *Hartford & S. O. Co.* v. *Miller*, 41 Conn. 112.

Where, however, the other tenants in common afterward released to M. their interest in the one seventh ore-right in the particular land conveyed, it was held that the infirmity of M.'s conveyance was healed, all parties interested being estopped from denying its validity, and that in a suit against him for a breach of the covenant of seisin, only nominal damages could be recovered. Id.

The principle on which such conveyances are held void is that they tend to prejudice the rights of the other co-tenants. Hence, if the other co-tenants co-operate in or confirm the conveyance it is valid. Id.

22. One co-tenant cannot sever. One tenant in common cannot convey a particular part of the common property or an easement in it, as the right to dig ores, to the prejudice of his co-tenant. Such conveyance is void as to the co-tenant but good as against the grantor. *Boston F. Co.* v. *Condit*, 19 N. J. Ch. 394.

23. Attempted severance. A tenant in common of lands cannot convey to a stranger his interest in the ores therein found severed from his interest in the soil. *Adam* v. *Briggs Iron Co.*, 7 Cush. 361.

24. Void reservation. A party being tenant in common of the entire estate in lands (soil and mines) conveyed his interest in the land to a third party, reserving his estate in the mines: *Held*, that such reservation was void because a tenant in common cannot convey an interest in any aliquot part of the property held in common. *Adam* v. *Briggs Iron Co.*, 7 Cush. 361.

25. Ditch property. If two persons own a tract of land, as tenants in common, and one of them conveys to a third party a ditch crossing the same, and the other afterward conveys to another third person the same ditch, the deeds are valid conveyances as between the parties, and the persons to whom the conveyances are made become tenants in common in the property. *Reed* v. *Spicer*, 27 Cal. 57.

26. Salt works. Whenever the nature of the property (salt works) is such as not to admit of its use and occupation by several, and it is used and occupied by one only of the tenants in common; or whenever the property, though capable of use and occupation by several, is yet so used and occupied by one as in effect to exclude the others, he receives more than comes to his just share and proportion, and must account. *Early* v. *Friend*, 16 Grat., Va. 21.

27. Not accountable as partners. A joint owner in mining property in Kentucky joined the confederate army, leaving the common property in possession of his co-owners: *Held*, that this act dissolved the partnership relation (if it in fact existed), and that his co-owners, in an action against them as partners, could not be compelled to account for its use. *McAdams* v. *Hawes.* 9 Bush, Ky. 15.

28. Illegal sale of partner's interest. The mere passive acquiescence of the other partners or tenants in common in a sale of the interest of one of their number by a party having no title, cannot confer any upon the vendee. *Waring* v. *Crow*, 11 Cal. 360.

29. Possession of one — Delinquent partner. The possession of one tenant in common enures to the benefit of all until such possession becomes adverse. *Mallett* v. *Uncle Sam M. Co.*, 1 Nev. 194.

Obiter, If one partner or tenant in common, having become associated with his copartners in the development of a claim, voluntarily leaves it in possession of his copartners and refuses to bear his just proportion of expense, and afterwards brings his action to recover his interest, equity would, upon a proper showing, stay his relief until he had paid his full proportion of expense. Id.

30. Partner quitting work. When a tenant in common or partner goes away and remains absent from the premises, leaving his associates in possession, it creates no presumption of abandonment; nor does his refusal to pay or delay in paying the expenses of the business or his assessments create of itself a forfeiture. *Waring* v. *Crow*, 11 Cal. 360.

31. Remedies between. As to *fructus industriales*, a tenant in common does not receive more than his share under the statute of Anne, chap. 16, sec. 27 (in force in Pa.), by having the sole enjoyment of the property, though through his own industry and capital he make a profit by the enjoyment and takes the whole of it: *Dictum. Coleman's App.; Grubb's App.*, 62 Pa. St. 252; B. & W. L. C. 275.

Act of April 25, 1850 (mines held in common) construed. Id.

32. Ouster — Exclusive mining. A mere reception of the profits (by mining coal) and claiming the land by one co-tenant will not alone prove an ouster; there must be positive acts or a line of conduct indicating an intention to exclude the co-tenant. *Susquehanna Coal Co.* v. *Quick*, 61 Pa. St. 328.

33. Ouster of co-tenant. Possession of one tenant in common is presumed to be possession of all; and in order to rebut this presumption and make such possession adverse, an intention to hold adversely must be affirmatively shown; and such intent must be indicated by acts calculated to exclude the co-tenant. *Colman* v. *Clements*, 23 Cal. 245.

34. Possession of one. Unless there is some decisive act to show an ouster, the possession of one tenant in common of a mining claim inures to the benefit of all. *Van Valkenburg* v. *Huf*, 1 Nev. 142.

35. Ejectment—Ouster—Demand. If the plaintiff and defendant are tenants in common in a mine, and the plaintiff brings ejectment to recover an undivided interest, and avers that defendant has entered into possession of said undivided interest, it is requisite for the plaintiff to prove not only his title, but a demand to be let into possession, and a refusal of the demand, or more generally, to prove an ouster. *Hebrard* v. *Jefferson G. & S. M. Co.*, 33 Cal. 290.

36. One Co-owner against trespasser. In an action brought by several plaintiffs to recover a mining claim the answer, without alleging any misjoiner, denied plaintiffs' title and asserted an independent and better title in defendants, and the proofs showed that some of plaintiffs had no interest, and that others of them had a title superior to that of defendants as tenants in common with persons not made parties: *Held*, that those of plaintiffs thus showing title should recover of defendants the entire premises. *Rowe* v. *Bacigalluppi*, 26 Cal. 633.

37. Ejectment—Parties. A judgment in ejectment against some of several co-tenants will not be reversed because all the co-tenants were not made parties defendant. *Colman* v. *Clements*, 23 Cal. 245.

38. Law Expenses. Tenants in common in possession of a gold mine but claiming adversely to their co-tenants, are not entitled to contribution for defending the title against the claim of a third party. *Allen* v. *Barkley*, 1 Speer S. Car. Eq. 264.

39. Measure of damages. A tenant of the Cornwall ore banks (which are described as a solid superficial deposit of iron ore, not lying in any vein or bed, but a hill of ore which was removed *en masse* as dug) had under his title no physical means of obtaining his own share other than by taking at the same time the shares of his fellows: *Held*, that the value of the ore in place, "ore leave," was the just basis of settlement upon a bill for an account. *Coleman's App. Grubb's App.*, 62 Pa. St. 252; B. & W. L. C. 275.

40. Measure of accountability. If one tenant in common receive more than his just share of the proceeds of gold washings, he is liable to account to his co-tenant for such surplus, and if there is proof that he used such surplus, and no proof as to whether he made any profits out of it or not, the presumption is that he made profits out of it, and profits at least equal to the interest on the value of such surplus, calculated at the legal rate. *Huff* v. *McDonald*, 22 Ga. 131.

41. Partition. Minerals severed from the surface ownership and held under a tenancy in common, may be the subject of partition. *Canfield* v. *Ford*, 28 Barb. 336.

42. Parol partition. After parol partition of a mining claim, followed by exclusive possession of the several parcels, the parties cease "to be tenants in common, and forever after deal at arms' length." All relation of trust and confidence ceases. *420 Mining Co.* v. *Bullion M. Co.*, 3 Saw. 634.

43. Partition waived by agreement. The right of partition is a beneficial incident of tenancies in common, but it may be waived by agreement of the parties in interest. *Coleman* v. *Coleman*, 19 Pa. St. 100; B. & W. L. C. 260; *Coleman* v. *Blewett*, 43 Pa. St. 178.

Any mineral lands held in common, whatever the peculiarities of their structure, are subject to partition under the statutes of Pennsylvania; for if they cannot be divided without prejudice, they may be ordered to one or more of the tenants at a valuation, or be sold and the price divided; but neither the letter or policy of the law demand partition of an estate in circumstances such as attend these hills of ore. Id. (See Cornwall Ore Banks).

44. Estoppel. The representation of one tenant in common as to the extent of the subject of a joint conveyance by himself and his co-tenants (a ledge of lime rock) cannot estop his co-tenants from claiming, according to their rights; nor can the representation estop him, unless acted on by the purchaser. *Dexter Lime Rock Co.* v. *Dexter*, 6 R. I. 353.

45. Quiet title. One tenant in common of a mining claim, in actual possession, may maintain an action under sec. 254 of the practice act, to determine the validity of an adverse title purchased by a co-tenant. *Ross* v. *Heintzen*, 36 Cal. 313.

46. Joint suit. Tenants in common of a mine owning undivided interests acquired at different times, may sue jointly to recover possession of their several undivided interests. *Goller* v. *Fett*, 30 Cal. 481.

47. Action for diversion of water. Actions for the diversion of waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *Parke* v. *Kilham*, 8 Cal. 77.

48. Infants—Account. Complainants, infant heirs, claimed four twenty-sevenths of a tract of land on which was a gold mine in the possession of and worked by the defendants, who held such undivided interest under a deed from complainant's ancestor; but the deed was void, being the deed of a

feme covert. Upon bill for an account it was *held*, that defendants holding was adverse, and they could not be considered as trustees of the complainants; 2. That they must account to complainants as joint proprietors as if they worked the interest of complainants under lease; 3. That such relationship gave to complainants the right to receive the customary royalty paid to proprietors upon the working of gold mines, but did not entitle them to a division of the profits; 4. That the infancy of complainants did not affect the relationship of the parties or the measure of account. *Allen v. Barkley*, 1 Speer (S. Car.) Eq. 264.

49. Company name. Where several persons are owners of a tract of mining claims, as tenants in common, and are known by a company name, and an action is commenced against all of them as individuals composing the company, the judgment and sale of the mining claims thereunder does not affect the title of the defendants not served. *Wiseman* v. *McNulty*, 25 Cal. 230.

50. Relocation. If the mining laws require a renewal of notice of location at stated periods, and a claim has been lost by reason of a failure to make such renewals, and one of the joint locators afterwards renews the location, stating that it is a renewal and not a new location, the renewal will inure to the benefit of all the locators. *Strange* v. *Ryan*, 46 Cal. 33.

51. Inspection of title papers. A tenant in common (of mines) has a right to demand of his co-tenants inspection of documents showing the common title. *Maden* v. *Veevers*, 7 Beav. 489.

52. Sale by one of entire tract. Without a contract between the parties, the sale of the whole tract of land and receipt of the price by one tenant in common does not turn him into a trustee for a co-tenant, as the latter still has the legal title to his own share and can have redress on it at law. *Milton* v. *Hogue*, 4 Ired. Eq. (N. C.), 415.

53. Injunction against waste. Peter Ruttan and defendant were tenants in common. Defendant held under lease from Aulay Ruttan. Defendant, without authority from any party interested, dug up, excavated, carried away, etc., the soil and clay of the lot for brick making; part of said lot was valuable for building purposes. The value was greatly deteriorated by such excavating. During the time of said brick-making an interest in the lot was conveyed by Ruttan to plaintiff. Plaintiff served notice of application to restrain defendant and of application for partition: *Held*, when a tenant in common enters, not in virtue of his right as tenant in common, but under a lease, or where entering as tenant in common he is proceeding to destroy the common property, the court will interfere by injunction. Where a case of actual destruction is made out, the court will restrain, although the party be in possession in virtue of his right as tenant in common, upon the principle that destruction of common property is not a legitimate mode of enjoying that right of occupation which arises out of his title. *Dougall* v. *Foster*, 4 Grant's Ch. 319.

54. Plumbago—Equal opportunities of working. A. and B. were tenants in common of large tracts of land which from time to time A. worked for plumbago and from which also he cut timber and sold the products of both operations. The mineral outcropped in many places and the supply of timber was abundant, so that B. could readily have got his share of the mineral and timber. *Query*, whether such state of facts would release A. from accounting. *Weisman* v. *Smith*, 6 Jones Eq. (N. C.) 125.

See PARTNERSHIP.

TENANT FOR LIFE.

1. Open mines. A tenant for life has a right to work quarries or mines opened upon the land before the commencement of his life estate. *Lynn's Appeal*, 31 Pa. St. 44.

2. Open mine or quarry. A tenant for life is entitled to work a mine, quarry, clay-pit, or sand-pit, which has been opened and used by the former owner. It is a mode of enjoyment of the land to which he is entitled. *Reed* v. *Reed*, 16 N. J. Ch. 248.

3. Mines open or unopen. A tenant for life has no right to open mines or clay-pits; but where the author of the settlement has previously worked them, the tenant for life may continue. *Viner* v. *Vaughan*, 2 Beav. 466.

4. May lease open mines. Tenant for life having power to lease for twenty-one years may let an opened mine. *Campbell* v. *Leach*, Amb. 740; *Leach* v. *Campbell*, Id.

5. Not restricted in working. A tenant for life claiming under a will sold to a coal company all her right, title, and interest to the coal in the land, without limit to the quantity of coal to be taken therefrom: *Held*, that estrepement did not lie to prevent the company operating largely, for sale, a mine which had been worked during the life of the testator for the use of the farm and for sale in the neighborhood. *Irwin* v. *Covode*, 24 Pa. St. 162.

6. May open new pits. Tenant for life of coal mines may open new pits or shafts to follow the same vein. *Clavering* v. *Clavering*, 2 Peere Wms. 388; S. C., Mosely, 219; Sel. Ch. Cas. 79; Macnaghten's Sel. Ca. 221; 2 Eq. Ca. Ab. 589.

7. New coal seam. A testator demised all the seams of coal under his land but only two seams were worked or known in his life. After his death a lower seam was discovered which could only be worked by a new shaft. A new lease being granted after the testator's death: *Held*, that the tenant for life under his will was entitled to the annual profits arising from the new seam. *Spencer* v. *Scurr*, 31 Beav. 334.

8. Rights in open mines. A tenant for life of land having coal mines opened on it, may mine the coal not only for his own use but also for sale. *Neel* v. *Neel*, 19 Pa. St. 323; B. & W. L. C. 252; *Irwin* v. *Covode*, 24 Pa. St. 162.

He may also cut timber on the land for use on the land in his mining operations. Id.

9. Mine products are annual profits. If a mine be already open the working is a part of the annual profits, the minerals are not then part of the inheritance, and tenant for life may work it. *Plymouth* v. *Archer*, 1 Bro. C. C. 159.

10. Mines worked by tenant in tail. It seems that tenant for life may work all mines which were lawfully opened by the precedent tenant in tail, though subsequent to the settlement. *Clavering* v. *Clavering*, 2 Peere Wms. 388; S. C., Mosely, 219.

11. Settled estates. Tenant for life is not entitled to get stone from quarries on settled estates (except for repairs or buildings) nor to open or work any mines of coal or minerals not opened or in work at the death of the testator from whom the estate came. *Ferrand* v. *Wilson*, 4 Hare, 344.

12. Waste—Burden of proof—American usage. To charge a tenant for life with waste, committed to the injury of the remainder man, the evidence must show affirmatively such facts as will sustain the charge; the presumption is in favor of the tenant for life until the contrary appears. His privileges under the laws of Pennsylvania are much greater than those recognized by the common law of England. *Lynn's App.*, 31 Pa. St. 44.

See WASTE.

TIMBER.

1. On public domain. In an action between mineral and agricultural occupants of the public lands neither party can claim a right to the growing timber thereon under the laws of the United States. The cutting or destruction of the timber by any occupant is expressly prohibited by act of congress of March 2, 1831. *Rogers* v. *Soggs*, 22 Cal. 444. (But see act of 1878.)

2. Use in mining. In mining operations timber is indispensable for some purposes and capable of use for many; the purchase of it is within the powers of a general agent and a sale of it by an agent will be held valid. *Adams M. Co.* v. *Senter*, 26 Mich. 73.

3. Not included in lease. The lease of coal mines does not carry with it the right to fell timber on the land for the use of the mines. *Darcy* v. *Askwith*, Hob. 234; S. C., Hutt. 19.

4. Limited timber privilege. A lease was granted of a farm and tenement, and the quarries of paving and tile stone in and upon the premises, with liberty and power to open and work the quarries, subject to an annual rent for the premises, excepting the quarries, and to the payment of a royalty for the stone obtained. Out of this demise was reserved and excepted "all timber-trees, trees likely to become timber, saplings, and all other wood and underwood, which then were, or which should at any time thereafter be, standing, growing, and being on the premises, and all mines, minerals, etc., which should thereafter be opened and found." And the lease contained a covenant "not to commit any waste, spoil, or destruction, by cutting down, lopping, or topping any timber-trees, or trees likely to become timber, saplings, or any other wood or underwood;" and a power of re-entry, for non-payment of rent, or if the lessee, etc., should commit any waste, spoil, or destruction by any of the means or ways aforesaid, and should not perform and keep all and singular the covenants, etc., contained in the lease. The assignee of the term having cut down and grubbed up certain saplings, wood, and underwood for the necessary purpose of working a quarry on the demised premises: *Held*, that the effect of the covenant was, that the tenant should not so cut away any of the trees excepted as that such cuttings should amount to an excess of the right which it was intended he should exercise; and therefore, that cutting trees in a manner necessary to a reasonable exercise of the power to get the stone, was no breach of the covenant. *Doe* v. *Price*, 8 C. B. 894.

5. Smelting works—Waste. If a tenant who has leased a lead mine, with liberty to smelt ore, use more timber than is necessary for that purpose, it cannot be recovered

by the landlord in an action upon the contract for the rent, though it may in a separate suit for the waste. *Wilson* v. *Smith*, 5 Yerg. (Tenn.) 379.

6. Timber requisite for iron works—Parol explanation. Where articles between two persons were entered into for the erection of iron works on the lands of one of them, with privilege of timber reserved to the other party, parol evidence is not admissible to explain the articles so as to make them embrace the timber on two certain tracts of land, but the local situation and description of the tracts may be shown to enable the court to apply the contract to the subject-matter and to discover, as matter of law, whether or not it applies to both tracts. *Snodgrass* v. *Ward*, 3 Haywood (Tenn.), 40.

A general privilege to take the timber requisite, etc., does not confine a party to any part of a tract of land or any subdivision of a tract. Id.

TIME.

1. Essence of mining contract. The working of a mine is a trade of a fluctuating character, and this incident brings it within that class of cases where time is of the essence of the contract. *Macbryde* v. *Weekes*, 22 Beav. 533.

2. Vendor and purchaser. Where an interest in a mine was conveyed by deed accompanied by a contract that the purchaser might at any time within six months abandon the purchase upon making a reconveyance, but in case the contract was not so abandoned the purchaser should pay $3000: *Held*, that plaintiff's case was complete upon showing the contract and the lapse of time without proof of demand; 2. That if defendants claimed an extension of time, they must show the granting of such extension affirmatively; 3. That such extension being proved generally, the law would construe it to be for a reasonable time, and that what was a reasonable time was a question of law for the court. *Lockhart* v. *Ogden*, 30 Cal. 547.

3. Sale of mine on instalments. An indenture to secure the purchase-money of mines in instalments provided for the payment of £768 on every twenty-fourth day of December, until, etc.; if not paid within one calendar month, to carry interest: *Proviso*, that no suit should be brought within that month: *Held*, that the proviso controlled the covenant; that it was not a naked promise to forbear, and that a plea that suit was brought within one calendar month was good. *Foley* v. *Fletcher*, 3 H. & N. 769.

4. Increased value after delay. Time is not of the essence of an executory contract for the purchase of land where the delay in payment has been acquiesced in and the vendee has continued in possession, the vendor retaining his notes for purchase-money; although sudden and immense value has been given meanwhile to the premises by the discovery of gold. *Falls* v. *Carpenter*, 1 Dev. & Bat. Eq. 277 (N. C.)

TIN BOUNDS.

1. Tin bounds of Cornwall. For history and description of, see note to appendix, 3 Man. & R., 497; *Rogers* v. *Brenton*, 10 Q. B. 26; Smirke's report of *Vice* v. *Thomas*.

2. Custom. By the custom of Cornwall, wherever there are tin mines under waste lands, if the owner or lord of these lands does not think fit to work them, any persons willing to do so may, complying with certain rules, mark off a definite plot of the waste land, and, without the consent of the owner, work the mines under it, yielding to him a certain proportion of the produce. *Ivimey* v. *Stocker*, *Law R.* 1 Ch. App. 396.

3. Common law. The rights of tin bounders may be called the common law of Cornwall. *Gavid* v. *Martin*, 19 C. B. N. S. 732.

4. Ancient tenure. For statement of the ancient tenures of tin bounders and copper miners in the duchy of Cornwall, see *Rowe* v. *Brenton*, 8 B. & C. 737; 3 Man. & Ry., 133; and app. to 3 Man. & Ry., p. 449.

5. Crown right. Tin mines do not belong to the king by virtue of his prerogative but to the subject who is the owner of the land. Case of the Stannaries, 12 Coke R. 9.

The history of the crown's claim of the right of purchase of the tin, stated, together with the supposed original ownership of the mines of Cornwall in the crown. Id.

6. Validity of the custom. Upon trial in trover for tin ore dug in tin bounds, it was found by the jury to be the custom of Cornwall in regard to tin bounds, that any person may enter on the waste land of another in Cornwall, and mark out by four corner boundaries a certain area; a written description of the plot of land so marked, with metes and bounds, and the name of the person for whose use the proceeding is taken, is recorded in an immemorial local court, called the stannary court, and proclaimed at three successive courts held at stated intervals; if no objection is successfully made by any other person, the court awards a writ to the bailiff of the court to deliver possession of the said "bounds or tinwork" to the bounder, who thereupon has the exclusive right to search for, dig, and take for his own use all tin and tin ore within the described limits, paying to the

land-owner a certain customary proportion of the ore raised, under the name of toll tin. The right descends to executors, and may be preserved for an indefinite time, either by actually working or paying toll, or by annually renewing the four boundary marks on a day certain. *Held*, that the custom to preserve the right by the mere ceremony of an annual renewal without working is unreasonable and bad in law, and that plaintiff (who had ceased to work or pay toll for eighteen years) could not recover in the above action, even as against a stranger. (2) That, although the alleged custom involved a claim of a profit in *alieno solo*, it would have been a good one if bona-fide working had been found to be obligatory under it. *Rogers* v. *Brenton*, 10 Q. B. 26; 17 L. J. Q. B. 34; 12 Jurist, 263.

7. A custom, as distinguished from local law. The custom of tin bounding in Cornwall is to be tested and applied as any other local custom, and as the mining usages of the Forest of Dean, the King's Field in Derbyshire, and other mineral districts, having regard in all cases to local peculiarities, but is not an instance of absolute local law, nor affected by the fact that it may have been the law of an extinct kingdom. *Rogers* v. *Brenton*, 10 Q. B. 26; 17 L. J. Q. B. 34; 12 Jur. 263.

8. Incidents of the custom. The custom of tin bounding described as to its incidents, tenure, and territorial extent. *Rogers* v. *Brenton*, 10 Q. B. 65, note.

9. Location of tin bounds. The mode of acquiring a right in tin bounds is thus stated: "An agent goes on the spot to be bounded and digs up the turf or surface, making little pits at the four corners towards the east, west, north and south, of a reasonable extent, and the area or space within the four corners will be the contents of the bounds. Having made these corners, the agent describes on paper the situation of the bounds, states the day when and the person by whom they were marked out or cut, and makes a declaration for whose use this was done, expressing thereon that the spot was free of all lawful bounds. At the next stannary court, he procures this description to be put on parchment or paper, and a first proclamation is made of it in open court, the parchment or paper being stuck up in a conspicuous place in the court; and a minute of the transaction is made by the steward in the regular court paper. On the next court day, three weeks afterward, a second proclamation is in like manner made, and so also at the third court, when, if there be no lawful opposition, judgment is given, and a writ of possession issues to the bailiff of the stannary, who delivers possession accordingly. After this, the bounds must be renewed annually, or the lord may re-enter. In this mode, the bounder acquires a right to search for and take all the tin he can find, (paying the lord of the soil one fifteenth) or to permit others to do so and to resist all who attempt to interrupt him." *Rogers* v. *Brenton*, 12 Jurist, 263, n.; *Rowe* v. *Brenton*, 3 Man. & Ry. 497, n.

10. Customs, etc. For peculiar jurisdiction over rights and customs of tin bounders; form of writ of possession of tin bounds, etc., see *Vice* v. *Thomas* (Smirke's Rep.) app. 63.

11. Size of tin bounds. The amount of ground which may be taken by tin bounders has never been specifically limited: it must be a reasonable extent. *Rogers* v. *Brenton*, 10 Q. B. 65, n.

12. Profit a prendre. The custom of tin-bounding (where otherwise valid) is not void by reason of its being a right to take a profit in *alieni sole*. *Rogers* v. *Brenton*, 10 Q. B. 26; 17 L. J. Q. B. 34; 12 Jur. 263.

13. Alay. The term "alay" is applied to a neglected or deserted tin work. *Rogers* v. *Brenton*, 10 Q. B. 65, n.

TITHES.

1. Due by special custom. Tithe ore is not due of common right, but by particular custom only. *Buxton* v. *Hutchinson*, 2 Vern. 46.

2. Quarries. No tithes are due *de jure* for quarries of limestone, coal, etc., and where they are paid it is by custom, as of lead ore in Derbyshire. *Stile's case*, 1 E. & Y.; *Tithe cases*, 361; 1 Littleton R. 147.

3. Decree against body of miners. In a suit by a vicar for tithe of lead ore by prescription, four miners were named to defend for the rest: *Held*, that the decree bound all other owners and workers. *Brown* v. *Vermuden*, 1 Eagle and Y. 509 Ch. Ca. 272, 282.

Case of decree *temp. Car. I* against the defendants and "every other the miners within the said parish," that they render every tenth dish of ore to the vicar, enforced 1690, and held valid against all miners in the parish, though not parties nor privies to the decree, nor working mines known at the time of the decree. *Brown* v. *Booth*, 2 Vern. 184.

TRADE-MARK.

1. "Congress" water. Where the spring first known as and named "Congress spring" produces natural mineral water of peculiar medical and curative properties possessed by no other spring, the words

"Congress water" and "Congress spring water" appropriately indicate the origin and ownership of the water flowing from Congress spring, and the word "Congress" used in connection with the bottling and sale of such water is a proper and legitimate business trade-mark. *Congress & Empire Spring Co.* v. *High Rock Congress Spring Co.*, 45 N. Y. 291.

2. Bethesda mineral water. The name "Bethesda" applied by the plaintiff to her mineral spring and used as a mark or brand upon the barrels in which the waters thereof have been put up by her for shipment and sale, and recorded by her as a trade-mark in the patent office, is a proper trade-mark; and the fact that defendant owns another spring within twelve hundred feet of that belonging to plaintiff, which is alleged to have the same chemical constitution and curative properties, does not entitle him to use such trade-mark; the name "Bethesda" not being the geographical designation of any district of country or civil division, within or near which either of said springs is located. *Dunbar* v. *Glenn*, 42 Wisc. 119.

TRESPASS.

1. Title to maintain action. One who has the exclusive right to dig turf and peat in a parcel of ground may maintain trespass: *aliter*, if he had merely a right of common. *Wilson* v. *Mackreth*, 3 Burr. 1824.

2. Legal title. Action on the case cannot be maintained by one having the legal title to land against another who enters, cuts timber, quarries stone and commits like trespasses. *Robertson* v. *Rodes*, 13 B. M. (Ky.) 325.

3. Possession. Trespass and not case lies for the digging of pits in land in the possession of the plaintiff. *Thornton* v. *Austen*, cited 1 Ld. Ray. 188.

If the owner of land have the actual possession by having entered thereon, with the intention to possess it, and whilst so possessed another enters and commits trespasses, such as cutting timber, quarrying stone, etc., the only remedy is by action of trespass, *vi et armis*. If there be no actual possession, it does not follow that the action on the case lies. *Robertson* v. *Rodes*, 13 B. M. (Ky.) 325.

4. Outstanding title. A party in possession of a ditch and the water incident to the ditch, may maintain an action against trespassers, although the legal title to the ditch be outstanding. *Barkley* v. *Tieleke*, 2 Mont. 59.

5. Constructive possession. A warrant for unimproved land gives to the owner of it a constructive possession of the land which will enable him to maintain trespass for digging ore upon it against one who has not an actual adverse possession of the land. *Baker* v. *King*, 18 Pa. St. 138.

6. Possession to maintain. To maintain trespass, *quare clausum*, the plaintiffs must have actual or constructive possession of the *locus in quo* at the date of the alleged trespasses. *Hugunin* v. *McCunniff*, 2 Colorado, 367.

7. Possession of claim. In an action of trespass upon land (mining claim on public domain) it is only necessary for the plaintiff to prove a rightful possession in himself; it is not incumbent on him to establish any title beyond that. *Rogers* v. *Cooney*, 7 Nev. 213.

8. Action without possession. Where iron land is entered by a trespasser and ore taken for the use of a neighboring furnace to such extent and under such claim of right as constitutes such mining a possession against the true owner, such true owner may recover for the original ouster, but not for the continuing trespass until he has first recovered possession. *West* v. *Lanier*, 9 Humph. (Tenn.) 762.

9. Plaintiff out of possession. From the time that a *caveat* is entered until the right to the patent is determined in ejectment, neither party, unless in actual possession, has such a title as will sustain an action of trespass against the other for digging ore. Therefore, though a party has the decision of the board of property in his favor, he cannot maintain trespass on such title till the determination of the ejectment instituted by the opposite party. *Shoenberger* v. *Baker*, 22 Pa. St. 398.

10. Workings amount to possession. Hugunin conveyed to Cushman the Elkhorn lode and delivered a shaft and level in the mine to plaintiffs as agents of Cushman, retaining a certain other shaft and drift which afterwards by development were proved to be parcel of the Elkhorn lode, but which were then claimed and worked as parcel of the Casket lode. Cushman in fact bought for the benefit of plaintiffs, gave them a bond for a deed, and after suit commenced delivered a deed for the premises. Defendant Hugunin continued to mine and take out ore from the Casket works after his sale of the Elkhorn, and in trespass for the ore so taken it was: *Held*, 1. That throughout the length of the level retained by him, defendant Hugunin was in possession of the vein from the surface to the center of the earth; 2. That the plaintiffs' constructive possession as licensees of Cushman, or under his bond or deed, must yield to the actual possession as to that part of the lode so possessed by the defendant through the

Casket level; 3. That the rights of parties cannot be affected by title acquired after suit brought; 4. That the possession of the *locus in quo* being in defendant "at the time of the trespasses," the action of trespass could not be maintained; 5. That for the injury done to the estate by the mining and carrying away, Cushman, as defendant's lessor, alone was entitled to recover. *Hugunin* v. *McCunniff*, 2 Colorado, 367.

11. Lessors' liability. The lessors of a coal vein are liable as co-trespassers for the act of their tenant in mining coal in the land of an adjoining owner, they having leased the particular vein of coal, authorized the sinking of the slope by which it was reached, and contributed to its expense, though believing that it would not extend beyond their own line, and the tenant having, by means of this slope, taken out coal from the adjoining property and paid for the greater part of it to his lessors a certain rent for each ton of coal mined by him. *Dundas* v. *Muhlenberg*, 35 Pa. 351.

12. By licensee for ore taken. Trespass and not case lies for taking ore from a mine. *Harker* v. *Birkbeck*, 3 Burr. 1556; 1 Wm. Bl. 482.

And this, though the plaintiff have only a liberty of digging ore, with no property in the soil. Id.

13. Licensee against stranger. Where there was a lease of land for farming purposes, upon which, on the date of the lease, was indorsed a license to get or sell stone off the premises, yielding one half of the stone sold: *Held*, that such indorsement was not a lease of an open quarry, and gave licensee no property in the stone, or a right to sue parties trespassing upon it. *Freer* v. *Stotenbur*, 2 Abb. App. 189, reversing 36 Barb. 641.

14. Licensee against owner. Trespass *quare clausum fregit* may be maintained on mere possession against a wrong-doer, but will not support an action by a licensee against the real owner for his dispossession, when such real owner had the right of entry. *Fuhr* v. *Dean*, 26 Mo. 116.

15. License—Pleading. A license can not be proved in trespass, under the general issue. *Gesner* v. *Cairns*, 2 Allen (N. B.), 595.

16. Traverse of license. To a plea justifying the right of defendant to mine under copyhold lands by a seisin in fee of the veins, together with the liberty of boring for and getting the coal, it is not enough to deny or reply to the seisin, but the liberty of working the mines must be traversed. *Bourne* v. *Taylor*, 10 East, 189.

17. License from third parties. Defendants in trespass, averring such facts in their answer, may show that the *locus in quo* was the property of third parties at the time of the trespass committed, and that they had since purchased the ground from such third parties. *Columbus Co.* v. *Dayton Co.*, 18 Cal. 615.

18. License by one co-tenant. In trespass by several tenants in common of a coal bed, a plea of license from the plaintiffs is not sustained by proof of a license from but one of the tenants in common. *Murray* v. *Haverty*, 70 Ill. 318.

19. Authority of part owners. The plaintiff, a tenant in common of a coal mine, had notice of a negotiation, which was followed by a lease for three years (in which he did not join) by his two co-tenants, dated in December, 1865, of two undivided thirds of the coal, with license to work the coal. Under this license some coal, but considerably less than two thirds of the whole, was raised, and one third of the royalty was kept by the licensee for the plaintiff. A negotiation for a further license was on foot when, in October, 1872, the plaintiff filed the bill against his co-tenants and the licensee, praying for an inquiry as to the value of the coal raised, and an account against all the defendants as trespassers, for an injunction and receiver, and for damages: *Held*, that the working was not a trespass; and the plaintiff electing to dismiss the bill with costs against his co-tenants, decree, without costs, against the licensee for an account of the value at the pit's mouth of the coal raised, less costs of getting and raising, and for payment of one third to plaintiff. *Job* v. *Potton*, L. R. 20 Eq. 84.

20. Tenant in common—Massachusetts practice.—Where one of several tenants in common of the right to dig and remove ore from the land of another, enters and digs and removes ore therefrom, the owner of the land cannot maintain trespass against him, on the ground that he did not first give notice to his co-tenants under c. 105, section 7 of the revised statutes, as to his intention to enter. *Arnold* v. *Stevens*, 1 Metc. (Mass.) 266.

21. Action against executor.—*Semble:* The owner of minerals taken by trespass does not lose his remedy by death of the trespasser. If assets are left they ought to answer for it. *Winchester* v. *Knight*, 1 P. Wms. 406.

22. Pleading—Extent of recovery.—Three persons holding undivided portions in fee of certain coal lands on the twelfth of August, 1867, brought an action of trespass to recover damages for the entering upon said lands, and mining and carrying away

coal. The *narr.* charged sundry trespasses between the twenty-first of August, 1864, and the day of instituting the suit. The injuries complained of were digging and sinking divers mines, drifts, pits, shafts, etc., of great length, breadth and depth, and from out of said mines, etc., raising earth, soil, stones, coal, iron ore and other minerals, etc., and taking and carrying them away. Evidence was offered tending to prove the injuries complained of. One of the plaintiffs died in 1868, and his executors were made parties, and with the co-plaintiffs of their testator prosecuted the suit. The deceased devised his estate, real, personal and mixed, to his wife, Mrs. Sally Smith, during her natural life, with power to convey, etc. *Held*: 1. That the operations complained of in the *narr.* could not be continuously carried on for a series of years without impairing the fee-simple value of the land in the life-time of the testator; that his co-plaintiffs and himself, and his executors after him, had the right to recover the full value of the property injured, even if it absorbed the fee-simple. The devisee took only what remained after the testator's death; she could institute no action for the consequences of the trespass committed in the testator's life-time; there could be but one satisfaction for the injuries done him. 2. That the *narr.* having charged the most serious injury which could have been inflicted on the fee or inheritance, and which necessarily involved all the natural results of waste, damages were recoverable therefor, without further specification. *Barton C. Co.* v. *Cox*, 39 Md. 2.

23. Copyhold. — Action by surface owner. In copyhold lands, although the property in the mines be in the lord, the possession of them is in the tenant. The latter, therefore, may maintain trespass against the owner of an adjoining colliery, for breaking and entering the subsoil and taking coal therein, although no trespass be committed on the surface. *Lewis* v. *Branthwaite*, 2 B. & Ad. 437.

24. Adverse holding. An action cannot be maintained for trespass in mining and taking away gold, where the plaintiff is totally disseised and the defendant is in the adverse possession thereof. *Raffetto* v. *Fiori*. 50 Cal. 363.

25. Proof of possession. In trespass for breaking and entering the plaintiff's mine and taking coals, evidence of working by the plaintiff in another part of the same mine, within eighty yards of the place of the alleged trespass, coupled with a statement by the defendant that he had got the coal and was willing to pay such amount as should be settled by arbitration, was held to be evidence of the plaintiff being in possession of the place where the trespass was committed. *Wild* v. *Holt*, 9 M. & W. 672.

26. Joint and several. Where several defendants are declared against jointly, but no joint trespass is proved, plaintiff can introduce evidence of a several trespass against one of the defendants, and recover against such defendant, but if a joint trespass has been proved, he cannot waive it and show evidence of a several trespass. *McCarron* v. *O'Connell*, 7 Cal. 152.

27. Tenants.—Joint plaintiffs. Two persons, one owning a mining lease and all the stock, fixtures, property and capital, the other being an expert, entered into a mining partnership, and both being in possession operated the mine as partners: *Held*, that in an action of trespass for injury to the mine, they properly joined as plaintiffs. *Douty* v. *Bird*, 60 Pa. St. 48.

28. The motive. In an action of trespass to recover damages for injury to a mining claim, the right of the plaintiffs to recover the damages which they have actually sustained, is not affected by the fact that the trespass was not willful in its character. *Maye* v. *Yappen*, 23 Cal. 306.

29. Unlawful entry. In case of a cotenant assisting a sheriff who has in fact no process against the co-tenant whose share of proceeds he pays over to the officer, no ouster is necessary to maintain an action of trespass; any unlawful entry is sufficient. *Rowe* v. *Bradley*, 12 Cal. 228.

An officer who places a receiver in the possession of a mine not the property of any one against whom he has process, or asserts a claim and receives the gold taken from the mine, is a trespasser. Id.

30. Forcible resistance to. The owner of a mine in possession may resist, with so much force as may be necessary, a trespasser, the pretended assignee of an unassignable license, entering to dig and take away the ore. *Riddle* v. *Brown*, 20 Ala. 412.

31. Secret trespass. Where a trespass was committed on plaintiff's mine, and the air course and level roads made through it underground to connect adjoining collieries in mortgage to defendants, and large quantities of plaintiff's coal were thereby fraudulently gotten and removed without their knowledge: *Held*, 1. that the defendants, the mortgagees, could not be made accountable for any portion removed by their mortgagor while they allowed him to remain in possession, notwithstanding the proceeds of the coal so wrongfully removed by him, had found their way week by week, but without notice of the fraud, into de-

fendants' hands, and notwithstanding they continued the use of the air course and roads after taking possession, and retained in their employment, as manager of the collieries, the person by whose agency the fraud had been perpetrated. 2. That all the proceeds having been traced to the mortgagees, and no portion retained by the agent, the latter could not in this court be made personally chargeable for the value of the coal removed, notwithstanding his own fraudulent conduct in the transaction. *Powell* v. *Aiken*, 4 Kay. & J. 343.

32. Concealment—Underground trespass. Where by underground working the defendant had taken the coal of his neighbor, the court limited the account to six years, but intimated that the amount wrongfully abstracted being proved, the *onus* of proof would lie on the wrong-doer to show that it was not taken within the six years. *Semble*, the account would not be so limited if the coal had been abstracted intentionally and steps had been taken to conceal the fact and prevent discovery. *Dean* v. *Thwaite*, 21 Beav. 621.

33. Injury consequential after breaking barriers. After a trespass in breaking through barriers the flow of water is only consequential; the continued flow is not a continuing trespass, and the plaintiff cannot recover further damages after a verdict in a suit for breaking the barriers, and damages ensuing therefrom. *Clegg* v. *Dearden*, 12 Q. B. 576.

34. Malice—Force. Evidence of personal feeling and of previous threats, though uncommunicated to defendant, is admissible upon the question of whether excessive force was used in preventing a trespass upon the ore bank of the defendant. *Riddle* v. *Brown*, 20 Ala. 412.

35. Release by receipt of rent. A receipt for rent subsequent to a trespass in taking ore is a discharge of the trespass. *U. S.* v. *Gear*, 3 McLean, 571.

36. Accord and satisfaction. A. took and carried away iron ore from the land of B., under a claim of right, and B. took a bond from A. to pay the value of the ore if it should be finally determined to be B.'s property. *Held*, that the bond was a bar to an action of trover by B. for said ore against one who had purchased it of A., and that the only remedy was on the bond. *Briggs Iron Co.* v. *North Adams Iron Co.*, 12 Cush. 114.

37. Mesne profits barred by sale. An ejectment suit for a mining claim dismissed by stipulation compelling each party to pay his own costs, and releasing plaintiff from liability on his injunction bond followed by a deed of quitclaim from the defendant, is a bar to an action for mesne profits of the premises. *Phillpots* v. *Blasdel*, 10 Nev. 19.

38. Ratification. A party appearing to ratify the sale of mines and to take the purchase-money, cannot treat the act of the purchaser in opening new mines as a trespass and at the same time ratify the purchase, although he was in a position to have elected to treat the purchaser as a trespasser in the first instance. *Gresley* v. *Mousley*, 3 DeG. F. & J. 433.

39. No acquiescence by short delay. One who enters wrongfully upon the claim of another is a trespasser, and he does not cease to be such so that an action will not lie against him for a trespass because he is allowed for one month after his entry to remain in the undisturbed possession. *Meyers* v. *Farquahrson*, 46 Cal. 190.

40. Complaint—California. Where a complaint averred that defendant "with force and arms broke and entered" upon the premises of plaintiff and damaged them by causing them to be overflowed and covered with tailings, etc., deposited thereon by the action of running water, it was *held*, that under the California practice the words "with force and arms broke and entered" did not confine the proof to the direct and immediate damage as in the old action of trespass, and that the facts being clearly set out the addition of these words was surplusage. *Darst* v. *Rush*, 14 Cal. 82.

41. Denial of damage. In trespass upon a mining claim where there is no specific denial of the amount of damages claimed, although the cause of damage be denied, it is *doubted* whether the amount of damage is to be considered as denied. *Rowe* v. *Bradley*, 12 Cal. 228.

42. Claim assignable in California. A claim for damages in trespass, quarrying and taking away asphaltum, is assignable, and the assignee may sue in his own name under section 4 of the practice act. *More* v. *Massini*, 32 Cal. 590.

43. Effect of verdict. Where in an action of trespass the jury find generally "for the plaintiffs," it is a finding upon all the issues raised by the pleadings material to a recovery by the plaintiffs, and concludes the parties upon a question of title where it was distinctly put in issue. *McLaughlin* v. *Kelly*, 22 Cal. 211.

44. Injunction following verdict. It is no reason for refusing a perpetual injunction in an action of trespass in which the title has been litigated that defendants will thereby be precluded from asserting their title in any other form of action. When

there has been a fair trial of an issue of fact, courts give the verdict and judgment a conclusive effect, and will not permit the parties to litigate the same matter in another suit. *McLaughlin* v. *Kelly*, 22 Cal. 211.

45. Former recovery. A judgment in a former action for trespass upon a mining claim between the same parties or their privies is not conclusive unless the issues of the second trial were necessarily involved in the determination of the former. *Campbell* v. *Rankin*, 2 Mont. 363.

In trespass *quare clausum fregit* for entering plaintiff's close, digging and taking away coal, defendants pleaded *liberum tenementum*, to which plaintiff replied that the premises were the same upon which he had recovered judgment in a former action of trespass against the same defendant upon a traverse of the same plea: *Held*, that such former recovery was an estoppel to the pleading of the same title by the defendant or his privies. *Outram* v. *Morewood*, 3 East, 345.

46. Injunction to prevent destructive trespass. Courts of equity will not ordinarily interfere to enjoin the commission of a threatened trespass to real property, unless the trespass be one going to the destruction of the substance of the estate, such as the extracting of ores, the cutting down of timber, the digging of coals and the like. The jurisdiction of the court in such cases is asserted for the preservation of the property pending proceedings at law for the determination of the title. *LeRoy* v. *Wright*, 4 Saw. 535.

47. Damages to lessee against trespasser. J. T. demised land to the plaintiff at an annual rent for twenty-one years, with liberty to dig half an acre of brick earth annually; the lessee covenanted that he would not dig more, or if he did, that he would pay an increased rent of £375 per half acre, being after the same rate as the whole brick earth sold for. A stranger dug and took away brick earth; the lessee recovered against him the full value of it. It was *held*, that he was entitled to retain the whole damages. *Attersoll* v. *Stevens*, 1 Taunt. 182.

TROVER.

1. Possession good against wrong-doer. The plaintiff, under the license of the owner of the soil to search for tin ore, had in searching for the mineral made certain excavations in the soil. The defendant carted away some of the soil which the plaintiff had so thrown out, the plaintiff not having abandoned his right to search the soil thrown out for ore. In an action of trover for the removal of the soil: *Held*, that the plaintiff had, as against the defendant, a mere wrong-doer, a sufficient possessory title to the mass thrown out to enable him to maintain the action. *Northam* v. *Bowden*, 11 Exch. 70.

2. Ore carried into another jurisdiction. The owner of minerals may maintain trover for them where found though dug in New Brunswick and shipped to Nova Scotia. *Gesner* v. *Gas Co.*, 1 James (Nova Scotia) 72.

3. Coal mined by mistake. Trover lies for coal mined upon and carried away from another's land by mistake. *Forsyth* v. *Wells*, 41 Pa. St. 291.

The measure of damages is the fair value of the coal in place and such injury to the land as the mining may have caused. Id.

4. Earth — Mistake. Trover will lie against the *bona fide* purchaser of loads of earth wrongfully taken from the plaintiff's land, and that without demand and refusal, although the defendant was ignorant of the trespass when he converted the earth to his own use. *Riley* v. *Boston W. Co.*, 11 Cush. 11.

5. Oil in salt well. Trover will not lie for oil which rose naturally with the brine in lands leased for the manufacture of salt, and after reaching the surface had been separated and sold by the lessees. *Kier* v. *Peterson*, 41 Pa. St. 357.

Trover will not lie because the lessor had not the right of possession at the time of conversion by the lessees, either of the oil itself or of the land from which it flowed. Id.

Held, further, that the proper remedy is by bill for an account, and that the measure of damages was the value of the oil at the instant of separation from the freehold. Id.

6. Title to realty involved. Trover for stone and gravel dug from land does not lie by one who has the right of possession against the person who has the actual adverse possession of the land under claim of title. *Mather* v. *Trinity Church*, 3 S. & R. 509.

7. Fixtures. Trover will not lie for steam engines erected for the purpose of working a mine and affixed to the freehold in the ordinary way. *Minshall* v. *Lloyd*, 2 M. & W. 450.

8. Nominal transfer of stock. In an action for conversion of mining stock it is competent for defendant to show that assignments constituting the alleged conversion were nominal and that the stock still remained under his control. *Day* v. *Holmes*, 103 Mass. 306.

9. Assignment of stock. Trover will not lie against the real owner on account of

the assignment of stock never issued to nor held by him. *Dawson* v. *Rishworth*, 1 B. & Ad. 574.

10. Refusal to transfer stock. When in trover against a mining company for refusal to transfer stock, the treasurer had based his refusal on plaintiff's supposed non-compliance with a certain by-law which had been in fact complied with, the inability of the president from sickness to sign the certificates at the time is immaterial. *Bond* v. *Mount Hope Iron Co.*, 99 Mass. 505.

11. Measure of damages. The measure of damages for coal mined and taken is the same in trespass and trover, except where circumstances of aggravation are relied on in trespass. *Barton Coal Co.* v. *Cox*, 39 Md. 1.

12. Proof. In trover by lessees for ore dug by defendants, it is sufficient to prove the occupation of the mine by the plaintiffs without proof of the lease or of the lessors' title. *Taylor* v. *Parry*, 1 Scott, N. R. 576 S. C. 1 M. & G. 604.

13. Practice—Parties. In trover for converting coals, against several defendants, there may be a verdict of guilty as to parcel of the property, and not guilty as to the residue; and though the defendants are found severally guilty, there may be but one judgment. *Player* v. *Warn*, Cro. Car. 54.

14. Demand. Where the taking has been tortious, as by crossing bounds, no demand is necessary. *McLean County Coal Coal Co.* v. *Long*, 81 Ill. 359.

TRUSTS AND TRUSTEES.

1. Constructive trust. The ordinary rules applied to trusts are not applicable to cases of constructive trust, having to do with the development of property of the uncertain character of mines, and requiring large expenditures. *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.

2. Express or implied. In cases of express trust, or where a direct confidence is created by the instrument, the evidence to show a denial of the relation must always be stronger than where the relation is less direct and confidential, as between co-tenants. *Susquehanna Co.* v. *Quick*, 61 Pa. St. 328.

3. Secret trust. Jones was the owner of two hundred feet upon a mining claim, which was held adversely by third parties. He conveyed, by deed absolute, to one Osborne, with a verbal agreement that Osborne should commence suit for the premises, and upon recovery reconvey to him, Jones, seventy feet. Osborne commenced the suit, and Jones soon after contracted with one Stonecifer to convey ten feet of the property when recovered. Afterward Osborne settled the suit and released to the defendant. *Held*, in an action by Stonecifer against the adverse party to whom Osborne had released, in which a conveyance of the ten feet was prayed for, that Jones had no title to convey to Stonecifer; and that the settlement of the case was binding against Jones and his grantee. *Held*, further, that if Osborne in settling was guilty of any breach of trust, the remedy was in damages and not *in rem*, even if the defendant had notice of the trust, and of the subsequent conveyance by Jones to Stonecifer. *Held*, further, that the case involved an issue of fact (the original title of Jones or Osborne never having been admitted by the defendant) which the defendant had a right to see determined in an action of ejectment, so that equity had no jurisdiction; and as Stonecifer had at best only an equitable interest, and the party who alone could sustain ejectment had disposed of his rights, he was, therefore, deprived both in law and equity of any specific relief, and could only sue for damages. *Held*, further, that the original defendant, holding adversely to all other parties had a right to buy its peace from one or all of them, and was not bound to recognize any trusts between them, although notified thereof. *Stonecifer* v. *Yellow Jacket S. M. Co.*, 3 Nev. 39.

4. Conveyance—Secret trust. Where L. had a verbal agreement with the owners of oil lands for a lease, upon payment of a bonus and a royalty, and P. agreed verbally with L. to take the lease, advance money to pay the bonus and sink a well, with the understanding that he was to hold a half interest in the lease in trust for L.'s wife, and upon reimbursing himself out of the proceeds of the well, if successful, to convey her half interest to her, and P. afterwards took the lease and put down a well: *Held*, upon a bill filed by L. and his wife and her assignee against P., for an account of the profits and a conveyance, that the wife of L. had a right to an account, and to a conveyance to her or her assignee of her half interest, upon payment of the amount found to be due to P.; 2. Also that the fact that when the bill was filed P. had not received enough proceeds from the well to reimburse himself, was not a ground for his refusal to render an account. *Long* v. *Perdue*, 83 Pa. St. 214.

5. Consideration paid by A.—Title granted to B. Where one person pays the consideration money for the purchase of a mining claim, and the conveyance is made

to another, the latter holds the title in trust for the person paying the consideration. *Bayles* v. *Baxter*, 22 Cal. 575.

The fact that the party receiving such a conveyance verbally agreed at the time with the person paying the consideration that the former should, upon demand, execute a conveyance to the latter of the premises, does not make the trust express as distinguished from one implied by law from the act of the parties, so as to exclude proof of it by parol, under the operation of the statute of frauds. Id.

6. Executor—Profit. An executor, being also legatee, usurping a trust as to the working of his testator's colliery, may not make a profit out of the premises greater than would have accrued to him by the disinterested working of the premises under a trustee. *Wightwick* v. *Lord*, 6 H. L. Ca. 217, affirming *same ads. same*, 4 DeG. M. & G. 803.

7. Liability of cestui que trust. Where a coal mine was demised to A., who declared himself trustee afterwards, and worked the mines for four other persons besides his own fifth interest, and the mine was worked on such joint account until abandoned: *Held*, that the *cestuis que trust* were liable in equity during the time they received the profits. *Clavering* v. *Westley*, 3 P. W. 402; doubted, *Walters* v. *Northern Co.*, 5 DeG. M. & G. 629.

8. Infant's estate.—Trustee of collieries will not be permitted to act for his own or infant's benefit, as he may elect, after the adventure is undertaken. *Wilkinson* v. *Stafford*, 1 Ves. jr. 32.

9. Trust fund followed into company assets.—The president and acting manager of a mining company, being also trustee in a marriage settlement, sells the trust property in violation of his duty and purchases it for the corporation; the corporation, being made a party to a bill for accounting, the beneficiary after having exhausted the decree against the principal, may then pursue it in the hands of the corporation, or have a decree for the price at which it was purchased. *Barksdale* v. *Finney*, 14 Grat. 338.

10. Proved by letters.—That a party held an interest in a colliery in trust for another may be shown by letters. Such a trust need not be created by writing, but must be shown by writing. *Forster* v. *Hale*, 3 Ves. jr. 696; 5 Id. 308.

11. No acquiescence without knowledge.—Purchase of lead mines held in trust by the trustee, set aside after lapse of twenty-two years, without regard to price paid, the case not coming within the exception allowing trustee to purchase upon full information to the *cestui que trust*, and acquiescence after such information. *Randall* v. *Errington*, 10 Ves. jr. 423.

12. Specific performance.—Where defendant, Robbins, at request of Gillett, and with the money of Gillett, had purchased from the United States, at public sale, a tract of mineral land for the use of Gillett: *Held*, upon bill brought by the heirs of Gillett alleging such facts and a request for conveyance, that specific performance should be decreed. *Gillett* v. *Robbins*, 12 Wisc. 320.

13. Deed of co-trustee.—The deed of one of several trustees of mines can convey no beneficial interest in the estate. *Boston F. Co.* v. *Condit*, 19 N. J. Ch. 394.

14. Agent taking deed in his own name. An agent who, while under contract to buy land or lease a mine for his principal, takes the conveyance or lease in his own name, is a trustee for the use of his principal. Equity will decree him to convey or assign to his principal, nor does the statute of frauds apply to the parol contract existing between himself and his principal. *Hargrave* v. *King*, 5 Ired. Eq. (N. C.) 430.

15. "Trustee" on face of stock. The mere addition of the word "trustee" after the name of a person to whom stock is transferred, is not sufficient to put persons dealing with the trustee upon inquiry as to the trustee's title, nor will it operate as constructive notice of the owner's equitable right. *Brewster* v. *Sime*, 42 Cal. 139; *Thompson* v. *Toland*, 48 Cal. 99.

The mere fact that a person holding the legal title of stock and apparently having the right of disposition is styled "trustee," raises no implication that he has not authority to sell or hypothecate it in the usual course of business. Id.

16. Collusive recovery against trustee. The trustee of a mine cannot be suffered to allow a collusive recovery in ejectment for the purpose of recovering a claim held by him against the mine. Such action is a breach of trust, and the plaintiff who claimed adversely to the legal title held by the trustee, will be enjoined from suing out a writ of possession on his recovery. *Irwin* v. *Harris*, 6 Ired. Eq. 215.

TUNNELS.

1. Right of way. A local custom for the owners of back claims, placer mines having no frontage for working, to run a tunnel through other claims and work through such tunnel, construed to relieve the owners of back claims from proceeding under an act to condemn a right of way. *Bliss* v. *Kingdom*, 46 Cal. 651.

2. Percolation into. Where defendant, owning an agricultural claim located prior to plaintiffs' mining tunnel, by the use of water for irrigation, caused damage to the tunnel through the percolation of the water in such quantities as to prevent working in it: *Held*, that plaintiffs had no rights under the act of April 25, 1855, relating to mining upon inclosed lands; 2. That defendant was not liable if the proper use of water interfered with the later appropriation of plaintiff; 3. That the maxim *Sic utere tuo ut alienum non lædas* applied, and defendant was answerable only for injuries caused by negligence or malice. *Gibson* v. *Puchta*, 33 Cal. 310.

3. Tunnel contract. Plaintiffs agreed to run a tunnel at $20 per foot, the defendants to supply tools and blacksmith shop, one half the money to be paid after the completion of each one hundred feet, and the balance after the first shipment of coal from the mine. Plaintiffs completed one hundred and seventeen feet and quit work on account of defendant's refusal to supply tools and blacksmith shop: *Held*, that upon such violation of contract by defendant the deferred payments became due; 2. That $20 per foot for each foot run was the proper measure of damages without considering the fact that there would be more work and less profit on the latter portion of the tunnel, there being but one rate provided in the contract. *Monroe* v. *Northern Pac. C. M. Co.*, 5 Or. 509.

4. Right granted to railroad. The owner of land granting to a railway company the right to make and maintain a tunnel through his land is in the same position with respect to his right to work mines under the 77th and 78th sections of the Railway Clauses Consolidation Act, 1845, as if the company had actually purchased the land; and the rule that a grantor cannot derogate from his own grant does not apply. *London & N. W. R. Co.* v. *Ackroyd*, 31 L. J. Ch. 588.

5. Railroad tunnels. For cases between owners and contractors of tunnel not run for mining purposes, but involving analogous points, see *Seymour* v. *Long Dock Co.*, 24 N. J. Ch. 399; *Long Dock Co.* v. *Mallery*, 1 Beas. (N. J. Ch.) 95 and 431.

6. Appropriation of water in. A stream of water struck in a tunnel and appropriated and applied to valuable uses, must be regarded in the working of another tunnel in the vicinity, not having a superior right. *Cole M. Co.* v. *Virginia W. Co.*, 1 Saw. 470 and 686.

7. Contract, to complete by day certain. Defendants agreed, among other things, to finish a tunnel by a certain date, and that if not finished within such time they would forfeit the contract, and all moneys due on the same. The work was not finished until long after the time specified, but the defendants asserted that the length of the tunnel to be driven was much longer than the company represented, and the rock in the tunnel was found to be much harder than was anticipated, and harder than represented by the company: *Held*, that if the parties were mutually mistaken in regard to the length of the tunnel, and the time fixed was based on such mistake, the stipulation as to time would be void, and the defendants would have a reasonable time in which to complete the work. Or, if the company represented the tunnel to be shorter than it really was, and the defendants believed such representations to be true, and acted thereon in fixing the time of completion, then the clause as to time and forfeiture would be void, and defendants would be entitled to a reasonable time. *Verzan* v. *McGregor*, 23 Cal. 345.

8. Line of tunnel. The construction of Sec. 2323 of the revised statutes of the United States, as to the right of a tunnel to a lode discovered in front of it, or on its line, after the location of a tunnel-site, is now (1878) under consideration before the supreme court of Colorado, in the case of *Corning T. Co.* v. *Pell.*

UNITED STATES MINING STATUTES.

1. Acts of 1866, '70 and '72 construed together. The provisions of the act of congress approved July 26, 1866, "granting the right of way to ditch and canal owners over the public lands and for other purposes;" and the act amendatory thereof, approved July 9, 1870, and the "act to promote the development of the mineral resources of the United States," approved May 10, 1872, must be considered and construed together; and said acts merely confirm to the owners of mining claims and ditches and water rights on the public lands of the United States the same rights which were accorded to them by the local customs, laws and decisions of the courts prior to the passage of said acts. *Titcomb* v. *Kirk*, 51 Cal. 288.

2. Construction. For review and construction of the mining acts of congress with reference to the nature of lode claims and the extent of the grant of the patent of the United States, see *Eureka Con. M. Co.* v. *Richmond M. Co.*, 4 Saw. 302. Field, Sawyer and Hillyer, JJ.

3. Lode—End lines. The limitation of a claim on a lode to a certain number of feet

in length *ipso facto* confines the claimant to that part of the lode lying within such end lines and within vertical planes drawn downward through such end lines, or such end lines extended. No other mode of division would carry out the limitation. A patented claim is limited or bounded in the same way by the mining acts in terms. The lode cannot be followed beyond a vertical plane drawn downwards through the end lines or through the end lines extended to cover the dip. Id.

An agreed line between claimants on the same lode must be carried downward in the same way. Id.

4. Lode leaving side lines of survey. The surface land taken up with the lode under the act of 1866 is for the convenient working of the mine, and "does not measure the miner's right either to the linear feet upon its course, or to follow the dips, angles and variations of the vein, or control the direction he shall take. Id. p. 323; but see p. 324, where the right is apparently stated as restricted to the one vein under act of 1866, or all the veins under the act of 1872, "the apex or top of which lay within the surface lines" of its location.

5. Surface. The surface of a survey lot upon a lode claim was granted under the act of 1866, only for the convenient working of the mine. Under the act of 1872, the exclusive possession of a specific quantity of surface is granted. Id.

6. Lodes and placers. The mining acts of the United States make a distinction between lode and placer claims. *Moxon* v. *Wilkinson*, 2 Mont. 421.

7. Mining acts to be liberally construed. The grants made by congress in the mining law of July 26, 1866, should be liberally construed in favor of the grantee; and the grant of the right to occupy and explore the mineral lands of the United States carries with it the implied right to extract the precious metals found by the occupant and explorer. *Robertson* v. *Smith*, 1 Mont. 410.

8. Easement. Section nine of the general mining act of the United States, approved July 26, 1866, grants to the proper person an easement upon the mineral lands of the public domain, which they may appropriate according to the local rules and customs of miners in the mining district in which the same may be situated, and thereby legalizes the mining upon the public lands of the United States for the precious metals. Id.

9. General construction.—The mining act of congress of July 26, 1866, operated as a grant of the right of way and of the ditch where a right to the use of water such as was "recognized and acknowledged by the local customs, laws and decisions of courts," had been acquired at the date of its passage. *Broder* v. *Natoma W. Co.*, 50 Cal. 621.

And the subsequent grantees of the United States take subject to the easement. Id.

10. Construction of the reserving clauses.—The clause in section 1 of the general mining act of July 26, 1866, "subject to such regulations as may be prescribed by law," is a reservation of the right by congress to regulate by legal enactments the manner and conditions under which claims must be worked by miners. The clause in the same section, "subject also to the local customs or rules of miners in the several mining districts," relates to the rules, customs and regulations of miners regarding the location, use, and forfeiture of mining claims. *Robertson* v. *Smith*, 1 Mont. 411.

11. Not retroactive—Water.—The act of congress of July 26, 1866, is prospective in its operation and cannot affect the rights held under a patent issued prior to that date. *Union M. Co.* v. *Ferris*, 2 Saw. 176.

Where land has been entered prior to the passage of the act of July 26, 1866, it is unaffected by that act, the same as if patented, by reason of the relation of the patent to the date of entry. *Union M. Co.* v. *Dangberg*, 2 Saw. 450.

Prior to that act a patentee took full riparian rights undiminished by the fact of prior appropriation of the waters above, but appropriation is confirmed by that act to the claimant as against patents of subsequent issue. Id.

12. Grant of appropriated water.—"Under the law of congress" (Rev. Stat. Title 32) "a grant of the kind of property in question" (water) "is presumed by the act of appropriation." *Barkley* v. *Tielebe*, 2 Mont. 59.

13. Peculiar nature of the grant.—"The right to occupy, explore and extract from mineral lands the precious metals, is of a higher character than if created by what is termed a parol license, for it is given by an act of congress, and, hence, equivalent to a patent from the United States to the same." *Robertson* v. *Smith*, 1 Mont. 416.

The grant of said act considered as an "easement." Id.

14. Not a bounty. The right of purchase under the United States mining acts is not a bounty. *420 Mining Co.* v. *Bullion M. Co.*, 3 Saw. 634.

15. Confirmation of right. It was the intention of congress, in the mining acts 1866, '70 and '72, to give the right of purchase of a claim upon a silver or gold-bearing lode to the person or association of persons entitled to the possession thereof under the state or territorial laws and local mining customs. Id.

16. Local legislation. The mining acts of congress of 1866 and 1872 have recognized the authority of the territorial legislatures and of the miners of districts to enact laws regulating the extent of mining claims and the manner of working them, but this permission cannot be construed to validate a law interfering with the primary disposal of the public domain—the act of Montana attempting to forfeit claims held by aliens. *Territory* v. *Lee*, 2 Mont. 124.

17. Local laws. The mining acts have expressly recognized the state, territorial and local laws, and, in terms, the statutes of limitations. *420 Mining Co.* v. *Bullion M. Co.*, 3 Saw. 634.

18. Permissive license of the United States. The permissive course of the United States government towards parties mining on the public domain before there was any legislation on the subject, placed them in such a relation that the government could not equitably abridge the rights of the miner. *Gold Hill Q. M. Co.* v. *Ish*, 5 Or. 104.

19. Adverse claim. The statute of limitations of Nevada constitutes a part of the local laws by which the right between an applicant for patent and an adverse claimant are to be determined. *420 Mining Co.* v. *Bullion M. Co.*, 3 Saw. 634.

20. Departure of vein from side lines. The mining act of 1866, considered with regard to departure of the vein from its side lines, the respective duties of the applicant and of the surveyor, the necessity of confining the grant to the survey lines, and the necessity of the existence of a discovered vein within the line of the claim. *Wolfly* v. *Lebanon M. Co.*, 4 Colorado, 1878.

21. Burlinghame treaty—District rule excluding Chinese. A Chinaman who has not declared his intentions to become a citizen of the United States (which fact particularly applies to all Chinamen), cannot locate a claim nor lawfully hold the same against a citizen of the United States attempting to locate the same; but a district rule prohibiting such Chinaman from working upon a claim, is in violation of the Burlinghame treaty, and therefore void. *Chapman* v. *Toy Long*, 4 Sawyer, 35.

See PATENT, PUBLIC DOMAIN.

USAGE.

1. Usage, proof of. A usage of trade does not require the evidence necessary to establish a custom. *Carter* v. *Philadelphia Coal Co.*, 77 Pa. St. 286.

2. Smelting contract. The defendants contracted in writing to deliver the plaintiffs five hundred tons of copper ore to be paid at certain specified prices per ton, according to the quality of the ore, to be ascertained by an assay thereof, "the moisture to be deducted, as usual, from the weight of the ore." The plaintiffs claimed that under this contract the defendants were bound to deliver a quantity of ore weighing five hundred tons after deducting for the moisture, while the defendants insisted that they were only bound to deliver five hundred tons of ore, gross weight, without any deduction for the moisture, and that the proviso in regard to such deduction related only to the mode of ascertaining the weight of ore to be paid for: *Held*, that it was competent for either party to introduce testimony tending to prove a uniform and known custom of trade in regard to the sale and delivery of copper ore corresponding with their respective claims as to the construction of the contract in question. *Humphreysville Copper Co.* v. *Vermont Copper M. Co.*, 33 Vt. 92.

3. Coal breaker. Where a tenant rents a coal mine and is to pay the lessor the rent in coal at specified prices, in the absence of any special agreement as to the condition in which the coal is to be delivered, it is the usage for the tenant to provide the coal breaker and his duty to deliver it in a marketable condition; and if not so delivered, the expense necessarily incurred by the landlord in preparing it for market may be charged by him to the tenant. *Audenried* v. *Woodward*, 4 Dutch. (N. J. L.) 265.

4. Marble "wrought" or "unwrought." In a suit concerning the charges for transportation of marble, the amount of freight charges depending upon whether the marble, which was sawn in slabs, was wrought or unwrought, the court properly charged the jury "that the terms wrought and unwrought as applied to marble were of doubtful signification; that it was competent for the owner to show what meaning was given them by custom and usage; that such custom, in order to bind the carrier, need not be uniform, universal or settled among dealers or carriers; but that if the jury believed, from the evidence, that the generally prevailing usage among manufacturers, dealers and carriers was to class marble in slabs as unwrought, then the carrier could only claim freight on it as of that

class, to wit: as unwrought marble. *Bancroft* v. *Peters*, 4 Mich. 619.

5. Marine insurance on copper. A policy on a particular kind of property by name, which, from its peculiar nature, is usually carried on deck for its own safety or for the safety both of itself and of the ship, will protect such property when so laden, for the insurer is presumed to know the usage. But copper is not of such a class of goods. Rather, from its weight it ought to be stored so as to serve as ballast. Where, therefore, copper in pigs, after being insured generally, was carried on deck, it was *held*, that the insurers were not liable for its loss, notwithstanding a usage to carry on deck such goods as were not liable to injury from dampness, it not being proved that insurers had ever paid for losses on goods so carried under such usage, upon a general risk, except such goods as from their nature might be supposed to be properly carried on deck. *Taunton Copper Co.* v. *Merchants' Ins. Co.*, 22 Pick. 108.

UTAH.

1. Statute of conveyances. The Utah statute of conveyance of January 18, 1855, had no application to mining claims. *Kinney* v. *Con. Virginia M. Co.*, 4 Saw. 431.

VEIN.

1. Land. A vein of coal is land, unless distinguished from the land by the conveyance. *Wilkinson* v. *Proud*, 11 M. & W. 33; B. & W. L. C. 23.

2. When a mine. A vein is not a mine until it is opened. *Astry* v. *Ballard*, 2 Mod. 193.

3. Range—Description. A grant of the exclusive right to mine upon the "Watkins Range or Works" of lead and zinc ore upon a certain part of a quarter section owned by the lessor: *Held*, to carry the right to mine on such range not only as far as actually opened or worked, but to follow it to the limits of said land. *Sobey* v. *Thomas*, 39 Wis. 317.

4. Cross seam. Where a spar seam is found crossing a deposit (considering the character of such seams in the district where Treasure Hill is situate as a matter of notoriety), it does not constitute a division between lodes, even where it is shown that the rock behind the spar seam contains but little ore. *Phillpots* v. *Blasdell*, 8 Nev. 61.

5. Verdict. The verdict of a jury upon a question of fact as to identity of veins, may be set aside when found against a clear preponderance of evidence, the same as upon any other issue of fact. Id.

6. Identity of veins involved. Where a juror upon his *voir dire* expressed the holding of a decided opinion as to the course of all the veins in the vicinity of the ground in controversy, but had no knowledge of the particular vein or veins in dispute, and it did not appear upon the pleadings nor otherwise before trial that identity of veins was a material fact in issue: *Held*, that the challenge for cause to such juror was properly disallowed. *Weill* v. *Lucerne M. Co.*, 11 Nev. 200.

7. Angle—Tortuous vein. When lessor demised the "Watkins Range or Works," being a vein or deposit of lead and zinc ore supposed to bear a certain general course, but which was afterwards traced to the east line of the quarter section on which the discovery was situate, and thence through the lands of other parties by a circuitous course back into another part of the said quarter section, but there was no connection directly through the lessor's land or the said quarter section to the point where the deposit was traced back into such quarter section, at which point it had (after the lease granted but before the connection proved), been discovered and worked by other parties: *Held*, that the lessee's right terminated when he reached the east end of his lessor's ground, being the east line of the quarter section, and did not extend to that part of the deposit within the lessor's tract as traced back, because not proved to connect on the same tract; and that the fact that the deposit was a horizontal seam did not affect the case, since lessee's rights terminated when they reached the exterior line of the lessor's ground. *Sobey* v. *Thomas*, 39 Wis. 317.

8. Dictum — Following the vein. "Note—This case was referred by my Lord Keeper to Justice Wilde. A man opens a mine in his land, and digs till he comes under the soil of another, whether he can follow his mine there? And he certified his opinion that he might. But if the owner dig there also, he conceived that he might then stop his further progress. And in Cornwall it is their use that if a man begins a mine in his own land, he may proceed in the vein through another man's ground:" *Anon.* (Note entire.) Temp. Car. II; 2 Vent. 342.

9. Workings to follow the vein. It is the course of the country, and a practice well known among miners, that any person having the right to dig in mines may pursue the vein and open new shafts to follow the vein, otherwise the coal could not be worked. *Hellier* v. *Twyford*, cited, 2 P. Wms. 389; Mosely, 223.

10. Development. The statute of Ne-

vada allowing mining suits in certain cases to be continued until further development is made, cannot be construed as excluding all evidence as to the identity of veins except that produced from actual workings. *The Silver M. Company* v. *Fall*, 6 Nev. 117.

11. Of Water.—Mineral Spring. For case describing the percolating supply of a soda spring as a "vein of water," see *Whitney* v. *Buckman*, 26 Cal. 447.

12. Departure from side lines. The vein of a lode mining claim which after patent issues, is found on its strike, or general course, to depart from the side lines of its survey, and enter the side lines of another claim, cannot be followed into such other claim. It is restricted to its side lines except when it leaves them by its dip. *Wolfly* v. *Lebanon M. Co.*, 4 Colorado, 1878.

13. Location lines, presumed to include. A location of a lode mining claim will be presumed to include the vein upon which the discovery was made, until the contrary appears. *Patterson* v. *Hitchcock*, 3 Colorado.

But when the vein has been proved to leave the lines of the location in fact, the location beyond such point of departure, is defeasible if not void. Id.

See LODE, LEDGE, MINES.

VENDOR AND PURCHASER.

1. Sale of coal to be found. A sale of the coal lying within and under certain premises, the purchaser covenanting to pay £40 for every acre of coal which should be found within or under said premises, places no obligation on the vendor to find the coal. The covenant is absolute until the purchaser ascertains how many acres there are, and pays for the same at the rate stated. *Jowett* v. *Spencer*, 1 Ex. 647; 17 L. J. Ex. 367; reversing S. C., 15 M. & W. 662.

2. Implied right of inspection. In a contract for sale of the minerals under a given quantity of surface at a certain price, payable by installments, the times of payment to be accelerated if more than a certain quantity of minerals should be gotten from time to time, the vendor impliedly reserves the power of entering and inspecting the mines, to ascertain the quantity of minerals from time to time gotten therefrom, and the vendor is entitled to a specific performance of the contract, with a covenant reserving such power in the conveyance. *Blakesley* v. *Whieldon*, 1 Hare, 176; 11 L. J. Ch. 166.

3. Caveat emptor—Careless purchaser. If a purchaser choosing to judge for himself does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations, the rule being *caveat emptor* and the knowledge of his agents being as binding on him as his own knowledge. *Attwood* v. *Small*, 6 C. & F. 395; reversing *Small* v. *Attwood*, 1 Younge, 407.

4. Time—Laches. A purchaser of coal lands offering to perform his part of the contract, required by notice, the vendor to complete within a month: *Held*, that the purchaser could not afterwards set up as a defense to a suit for specific performance, misrepresentation of the vendor, of which he was aware at the time of giving the notice. *Macbryde* v. *Weekes*, 22 Beav. 533.

5. Warranty not implied on sale of claim. A contract for the sale and conveyance of an interest in certain mining property in Montana, after stating the fact of sale, its terms, and a description of the property, stipulated that upon the payment of certain notes, given for the purchase-money by the vendees, the vendor would execute to them "a good and sufficient deed" for the property. The title to the property afterwards became lost, and the claims abandoned, by the failure of those interested therein to keep alive the same by working them in accordance with the miners' rules in that region. *Held*, the situation of and circumstances surrounding the property and parties being for that purpose considered, that the parties only intended the sale and conveyance of a mere possessory or miner's claim; that the covenant to convey contained in the contract, did not amount to a warranty of title; that the vendor thereunder was only bound to execute a deed for the interest he possessed at the time of the contract; that he was not bound to protect and keep alive his interest in the claim by having the same worked in accordance with the miners' rules, and that the loss of the title, by reason of the failure of the vendees and others interested to thus keep it alive, constituted no defense to an action on the notes given for the purchase-money. *Corbett* v. *Berryhill*, 29 Iowa, 157.

6. Vendee attorning to hostile title. Parties taking possession of a quartz lode under an agreement with the owner, or one of the owners, to erect a mill in consideration of their purchase, cannot retain possession and refuse to comply with their contract, although they may have seen fit to buy outstanding claims on the same premises. *Hitchens* v. *Nougues*, 11 Cal. 28.

And where such parties upon their purchase from H. reconveyed one third of the premises to the wife of H. at his request, and subsequently acquired other title, their deed to the wife of H., purporting to con-

vey an absolute title in fee-simple: *Held*, that the subsequently acquired title inured to the wife of H., their vendee. Id.

7. Surrendering property to adverse claimant. A party buying and receiving possession of property (a quartz mill) in litigation and making his note for the same cannot, upon the mere demand of the adverse claimant without legal compulsion, surrender possession, and after surrendering possession plead his vendor's want of title, and on this ground defeat the collection of the note. *First National Bank* v. *How*, 1 Mont. 604.

8. Inadequate price. Inadequacy of price is not of itself sufficient to avoid a deed. It must be accompanied by other evidence of fraud. *Harris* v. *Tyson*, 24 Pa. St. 347; B. & W. L. C. 351.

9. Purchase-money to be paid out of mining stock. In an action upon a bond for purchase-money of land, evidence for defendant that the land was to be the basis of an oil and mining company; that the sum secured was to be paid when realized from the sale of stock, or if the stock could not be sold, from the products of the land: *Held*, admissible. *Hoeveler* v. *Mugele*, 66 Pa. St. 348.

10. Consideration—"First Proceeds." Where the owner of mineral lands formed a coal and oil company and transferred to it lands in unequal proportions upon agreement to pay the parties transferring the larger interest a certain sum from the profits of the first coal sent to market; but the land was sold by the company before any profits were realized: *Held*, that such sum should be paid out of the consideration money, "if it sold for sufficient to pay them." 2. That stockholders could not be held for such sum unless they had actually received the proceeds of sale. *Bainbridge* v. *Gearing*, 3 W. Va. 240.

11. Compensation against outstanding mineral grant. The vendor of an estate had granted to A. B. the right to work coals under the property, with a proviso that when the workings of the coal had finally ceased, the pits should be filled up and the land restored to a proper state of cultivation. A. B. ceased to work the mines and filled in the pits. Upon the sale of the estate A. B. claimed to be entitled to rework the coal, and the purchaser therefore claimed compensation. The court considered that there had only been a temporary cessation to work the coals, and held that the purchaser was entitled to compensation to be ascertained by an expert appointed by the judge. *Ramsden* v. *Hurst*, 27 L. J. Ch. 482.

12. Suit for purchase-money. An affidavit of defense to a bond given for purchase-money of mining land sold by warranty deed, stated that adverse outstanding claims existed prior to the purchase: *Held*, insufficient for not alleging that these claims were valid or believed by the defendant to be so. *Brick* v. *Coster*, 4 W. and S. 494.

13. Rescission—Shortage in acres.—The owner of an estate agreed to sell it for £250,000, representing it to contain 1530 acres. The purchaser agreed to sell it to a company for £350,000, of which £150,000 was paid to him, £75,000 in cash and bonds for £75,000, and he paid the vendor of the estate £50,000 as a deposit. It appeared that the estate contained less than 1100 acres, and the company having at the time only £1536 in hand, complained to the purchaser of the deficiency, and he then wrote to the vendor, declining to complete. The company afterwards rescinded the contract, and the purchaser brought an action against the vendor for the deposit, which was compromised by the vendor repaying the deposit and rescinding the contract. The company filed a bill against the purchaser, and some other defendants who had agreed to share with him, for a return of the £75,000 and of the bonds. *Held*, that the company was entitled to rescind on the ground of misrepresentation, though they might have been able to ascertain the extent of the estate. 2. That the company were entitled to repayment of what they had paid and to a return of the bonds, and that they had a lien on a portion of the £50,000 repaid to the purchaser, which had been paid into court. 3. That the company were not bound to take the smaller number of acres, although at the time they might have been willing to have bargained for a less number. *Aberaman Iron Works* v. *Wickens*, L. R. 4 Ch. 101, reversing L. R. 5 Eq. 485.

14. Transfer by delivery.—Where by the mining customs (in Utah, now state of Nevada) the title to a mining claim may be transferred by delivery of possession without deed, the formation by the locators of a corporation and the placing of such corporation in possession gives it title to the claim, and suit may be maintained to force it to issue stock to the locators, pursuant to the agreement made at the time it was formed and received possession. *Blodgett* v. *Potosi G. & S. M. Co.*, 34 Cal. 227.

And such right may be enforced by those claiming under the original locators by descent. Id.

15. Assignment of deed.—Title does not pass by the assignment of a deed, or of the vendor's interest in a deed, to a mining claim. *King* v. *Randlett*, 33 Cal. 318, B. & W. L. C. 334; see *Bean* v. *Valle*, 2 Mo. 132.

16. Purchase by corporation. The president, and also one of the trustees of a corporation, made on its behalf a written contract for the purchase of certain ditch property, and immediately thereafter participated in a meeting of the trustees, at which he made a written report, stating that he had purchased the property, and stating partially, but not fully, the terms of the contract, upon which the trnstees by a vote ratified the report and the proceedings: *Held*, that the board must be presumed to have known the terms of the contract which it ratified; that this presumption could only be overcome by evidence of the contrary. *Blen* v. *Bear River & A. W. & M. Co.* 20 Cal. 602.

17. Defense to purchase-money. Maguire was the owner of land on which was a dwelling-house and an underlying tract of coal. He first sold the coal, and afterwards sold the land and dwelling to Howard, the defendant. But in two of the bonds secured by mortgage for the purchase-money, a proviso or memorandum was inserted that the obligee was bound, in case the well at the dwelling-house failed within two years by reason of the mining underneath for coal, to sink a well below the coal, or otherwise, and deep enough to get good water for family purposes. The well failed within the time as anticipated. The vendor failed to sink a well as provided. In the mean time, one of the bonds containing such condition had been paid. In an action upon the other, *Held*, that the condition amounted to a guarantee, and the failure to sink the well was a defense to the bond for purchase-money. *Maguire* v. *Howard*, 40 Pa. St. 391.

18. Rescission. One of the articles of a contract of sale of mineral lands provided that the estate as to extent of acreage should be taken to be conclusively shown by certain deeds: *Held*, that this was merely a conveyancing condition as to identity, and that, coupled with the representation as to the acreage, it did not estop the company from rescinding on the ground of deficiency in acreage. *Aberaman Iron Works* v. *Wickens*, L. R. 4 Ch. 101; reversing L. R. 5 Eq. 485.

19. Rescission after entry. A vendee, by his entry and acting as a partner in an iron concern, does not waive the benefit of a contract for good title; and may rescind upon failure to receive such title. *Stevens* v. *Guppy*, 3 Russ. 171.

20. Inducement to rescission. The inability or want of money of a vendee acting as an inducement to rescind is no argument against the rescission if he have the right to rescind. *Aberaman Iron Works* v. *Wickens*, L. R. 4 Ch. 101.

21. Ratification—Contract of exchange. Gale and wife, in 1857, contracted to sell and convey to Cady certain real estate in this state, the property of the wife, in consideration of the right to manufacture and vend a certain machine of which Cady was the proprietor in 1857. All the parties then resided in Illinois. In 1861 the land was greatly enhanced in value by reason of the discovery of oil deposits under the surface. Gale refuses to convey and Cady brings suit. Gale answers alleging worthlessness of patent, etc.: *Held*, that inasmuch as Cady had been manufacturing and vending the machines for two years before the sale of the right to Gale in the neighborhood where the parties both resided, he could not have been unacquainted with it; and no fraud, misrepresentation or concealment being proved or shown on the part of Cady, and it also appearing that more than a year after the contract was made Gale reaffirmed it by indorsing an extension of time for a compliance on his part, the contract must be regarded as a fair one and specific performance decreed. *Cady* v. *Gale*, 5 W. Va. 547.

22. Joint negotiation. Although parties may have negotiated jointly for the purchase of a mine, yet if there has existed no confidential relation between them, the purchase by one of them for his own benefit cannot be set aside. *Tatham* v. *Lewis*, 65 Pa. St. 69.

23. After acquired title. Title accruing to grantor after his grant must be in trust for the prior grantee; if conveyed afterwards to another with notice, the second grantee will be substituted to the obligations of the grantor. *Doyle* v. *Peerless Petroleum Co.*, 44 Barb. 239.

24. Contract as affected by marriage settlement. Sir Richard Standish, seized in fee of the manor, entered into a contract with three other persons to search for mines on his manor, and work the same as partners, he to have a one tenth share in consideration of his proprietorship, and to hold two fifths as a partner. Any partner to have the right to recede upon accounting to date. After a valuable mine was discovered and had been worked three months, Sir R. died, and his widow set up against the agreement a settlement made after marriage but long prior to the agreement. Upon bill to have the benefit of the agreement the court was inclined to decree that the partners were purchasers, and that the agreement should stand against the settlement. *Shaw* v. *Standish*, 2 Vernon, 326.

25. Mines conveyed as land. Mines and minerals not severed from the land, are land and may be conveyed and will descend in

the same way. *Reaves* v. *Ore Knob Copper Co.*, 74 N. Car. 595.

26. Defective conveyance. Pursuant to an unwritten agreement for sale of oil lands in Pennsylvania, the vendor made and delivered to the purchaser a written instrument, supposed and intended by both to convey the title, but imperfect and inoperative in not containing the grantee's name; and the latter thereupon executed a mortgage for the price upon land in New York: *Held*, 1. That the grantee had a right in equity to compel the execution of a proper conveyance, and that the mortgage was valid as against judgment creditors of the mortgagor; 2. That the contract was not executory, resting in parol, but executed; 3. That equity would not, in such case, consider whether the bargain, out of which the mortgage arose, was advantageous to the mortgagor or otherwise. *Stowell* v. *Haslett*, 5 Lans. (N. Y.) 380.

27. Inartificial conveyance.—Effect of the word "sold." An instrument under seal in terms as follows: "This deed witnesseth, that I, Jessie B. Reaves, have this day sold and by these presents do convey unto George T. Reaves one sixteenth part of my half of all the mineral that is in a certain tract of land." (Description.) "This deed, therefore is, that I convey unto the said George T. Reaves, and his heirs and assigns forever, one sixteenth part of my half of all the minerals of all kinds that said tract of land may contain to him and his heirs forever." *Held*, that such deed showed upon its face that Jessie B. Reaves intended to convey the mines and minerals; 2, That the word "sold" imported a valuable consideration so as to rebut the presumption of a resulting use; and the intended operation of the deed was sustained. *Reaves* v. *Ore Knob Copper Co.*, 74 North Car. 595.

28. Sale. Coal on wharf. Where the owner of coal lying on the wharf orders the wharfinger to deliver it to a purchaser, and the wharfinger agrees to deliver upon the purchaser paying the wharfage, the delivery is complete, so far as the vender and vendee are concerned. *Boswell* v. *Green*, 1 Dutch. (N. J. L.) 391.

29. Barytes—Contract requires merchantable quality. Archibald was the owner of a mine of barytes, situate in Nova Scotia, near the Bay of Funda. Fitch, the plaintiff in error, was the owner of mills for grinding barytes, in New Jersey. Archibald had a large lot of the mineral which had been exposed within the reach of the tides on the Bay of Funda, for two or three years, where it had become so damaged as to be almost worthless. Fitch sent an agent to Nova Scotia, where he examined the mine of barytes, as well as this special lot of mineral, reported nothing wrong, and brought back a clean sample thereof; after his return, the plaintiff and defendant, in person, made a contract in writing, by which Fitch agreed to take all the barytes which Archibald might deliver during that season. Defendant shipped this lot of damaged mineral, which plaintiff received and paid the duties upon under protest: *Held*, that under the agreement plaintiff was entitled to have a merchantable article, and parol evidence could not be given to show that this particular lot was intended; that barytes, being a known article of merchandise, parol evidence could not be received to show it was to be of a certain kind or quality. 2. That the place of delivery being New Jersey, the vendee may pay the government duties, which are required to be paid before delivery of the goods, and may deduct the same from any purchase-money due the vendor. *Fitch* v. *Archibald*, 5 Dutch. (N. J. L.) 160.

30. Severed and movable property. Movables, such as bricks in a kiln, on a plantation, do not pass to the purchaser by a sale of the land, unless it is so expressed in the deed of sale. A purchaser of a plantation who converts the bricks in the kiln to his own use, with the knowledge at the time of the purchase that they had been previously sold to another person by his vendor, is therefore liable to the owner for their value. *East* v. *Ealer*, 24 Lov. Ann. 129.

31. Trade fixtures. The defendant purchased a gold mine, by articles providing for a deed upon payment of purchase-money. He entered under the articles, and erected a steam engine, under cover, and which could not be got out without removing a portion of the house. He made default in the payment of the purchase-money, but claimed the right to remove the engine, as a trade fixture. The form of the agreement constituted an absolute agreement to purchase, and was not a lease or a conditional sale: *Held*, that all improvements made by vendee under such contract became parcel of the realty, and went with the land, and that the rule which would have given him such fixtures, if the relation of landlord and tenant had existed, had no application. *Moore* v. *Vallentine*, 77 N. Car. 188.

32. Sale based on misrepresentations of intermeddling third party—Clairvoyant and witch hazel. Plaintiff sold defendant 400 acres of land for $40,000, of which $25,000 was secured by purchase-money mortgage. In suit to foreclose it appeared that the tract was actually worth at the time of purchase about one-third of

the agreed price; that defendant had been induced to purchase the land upon representations of one R. S. Law, and one McDougall, that lead ore existed in large quantities on the land. A letter of McDougall's stated: "Mr. Law is confident we could take out ore in thirty days from the beginning and make it then produce $5,000 monthly upon a vein 20 feet from the surface. * * Fox regarded it as the richest mine in the country. * * There is a spring yielding six barrels of water an hour, gushing out twenty feet from the surface and throwing out fine specimens of lead ore. Fox went over it and pointed out a place where there was a rich deposit," etc. No agency or privity, however could be traced between either R. S. Law or McDougall and the plaintiff, the vendor, and the vendor had not stated that there was any mineral on the land. After the defendant's purchase and the expenditure of several thousand dollars it was developed that there was no mineral deposit whatever. It was further shown that Fox "claimed to possess the power or faculty of discovering mineral in the earth by means of certain mental or physical impressions produced by passing over the place where the mineral is deposited." That defendant had "consulted a woman who professed to be a clairvoyant concerning his proposed purchase," who advised him to buy. Defendant was a spiritualist and had further consulted "a woman from Chicago named Allen, who the defendant says was a medium." Aside from the extravagant price which plaintiff had put on the land and the further fact that plaintiff was aware of the peculiar sources upon which defendant's estimate of the value of the land was based, which had induced him to demand so high a price, no fraud was brought home to the plaintiff: *Held*, that the transaction could not be set aside; 2. That if a vendor of land knows when he effects a sale that the purchaser has been induced by false and fraudulent representations of a third person, he is responsible for the fraud, although such third person was not his agent. But if the sale was made without any false representations by the vendor or his agent, and without knowledge that such representations had been made by any other person, he may maintain the sale; 3. That knowledge of fraudulent representations so made, acquired after the sale, could not affect the transaction; 4. That defendant's belief in the power of Fox to detect mineral veins by walking over the surface, and other like beliefs, such beliefs not being created or strengthened by acts of the vendor, formed no basis for a rescission in a court of equity. *Law* v. *Grant*, 37 Wisc. 548; see *Grant* v. *Law*, 29 Wisc. 99.

83. Gypsum in salt wells—Misrepresentations which have not misled—No defense to purchaser. Where, in defense to a bill to foreclose a purchase price mortgage, damages were claimed in reduction of the amount due on the mortgage, on account of fraudulent misrepresentations alleged to have been made by the complainants at the time of the purchase from them by the defendants of the salt well, salt blocks and machinery constituting the mortgaged property; and the representations complained of were, in substance, that at the date of the purchase the brine in the well was of ninety degrees of strength, free from gypsum, and of quantity sufficient to supply three or more salt blocks; and it appeared from the evidence that the defendants, pending negotiations, were, for fifteen days after such representations were made, and before they were bound by the contract of purchase, in possession of and steadily working the well; that they were acquainted and practically familiar with the business of salt making, and that during this period the defendants and their agents discovered that the well contained gypsum, and that the brine was greatly deficient in strength and quantity, such representations, if made as alleged, would be no defense to the bill. *Whiting* v. *Hill*, 23 Mich. 399.

84. Discovery of gold by vendee in default—Fraudulent conveyance to third parties—Time. Falls in 1823 purchased from Carpenter two tracts of land, gave bonds for purchase-money and took a covenant for conveyance on payment of price. He took possession but made default in payments. The contract was, however, renewed in 1826, and partial payments made until in 1829 a valuable gold mine was discovered on the land. B. and O., who saw him at work taking out gold, went privately to Carpenter, who was unwilling to sell to them unless Falls gave up his bond. They, however, by representing that the contract was not obligatory because payments had not been promptly made, that they desired it for special purposes, and by concealing the discovery of gold, upon which point he had made special inquiry of them, obtained a conveyance from Carpenter. It appeared that but for the discovery of gold Falls might not have been able to complete his contract, and there was evidence tending to show that the partial payments did not amount to more than the interest. Upon bill filed by Falls against Carpenter's heirs and B. and O., to secure the legal title as well as bills or cross bills filed by Carpenter's heirs and B. and O., seeking to set aside Falls' contract, and by Carpenter's heirs seeking to set aside the conveyance to B. and O., it was *held*, 1. That the contract was valid and subsisting;

2. That the fact that Falls was able to pay for the land only out of the results of the accidental discovery of gold, was wholly immaterial; 3. But that if such discovery had been made after a rescission, or a refusal to comply treated as a rescission, it would have been otherwise; 4. That the balance of the purchase-money being paid, specific performance should be decreed; 5. That time was not of the essence of the contract, it not having been treated as such by the parties, the vendor having acquiesced in the delay. Decree in all the cases confirming title in Falls. *Falls* v. *Carpenter*, 1 Dev. and Bat. Eq. 237 (N. C.).

35. Specific performance not affected by sudden discovery of valuable mines. "Whoever is at all acquainted with the operations of mining, must know that a man may live on land for half a century, may dig into it often and deep and discover nothing of value; another may thereafter, or he may himself thereafter, by one day's labor discover a mine of great value." The fact of valuable lead diggings being opened on a tract purchased within a short time after its purchase is no evidence of a fraudulent concealment of its mineral value by the purchaser. *Bean* v. *Valle*, 2 Mo. 132.

The discovery of a valuable mine between the time of contract and the time for delivery of deed, whereby the land is shown to be worth a great price, instead of the small price paid for it, does not affect the transaction so as to make a court of equity treat it as an inadequate price and on that ground refuse specific performance. Id.

36. Time — Defaulting co-purchaser. A. bound himself to B. to buy certain lands, and to let B. have one third thereof, provided the latter paid one third of the price in three years. Afterwards A. made a contract with the owner of those lands, and took his bond to make title to them. Subsequently they rescinded the contract; whereupon, after the expiration of three years from the date of the contract between A. and B., C. purchased the lands in question without notice that B. had any claim to them: *Held*, 1. That B. had no equity upon the pretense of a claim upon A. as owner of these lands, under the contract above stated, to pursue them into the hands of C.; 2. The maxim, "In equity time is not of the essence of a contract," does not apply to bargains like the above, where it was incumbent on B. to raise a part of the purchase-money; 3. That the obligation of A. to B. was personal and did not attach to the land, sounding in damages only. *Willis* v. *Forney*, 1 Busbee's Eq. 256 (N. C.).

37. Time—Contract for re-conveyance. Where the owner of a one third interest in land conveyed that interest to the owner of the other two thirds, and took a covenant from the bargainee that he would sell the tract to the best advantage, and pay the bargainor one fourth of the proceeds, but would not sell unless such one fourth would amount to $1,500, and in case no sale should be effected in six months, would reconvey to the bargainor, or pay him $1,300; and a sale was not effected till after the lapse of six months: *Held*, that the obligation to sell had ceased, and the bargainor could only claim a reconveyance of his former interest in the land, or $1,300, at the election of the bargainee. *Hargrave* v. *Smith*, 1 Cases in Law and Eq. (N. C. 1867) 165; 1 Phillips Eq. (N. C.) 165.

38. Rescission attempted after title confirmed. A. purchased a tract of land, supposed to contain gold, from B., and afterwards, supposing that B. had not a good title, procured a conveyance from C., the original owner, under whom B. claimed: *Held*, that if B.'s title was but an equitable one, when A. was induced to believe that it was a legal one, upon B.'s refusal to procure and convey the legal title A. had a right to have the contract rescinded. But, as he chose to purchase the legal title himself, he cannot claim more from B. than to be reimbursed what it cost him to get the legal title. *Kindley* v. *Gray*, 6 Ired. Eq. (N. C.) 445.

39. By-bidders — No rescission after unsuccessful prospecting. Although the secret employment of by-bidders, at an auction sale, to puff the value of the land as containing valuable gold deposits may be a fraud upon the vendee, yet the latter must aver and show that he abandoned the contract as soon as he discovered such fraud. He cannot set it aside when he has prospected the property since the purchase, and found in it less gold than he hoped for. *McDowell* v. *Simms*, 6 Ired. Eq. (N. C.) 278.

40. Contract surviving to executors. A coal mining company contracted with one Smith, to deliver to him three car loads of coal each week, from April 15, 1872, to October 15, of the same year, at three dollars and seventy-five cents per ton, and six car loads per week from said last mentioned date till April 15, 1873, at four dollars per ton. The company delivered coal as per contract until the death of Smith, in October, 1872, when they declined to deliver, on the ground of his decease: *Held*, that the death of one of the contracting parties did not put an end to such a contract, it not being of a personal character, nor within any other class of exceptional cases. That the administrator had a right to demand its fulfillment, as he had done, and to recover damages for its non-fulfillment, either upon his own option, at his

own risk, or under direction of the court, at the risk of the estate. *Smith* v. *Wilmington Coal Co.*, 83 Ill. 490.

41. Parol transfer. The occupation of a mining claim, amounts to an estate in lands which must be conveyed by deed; a parol transfer cannot connect the vendee with his vendor's previous possession. *Sears* v. *Taylor*, 4 Colorado (1878).

42. Suppressio veri fraud. A purchaser having discovered salt water on the land, prevented the agent of the vender from giving information thereof, and concealed the discovery from the vendor by artifice, is guilty of a fraud, and will not be permitted to retain the purchase. *Bowman* v. *Bates*, 2 Bibb, 47, 4 Am. Dec. 677.

43. Defenses to specific performance. Where a vendee, as the defendant alleged, having discovered a very valuable salt spring on the land, concealed the same from the vendor at the time of making the contract, pretending that the purchase was made for the benefit of the wood on the tract, the price agreed upon proving wholly inadequate, when the existence of the spring came to be considered; the vendee further being in default by delay in tender of installments, it was *held*, that the plaintiff should have no decree for a specific performance, although his knowledge and concealment of the salt springs was not conclusively shown, as the delay and inadequacy of consideration of themselves would be sufficient to defeat relief of that kind, leaving the plaintiff to his remedy at law for breach of contract. *Bowman* v. *Irons*, 2 Bibb. 78; 4 Am. Dec. 686.

See SPECIFIC PERFORMANCE, RESCISSION, FRAUD.

VENDOR'S LIEN.

1. Creditor—Co-tenants. Where A. and B. were tenants in common and partners in the working of a quartz mine and mill, and while an indebtedness existed against the firm, A. sold to C., receiving only a small portion of the purchase-money, the balance remaining unpaid. Afterwards a creditor obtained judgment against the original firm, and the entire interest of A. and B., the original members, was sold by the sheriff: *Held*, that A.'s title having been conveyed, he had no interest to sell, and that a balance of purchase-money, secured by vendor's lien, was not an interest in real estate which would pass under the sale of the property. As to whether any equitable lien existed in favor of the creditor, not decided on account of its not being specially pleaded. *Ross* v. *Heintzen*, 36 Cal. 313.

2. Garnishment — Assignment. — Purchase-money due for a mining claim may be garnisheed or assigned, but the vendor's lien cannot be transferred. Id.

VENTILATION.

1. The right, property.— A right of ventilation through the mine or land of another is a valuable privilege, not to be taken without leave and compensation. *Powell* v. *Aiken*, 4 Kay & J. 343.

2. Safe workings.—By 22 and 24 Vict. c. 151, sec. 10, rule 1, of the general rules to be observed in every colliery or coal mine and iron-stone mine, by the owner or agent thereof, "an adequate amount of ventilation shall be constantly produced in all coal mines, etc., to dilute and render harmless noxious gases, to such an extent that the working places, and the traveling roads to or from such working places, shall, under ordinary circumstances, be in a fit state for working or passing therein:" *Held*, that it was not sufficient compliance with this rule to cause ventilation to pass along the working places and traveling roads, but that so much of the mine must be kept ventilated as to render the working places and traveling roads safe. *Brough* v. *Homfray* L. R. 3 Q. B. 771; 9 B. & S. 492.

3. Sunday. Stats. 18 and 19 Vict. c. 108, s. 4, requires certain rules to be observed in every coal mine and colliery by the owner and agent thereof. By rule 1, "an adequate amount of ventilation" is to "be constantly produced at all collieries," in order that the working places of the pits and levels of such collieries may, "under ordinary circumstances, be in a fit state for working." Sec. 11 imposes a penalty upon the owner and agent "if any colliery be worked" and the aforesaid rules are neglected or willfully violated: *Held*, that the agent of a colliery which was actually worked only on week days, incurred a penalty under sec. 11, for a breach of rule 1, by neglecting to keep up adequate ventilation in the colliery during the suspension of actual work there between Saturday night and Monday morning; for that, notwithstanding such suspension, the colliery was "worked" during that time within the meaning of that section. *Knowles* v. *Dickinson*, 2 El. & El. 705.

4. New shafts necessary. The right to open new shafts follows the right to work a coal vein, from the necessity of ventilation. *Hellier* v. *Twyford* cited, 2 P. Wms. 389; Mosely, 223.

5. Pennsylvania act. Where in connection with the mine or colliery a shaft has been sunk to, or a slope driven in a

seam or stratum of coal which is in communication with a second outlet at the point where the mining is carried on, and a field of coal has there been exhausted; yet, if from that point, a slope be continued on following the pitch of the seam or stratum down several hundred feet, and at the bottom thereof extensive mining be carried on in the same, and there is no second outlet communicating therewith, separated from such slope by natural strata of at least one hundred and fifty feet in breadth, the mine or colliery is within the legislative inhibition, and an injunction will be granted to restrain the owners, lessees and occupiers thereof from thus working the same. *Com.* v. *Wilkesbarre Coal Co.*, 29 Leg. Int. 213.

6. Constitutionality—Pennsylvania act. The constitutionality of the act of the 3d of March, 1870, commonly known as the "mine ventilation law," re-affirmed. Id.; *Com.* v. *Bonnell*,, 8 Phila. 534.

7. Standing Gas. The defendant's mine at the point where workings are going on, is free from standing gas; but these workings connect with and open into old abandoned workings, where standing gas accumulates, flows, and by frequent falling of the roof is liable to be driven into the defendant's workings, to affect the air and to cause destructive explosions: *Held*, that under these circumstances and thus connected, "the entire mine is not free from danger to the lives and health of the men," nor in a fit state for them to work therein, as required by the ventilation act, and an injunction awarded. *Com.* v. *Tompkins*, 1 Luzerne Legal Reg. 341 (Pa).

A mine is not free from danger when it actually exists within the mine, simply because the danger originates in causes located a few feet or yards beyond and outside of the boundary lines. The act deals with its presence, not its origin. Id.

The act does not require that a mine be kept absolutely clear of gas, for this is impossible; but that as fast as evolved, it be, by the introduction of pure air and the process of ventilation, "diluted, rendered harmless; and expelled," and its accumulation as, and so as to fall within the designation of, "standing gas" avoided. Id.

8. Abuse of the act. The proviso of section 3 of the act of March 3, 1870 (P. L. 3) does not authorize the production of coal for market under the pretext of "making another opening through coal." *Com.* v. *Bonnell*, 8 Phila. 534; See *Com.* v. *Wilkesbarre Coal Co.*, 29 Leg. Int. 213.

9. Mine operated by tunnel. A coal mine operated through a tunnel, and having no second outlet connected with it is not within the prohibition of the act of 1870, known as the Mine Ventilation Law. *Com.* v. *Connell*, 2 Luz. L. Reg. 1.

WAGES.

1. Lien—Pennsylvania. The preference to which miners are entitled under the act of April 2, 1849, for the protection of miners, mechanics and laborers in certain counties, is not limited to the personal property at the mines, but extends to the personal estate generally of their employers. *Reed's appeal*, 18 Pa. St. 235.

2. Wages to come out of claim. Where the owner of a mining claim made a verbal contract with the plaintiff to work the claim and agreed to pay him at a certain rate out of the proceeds of the claim, upon which contract plaintiff went into possession and began to work, and while he was so in possession and at work the owner conveyed the premises to a party who took, without notice of plaintiff's contract, *Held*, that the possession of plaintiff was possession of his employer, and that he had no lien against the premises. *Jenkins* v. *Redding*, 8 Cal. 598.

3. Hiring by the month. The hiring of miners at a fixed per diem, payable monthly, cannot be construed as a contract for more than a month's service; but if the miner continues his work the law implies a renewal of the contract, whatever it was, whether by the day or by the month. *Capron* v. *Strout*, 11 Nev. 304.

4. Monthly hiring. The contract of a foreman of a mine at a stipulated rate per day, payable monthly, is such a contract as may be terminated by either party at the end of any current month. Id.

5. Wages exempt. A party agreed to superintend the raising of ore for half the profits and two dollars a day: *Held*, that the per diem was wages, and exempt from attachment, and that the other phrase of the agreement constituted a partnership. *Knerr* v. *Hoffman*, 65 Pa. St. 126.

6. Exemption. Under a statute of Pennsylvania (act of April 15, 1845), wages earned by personal manual labor of the debtor are exempt. Under this act the following case was presented, and (it seems) made a test case: A coal company employ two, or sometimes four skilled miners to a chamber, who are paid by the company, at the end of each month, at so much per ton mined; and either purchase their own tools, oil and powder, or are charged for them by the company. They labor in person as miners, but employ one or two persons as helpers, heavers or laborers, whom they pay out of their monthly receipts at so much per day; or if the laborer gives notice,

the company hold back his money for him. The balance, after payment of the laborer and deductions for supplies, goes to the miners: *Held*, that the money so due the miners is the wages of personal manual labor, and exempt under the act. *Penn. Coal Co.* v. *Costello*, 33 Pa. St. 241.

7. Artificer—Truck act. A person contracting on a large scale for the loading and unloading and burning of iron ore, employing laborers under him, is not an "artificer, workman or laborer" within the meaning of the "truck act," 1 and 2 Wm. 4, c. 37, though he superintends the work, and from time to time labors personally therein. *Sharman* v. *Sanders*, 13 C. B. 166, affirming S. C. styled *Sharman* v. *Union Iron Works*, 3 Car. & K. 298.

8. Collier paid by the ton, etc. If a collier be employed to get coal from a mine, and is to be paid at a certain rate per ton on the coals got by him, and has liberty to employ other men to assist him, he is an artificer within the meaning of the truck act, 1 and 2 Wm. 4, c. 37, and his wages must be paid in money, not in goods, if by the contract he is bound to give his personal labor in the performance of the work. *Weaver* v. *Floyd*, 21 L. J. Q. B. 151.

9. Truck act—Medicines, etc. Section 23 of the truck act, 1 & 2 Wm. 4, c. 37, permits an employer of an artificer to contract to supply the artificer with medicine, medical attendance and materials to be employed in his occupation, if a miner, and to demise to the artificer a tenement at any rent reserved, and to contract to make stoppages or deductions from the wages in respect of rent, medical attendance, etc., provided the contract for such stoppages be in writing and signed by the artificer: *Held*, that the amount to be deducted in respect to each head of deduction need not be specified in the written contract. *Cutts* v. *Ward*, L. R. 2 Q. B. 357.

Under a contract in writing allowing stoppage to be made for medicine and medical attendance, the employer may deduct 6d. a week, which, by the practice of the mine, was paid by each miner towards a club kept by the employer for the purpose of providing medicine and medical attendance for such miners as required them. Id.

The contract as to the supply of materials in order to be within section 23, must be shown to be an absolute contract of sale, and not a mere contract of hiring by the artificer. Id.

10. Batty colliers. "Batty colliers" working in partnership under a verbal contract with the owner of a colliery and paid by the yard and ton and sometimes by the day, and though not allowed to underlet the works or leave it, employing others to assist them for whose wages they are responsible, are not artificers performing labor for wages within the meaning of the truck act, 1 and 2 Wm. 4, c. 37. *Sleeman* v. *Barrett*, 2 H. & C. 932.

Batty colliers engaged to get coal and iron-stone from a mine at so much per yard or ton, who are bound to work personally in the mine and who do so work, are artificers within the meaning of the truck act, 1 and 2 Wm. 4, c. 37, although they employ other workmen under them. *Bowers* v. *Lovekin*, 6 El. & Bl. 584; 25 L. J. Q. B. 371.

11. Notice—Work stopped. By custom when batty colliers leave off working a coal mine without giving notice, they are not entitled to be paid for gate roading, air heading, or coals undergone; but if they leave after having given notice, they are entitled to be paid for these things by the owner of the mine, and if the mine be not worked they are not bound to wait till the working is recommenced, and to be then paid by the succeeding batty collier. *Bannister* v. *Bannister*, 9 Carr. & P. 743.

See LIEN.

WAR.

1. Bullion. Bullion, when destined for hostile use, or for the purchase of hostile supplies, is contraband of war. *United States* v. *Diekelman*, 92 U. S. 520.

WARRANTY.

1. Covenant for quiet enjoyment—Outstanding lease. In 1844 the defendant was party to a twenty-one years' lease of coal mines, which gave certain power over the surface incidental to the workings of those mines and an adjoining colliery. The coals so demised were substantially worked out before September, 1845. In October, 1845, the defendant sold and conveyed the land to J., who knew of the workings, and the defendant covenanted with him for title for quiet enjoyment and against incumbrances. In July, 1846, J. sold and conveyed to the plaintiff, who was ignorant of the workings. In 1865, in consequence of the mining operations above described, the land subsided, and houses built on it by J. and the plaintiff were damaged. In 1848, subsequent to the plaintiff becoming owner of the land, and within twenty years before action, the lessees, or persons acting under their authority, entered the mines and took some fire-clay, which was not included in the demise, and a few loose pieces of coal. In an action brought on the above covenants, the declaration in which alleged that whilst the plaintiff was seised the lessees

entered upon the land, and worked, got and carried away the coal, whereby the plaintiff lost the coal, and the land subsided: *Held*, by the court, that as to the breach of the covenant for quiet enjoyment by the removal of coal which caused the subsidence, there was a fatal variance between the declaration and the evidence, which under the circumstances the court declined to allow to be amended. *Spoor* v. *Green*, 9 L. R. Ex. 99.

A covenant for title or quiet enjoyment is not broken by the fact known to the purchaser at the time of purchase that all the coal under the land sold had been worked out prior to his purchase. Nor does the subsequent subsidence of the land on account of such working cause a breach of such covenants. Id.

2. Deed of surface. By deed in 1857 the trustees of defendant conveyed lands to R. in fee, reserving the coal, with power to get the same, paying compensation therefor, And the defendant covenanted that notwithstanding any act done by his grantors to the contrary, the trustees had power to grant the land free from incumbrances. In 1859 the plaintiff became owner of a portion of the lands. In fact, in 1844, S., defendant's grantor, had made a lease of the mines under the land whereby the lessees covenanted that they would work and carry on the colliery, coal mines and seams of coal thereby demised in a fair, proper and orderly manner, and according to the best and most approved method of working collieries of a like nature on the rivers Tyne and Wear, and so as to produce with safety the greatest quantity of merchantable coals from and out of each and every the workable seams thereof, and would not knowingly do or suffer to be done any willful or negligent act, matter or thing whatever, which might hazard or endanger the colliery, coal mines, or seams of coal, or which might bring any creep or thrust upon them, or occasion any loss, damage, or detriment thereto, or which might tend to hinder, stop or obstruct any of the water courses, air courses, passages or drifts which should be in or belonging to the same. The lessees also covenanted not to sink pits within two hundred yards of any dwelling-house, building or farm yard erected or to be erected upon the lands without consent in writing, and to leave unwrought the coal under the mansion house and park and other parts of the superincumbent lands. The lease contained other covenants for the security or benefit of portions of the surface. Dwelling-houses had been built upon the lands, after the purchase by R., and the lessees had so worked the mines as to cause portions of the lands to subside and sink, and the dwelling-houses and their foundations to be weakened, cracked, injured, etc. In an action by the plaintiff, upon the covenant to pay compensation and the covenant for title contained in the deed of 1837, the jury having found that the lessee had worked the mines according to the best and most approved method of working collieries of the like nature on the Tyne and Wear, and that the sinking of the land was not caused by the weight of the houses: *Held*, that the plaintiff was not entitled to recover on the covenant for compensation; 2. That the lessees were not only authorized, but bound to so work the mines as to get the largest quantity of coal that could be gotten consistently with the safety of the mines, and without regard to the safety of any dwelling-house which might be erected after the date of the lease upon any portion of the surface, not specially protected by its provisions; 3. And that, as the result of such covenant, the covenant for title was broken by the grant of such prior lease. *Taylor* v. *Shafto*, 8 B. & S. 228.

3. Enjoyment of coal mine. By indenture, the defendant demised to the plaintiffs a coal mine for a term of years, with liberty to dig and sink pits, etc., for obtaining the coal; and the defendant covenanted with the plaintiffs that they might peaceably and quietly have, hold, occupy and possess, and enjoy the mine during the term, without any molestation, interruption or disturbance whatever, of, from or by the defendant. After the making of the indenture, the defendant excavated a quarry of iron-stone, lying under some of the closes under which the demised mine was situate, but above that mine, and made holes from the strata of iron-stone into the demised mine, and thereby caused quantities of water to percolate into the demised mine; and the defendant also, by excavating the quarry, caused parts of the roof of the demised mine to fall in, so that by reason of the premises the demised mine became flooded, and the working of the coal was rendered impracticable. *Held*, that, though the defendant had a right to excavate the quarry; yet, as the excavation had caused an interruption of the plaintiffs' occupation of the demised mine, the defendant was liable for a breach of his covenant for quiet enjoyment. *Shaw* v. *Stenton*, 2 H. & N. 858.

4. Lessee taking minerals not demised. The fact of the holder of an outstanding lease of coal under certain lands, taking fire clay, a mineral which he was not authorized to take from such lands, does not operate as a breach of a covenant for quiet enjoyment against the vendor and in favor of the purchaser, but is a matter of

trespass between the purchaser and the lessee. *Spoor* v. *Green*, L. R. 9 Ex. 99.

5. Outstanding mine license. An outstanding, revocable parol license to take minerals is no breach of a covenant of warranty. *Gesner* v. *Cairns*, 2 Allen (N. B.), 595.

6. Abandoned mine—Support. An outstanding mining lease, under which all the coal demised has been taken from under the parcel of land subsequently sold, and under which no operations are carried on upon the parcel of land sold, is no breach of a covenant for title or quiet enjoyment, although the right remains to use the surface if necessary, and the coal upon a portion of the demised land, not a parcel of the smaller portion subsequently sold, still remains ungotten. *Spoor* v. *Green*, L. R. 9 Ex. 99. (Kelly, C. B., dissented.)

And this, though the lessee or persons under him had, after the sale with such warranty, entered and taken the loose pieces of coal which had dropped down from the pillars left for support. Id.

7. Deed of one co-tenant—Reformation. M., by his deed, conveyed the land and one seventh of the ore right, the deed containing the following clause: "It being understood that the said Holley heirs own the six sevenths of said ore and minerals." The easement, however, included not merely the right to the ore, but the right to search and dig for it, and transport it over the land. *Held*, to be questionable whether the statement was sufficient to save the grantor from liability on his covenant against incumbrances. *Hartford & S. O. Co.* v. *Miller*, 41 Conn. 113.

But, it appearing that the conveyance was made under a previous written contract, which stated expressly that the land was to be conveyed subject to the rights of the Holley heirs "to six sevenths of the iron-ore mines upon said land," and that the mistake was wholly that of the scrivener, nor observed by either party until some time after, it was held, upon a petition of M. for a reformation of the deed, that it ought to be so far reformed as to state the incumbrance in the manner in which it was stated in the contract. Id.

8. Incumbrance. A deed whereby "all the iron ore and coal" upon certain lands, with right of way and other privileges for their removal, were granted and sold, is an "incumbrance" within the meaning of a covenant of warranty "that said lands are free from all incumbrances whatsoever." *Stambaugh* v. *Smith*, 23 Ohio St. 585.

An exception from such covenant of a claim J. W. "has on said lands for iron ore," when in fact the claim of J. W. was for both the iron ore and coal, is not an exception of his claim for the coal or the easements in connection therewith. Id.

An agreement for the release of such incumbrance is not an equivalent to its actual release. Id.

A deed which describes the property conveyed as "all my interest in real estate easements and rights to dig and mine coal in Mahoning county, Ohio, conveyed to me and now owned, held and enjoyed by me from W. B.," is not void for uncertainty. Id.

9. Coal—Quality. An ordinary sale of coal carries no warranty of quality, but without words of express warranty, a warranty of quality may be inferred from the terms used in making the contract. *Warren* v. *Philadelphia C. Co.*, 83 Pa. St. 437.

10. Pig iron. Where an article (pig iron) is ordered for a special purpose a warranty is implied that it is fit for such purpose, but this rule does not apply where it is merely intended, and not ordered, for a special use. *Port Carbon Iron Co.* v. *Groves*, 67 Pa. St. 150.

11. Oil tanks—Practice. In a suit or proceeding by foreign attachment in equity to collect the price of two oil tanks, it is competent for the defendant to plead and rely on a breach of warranty as to the quality of the material of the oil tanks in reduction or abatement of the price, and when such defense is pleaded and relied on in the answer, it is unnecessary to file a cross-bill for that purpose. *Baker* v. *Rathbone Oil T. Co.*, 7 W. Va. 454.

12. Measure of damages—Ditch sale. The measure of damages against grantors warranting the title to a ditch and water. *Held*, to be the value at the time of the conveyance, with interest, costs, etc., without regard to the known use which grantees intended to make of the water. *Taylor* v. *Holter*, 1 Mont. 688.

13. Of stock—Corporate debts. A warranty that mining stock transferred or the title thereto is free and clear of all incumbrances, debts or liabilities, or an agreement to vest the "clear title" in the purchaser, is in no sense a warranty that the corporation itself is free from indebtedness. *Williams* v. *Hanna*, 40 Ind. 535.

14. Sale of "all interest." The assignment of the holder of an oil lease or of the equitable right to have one executed, which is restricted to "all the right, title and interest," of the assignor, there being no fraud or concealment, is a sale without warranty, and a defect in the assignor's right cannot defeat a suit for purchase-money. *Johnston* v. *Mendenhall*, 9 W. Va. 112.

15. Diamond drill—No warranty of success in novel application. Ward, (the defendants' intestate) bought a patent Diamond Drill from Fletcher, the plaintiff. Plaintiff knew that he purchased with the design and for the purpose of using the machine in prospecting for minerals in Missouri. There was no express warranty proved that the machine would work with any efficiency in prospecting. But to defeat an action for purchase-money, the machine having proved practically worthless in prospecting, the defendants relied on the fact of plaintiff's knowledge of its intended use as above stated, and upon a passage in the contract that the machine was "to be complete in everything for working." But while plaintiff had stated to defendant that the machine had been used in prospecting, both parties understood that the machine had not been contrived for this species of work, and that its ability to be really useful in that way had not been tested. The plaintiff had further stated that it had been known to cut 50 feet into rock in one day, but refused to warrant its cutting any expressed number of feet: *Held*, that there could be no implied warranty of its capacity as a machine for prospecting, but only that it should be delivered, prepared and equipped to do what in principal it was capable of doing; and that from the facts it must be implied that Ward, the purchaser, took the risk as to its ability to be used successfully in prospecting. The judgment for the purchase-money was affirmed. *McGraw, Adm'r* v. *Fletcher*, 35 Mich. 104.

16. Steel for oil drills—Laches. Defendant sold to plaintiffs a quantity of steel, warranting it to be first-class steel, with knowledge that it was to be used to make oil drills. The steel proved unsuitable for that purpose, and the defects in it were discovered as soon as the plaintiffs began to use it: *Held*, that they had no right after that, to continue making drills in expectation of recovering of the defendants, upon the warranty, the expenses or loss of profits. *Draper* v. *Sweet*, 66 Barb. (N. Y.) 145.

17. Statement of quality. The mere description of iron sold, as mill iron, in a bill rendered to the purchaser, will not amount to a warranty that the same is of the quality or grade described, but will be regarded as a mere statement or expression of opinion as to the quality. *Carondelet Iron Works* v. *Moore*, 78 Ill. 65.

18. Warranty by comparison. Where upon a sale of coal the vendor warranted that it should be "of good quality and of as good quality as" certain coal then being landed "at the mills at Havens," in Milwaukee, but, in fact, delivered coal of inferior quality, it was *held* that the warranty called for good coal in any event, even though no place where coal was delivered could be identified as the "mills of Havens," mentioned in the contract. *Pearson* v. *Martin*, 38 Wisc. 265.

WASTE.

1. Without impeachment of waste. The intent of this phrase is that new mines may be opened and timber cut. The tenant under pretense of such clause attempting to pull down the castle, was enjoined. *Vane* v. *Bernard*, 1 Salk. 161; S. C., 2 Vernon, 738.

2. Tenant in common working mines. It is not destructive waste for a tenant in common of a coal mine to get, or to license another to get, the coals, he, the working tenant, not appropriating to himself more than his share of the proceeds. *Job* v. *Potton*, L. R. 20 Eq. 84.

3. Life tenant. The statutes of Pennsylvania relating to waste forbid to tenants for life such acts as at common law constitute waste, except they be such as in the judgment of the common pleas, and according to the terms of the act of 1848, are requisite to "the reasonable and necessary use and enjoyment" of the estate. *Irvin* v. *Covode*, 24 Pa. St. 162.

At common law the working of open mines by a tenant for life is not waste; nor is it waste in Pennsylvania. Id.

4. Presumption—Life tenant. The charge of waste in mining against tenant for life must be made affirmatively to appear: the presumption is in favor of the tenant for life. *Lynn's Appeal*, 31 Pa. St. 44.

5. Lease with perpetual renewal. It seems that injunction in the nature of an estrepement to stay waste does not lie against a tenant for lives under lease containing covenants for perpetual renewal, unless there be a reservation in the lease. *Calvert* v. *Gason*, 2 Sch. & Lef. (Irish), 560.

6. Threats. The court of chancery has jurisdiction to stay waste in opening mines where the defendant has threatened to open them and insists upon his right so to do. *Gibson* v. *Smith*, 2 Atkyns, 182; S. C., Barnad. Ch. Rep. 497.

It is not necessary to stay till waste is actually committed where the intention appears. Id.

Though no proof of waste appears, reversioner may have injunction where the tenant for life insists upon a right to open mines and it is proved that he has no such right. Id.

7. Dormant Mine. It is a question of degree, to be established by evidence, whether the working of a mine which has been for-

merly worked (a dormant mine) is waste or not. A distinction suggested between mines lately and mines long abandoned; between a mine abandoned for want of immediate profit and a mine abandoned with a view to some "advantage to the property." *Bagot* v. *Bagot, Legge* v. *Legge*, 32 Beav. 509; S. C., 33 L. J. Ch. 116.

8. Circumstance of new country. The law of waste must be accommodated to the circumstances of a new and unsettled country. (Virginia, 1818.) *Findlay* v. *Smith*, 6 Munf. 134.

9. Removal of mark. Plaintiff and defendant were tenants in common of a fishery, to use which a strip of land on the bank was necessary. On this land was a deposit of marl, valuable for agricultural purposes. Its removal was a benefit rather than otherwise to the fishery. Defendant dug it away and sold it against the will of his co-tenant: *Held*, that it was not waste, but that defendant would be bound in a proper action to account for the proceeds of sales. *Smith* v. *Sharp*, 1 Busbee's Law, 91 (S. Car.)

10. Dowager working mines. The general doctrine is, that where mines have been opened and worked during the life-time of the husband, the wife is dowable; but not in mines or strata not opened at all. It makes no difference that they may have been temporarily abandoned. If opened in the life-time of the husband, she may not only work them, but may construct new approaches thereto. But is not waste in a widow to work mines opened by the heir before assignment of dower, and she is entitled to dower in the profits in case the mines should be worked by the heir or owner of the fee before assignment of dower. *Lenfers* v. *Henke*, 73 Ill. 405.

See TRESPASS.

WATER.

1. As land—Patent.—A stream is parcel of the land through which it flows, inseparably annexed to the soil, and the use of it as an incident to the soil passes to the patentee. *Union M. & M. Co.* v. *Ferris*, 2 Saw. C. C. 176.

2. Characteristics, as real estate. The right to water must be treated in this state as a right running with the land and as a corporeal privilege bestowed upon the occupier or appropriator of the soil, and as such has none of the characteristics of mere personalty. *Hill* v. *Newman*, 5 Cal. 445.

From the policy of our laws, it has been held in this state to exist, without private ownership of the soil, upon the ground of prior location upon the land or prior appropriation and use of the water. Id.

Justices of the peace have no jurisdiction to try a cause where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted. Id.

3. Natural wants. Possession of public land gives the right to the use of water flowing through it for natural wants, but does not confer the right to divert it, and prevent its running upon the adjoining land of another, who has taken the same up subsequently, but before the attempt to change the course of the water. *Crandall* v. *Woods*, 8 Cal. 136.

4. Against mining claim. Those who locate a mining claim and those who appropriate water have an equal equity, and their rights must be decided by priority. *Irwin* v. *Phillips*, 5 Cal. 140; B. & W. L. C. 727.

5. Valuable stream struck in mining. If a mining corporation, in the rightful prosecution of its business of mining, disclose a flow of water which may be put to valuable uses, it may lawfully appropriate the same, or in any event may maintain its claim to it against a mere trespasser. *Cole M. Co.* v. *Virginia W. Co.*, 1 Saw. 470, 686.

6. Common law inapplicable on Pacific Slope. The common law in relation to rights in running water is not applicable, or is applicable only to a limited extent, to the necessities of miners upon the public domain in the Pacific states and territories and is not adequate to their protection. The doctrine of the right of appropriation has been there recognized, by custom, judicial sanction, and by the act of congress of July 26, 1866. *Atchison* v. *Peterson*, 20 Wall. 507; B. & W. L. C. 730; affirming 1 Mont. 561.

This prior appropriation gives the better right to running waters to the extent necessary for the uses to which the water is applied. Id.

The common-law doctrine that water must flow in its natural channel cannot be applied in the case of the public mineral lands of California. *Irwin* v. *Phillips*, 5 Cal. 140; B. & W. L. C. 727.

7. Necessities of Pacific Slope. The necessity and peculiar uses of water in California and Nevada recognized by the court. *Cole M. Co.* v. *Virginia W. Co.*, 1 Saw. 470, 686.

8. Peculiar conditions. The reasons which constitute the groundwork of the rules of the common law touching water rights have not lost their governing force in

the mineral regions of the state. The conditions to which we are called upon to apply those rules are changed rather than the rules themselves. *Hill* v. *Smith*, 27 Cal. 476.

9. Water rights, how acquired and held. The right to the use of a watercourse in the public mineral lands, and the right to divert and use the water taken therefrom, may be held, granted, abandoned or lost by the same means as a right of the same character issuing out of lands to which a private title exists. The right of the first appropriator may be lost by the adverse possession of another; and when such person has had the continued, uninterrupted and adverse enjoyment of the water, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him. *Yankee Jim's U. W. Co.* v. *Crary*, 25 Cal. 504.

10. Congressional recognition of customs. The object of the section of the act of congress of July 26, 1866, concerning appropriation of water for mining and other purposes, was to recognize as valid the customary law which had grown up among the occupants of the public land (in the states and territories of the Pacific slope and Rocky mountains), and this law may be shown by evidence of the local customs, or state or territorial legislation and decisions. *Basey* v. *Gallagher*, 20 Wall. 670.

11. The claim usufructuary. The right of the appropriator of water is usufructuary, is not in the *corpus* of the water, and continues only with its possession. *Eddy* v. *Simpson*, 3 Cal. 249.

12. The right to use—Appropriation. Running water, so long as it continues to flow in its natural course, is not the subject of private ownership; but a right may be acquired to its use which will be regarded and protected as property. *Kidd* v. *Laird*, 15 Cal. 163.

13. First possession. The foundation of a right to water is the first possession. *Eddy* v. *Simpson*, 3 Cal. 249.

14. Priority of appropriation. As between two locators of public land the rule *qui prior est in tempore potior est in jure* must always apply. *Crandall* v. *Woods*, 8 Cal. 136.

15. Test of priority of claim. Possession or actual appropriation must be the test of priority in all claims to the use of water, wherever such claims are not dependent on the ownership of the land through which the water flows. *Kelly* v. *Natoma Water Co.*, 6 Cal. 105; *Kimball* v. *Gearhart*, 12 Id. 28.

16. Appropriation. Water may be appropriated for the use of different pursuits and employed at alternate periods by the different appropriators. *Smith* v. *O'Hara*, 43 Cal. 371.

17. Special appropriation. The taking up of the waters of a stream for a special limited purpose is an appropriation of only so much of the water as is necessary for that particular purpose. The surplus may be the subject of a new appropriation which will give to the second locator a paramount right to the use of all the waters of the stream not required for the specific purpose of the first appropriation. *McKinney* v. *Smith*, 21 Cal. 374.

18. Surplus after first appropriation. Plaintiffs constructed a dam across Clear Creek and dug a ditch for some distance along its bank, by means of which all the waters of the stream were diverted and returned to the creek at a point half a mile below. The object of the diversion was to drain the channel of the stream below the dam and facilitate the working of a tract of mining claims owned by plaintiffs in the bed of the stream. Subsequently defendants dug a ditch at a point above, through which they diverted the waters of the stream for general mining purposes. Still later, plaintiffs extended their ditch to other mining points and to agricultural land below, and used the water for mining and irrigating at these latter places. In an action by plaintiffs to recover for injuries occasioned by the diversion of defendants to the use of the water at the latter points to which plaintiffs' ditch had been extended: *Held*, that the prior right of plaintiffs was limited to the use of the water for working their original claims in the bed of the stream; that as to the surplus above what was required for that particular purpose, defendants' right was paramount, and that plaintiffs could not recover. *McKinney* v. *Smith*, 21 Cal. 374.

19. Waste water. If two persons, one prior in point of time to the other, appropriate water from the same stream by means of ditches, and a third person turns water into the stream from his ditch, starting from another stream, without the intention of recapturing it, the water thus turned in becomes *publici juris* and belongs to the persons who appropriated the stream, according to their priority of right. *Davis* v. *Gale*, 32 Cal. 26.

20. Subsequent location above and below. The right of the first appropriator of water is protected from damage occasioned by subsequent locators above as well as below him. *Hill* v. *King*, 8 Cal. 336.

21. Rights of second appropriator. The subsequent appropriator of water who acquires the privilege of using the waste water of the prior appropriator, can be deprived of the same at any time, unless the water has been returned into the original channel without any intention of recaption. *Woolman* v. *Garringer*, 1 Mont. 535.

22. Purpose of appropriation. In controversies in the mining regions between the prior and subsequent appropriators of water, the question to be determined is, Has the use and enjoyment of the water for the purpose for which the first appropriator claims it been impaired by the acts of the subsequent claimant? *Hill* v. *Smith*, 27 Cal. 476.

23. Draining ditch. Where a ditch was cut by the grantors of plaintiff for the mere purpose of drainage and with no *bona fide* intention of appropriating the water thus diverted to some useful object, and the ditches of defendant were built for the express purpose of appropriating such water: *Held*, that the grantors of plaintiff had made no appropriation and had no priority. *Maeris* v. *Bicknell*, 7 Cal. 261.

24. Change of first appropriation. If H., a miner, appropriated the water of a creek at a certain point, in 1865, and C. appropriated the same water above H. in 1867, for the use of a mill, and returned the water into the creek, so that H. had the benefit thereof, H. has no right to change his point of diversion of the water in 1869, and appropriate it above C.'s mill and thereby deprive C. of the use of the water. *Columbia M. Co.* v. *Holter*, 1 Mont. 296.

25. Surplus — Subsequent appropriators. Subsequent locators may appropriate the surplus waters of a stream left after a prior appropriation, and when the rights of such subsequent appropriators once attach, the prior appropriator cannot encroach upon them by extending his appropriation; nor can he enlarge his ditch or dam so as to retain what he originally appropriated, if through intervening accidents (as the filling of the stream-bed with tailings) such enlargement would interfere with such intervening rights. *Nevada W. Co.* v. *Powell*, 34 Cal. 109.

In such a case, when a right has once vested in the subsequent appropriator, the prior appropriator would be no more justified in extending his claim, or changing the means of appropriation, to the prejudice of the second appropriator, than the latter would be in encroaching upon the prior rights of the first. Id.

26. Appropriation by tin-bounders. A mine had, from before the time of living memory, been worked by tin-bounders, according to the custom of Cornwall, which enables any person to mark out a piece of waste ground, the owner of which does not choose to work the mines under it, and work them without the consent of the owner, yielding to the owner a share of the proceeds. The bounders had, from before the time of living memory, used for the purpose of their works the water of an artificial water-course, arising in the land of another person. The bounders abandoned the mine in 1856, since which the owners had been in possession. A bill by the owners, to restrain the diversion of the water-course by the owner of the land in which it rose, was dismissed by the vice-chancellor, on the ground that there was no privity of estate between the owners and the bounders, and that the owners, therefore, could not claim an easement by prescription, on the ground of their enjoyment of it. *Held*, on appeal, that an injunction ought to be granted, for that it ought to be presumed that a right to use the waters had been acquired by arrangement with the owner of the mine, as well as with the bounders. *Ivimey* v. *Stocker*, Law R. 1 Ch. App. 396.

27. Intervening appropriation. If one who has appropriated a part of the water of a stream to propel machinery at a point on the same, makes a conveyance of all his interest in the water of the stream to one who has a ditch above, he does not thereby lose his prior right to the water which flows down after the sale, as against one who appropriated the water of the stream below him after his appropriation, but before his sale. *McDonald* v. *Askew*, 29 Cal. 200.

28. Placers — Reasonable use. The reasonableness of the use of water in placer mining is a question of fact for the jury. *Esmond* v. *Chew*, 15 Cal. 137.

29. Reasonable use. The test of a reasonable use is whether the use works damage to the common right; and, as applied in this case, is whether the defendant has, after allowing him unlimited use for domestic and culinary purposes, so used the water as to cause "actual, material and substantial injury to the plaintiff," in the operation of his mill for reducing ores. *Union M. Co.* v. *Dangberg*, 2 Saw. 450.

30. Use of drain water by strangers. No presumption of grant can arise against the mine-owners from the continued use of an artificial stream of water obtained by drainage from mines. *Arkwright* v. *Gell*, 5 M. & W. 203, B. & W. L. C. 816.

Such a stream may be rightfully cut off by a lower drain, draining the mine at a greater depth, although the water had been used for manufacturing purposes for many

years, and had been granted by the owner of the surface to the parties so utilizing it. Id.

31. Use for mill purposes. The interest in water acquired by one who locates on the bank of a stream and appropriates the waters of the same for machinery, is not property in the water as such, but the right to the momentum of its fall at the point of location and to the flow of the water in its natural course above. *McDonald* v. *Askew*, 29 Cal. 200.

32. The right to use. A proprietor of land over which a stream of water runs has as against a lower proprietor the use of only so much of the stream as will not materially diminish its quantity or corrupt its quality. His right is not to be measured by the necessities of his business (operating lead mines). *Wheatley* v. *Chrisman*, 24 Pa. St. 298.

33. Change of use. A person who has appropriated the water of a stream, and caused it to flow to a particular place by means of a ditch, for a special use, may afterwards change the use to which he first applied the water, and the place at which he used it, without losing his priority of right, as against one who has dug a ditch from the same stream before the change is made. *Davis* v. *Gale*, 32 Cal. 26.

The transfer of the use of water from one locality to another does not forfeit the right. *Maeris* v. *Bicknell*, 7 Cal. 261.

34. Use and return. If A. is the owner of a ditch and of the right to divert and use the waters of a stream in the same, and B. diverts the waters of the stream at a point above A.'s ditch and uses them for mining, but turns them back into A.'s ditch at another point before A. has use for them, without material diminution in quantity or quality, A. has no cause of action against B. *Yankee Jim's U. W. Co.* v. *Crary*, 25 Cal. 504.

35. Deterioration. As to the deterioration in the quality of the water by reason of being used for mining purposes before it reaches the ditch of the prior locator, it must be deemed *damnum absque injuria*. *Bear River Co.* v. *N. Y. M. Co.*, 8 Cal. 327.

Any other rule would involve an absolute prohibition of the use of all the water of a stream above any ditch supplied by it, in order to preserve the quality of a small portion taken therefrom. Id.

36. Expiration of use. Where the use for which water was appropriated has ceased the original appropriator has the right to hold it for sale. *Fabian* v. *Collins*, 2 Mon. 510.

37. Use for colliery purposes. An allegation that the plaintiff was possessed of mines, lands and premises, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the water of a stream which had been used to flow along side the said lands and premises, is not supported by proof that the plaintiff was a lessee of mines under land adjoining the stream, with a grant from the surface owner of the use of the water for colliery purposes. *Insole* v. *James*, 1 H. & N. 243.

38. Adverse use. If a lower riparian proprietor has by reason of an adverse use by a proprietor above, presumptively granted the use of the water to such upper proprietor, such presumed grant affects only the land held by the lower proprietor at the time of the supposed origin of the grant; and he may afterwards purchase lands on the same stream and will hold them unaffected by such presumed grant. *Union M. Co.* v. *Ferris*, 2 Saw. 176.

The use of water does not become adverse until it amounts to an actionable invasion of another's right. Id.

39. Use for twenty-one years. Where the lower proprietor had a right by deed from the then upper proprietor to erect a dam on the land of the latter, for the diversion of water for watering his meadows, but had actually used the water so diverted (by means of a ditch from the dam) for above twenty-five years in watering his stock: *Held*, that such use for over twenty-one years entitled him to it, and that he might maintain suit against one claiming under the former upper proprietor for polluting the stream so as to render it unfit for his cattle. *Wheatley* v. *Chrisman*, 24 Pa. St. 298.

40. Water drained from mine, used by brewery. In the absence of a special custom, artificial water-courses are not distinguished in law from natural ones; and a title may be gained by twenty years' user, as well to the former as to the latter. Therefore, where mine-owners made an adit through their lands to drain the mine, which they afterwards ceased to work, and the owner of a brewery, through whose premises the water flowed for twenty years after the working had ceased, had during that time used it in brewing: *Held*, as against strangers to the title of the makers of the adit, that he thereby gained a right to the undisturbed enjoyment of the water, and that mines could not afterwards be so worked as to pollute it. *Magor* v. *Chadwick*, 11 Ad. & El. 571.

Query, whether a universal practice in the neighborhood to resume the use of such adit waters, for mining purposes, after a long interval, might not have been set up in answer to the claim of easement, thereby

raising the inference that the party claiming used the water, not of right, but only during the accidental disuse of the adit, and with knowledge that the mine-owners reserved to themselves a power to recommence working, and thereby disturbing the waters. Id.

41. Precipitating pits—User. A claim by the owner of a copper mine, who has used to sink pits on his own land, to fill such pits with iron, to cover the same with water, pumped from the mine for the purpose of precipitating the copper contained in such water, and afterwards to let off such water impregnated with metallic substances into a water-course upon the land of another, is a claim to a water-course within section 2 of 2 and 3 Will. 4, c. 71. *Wright* v. *Williams*, 1 M. & W. 77; S. C. 1 Gale 410; S. C. 1 Tyr. & Gr. 375.

In a plea of forty years user under that statute, it is sufficient to allege the user to have been before the commencement of the suit; it is not necessary to allege it to have been before the act complained of. Id.

42. Dam. The right to use water necessarily implies a right to dam and detain it. *Oregon Iron Co.* v. *Trullenger*, 3 Oreg. 1.

43. Abatement of dam. Where a party attempts to construct a dam on a creek, for the purpose of diverting the water at that point, and such diversion is illegal as against another party, who has a dam lower down, the latter may oust the former from the possession of the ground at that point, and prevent the construction of the dam. *Butte T. M. Co.* v. *Morgan*, 19 Cal. 609.

44. Entry to abate water-course after license revoked. The plaintiffs by parol license from L. and from the defendant, constructed a water-course, and thereby discharged the water from their own mines across the land of L., and thence across the land of the defendant. The defendant, having revoked his license upon the plaintiff's refusal to discontinue using the water-course, entered upon the land of L. at a spot near the boundary between it and the land of the plaintiffs, and obstructed the water-course. The defendant by stopping the water-course on his own land would have done less damage to the plaintiffs than was actually done, but more damage to L. and possibly some damage to the public. *Held* (affirming the judgment of the court below), that the water-course was obstructed in a reasonable manner, inasmuch as the convenience of the plaintiffs, who after revocation of the license were wrong-doers, was subordinate to the convenience of innocent third persons and of the public. *Roberts* v. *Rose*, 3 H. & C. 162; 33 L. J. Ex. 1, 241, affirmed 4 H. & C. 103; L. R. 1 Ex. 82; 35 L. J. Ex. 62.

45. Raising dam. Where a party has appropriated the waters of a stream for ditch purposes by means of a dam, and afterwards the stream becomes so filled with tailings, from workings above, that it becomes necessary to raise the dam to secure the water, it does not follow that he has the right so to raise the dam because of such unforeseen changes in the condition of the stream. *Nevada W. Co.* v. *Powell*, 34 Cal. 109.

If such further act of appropriation cause injury to intervening appropriations, such intervening appropriations must be considered as prior thereto: the party attempting to raise such dam cannot do so upon the ground of its being a necessity, in order to secure only the full extent of his original appropriation. Id.

The appropriation carried with it the right to erect all works necessary to the enjoyment of the water: but that appropriation being complete and acted on, subsequent locations could be made by others based upon the extent of that established appropriation, "unless there was something which manifested a further right." Id.

46. Raising dam—Backwater. Plaintiffs owned certain mining claims and a quartz lode on the banks of a stream above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water upon plaintiffs' claims and thus prevent them from working them, and would also destroy their water privilege for a quartz mill which they intended to construct: *Held*, that the action was premature, and that the demurrer to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action was properly sustained. *Harvey* v. *Chilton*, 11 Cal. 114.

47. Diminution of supply. The first appropriator of water for mining purposes is entitled to have the water flow, without material interruption, in its natural channel. *Bear River Co.* v. *N. Y. Mining Co.*, 8 Cal. 327; *Mokelumne Hill Co.* v. *Woodbury*, 10 Cal. 185.

He is entitled to the water so undiminished in quantity as to leave sufficient to fill his canal or ditch as it existed at the time of subsequent appropriations of the stream above him. Id.

The prior appropriator of a stream of water for mining purposes has a right to have the water flow down above the point of his appropriation, without interruption or diminution in quantity. *Phœnix W. Co.* v. *Fletcher*, 23 Cal. 482.

48. Sensible diminution. The detention of water resulting in its final diminution to the extent of five per cent. is not a case of "*de minimis*," etc.; but a sensible injury for which an action will lie. So held as to water taken from an artificial watercourse supplied from coal mines. *Wood* v. *Waud*, 3 Ex. 748.

49. Diminution by second appropriator. What diminution or deterioration will constitute an invasion of the rights of the first appropriator of water will depend upon the special circumstances of each case; and in controversies between him and parties subsequently claiming the water the question for determination is, whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the other parties. *Atchison* v. *Peterson*, 20 Wall. 507; B. & W. L. C. 730; affirming 1 Mont. 561.

50. Interruption of flow. The owners of a ditch, by which the waters of a stream have been first appropriated, are entitled to recover damages for injury or loss sustained, caused by dams or other obstructions having been erected on the stream, above the head of the ditch, by which the regularity of the flow of its waters is so disturbed as to cause actual injury or loss to the proprietors of the ditch. *Natoma W. & M. Co.* v. *McCoy*, 23 Cal. 491.

51. Hydraulic—Irregular flow. One who enters upon a stream of water above the prior appropriator and erects hydraulic works, must so construct them as not to impede the regularity of the flow of the water, if its irregular flow would injure the first appropriator. *Phœnix W. Co.* v. *Fletcher*, 23 Cal. 482.

A mere temporary or trivial irregularity in the flow of the water, such as does not cause actual injury to the prior appropriator below, will not be actionable; but if a sensible or positive injury be caused, such as would diminish the value of the water right, an action will lie, not only to recover damages, but to enjoin the future commission of the wrong. Id.

52. Averment of possession. In an action for damages for diverting water from a mill, an averment of possession of the land and mill is sufficient without averring prior appropriation or riparian rights, as against a trespasser. *McDonald* v. *Bear River Co.*, 13 Cal. 221.

53. Admission of diversion. A denial that defendants "wrongfully and illegally" diverted certain water is an admission of the act of diversion. *Harris* v. *Shontz*, 1 Mont. 212.

54. Diversion—Pleading. A complaint alleging that plaintiffs are the owners and in possession of certain mining claims on a certain stream, and are entitled to the natural flow of the waters of the stream, which have been diverted to their injury by defendants, sets forth a sufficient cause of action. *Leigh Co.* v. *Independent Ditch Co.*, 8 Cal. 323.

It is not necessary that the complaint should further allege an appropriation of the water or an ownership thereof. Id.

55. Changing point of diversion. A person appropriating and diverting the water of a stream at a given point, cannot afterwards change the point of diversion to the prejudice of a subsequent locator. *Butte T. M. Co.* v. *Morgan*, 19 Cal. 609.

56. Damage for diversion. A verdict for damages in an action at law for diversion of water does not establish the quantity of water to which plaintiffs are entitled, nor is it to be presumed that the whole number of inches claimed in their complaint was proved to and found by the jury; and the averment of such former recovery is not of itself sufficient to support an injunction against further diversion. *McDonald* v. *Bear River Co.*, 15 Cal. 145.

57. No diversion from a ditch while choked. In an action for diverting water from the plaintiff's ditch, where both parties claimed in part the waters of the same stream: *Held*, that defendant was not liable for deficiency of water in plaintiffs ditch, unless defendant was diverting more water than he was entitled to, at the precise time that such deficiency existed. *Brown* v. *Smith*, 10 Cal. 508.

Held further, that plaintiff could not recover for alleged diversion of water from one of his ditches, if the jury believed that at the time of the alleged diversion such ditch was so filled up with tailings that it was incapable of carrying off the water itself. Id.

58. Joint liability for diversion. For the diversion of water, defendants are jointly and severally liable, and the granting of separate trials is discretionary with the court. *Townsley* v. *Hornbuckle*, 2 Mont. 580.

59. Side canyons. A general allegation in a complaint for the diversion of water that plaintiffs were entitled to all the water flowing into the canyon at the head of their ditch, entitles them to prove a diversion of water from the smaller branches of the canyon supplying water to that point. *Priest* v. *Union Canal Co.*, 6 Cal. 170.

60. Complaint for diversion. The gravamen of the complaint being the diversion of water, plaintiff may allege in the

same count the actual diversion of water by dams erected by defendant, and the further obstruction to the flow of water in plaintiff's ditch, by sediment from defendant's waste gates. *Gale* v. *Tuolumne Water Co.*, 14 Cal. 25.

61. Subterranean "stream"—Prior use. A valuable spring ceased to flow after the erection of a large pump at a copper mine above and about five hundred and fifty yards distant. *Held*, that where a subterranean flow of water has become so well defined as to constitute a regular and constant stream, the owner of the land through which it flows may not divert or destroy it to the injury of the person below, on whose land it issues in the form of a spring. But where the spring depends for its supply upon percolation through the land of the owner above, and in the use of the land for mining the spring is destroyed, such owner is not liable, unless the injury was caused by malice or negligence. The prior use of the spring for the uses of a tannery, conferred no right of servitude over or through the land of an adjoining proprietor; nor would the enjoyment of the spring raise any presumption of a grant, for no presumption would arise against the owner until it was shown that the exercise of the privilege interfered with his rights in such manner as to entitle him to legal redress. *Wheatley* v. *Baugh*, 25 Pa. St. 528.

62. Underground flow. The owner of land through which water flows or percolates in an underground course, has no right or interest in it which will enable him to maintain an action against a land-owner, who by mining in the usual manner on his own land drains away the water from the spring or well of the owner of the neighboring land and leaves it dry. *Acton* v. *Blundell*, 12 M. & W. 324; B. & W. L. C. 758.

Query: If the well had been ancient, whether the law would be different. Id.

Where by the mining upon adjoining land a spring or well is drained, it is *damnum absque injuria*. Id.

63. Drain water. Where water from coal mines had been permitted for more than sixty years to pass through a covered drain, forming an artificial underground water-course: *Held*, that the proprietor of mills who had made use of such water (for less than twenty years) could not maintain an action against a person through whose land such mine drain (sough) passed in its course for the diversion of the water, as he was under no obligation to permit it to run through his land; although such party claims no right to such water or water-course through or from the mine-owner. *Wood* v. *Waud*, 3 Ex. 748.

But an action lies in such case for the pollution of the water, or for its detention accompanied with an injury. Id.

64. Mine water drained into stream. After water drained from a colliery and carried by an artificial water-course into a natural stream has mingled with the water of that stream it becomes a part of it, and no distinction can then be made between the original stream and such accessions to it. *Wood* v. *Waud*, 3 Ex. 748.

65. Escape—Reclamation. When the water of a stream leaves the possession of a party, all his right to and interest in it is gone. *Eddy* v. *Simpson*, 3 Cal. 249.

Where the appropriator of the water of a stream has suffered it, after use in his ditch, to escape and flow into another natural stream, he cannot claim the water any further, nor take an equivalent amount from the latter stream upon the ground of his having caused an accession to the body of that stream. Id.

66. Reclamation after flowing back into natural stream. Where water from an artificial ditch is turned into a natural water-course and mingled with natural waters of the stream for the purpose of conducting it to another point to be there used, it is not thereby abandoned, but may be taken out and used by the party thus conducting it, so that he do not in so doing diminish the quantity of the natural waters of the stream to the injury of those who have previously appropriated such natural waters. *Butte Canal & Ditch Co.* v. *Vaughn*, 11 Cal. 143.

The burden of proof devolves on the party thus mingling the water belonging to him, with that appropriated by others. He can only claim the quantity to which he establishes his right by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled. Id.

67. Carrying water through appropriated stream. Where defendants had brought water from foreign sources into a stream where plaintiff had a prior right by appropriation, with the intention of diverting it at a point below, the court instructed that they could so divert it, "less such amount as might be lost by evaporation and other like causes," as defendants requested, but added that they could not so reclaim the water as to diminish the quantity to which plaintiff was entitled as a prior locator. The instruction was held to have been properly explained, as in its original shape it was too general. *Burnett* v. *Whitesides*, 15 Cal. 35.

The jury in such case having found plaintiff entitled to the use of so much water as

would run in a ditch of a certain capacity, judgment was so entered and defendant enjoined from diverting the same: *Held*, that the judgment was not erroneous in failing to mention or distinguish between the water of the stream and the water brought into it by defendants. Id.

68. Extension of flume to prevent reception of the water. Plaintiff dug a ditch below defendant's hydraulic workings to catch the water partly natural to the ravine and partly brought there by defendant, which escaped from defendant's flume, whereupon defendant extended his flume below the head of the ditch, so as to prevent the utilization of the water by plaintiff. Plaintiff's ditch was within the lines of defendant's claims, but below their works, and on ground asserted to be worthless for mining purposes: *Held*, that defendant had a right to extend his flume whether it subserved any useful purpose or not. 2. That plaintiff had no right to build his ditch on defendant's claim. *Correa* v. *Frietas*, 42 Cal. 339.

69. Incidental use to preserve the flume. Where parties have appropriated the waters of a stream and obtained the prior right by the commencement and partial completion of a ditch and flume, they have the right to use so much of the water as is necessary to preserve their flume from injury while in the process of construction. *Weaver* v. *Conger*, 10 Cal. 233.

70. Relation of mine-owner to surface streams. It seems that a party having a coal mine worked below the level of a watercourse ought to be in no worse position with relation to a party tampering with the water of such stream, to the injury of the coal mine, than a surface riparian proprietor. *Crompton* v. *Lea*, L. R. 19 Eq. 115.

71. Right of mining claim to bed of stream. A prior locator of a mining claim on the bank of a stream has the right to the use of the bed of the stream for the purpose of fluming or working his claim, and any subsequent erection, dam or embankment which will turn the water back upon such claim, or hinder it from being worked with flumes or other necessary means or appliances, is an encroachment upon the rights of said party, and he is entitled to recover the damages consequent on such obstructions. *Sims* v. *Smith*, 7 Cal. 148.

72. Canyon—Natural Channel. An allegation that a certain canyon is the natural and proper channel and outlet for the water and tailings from plaintiffs' claims is not an averment that they have the right to the use of the canyon to convey the water and tailings, nor equivalent to such averment. *Stone* v. *Bumpus*, 40 Cal. 428; S. C. 46 Cal. 218.

73. Canyon Claim. In an action to abate a nuisance and for damages, founded on section 249 of the practice act, plaintiffs charged in their complaint that the alleged nuisance was caused by the erection and maintenance by defendants of a dam across a canyon on which plaintiffs' mining claim was situated, and below their claim, by which the outlet for the water and tailings from their claims was obstructed to such an extent as to render its working impracticable. To which the defendants replied, admitting in effect the erection of the dam and its effect upon the work of the plaintiffs, but denying plaintiffs' title to the mining ground, or their right to work the same, and alleging that the ground worked by plaintiffs was, in fact, a part of their claim; and that the dam was erected for the purpose of working their claim, which could not be worked without it: *Held*, by the court, that to enable the plaintiffs to recover, they must show: 1. That they own the ground claimed by them; 2. That the dam prevented their working it to advantage; 3. Alternatively, that defendants had no title to the bed of the cañon, or, if they had, that their right was acquired subsequently to that of the plaintiffs, or, if prior, that the dam was not needed to enable defendants to work to advantage. *Stone* v. *Bumpus*. 40 Cal. 428; S. C., 46 Cal. 218.

Although the plaintiffs might own the ground claimed by them, yet, if the defendants had the prior right to mine, and could not mine without the dam, the plaintiffs cannot recover. It is a case of *damnum absque injuria*. Id.

74. Coal washings. That water will naturally descend is entirely consistent with its descent being so compelled, controlled or directed in a particular instance by human agency as to work an injury to lands lying below, which would not otherwise have resulted. *Robinson* v. *Black Diamond Coal Co.*, 50 Cal. 460.

75. Prescription to flood lands. To acquire a prescriptive right to overflow the lands of another, there must have been an uninterrupted enjoyment, under claim of right, for a period of five years; there must have been an actual occupation by the flow of water, to the knowledge of the owner, and such as to occasion damage and give him a right of action; and there must have been such a use of the premises and such damage as will raise a presumption that the owner would not have submitted to it unless the other party had acquired a right so to use it. *Grigsby* v. *Clear Lake W. W. Co.*, 40 Cal. 396.

76. Prescription act. A right to the flow of water along an artificial cut over the soil of another cannot be acquired under the prescription act, 2 and 3 W. 4, c. 71, unless the circumstances under which the cut was made show that it was intended to be of a permanent character. *Gaved* v. *Martyn*, 19 C. B. N. S. 732.

77. Tin-bounds ditch. A prescriptive right to an artificial stream of water, made for purposes of tin bounders, cannot be acquired by twenty years' user when there has been no abandonment of the water by the miners during that time. *Gaved* v. *Martyn*, 19 C. B. N. S. 732.

78. Injuries from—Mine flooded by reservoir. Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbor, he will not be liable in damages. But if he bring upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned. A. was the lessee of mines; B. was the owner of a mill standing on land adjoining that under which the mines were worked. B. desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to construct it. A. had worked his mines up to a spot where there were certain old passages of disused mines. These passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth from surrounding land. No care was taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages and flooded A.'s mine: *Held*, that the defendant, B., was liable for the injury, as having brought a thing upon his land which was capable of mischief if not there retained, and against any consequence of its escape: though without negligence, he must be responsible to parties injured. *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, affirming S. C. L. R. 1 Ex. 265.

79. Copper-works. The permission for a long course of time to the owners of copper-works to use water convenient but not absolutely indispensable to their works from a canal, by the owners of the canal, upon consideration of the good-will and freight of the copper-works, in the shape of a mutual understanding but continued for many years, does not create any equitable right nor amount to a license. *Aliter*, had expenditures been made with the knowledge of the canal-owners for the operation of works to which such supply of water was the only resource. *Bankart* v. *Tennant*, L. R. 10 Eq. 141.

80. Injury from water sold by ditch-owner. Where K. discharged water from his ditch above R.'s land in such place that it naturally would and did flow over and upon and injure R.'s land, K. is responsible for such injury; nor can K. shield himself from this responsibility because he may have sold this water at such place to miners, by whom it was used for mining purposes before, in the course of its flow, it reached R.'s land and occasioned such injury. *Richardson* v. *Kier*, 34 Cal. 63.

81. Joint wrong-doers. In such case, the fact that the miners so using the water contributed to and enhanced the injury sustained, and are joint tort feasors with K., will not relieve K. from his liability or affect its measure. Id.

82. Threatened subsidence. Where mining operations have been carried so far as to cause the subsidence of land and of the bed of a stream flowing over it, persons claiming rights in the water of the stream are not precipitate in bringing a bill to prevent obvious consequences, although no actual injury or deprivation of the water has yet happened. *Elwell* v. *Crowther*, 31 Beav. 163.

83. Conveyance. A water right is, under the law of Montana, "such a species of realty" as to require for its transfer the same form and solemnity as the conveyance "of other real estate." *Barkley* v. *Tieleke*, 2 Mont. 59.

84. Grant of, "below the mill." The grant of "all the water which naturally flows" "below the mill" means the water as it flows from the mill-wheel, the mill being in operation. *Oregon Iron Co.* v. *Trullenger*, 3 Or. 1.

85. Previous right of action. The conveyance of a water claim does not transfer the right of action for damages for the past illegal use of the water. *Kimball* v. *Gearhart*, 12 Cal. 28.

86. Ownership of water. Where, in an action for damages to a mining claim by leakage from defendant's ditch, plaintiff asked a witness: "Did you see water splashing over the flume?" Defendant was allowed, in cross-examination, to ask: "Whose water was that you saw splashing over the flume?" although the question might be considered as going to the ownership of the

water. *Jackson* v. *Feather River Co.*, 14 Cal. 19.

87. Insufficient notice. The notice of intention to appropriate water must be sufficient to put a prudent man upon inquiry. *Kimball* v. *Gearhart*, 12 Cal. 28.

88. Reservation of right in deed—Incorporeal hereditaments. A. granted to B. a certain tract of land, "excepting and reserving out of the lands" besides mines, all streams upon the premises with the soil under the same, with the privilege of erecting mills and dams, "and also such part of the said land as may by the said dams be overflowed with water." Afterwards B. conveyed to C. a portion of the same tract with a similar reservation. C. built a dam which flowed back upon the land of B., and being sued in case by B., urged in defense that the land so overflowed was included in the exception of the grant from A. to B., and so never passed to B. And further pleaded a parol license from A. to overflow the land: *Held*, 1. That the direct interest in the soil had passed by the deed from A. to B.; 2. That until A., the first grantor, had exercised his right, and erected dams, the reservation was inoperative, and considered strictly as an exception was void for uncertainty, and an action was maintainable against the latter grantee by his grantor; 3. That the parol license from A. to C. to erect the dams was inoperative, as such right, being an incorporeal hereditament, could only pass by deed. *Thompson* v. *Gregory*, 4 Johnson, 81; 4 Am. Dec. 255.

See APPROPRIATION, DITCHES, DRAINAGE, IRRIGATION.

WAY.

1. Incident to right to mine. Permission to take stone from a ledge on plaintiff's land, implies a license to carry the stone across the land, if necessary to the use intended, doing no needless damage. *Clark* v. *Vermont & C. R. R. Co.*, 28 Vt. 103.

2. "Necessary or expedient." The power, given in various acts, enabling the proprietor of a mineral district to make roads and railways when he shall find it "necessary or expedient," over lands of other persons, from his mines to the canal, does not restrict him to the shortest practicable route, but enables him to adopt any more circuitous route which, in the *bona fide* exercise of his judgment, he may find expedient, provided the point at which he joins the canal is within four miles of the boundary of his estate. *Richards* v. *Richards*, 1 Johnson (Eng.), 255.

Under a power to proprietor of mines to make a road or railroad when "necessary or expedient," the fact of saving time by avoiding a lock in uniting with a canal is a sufficient reason for not adopting the least circuitous route. Id.

3. Test of convenience. A private act of parliament for inclosing the waste lands of a manor reserved to the lord and his assigns all mines, etc., together with all convenient and necessary ways, etc., then already made, or thereafter to be made, and liberty of laying wagon ways, etc., at his or their free will and pleasure, to do all such other works, acts and things as might be necessary or convenient for the full and complete enjoyment thereof, in as full, ample and beneficial a manner as if that act had not been made. An action of trespass having been brought against the lord's assignee for laying a wagon way over one of the allotments in an improper direction and manner, it was *held*, that the real question to be decided by the jury was, whether the wagon way had been laid in such a direction as a person of reasonable skill would have selected, and whether the mode adopted was such as a prudent person would have adopted if he had been making the road over his own land, and not over the land of another. *Abson* v. *Fenton*, 1 B. & C. 195.

4. Over land of strangers. Where a convenient way leave is reserved for the operation of collieries, the fact that a railroad has been constructed in exercise of such reservation by trespassing upon the lands of third parties does not affect the right, the question being only whether such location was properly exercised with reference to its convenience to the situation and outlet of the colliery. *Dand* v. *Kingscote*, 6 M. & W. 174.

5. Reservation of mines and way leave construed. The Dean and Chapter of Durham, being seised in fee of lands in that county, demised them, in 1832, to W., by indenture between them and him, containing this clause: "Except and always reserving out of this present lease, indenture or grant, the woods, underwood and trees now growing, or hereafter to grow, upon the said demised premises, and the mines, quarries and seams of clay within and under the same, with full and free authority and power to cut down, take and carry away the said wood and trees, and to dig, win, work, get and carry away the said mines, quarries and seams of clay, with free ingress, egress and regress, way leave and passage, to and from the same, or to or from any other mines, quarries, seams of clay, lands and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient ways, passages, conveniences,

privileges and powers whatsoever for the purposes aforesaid, and particularly of laying, making and granting wagon way or wagon ways in and over the said premises, or any part thereof, paying reasonable damages for spoil of ground to be hereby done." Afterwards the lessors granted to a railway company, for a term, liberty to enter the demised lands, and to make and maintain a double main road or way over them, in a specified line, and to use and grant the use of such way for the conveyance of passengers, coals and goods: *Held*, 1. That the right reserved to the Dean and Chapter was only that of making and using ways and granting way leaves for the purpose of getting the excepted wood and minerals; not for general purposes, nor for carrying coals and minerals from whatever mines gotten; nor for carrying coals and minerals of their own, gotten elsewhere than on the demised land; 2. But that if the road, when made, was such as the reservation authorized, the intention to use it for a purpose not authorized was no ground for an action by the reversioner, though if the intent were carried into effect the tenant might be entitled to bring trespass; 3. That the proper questions for the jury were, whether when the road was formed, it had become necessary or expedient for the railway company to make a road for the purpose of getting the excepted minerals; and, if so, whether the road made was a proper road for that purpose, assuming that it would be used for no other, and that if either question were answered in the negative, plaintiff might recover damages for any injury caused by the railway, of sufficient permanence to affect the reversion; 4. That the right retained by the Dean and Chapter under the indenture was not properly a subject of exception or reservation, but an easement newly created by way of grant from the lessee. *Durham & S. R. Co.* v. *Walker*, 2 Q. B. 940; S. C. 2 G. & D. 326.

6. Sufficient way leave. A sufficient way leave must include such description of way leave and in such a direction as will be reasonably sufficient to enable the coal owner to get from time to time all the seams of coal at a reasonable profit. *Dand* v. *Kingscote*, 6 M. & W. 174.

7. Abuse of the right. Where the surveyors of highways are empowered to take stone from quarries and to make a way for the carriage of them, a wanton or malicious exercise of the right will give a cause of action for damages, in addition to the statutory award of compensation. *Boyfield* v. *Porter*, 13 East, 200.

8. Right limited to special use. A right of way may be limited to agricultural purposes, and so as to exclude the right to use it for the carriage of coals. *Cowling* v. *Higginson*, 4 M. & W. 245.

9. License — Dedication. Where the owner of land agreed with an iron company and with the inhabitants of a hamlet repairing its own roads, that a way over such land should be open to carriages, that the company should pay him five shillings a year and furnish cinders for repairs to be made by the inhabitants, and thereupon the way was so left open for nineteen years, at the end of which time the passage was interrupted and the interruption acquiesced in for five years: *Held*, not a dedication but a license only, revocable on breach of the agreement. *Barraclough* v. *Johnson*, 8 Ad. & El. 99.

10. Limited and revocable license. Where a land-owner suffered the public to use, for several years, a road through his estate for all purposes except that of carrying coals: *Held*, that this was either a limited dedication of the road to the public or no dedication at all, amounting only to a license revocable; and that a person carrying coals along the road, after notice not to do so was a trespasser. *Stafford* v. *Coyney*, 7 B. & C. 257.

11. Carriage of foreign minerals. A lease of waste land of a manor recently inclosed by the lessee contained a reservation to the lessor, the lord of the manor, of the mines and quarries, with full power to win and work the same, with free way leave and passage to, from and along the same, on foot or on horseback, with all manner of carriages, and a covenant by the lessor that in working the mines and using the liberties and privileges reserved, he would do as little damage and spoil to the soil and herbage of the premises demised as he conveniently could do: *Held*, that the lessor and those claiming under him were entitled not merely to a right of way for the purpose of working the reserved minerals, but to an absolute way leave, which might rightfully be used for the purpose of working minerals not under the demised property. *Proud* v. *Bates*, 34 L. J. Ch. 406; S. C., 13 L. T. N. S. 61.

12. Covenant for coal carriage running with the land. An agreement was entered into by the plaintiff and Lee to grant a lease of twenty-one years to the Messrs. Harters of certain land for the purpose of forming a railway. A covenant was inserted that the Harters, their executors, administrators and assigns, should carry over the railway all coals gotten by them from the Hatfield colliery, and also all coal they should obtain from any other mines they might afterwards work in the town-

ship of Stanley, paying 2d for every ton of coal so carried. The plaintiff became the sole owner of the land demised. The Harters assigned all their interest in the agreement to the defendants, who refused to pay the 2d per ton upon any other coal than that obtained from the Hatfield colliery, and used another railway for such other coal: *Held*, that the covenant ran with the land, and the defendants were bound by it. *Hemmingway* v. *Fernandez*, 12 L. J. Ch. 130.

18. Coke—Produce of mines. An inclosure act reserved to the lord of the manor his rights to mines and minerals in certain lands, with liberty to make ways along certain commons, and to do every act then or thereafter in use for working the mines and quarries therein, and carrying away the minerals, and for carrying the "coals and produce of any other mines and minerals from or under any other lands:" *Held*, that this gave the lord the power to convey coke along a railway which he had made on the commons, coke being a produce of a mine, and the word "other" meaning not other than coals, but other than the mines and minerals mentioned in a former clause. *Bowes* v. *Ravensworth*, 29 Eng. Law & E. R. 247; 15 C. B. 512.

14. Underground tramway. The use of an underground tramway in a coal-mine which is worked by the owner of the minerals, having the right to the necessary use of the surface to get the minerals under the surface, to get minerals from other lands, is a wrong to the surface-owner for which an injunction will lie. *Bowser* v. *Maclean*, 2 DeG. F. & J. 415.

15. Wagon way. Under the grant of a free and convenient way for the purpose of carrying coals the grantee has a right to lay a framed wagon way. *Senhouse* v. *Christian*, 1 Term R. 560.

A "wagon way" being a straight leveled plank road, invented or brought into use at collieries since the date of the grant: *Held*, not covered by a reservation of such convenient "way leave" for the carriage of coals as the grantor should think proper. 1729. *Pit* v. *Lady Clavernith*, 1 Barnad. 318.

16. Railroad, under old way leave. A railroad is not included in a reservation of way leave in a grant of the year 1630. *Selby* v. *Adair*, decided in 1818 by the vice-chancellor, cited in *Dand* v. *Kingscote*, 6 M. & W. 174.

17. Railroad — Ancient reservation. By deed dated 1630 land was granted excepting and reserving out of the grant the coal, with way leave and stay leave and the liberty of digging and sinking pits, with provision for satisfaction for surface damage: *Held*, 1. That the right of ways was not confined to such ways as were in use at the time of the grant, but the question whether it included a right to construct a railroad for shipment with embankments, and fenced in so as to exclude the proprietor, not decided; 2. That the way-leave did not give the right to transport coal from other mines, though on the same coal-field, over the premises covered by the grant and reservation; 3. That under the liberty of sinking pits the right of erecting a steam-engine and other machinery for draining them, with all accessories, was reserved as incident thereto, and a pond for the steam-engine and an engine-house seem to be such necessary accessories. *Dand* v. *Kingscote*, 6 M. & W. 174; and see *Smith* v. *Kingscote*, cited Bainbridge on M. 92.

18. Railway covers steam railway. The grant of the right to build railways for carrying coals will extend to steam railways or railways where locomotives are used, although steam railways were unknown at the date of the grant; it is not restricted to railways contemplated at the time. *Bishop* v. *North*, 11 *M. & W.* 418.

19. Cross railroad. Upon issue whether a cross railroad was built in fact for the carriage of minerals from certain closes in the exercise of an easement or was built for an ulterior object, it is a question of fact for the jury. *Monmouthshire Canal Co.* v. *Harford*, 5 Tyrw. 68.

20. Grant of railroad "as now located." Defendant, the owner of a quarry, having a side track running from his quarry to the railroad, granted to the plaintiff the use of such railroad "as now located" with a covenant to extend it to the adjoining quarry of the grantee. Defendant afterwards took up the old side track and built another nearer his quarry and about twenty-five feet from the old road-bed: *Held*, that the words "as now located" referred to the distance of the side track then completed, and not to the location of its bed; that plaintiff was entitled to the use of the new road the same as he had been to the use of the old one; that the following up of the quarry by relaying the track closer to the bluff, as the bluff was quarried away, must have been of the intention of the parties. *Fellows* v. *Webb*, 43 Iowa, 133.

21. Coal on shifting cars held liable. L., the owner of land with mines underneath the surface, granted a lease of part of his land known as A., and the mines under it, to a company known as P., carrying on the manufacture of iron. The lease contained this covenant: "Yielding and paying to the lessor, his heirs, etc., for every quantity of two thousand five hun-

dred and twenty pounds of coal, iron, stone, etc., the produce of any lands or mines not intended to be included in the present demise, but which shall be raised within the distance of twenty miles from any part of the premises hereinbefore expressed to be demised, and shall be brought through, over or under the said lands, etc., the royalty or sum of one half-penny." P. afterwards granted an under lease of a part of the surface of the land A. to a railway company, which made sidings thereon, for the purpose of more conveniently and safely shunting trains for a time, before forwarding them to their destination. Trains containing minerals raised within the twenty miles (often mixed with minerals in no way coming within the words of the covenant, and sent by other companies upon the line) were frequently, for safety and convenience, shunted for a time on the sidings formed on the land A., and afterwards taken out and conveyed to their destination: *Held*, affirming the judgment of the court below, that the minerals raised within the described distance did come within the words of the covenant, even though brought on the land only for the temporary purpose of being shunted there, and were therefore liable to the payment of the royalty. *Great Western R. Co.* v. *Rous*, L. R. 4 H. L. 650.

22. Carriage of foreign coal. Miller, by writing, sold all the coal under a tract of land with privilege to the vendee to use the railroad, tenements and other improvements of Miller; the vendee to remove the coal in forty years, after which time a reversion was provided for: *Held*, that the vendee had no right to use such railroad, improvements, etc., for the removal of other coal than that mentioned in the writing. *McCloskey* v. *Miller*, 72 Pa. St. 151.

Held further, that case, and not *assumpsit*, was the proper remedy. Id.

23. Copyhold — Carriage of foreign coal. The lord may drive carriages along a tramway under copyholds of the manor, for the purpose of working mines within the manor, but not of working mines beyond its limits, and a bill will lie for an injunction at the suit of a copyholder to restrain the lord from using the tramway for the latter purpose, nor is it an objection to such a bill that the copyholder is not in possession of the surface, but has let it to a tenant. *Bowser* v. *Maclean*, 2 DeG. F. & J. 415.

24. Construction—"Along." The grant of a right of way for carriage of coals in, through and along a particular way, does not carry the right to make a road transversely across the same. *Senhouse* v. *Christian*, 1 Term R. 560.

25. Enlargement. A right of way cannot be used by the owner of the dominant tenement on land other than that to which it is appurtenant. *Coleman's App.*, 52 Pa. St. 252; B. & W. L. C. 275.

26. Description — Intended use. The words "leading to the said colliery," used to aid the construction of the grant of a right of way, to ascertain the premises and to show that it passed a part of the road not staked at the time of the sale, but necessary to complete the route to the colliery, the property of and operated by the purchasers of the right of way. *Wood* v. *Stourbridge R. Co.*, 16 C. B. (N. S.) 222.

27. Obstructed passage. Where a way, used as access to a quarry, has not been limited or defined, the shutting up of the way commonly used gives the right to pass to and from in any course least prejudicial to the owner of the surface. *Farnum* v. *Platt*, 8 Pick. (Mass.) 339.

WEIGHTS AND MEASURES.

1. Stannaries—Local. The weights local to the coinage of tin are excluded from the act of Henry II. relative to uniformity of weights and measures. *Case of the Stannaries*, 12 Coke, R. 9.

2. Ton. A ton of coal is 2,240 pounds, notwithstanding state legislation fixing it at 2,000 pounds. So held in an admiralty case under peculiar state of facts. *The Miantinomi*, 3 Wall. Jr., C. C. 46.

3. Ton—Local custom. A contract was made for the delivery of forty tons of pig metal. By statute of Pennsylvania, a ton consists of 2,000 pounds. Proof of a local custom among those dealing in metal to rate a ton at 2,268 pounds is inadmissible. Custom cannot control the statute. *Evans* v. *Myers*, 25 Pa. St. 114.

4. Waiver of statutory regulation. On the trial of an action for the price of coal sold by a shipping company, there being evidence that on several previous sales defendant had requested plaintiff to send the weight in long instead of short tons, and had made no complaint that the coal had not been weighed by a sworn weigher and had frequently promised to pay the bill in suit: *Held*, that there was evidence proper for the consideration of the jury as to whether the parties had under section 5 of chapter 191 of the statutes of 1865, mutually agreed to waive the provisions of that statute. *Short Mt. Coal Co.* v. *Hardy*, 114 Mass. 197.

5. Oil barrels. Where a defendant has contracted to deliver a number of barrels of oil, but of no specified capacity, it is for the

jury to determine whether the contract was fulfilled by a delivery of a less number of vessels of a greater capacity than the statute barrel; and it is not error, no specific instruction to the effect that in the absence of a standard fixed by the parties the statute standard must govern having been prayed for, to leave the whole question to the jury, there being evidence showing that the oil barrel in common use contained a different number of gallons (40) from the statute barrel of thirty-one and a half gallons. *Cullum* v. *Wagstaff*, 48 Pa. St. 300.

WILL.

1. Legacy of Iron. Testator, owner of an iron foundry, made sundry bequests of iron, some of them by weight and some of them estimated in dollars. Consideration of such legacies as to mode of payment in connection with limiting clauses in the will. *Graham* v. *Graham*, 1 Busbee's Eq. 291.

See DEVISE.

WINDING-UP ACT.

1. Cost-book company reorganized as a limited company. A company was formed in 1853 and carried on upon the cost-book principle until 1857, when it was registered as a limited company, under the act of 19 and 20 Vict. c. 47, and an order was subsequently obtained for winding up the affairs in bankruptcy. An order was now made upon petition that the company should be wound up in chancery, under the acts of 1848 and 1849, in respect of such transactions as occurred prior to the date of registration as a "limited company." *In re Welsh Potosi Co.*, 27 L. J. Ch. 311.

2. Cost-book company—Practice. The proviso contained in the winding up amendment act, 1849, requiring the petitioners in the case of cost-book mines within the jurisdiction of the court of stannaries in Cornwall, to be owners of one-tenth of the shares, is not extended to mines in Devon by the 18 and 19 Vict. c. 12, which brought that county within the stannary jurisdiction. *Semble*, also, the said proviso is not repealed by the 20 and 21 Vict. c. 78, sec. 12, which requires the leave of the court of chancery or the certificate of the Vice Warden to a petition to wind up in chancery a mine subject to the stannary jurisdiction. *In re South Lady Bertha M. Co.*, 2 Johns. & H. 376.

A dispute having arisen between a mining company and one of the shareholders respecting his liability to pay calls, the company procured one of their creditors to bring an action against him. He served notice of the action on the company as required by the act, but they took no steps to stay the action or indemnify the shareholder, who thereupon presented a petition for the dissolution and winding up of the company. There were no circumstances to satisfy the court that the company were not in a solvent condition: *Held*, that although the case came within the strict letter of the act, yet as the action arose out of the dispute between the shareholder and the company and not from their inability to pay, he was not entitled, under the circumstances, to an order for winding up the concern. *In re Wheal Lovell M. Co.*, 18 L. J. Ch. 139; 1 Mac. & Gor. 1.

3. Practice — Special trusts. Iron works carried on by trustees, under a deed of arrangement, for the benefit of creditors whose debts are to be paid out of the profits, are not within the operation of the winding up acts, and no order will be made for winding up the affairs. *In re Staunton Iron Co.*, 21 Beav. 164; 25 L. J. Ch. 142.

4. Neglect to remove name. A shareholder in a company being in a position to file a bill against the company to have his name removed from the register, wrote to the secretary declining to have anything further to do with the company and requesting that his deposits might be returned. The deposit was returned but his name remained on the register of shareholders. Eighteen months afterwards the company was ordered to be wound up: *Held*, that he was not a contributary. *In re Canadian N. O. Co.*, L. R. 5 Eq. 118.

5. Registry. A shareholder in a mining company, on the cost-book principle, gave notice, according to the rules of the company, of his ceasing to be a member of it. Afterwards the company was registered under the joint-stock companies act, 1856, as a limited company, and was subsequently wound up: *Held*, that the shareholder was not liable to be placed on the list of contributaries of the company ordered to be wound up. *Losthouse's case*, 2 DeG. & J. 69; see *In re Welsh Potosi M. Co.*, 27 L. J. Ch. 311.

6. Debts incurred after the resolution. Where a limited company, being insolvent, passes a resolution to wind up voluntarily, and an order is afterwards made to continue the winding up under the supervision of the court, in an action afterwards brought by the liquidator, in the name of the company against a member, a debt due from the company to the defendant previous to the resolution cannot be set off against a debt incurred by the defendant to the company after the resolution. *Sankey Brook Coal Co.* v. *Marsh*, L. R. 6 Ex. 185.

7. Rent—Distress—Trust. A landlord demised a colliery to certain persons, who declared themselves trustees for a company. The rent fell into arrear, and the landlord put in a distress upon the premises. At that time a petition had been presented, upon which an order to wind up the company was afterwards made. Upon a petition by the landlord for leave to remove and sell the goods distrained: *Held*, that the act prohibiting a distress of the goods of a company in winding up did not apply except where the company was the tenant. *In re Exhall C. M. Co.*, 33 L. J. Ch. 595.

8. Debt to guaranteeing directors. A company whose articles of association authorized the directors, with the sanction of a resolution of the company, to borrow money on mortgage, being indebted to their bankers on an overdrawn account, the payment of which some of the directors had personally guaranteed, passed a resolution authorizing the directors to raise money on a mortgage of the property of the company, to be applied in discharging the liabilities of the company, or any director or person on behalf of the company, to the bankers; the resolution also confirmed the acts of the directors and sureties of the company in reference to the creation or continuance of the liabilities to the bankers, and declared that the bankers, directors and sureties should stand in the same position as to their claims against the company, as if such liabilities had been originally loans specially authorized and secured by mortgage under the articles. No mortgage was executed, the resolution was not communicated to the bankers, and no charge on the property of the company in favor of the bankers or the guaranteeing directors was registered under the forty-third section of the companies' act, 1862: *Held*, in the winding up of the company, that the resolution not having been communicated to the bankers, did not entitle them to a charge on the property of the company; and that, assuming the resolution to have created a charge in favor of the guaranteeing directors, their omission to register it disentitled them to set it up against the general creditors of the company. *In re Wynn Hall C. Co.*, L. R. 10 Eq. 515.

WITNESS.

1. Stockholder. In an action against a corporation a witness, who was a member of the corporation when the liabilities were incurred on which the action is brought, but who had sold out before the commencement of the action, is incompetent for interest. *McAuley* v. *York M. Co.*, 6 Cal. 80.

2. Disqualified witness. As to what interest in a mining claim is sufficient to disqualify a witness on the ground of interest. See *Columbus Co.* v. *Dayton Co.*, 18 Cal. 615; *Grady* v. *Early*, Id. 108.

3. Interest of witness. A witness in an action for a disputed mining claim who was in the employ of the party in possession at fixed wages, to be paid however, from the proceeds of the claim, is not incompetent, when his wages are not dependent upon the sufficiency of such proceeds. *Live Yankee Co.* v. *Oregon Co.*, 7 Cal. 40.

One of a company of miners suing for possession of a claim who has sold his interest before suit is not a competent witness in an action for detention with damages. *Packer* v. *Heaton*, 9 Cal. 568.

A vendor by quitclaim deed of a mining claim is a competent witness in an action of ejectment by the vendee against a third party to recover possession of the premises. *Johnson* v. *Parks*, 10 Cal. 446.

4. Possession. Possession is a question of law, and where possession is the point in issue, it is not competent for a witness to testify that he took possession. He must testify to the acts he performed, and it is for the court to say whether or not these constitute possession. *Thistle* v. *Frostberg Coal Co.*, 10 Md. 129.

5. Opinion of experts. Witnesses called to prove the damages done to a ditch as the result of mining in proximity to it, cannot on the direct examination, be questioned as to the effect of similar mining at points not in controversy, although the same kind of soil, etc., was alleged to exist at such points, so as to induce the idea of similar results, by comparison. The proper course in such cases is to take the opinion of witnesses who have examined the premises and are otherwise qualified to judge intelligently of the cause producing the injury. *Clark* v. *Willett*, 35 Cal. 544.

6. Usage—Experts. As to the meaning of terms used in the iron trade, the testimony of any persons connected with it, whether as manufacturers or workers in iron, as well as that of insurers of iron or merchants effecting insurance upon it, is admissible in evidence. But where the meaning is sought to be controlled by a usage of insurers with reference to a particular term, such as "bar iron," only the testimony of insurers, insurance brokers, and merchants accustomed to make and settle losses upon contracts of insurance upon such subjects, should be admitted. *Evans* v. *Commercial Ins. Co.*, 6 R. I. 47.

7. Extent of knowledge. While undoubtedly it must appear that a witness called as an expert has enjoyed some means of special knowledge or experience, no rule

can be laid down as to the extent of it. *Ardesco Oil Co.* v. *Gilson*, 63 Pa. St. 146.

See EVIDENCE; EXPERTS.

WORKINGS.

1. Workmanlike manner. The words "proper and workmanlike manner" admit of the evidence of experts, for no court can be so informed upon the subject of mining as to know what is a "proper and workmanlike manner." The extreme views of this phrase stated. *Lewis* v. *Fothergill*, L. R. 5 Ch. 103.

2. Quarry "face now opened." A stipulation in a lease of a quarry of a horse-shoe shape, and having faces on the north-west, north, east and south-east sides "that said quarry shall be worked as the face is now opened," is not violated by quarrying one of the faces to a greater extent than another, and such quarrying will not be enjoined if the same general shape be preserved. *Keeler* v. *Green*, 21 N. J. Ch. 27.

3. Coal "won." It seems that coal is "won" when it is put in a state in which continuous working can go forward in the ordinary way, but not when water is reached simultaneously with the coal so as to necessitate stoppage to provide sufficient means of drainage. *Lewis* v. *Fothergill*, L. R. 5 Ch. App. 103.

4. "Winning" coal—Lease. Coal is "won" when it is in position to be got by continuous working in the ordinary way. It is not "won" though the seam is reached, if in such condition as to require delay for drainage before continuous working can begin. Per Hatherly, L. C. Id.

5. Level, a working, not a plane. An award under 1 and 2 Vic. c. 43, defined the southern boundaries of the "Prosper Free Level" colliery, abutting the "Strip-and-at-it" colliery thus, "commencing at the point where the level struck the coal and extending in an eastward direction as deep as the level will drain." There was an old existing excavation (termed by miners a level) not horizontal, but running upwards into the coal eastward from the point where it struck the coal-bed. The excavation was described on the plan annexed to the award as the line of boundary: *Held*, that this existing old level was the boundary meant by the award and not an imaginary mathematical line drawn horizontally eastward from the point where the old excavation struck the coal: *Brain* v. *Harris*, 10 Exch. 908; 24 L. J. Exch. 177.

6. Level. The word "level," when used as a mining term in the coal district of Lancaster, refers to the inclination of the strata, and not to a horizontal plane. The expression "below the level of the bottom of the mine" explained accordingly. *Clayton* v. *Gregson*, 5 Ad. & El. 302; S. C., 4 Nev. & Man. 602; S. C., 6 Id. 694; S. C., 1 Har. & W. 159.

7. Incidental injuries. It is the right of owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his own mine in the manner which he deems most convenient and beneficial to himself, although the natural consequence be that some prejudice may accrue to the owner of the adjoining mine, so long as such prejudice does not arise from any negligent or malicious act. *Smith* v. *Kenrick*, 7 C. B. 515; *Baird* v. *Williamson*, 15 C. B. N. S. 376.

8. Order of working upper and lower collieries. By a lease of collieries in Cheshire certain pits or mines, comprising the T. mine, which was the uppermost, the B. mine, which was the next, and the C. mine, which was the lowest, were, with other higher and intervening mines, demised to lessees with power to work and get coal from the same at a fixed rent, and with a covenant that they should work and carry on the mines with their utmost skill and ability, in the best and most effectual manner, to the best advantage, and according to the common mode and usual practice of carrying on coal works or collieries with effect. On a bill by the lessor, alleging that the defendants, after having for some time worked the said three mines, had ceased working the T. mine, and also that they were working the C. mine in advance of the B. mine, and praying injunctions accordingly: *Held*, that under the terms of the covenant the defendants were entitled to work any of the mines without working all, or all that they had commenced to work; that, according to the evidence before the court, it was the common practice in the district to work a lower seam of coal before working a higher; that there was no ground for saying that the defendants were committing a breach of the covenant, and the bill was dismissed with costs. *Abinger* v. *Ashton*, L. R. 17 Eq. 358; 9 Moak. 585.

9. Drainage from upper mine. The owner of an upper mine is bound to use reasonable diligence to prevent the flow of water therefrom into a lower mine. *Locust Mountain C. & I. Co.* v. *Gorrell*, 9 Phila. 247; *Philadelphia & R. Co.* v. *Taylor*, 5 Leg. Gaz. 392; 1 Leg. Chron. 361.

10. Upper and lower levels. The owner of an upper level after working out all the coal therein is bound to give reasonable notice to the owner of a lower one of his intention to abandon the same, in order that the

latter may guard against the natural flow of water into his mine; and the owner of such lower level may enter upon the land of the other in order to secure his own property from danger. *Philadelphia & R. Co.* v. *Taylor*, 5 Leg. Gaz. 392; S. C., 1 Leg. Chron. 361.

11. Injury to adjoiner. The owner of a mine has a right to mine his coal in any usual manner which works no injury to an adjoining mine, except that which arises necessarily from the removal of the coal. *Horner* v. *Watson*, 79 Pa. St. 242; 21 Amer. R. 55.

12. Construction of lease. By indenture, a certain coal mine was demised to the defendants, with liberty to make such outstrokes, drifts, and other communications, through a barrier, covenanted to be left unworked, of the demised mine and any adjoining coal mine, as should be necessary for bringing coal from such adjoining mine unto the demised mine, and by such outstrokes, etc., to convey underground from such adjoining mine into the demised mine, and from thence to convey away such coal, and also to draw to bank at any of the pits sunk or to be sunk in the demised lands. The defendants covenanted that they would not do, or suffer to be done, anything in working the demised mine, whereby the same should be damnified, drowned, or overburdened with water or styth, or which might occasion any creep or thrust upon the workings, shafts, air-courses, or water-courses of such colliery, and would keep the levels, drifts, and necessary staples for air, clear and in good repair, order, and condition, from the surface of the earth down to the levels or drifts, and would draw all the water to come forth out of the colliery, by engines, to the surface of the earth; and also would, in working the demised mine, leave unwrought a barrier of coal of a certain breadth, and not open any communication between the demised and any adjoining mine, the coals of which should not be won by the lessees by virtue of the liberties aforesaid, or make any outstroke, drift or water-course into the same, except by virtue of those liberties: *Held*, that the liberty authorized the lessees to break through the barrier for winning coal, as well of the demised mine as of the adjoining mines, in their occupation, though the coal of such demised or adjoining mines, when won, was not to be, nor was, brought to the surface through a pit or shaft in the land of the lessors above the demised mine, and although no such pit or shaft existed, *James* v. *Cochrane*, 8 Ex. 556; 7 Id. 170.

Semble, that the suffering a seam of the mine, where workings had been formerly carried on but were discontinued, to be filled with water, whereby the air-courses in that seam were interrupted, was not a breach of the covenant to keep the levels, drifts, and necessary staples for air in good repair, order and condition. Id.

13. Lease—Minimum rent and work covenant. The plaintiffs granted a lease of a coal mine to the defendants, reserving a minimum rent of seven hundred and twenty pounds, to be increased to one thousand pounds, in case there should be pits sunk upon the estate, with a royalty upon all coal gotten beyond a certain quantity; and the lessees covenanted to work the mine uninterruptedly, efficiently, and regularly, according to the usual or most improved practice. The lessees paid the minimum rent, but only raised a small quantity of coal, by working through an adjoining mine, without sinking pits on the plaintiffs' property. The plaintiffs being desirous of enforcing a larger amount of working, whereby an increased rent would be payable, filed a bill for specific performance of the covenant in the lease: *Held*, that there was no obligation upon the defendants to sink pits, although that might be the most efficient mode of working, and that so long as the minimum rent was paid, the defendants could not be compelled to work the mine at all; that the lessees had committed no breach of contract; but if they had done so, the remedy was at law, and not in equity; and that this court could not, by a reference to chambers, give effect to the covenant by directions as to the management of a coal mine. Bill dismissed with costs. *Wheatley* v. *Westminster B. C. Co.*, L. R. 9 Eq. 538.

14. Instroke—Barriers—Lessee. A lessee of a coal seam operating seams on adjoining land may work the demised premises by instroke from the adjoining works and is not bound to leave barriers between the leased ground and his own workings. *Jegon* v. *Vivian*, L. R. 6 Ch. App. 742.

15. Remedy on covenant. The remedy in an ordinary case of an agreement to work a quarry in a particular manner is at law: specific performance refused. *Booth* v. *Pollard*, 4 Y. &. C. 61.

16. Relations to surface. It is seldom that questions of vital economy can create a necessity, but a right of the mineral owner to use the surface is not limited to the manner of mining in use when the reservation or grant was first made. He may keep pace with the progress of invention so far as is necessary for profitable working in competition with rivals. *Marvin* v. *Brewster Iron Co.*, 55 N. Y. 538; 14 Amer. R. 322.

17. Coal pillars. Surface support. The leaving of pillars in coal mines treated as for the convenience of operating other

parts of the mine and not as a support to the surface. *Eadon* v. *Jeffcock*, L. R. 7 Ex. 379.

18. Exhausting minerals. A covenant in a coal lease "to carry on the colliery, in a fair, proper and orderly manner and according to the best and most approved method of working collieries of a like nature on the rivers Tyne and Wear and so as to produce with safety the greatest quantity of merchantable coals from and out of each and every the workable seams thereof:" *Held*, not only to authorize but to bind the lessees so to work the mines as to get out the largest quantity of coal consistent with the safety of the mines, without regard to the surface or to buildings erected subsequent to the lease. *Taylor* v. *Shafto*, 8 B. & S. 251; *Shafto* v. *Johnson*, 8 B. & S. 252.

19. Different workings with reference to support. The customary (Scotch) systems of working coal considered with regard to the amount of subsidence occasioned and the amount of support left to the surface. *Buchanan* v. *Andrew*, L. R. 2 Sc. App. 286; 5 Moak. 125.

20. Regard to surface. The entire removal of the coal, so as to deprive the surface of support is not an act necessary for the working and winning of the mines. *Smart* v. *Morton*, 30 Eng. L. & E. 385; 5 Ell. & B. 30; S. C., 24 L. J. Q. B. 260.

21. "Fairly wrought"—Practice. The lessee of a coal mine covenanted to get all the coal so far as it could be "fairly wrought." The judge refused to explain what was meant by the expression, but said the jury were better judges of its meaning than he was: *Held*, that the judge was bound to state the meaning of the words, or to sum up the evidence and "ask the jury what they thought was the particular local meaning, if any." *Griffiths* v. *Rigsby*, 1 H. & N. 237; S. C., 25 L. J. Ex. 284.

22. Breaking through barriers. The owner of a coal mine excavated as far as the boundary (which he was by custom entitled to do) and continued the excavation wrongfully into the neighboring mine, leaving an aperture in the coal of that mine through which water passed into it and did damage: *Held*, that the party excavating was liable in trespass for breaking into the neighboring mine, but not in an action on the case for omitting to close up the aperture on his neighbor's soil, though a continuing damage resulted from its being unclosed. And therefore, that on an issue joined upon not guilty, the facts being proved as above stated, the defendant was entitled to the verdict. *Clegg* v. *Dearden*, 12 Q. B. 575.

23. Judgment of mine owner not to be questioned. It is not within the province of a court to question the judgment of the owner of a mining claim, or to determine whether one mode of use would be more beneficial than another; applying the ruling to the case of the working of a claim by a dam and flooding claims above, where such right was established by local custom. *Stone* v. *Bumpus*, 46 Cal. 218.

24. Unavoidable accident. An unavoidable accident means an accident physically unavoidable. An interruption by water *held* not to be such an accident under the facts of the case. *Morris* v. *Smith*, 3 Doug. 279.

25. "Developed"—Meaning of. Upon bill to set aside contract for sale of mine, where defendant had represented that it was "developed" for 100 feet: *Held*, that continuous exposure of the vein for that distance was not necessarily implied, but that shafts and cuts sunk or driven at intervals would satisfy the meaning of the expression. *Smith* v. *Richards*, 13 Pet. 39.

26. Statutory regulations — Illinois. The legislature has power under the constitution to establish reasonable police regulations for the operating of mines and collieries and the "act providing for the health and safety of persons employed in coal mines" (R. S. 1874), which requires the owner or agent of every coal mine or colliery employing ten men or more to make or cause to be made an accurate map or plan of the workings of such coal mine or colliery, etc., is not unconstitutional. *Daniels* v. *Hilgard*, 77 Ill. 640.

Under section two of said act, where the county surveyor, who was *ex officio* inspector of mines in his county, through his deputy prepares a map of the workings of a coal mine on the neglect of the owner or agent to do so, the former may maintain an action to recover the cost of the same in his own name. It is not necessary to sue in the name of the deputy doing the work. Id.

It is no defense to such suit that the map made is not such as the law requires. If the inspector, in the performance of his official duty, has caused to be made a map which he accepts as sufficient under the law, the owner of the mine will have no cause of complaint. Id.

27. Grant to work free of expense. Where, by the terms of a grant of the right of mining, the grantee is entitled to "work free of expense," etc., and is in no other respect restricted, he may conduct the work in any manner he thinks proper, either by himself, his servants, agents or assignees. *McBee* v. *Loftis*, 1 Strobh. (S. C.) Eq. 90.

28. Statutory regulation of workings in protection of miners. Chapter 93, Revised Statutes of Illinois, 1874, prohibits the use of uncovered cages for the purpose of conveying miners into or out of the mine, and also the hoisting of coal at the same time that miners are being hoisted. In a suit by the widow of a miner killed by a lump of coal falling down the shaft, the declaration alleged that the defendant was hoisting coal out of a shaft in its mine at the time the deceased was ascending, and that he was killed in consequence of that unlawful act, while the proof showed that he had just got upon the cage to be raised, when he was killed by the fall of coal: *Held*, that there was no material variance as the danger was as great as if the cage was in fact ascending at the time. *Litchfield Coal Co.* v. *Taylor*, 81 Ill. 590.

And upon the second count alleging death as the result of there being no cover to the cage, while deceased was on the cage, where the proof showed that immediately after the accident he was found lying on his back, off the cage, with his feet about six inches from it, it was *held*, that as matter of fact this evidence did not prove that he was on the cage when struck, but that even if he was in the act of getting off the cage upon the alarm given that the coal which killed him was falling, such fact would not constitute a variance between the averment and the proof. Id.

Where death to a miner has resulted from the willful conduct of a company in failing to use a covered cage, in known violation of the plain requirement of a statute, a verdict against the defendant is justified, although the deceased may not have been entirely free from fault. The fact that deceased may have been heard to say in conversation with strangers, that he preferred to be hoisted in an uncovered cage, or the fact that he went on the cage before the signal was given, when the man in charge of the cage had made no remonstrance, and the deceased and his comrades supposed the signal had been given, do not show that the misconduct of the deceased materially contributed to the injury. Id.

29. Custom—Coal pillars. Custom cannot control the contract of parties as to the working of a mine. A custom to remove coal pillars cannot avail against the terms of a lease, contracting to leave the mine in good working condition. *Randolph* v. *Harden*, 44 Iowa, 328.

Props and coal pillars are necessary in coal mining for the purpose of supporting the roof and surface. Their removal, though customary, would be a violation of an express contract to leave the mine in good condition, even if all the other coal is exhausted. Id.

30. Drowning through openings made by trespassers. The defendants worked mines in two places (A. and B.), B. being on the dip of A., towards which the water from A. would naturally flow in a proper course of working, and to save pumping, stopped up the only opening between A. and B., so as to dam up the water in A., which working they abandoned. The water thus dammed up rose so high as to overflow by natural gravitation into the plaintiffs' mines through openings made by their predecessors trespassing into defendants' mines: *Held*, that the plaintiffs were not entitled to any relief, but inasmuch as the defendants had in the first instance, and until restrained by injunction, used artificial means (pipes) to send the water to the plaintiffs' mines, the bill was dismissed without costs. *Lomax* v. *Stott*, 39 L. J. Ch. 834.

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