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THE EVOLUTION OF MINING LAW.

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A body of substantive law, providing for, and controlling the acquisition and enjoyment of, mining rights upon the public domain, created by local customs and regulations of the miners, territorial, state and federal legislation, and the adjudications of the courts construing these usages, regulations and statutes, is designated generally as AMERICAN MINING LAW.

At the date of the ratification of the treaty of Guadalupe Hidalgo, which was concluded February 2, and proclaimed July 4, 1848, there was no general legislation of the United States, accepted as, permitting, or regulating the acquisition by individuals of rights in gold and silver mines upon the public lands. Experimental legislation had been indulged in by Congress, but it had not been satisfactory in its results, and contemplated no such condition as existed in California. The discovery of gold there upon government lands, and the wonderful emigration to that country, with the attendant extended mining operations and speedy extraction and conversion of immense gold values, made necessary definite and authoritative laws fixing the relative rights of the hundreds of thousands of miners seeking and exploring these new gold fields.

Within the fifty years which have elapsed since the evocation of this necessity, there has originated, grown up, and been developed to a state of substantial completion, a system of law governing vast estates and interests which has been the subject of frequent, extended and costly litigations. This growth,

development or evolution of fifty years equals the accomplishment in other branches of the law of centuries of custom, legislation and decision. The rapidity of this development has been due to the exigent demands for it; to speedy means of travel and communication; the easy extraction and speedy dispersion of values, and resulting demand for instant determination of titles and disputes, and largely to that federal legislation which in presenting the right of securing complete title by the claimant, provided a procedure commanding the assertion of adverse claims by all who might question the right of the applicant and thereby prevented the further slumbering of dormant claims and the deferred determination familiar under the prescriptions and limitations in other branches of the law.

The discovery of new gold fields, as always in the history of the world, induced sudden and enormous movement to the new territory, the tidings of whose wealth and the ease with which it might be acquired had been rapidly carried to remote regions.

The mixed character of the inhabitants of this new territory, gathered from all quarters of the globe, bringing with them ideas of law and right with reference to mining peculiar to their own sections, with freedom from interference by the general government owning the land and having the only title to the mineral contained in it, gave an opportunity to those initiating and framing legislation to select from the mining codes of all the world their best elements, so far as applicable to the peculiar surroundings of the new situation, whilst the strong sense of right and independence with which this strange gathering was imbued freed their minds from the conventional ideas of particular systems of law, broke the fetters of tradition which would have affected legislation in older and more settled communities, left them freer to act promptly and directly and to choose those regulations which they might determine to be best after discussion, as fairest to all, where all were recognized as equals.

Among the early miners of California were to be found those who came from the western borders of American civilization, from the middle territory, from the seaboard, from every calling, avocation and profession of life, and with the varied experiences, views, traditions and temperaments of their sections, and as well miners from the western coast of Mexico, South America and Europe. The rich rewards which slight efforts had won from the earth excited the highest hopes and most sanguine expectations. Everything yielded to an effort to realize dreams of enormous wealth to be speedily acquired. The law, the pulpit, the counting-house, the army, the forum, the farm, the mine—all contributed to this inpouring into the new territory, not that here might be taken up again the business laid aside, but that all might engage in eager efforts to speedily amass fabulous fortunes. With all this variety of origin and eagerness for the acquisition of wealth, there was a general spirit of honesty, fairness and respect for law and order, and a desire that the opportunities which were presented by these new discoveries might be equitably distributed among these new Argonauts. Those familiar by participation with these early times, and those who have made them a study, have repeatedly, in vigorous and eloquent phrase, pronounced the highest eulogy upon the law-observing spirit of the general mass of the gold-seekers. They were overwhelmingly American, with a large endowment of the national genius for organization and state-building.

The laws of Mexico, derived substantially from Spain, concerning the exploration of mineral lands and acquisition of rights therein, ceased to exist in this territory upon its acquisition by the United States, and one of the first acts of Colonel Mason, military governor, was to declare, on the 10th of February, 1848, immediately after the signing of the treaty of peace, and but a few days after Marshall's discovery of gold at Coloma, that "from and after this date the Mexican laws and customs now prevailing in California relative to the denouncement of mines are hereby abolished." This proclamation was

accepted by the miners as authoritative, and fourteen years later was by the Supreme Court of the United States recognized as a correct but unnecessary declaration of the law.

California remained under military government until its admission as a state by the act of September 9, 1850. The ownership of the mineral in the public land was in the United States; the taking of it was a trespass; but the failure of Congress to legislate with reference to it, under the conditions surrounding the new and increasing population of the gold fields of California, led to the creation of a new mining system, which disregarded this paramount title of the general government. Governor Mason announced the true situation in this language:

“The entire gold district, with few exceptions of grants made some years ago by the Mexican authorities, is on land belonging to the United States. It was a matter of serious reflection with me how I could secure to the government certain rents or fees for the privilege of procuring this gold. But upon considering the large extent of the country, *the character of the people engaged, and the small, scattered force at my command, I am resolved not to interfere, but to permit all to work freely.*”

The government of the miners was in form a pure democracy, in which all were voters, lawmakers and triers of causes by right. The doctrine of delegated representation came much later. The great desire for wealth—the *auri sacra fames*—worked upon natures as strong and passionate in the early discovery and operation of gold mines in California and the West, as at any time in the history of the race. Controversies arose, intrigues were set on foot, the strong hand was lifted to assert, maintain or take away rights, and there was early recognition, by the thousands who had been drawn thither by these glowing prospects of great wealth, that law of some kind must control; that rights and their enjoyment must be provided for and protected, and some authority raised up for the investigation and determination of disputes. Slow, tedious

and expensive methods of acquiring and testing rights were not in harmony with the situation ; civil government did not exist ; the military government was provisional and uncertain ; federal legislation had not been enacted and was in only remote expectancy ; the power of the territorial government was doubtful ; but this adventurous class of our people met, as their kinsmen and ancestors have always met, every emergency, with good sense, promptitude and fairness, and from their action resulted a set of usages and regulations known as the Miners' Common Law, or the Miners' Law of Right, which were inspired by such a keen sense of practical justice that they are found, upon analysis, to contain the best elements of the most carefully formed mining codes of the older world, and the best elements of the code finally enacted by federal legislation. They were the essence of common sense and justice, operating in harmony with independence, enterprise and the necessity for direct and speedy action. This system of usage and regulation has been called " a special kind of law—a sort of common law of the miners—the offspring of a nation's irrepressible march—lawless in some senses, yet clothed with dignity by a conception of the immense social results mingled with the fortunes of these bold investigators." This " miners' law " consisted of two elements, usages or customs, and direct formal legislation. Customs sprang up among the miners with reference to the rights in placers and lodes independent of the adoption of rules and regulations, and were described and characterized in 1867 by Yale in this language :

“ These customs grew up by self-creation, and are not the subjects of invention or provision. They are not the ancient customs of the common law, which, to have force, must be immemorial, merely traditional, and not originating within living memory. Their force is greater because they are within living memory, and as no generation has elapsed since they have existed, are as ancient as circumstances will conveniently admit.”

Failing to possess many of the requisites which Blackstone defines as essential to a good custom under the common law, they had the inherent force of fairness and the overwhelming authority of universal acceptance, and rested for their vitality upon a vigorous and prompt support and enforcement by the miners, who esteemed them, not for their antiquity, but their aptness. In addition there were the specific, conscious and declared regulations of the miners in their mining districts. These were adopted at meetings of all the miners, who selected a president to preside over their deliberations, and a secretary to make a record. The main objects of these rules and regulations, to which all other provisions were incidental, being to ascertain the boundaries of the district; prescribe the size or extent of the mining claims; require the marking upon the grounds of the limits of the claims; to compel recording with the district recorder; to prescribe the amount and character of work which should be done; and length of time that work or actual occupation might be intermitted without forfeiture of the claim; the circumstances under which the claim would be deemed to have been abandoned and opened for occupation or location by new claimants. General principles, of universal acceptance, prevailed in all the districts, and were the basis of this local legislation, producing a general uniformity, with differences in details, depending upon the peculiarity of location and the origin of the inhabitants of the several districts.

Did these miners initiate or create their regulations something after the fashion ascribed to the makers of our own Federal Constitution by Mr. Gladstone? Or did they but consciously adopt and here put in force known mining regulations of other countries, of which they were informed by tradition or reading, or by the knowledge of the inhabitants of these different lands who congregated in this new world? This is a subject of dispute. Those who adopt the views of Rousseau find here an illustration of the civil compact; others, the reproduction of laws derived intentionally from older states; others, the application of the organizing faculty

of the American people to the circumstances of their new situation. Upon the one hand it is asserted most vigorously by those familiar through participation in the work, "that the large emigration of young men who rushed to this modern Ophir, found no laws governing the possession and occupation of mines but the common law of right, which Americans alone are educated to administer; that they were forced by the very necessity of the case to make laws for themselves."

Again, it is asserted that the mining code, as far as it can be traced, has sprung from the customs and usages of the miners, with rare applications of common law principles by the courts to vary them: or that the origin of the rules and customs of the miners is immediately recognized by those familiar with Mexican ordinances and continental mining codes, and with the regulations of the Stannary convocations among the tin bounders of Devon and Cornwall in England, and the High Peak regulations of the lead mines in the county of Derby; finally, that all these regulations are founded in nature, based upon equitable principles, comprehensive and simple, have a common origin, and are matured by practice. Halleck expresses the opinion that in the main the miners adopted, as best suited to their wants, the principles of the mining laws of Mexico and Spain, by which the right of property in mines is made to depend upon discovery and development; and that discovery is made the source of title, development or working the condition of its continuance; and that these two principles constitute the basis of all their local laws and regulations. The merit of adoption, the power of perceiving their appropriateness, and willingness to enforce them, whatever the source or suggestion, or origin, belongs to the men who made these laws. At first they constituted all the law there was upon the subject; and we have here a modern instance of an original congregation of the people creating the law required by their necessities, upon the assumption that the right to legislate was inherent in the people themselves. They proceeded upon the theory that the public domain belonged to

the people; that the mineral therein was the subject of free private acquisition, as a reward for discovery and occupation, and thus defied in effect the settled traditions and laws of other countries, and the right of the United States as a government to the mineral contained in its lands. The forms adopted, the methods of operation, the ideas of right, the machinery of justice selected by these miners in their primitive, inartificial but direct and expressive resolutions, present to the student of jurisprudence and of its originals, instructive objects of investigation, since they contain the history of the formation and growth of a living system of law.

As illustrative of these regulations, and giving indicia of their general character, I present the substance of a few of them.

In the Drytown mining district, Amador County, California, in regulations adopted June, 1851, after the selection of a president, vice-president and secretary, a committee of three were appointed to prepare resolutions for the consideration of the meeting, it is provided:

“*Resolved, first,* That rules and regulations for the security, peace and harmony of the miners who are now or who may be hereafter engaged in prospecting and working quartz mines, are positively necessary.

“*Resolved, second,* That in compliance with that necessity we do hereby ordain and establish the following rules and regulations for the government of the district:

“That the size of a claim in quartz veins shall be two hundred and forty feet in length of the vein, without regard to the width, to the discoverer or company, and one hundred and twenty feet in addition thereto for each member of the company that shall now or may be hereafter organized.

“That no claims shall be considered good and valid unless the same shall have been staked off in conformity with the provisions of resolution third, and written notice of the size of the claim and number of men in the company posted upon a tree or stake at each end of the claim.

“That the size of the claim, the number of men composing the company that holds the claim, together with a brief description of the location of the same, so that it may be identified, shall, within ten days after the claim is made, be filed in the office of the justice of the peace in whose district the same may be located. And all persons holding such claims shall file the same within ten days from this meeting.

“And all persons hereafter making claims (within ten days after the claims are located), or otherwise such claims shall be forfeited.”

That “whenever a claim has been abandoned and such can be clearly proven before the justice of the peace where such file was made, said claim shall be forfeited to the person or persons establishing such proof.”

“That these rules, regulations and proceedings be signed by the president and secretary of this meeting and filed in the justice’s office at Drytown.”

In the Mariposa County resolutions, adopted on the 25th of June, 1851, it is resolved in these words :

“WHEREAS, We deem the protection of the quartz mining interest in the county of Mariposa essential to the peace of said county ; and, whereas, certain definite and fixed rules are requisite to protect said interest and the maintenance of the peace and harmony of the county ; therefore, resolved,” etc.

And in conclusion :

“*Resolved*, That for the full and faithful maintenance of these rules and regulations in our country of Mariposa, we *sacredly pledge our honors and our lives.*”

In the regulations of Rich Gulch, Butte county, adopted on May 22, 1852, it is provided :

“That all disputes in regard to quartz claims shall be settled by three disinterested men, one to be chosen by each party and the third by the two chosen, who shall be governed in their decision by the laws of this district ; and, if it be desired by a party or parties, said arbitrators shall summon a jury, who shall decide the case, as before mentioned, under

the direction of the arbitrators and subject to an appeal to a general meeting of the miners."

"That all gulch, ravine and coyate diggings can be held during the dry season by recording the same until there is sufficient water to work the same.

"That no person shall be entitled to more than one claim in gulch, ravine or coyate diggings unless by purchase or inheritance.

"That the discoverer of any and all kinds of diggings shall be entitled to one extra claim."

In Upper Yuba mining district, Yuba county, California, there were regulations concerning the size of claims and the method of determining disputes, and, among others, these, which are representative in their character :

"*Resolved*, That all disputes in relation to miners' claims shall, on application by either party to the dispute, be settled by arbitration or reference, in the following manner, to-wit: The party aggrieved, or plaintiffs, shall give the other party twenty-four hours' notice. After the expiration of notice, both the parties shall choose two persons on each side, and then the persons thus chosen shall choose another, making five arbitors or referees. These five persons shall proceed to investigate the matter in dispute by hearing such witnesses of facts as can be of any benefit to either side of the question. The decision to be by the majority. At the request of either party, the arbitors and witnesses may be sworn by a justice of the peace. In case the defendant shall neglect or refuse to choose two arbitors, within twelve hours after the expiration of the first notice, they shall be defaulted. In case of an arbitration an appeal can be had to the county court.

"That no company shall monopolize a stream of water for speculation or unnecessarily use it to the injury of others."

Among the provisions contained in the Illinois mining district, Summit county, Colorado, are these :

"In case of dispute it shall be the duties of the president or secretary to summon jurors, of which there shall be nine, and

each contestant shall have the right to strike off one alternately until but three are left, who shall hear all evidence and render their verdict accordingly, which decision shall be final.

“No miner shall be entitled to a vote in this district unless he or they hold claims within the limits of this district.”

Among similar regulations in Virginia mining district, Clear Creek county, Colorado, it is provided that:

“All persons holding lode claims shall work them every ten days or get the same recorded.

“Any person or company may conduct water or tailings from a sluice or tom across other claims, so it be done without injury or damage to such claims.

“The right to vote upon matters relating to mining interests in this district shall belong exclusively to miners residing or mining in said district.

“Every dispute or difficulty respecting claims or boundaries, not settled by the parties themselves, shall be decided by a jury of miners, consisting of six or more, but an appeal may be taken from their decision to the miners' court of this district, and the decision of the miners shall be final.”

In these examples, which might be indefinitely multiplied, selected from the hundreds of records of mining regulations in the numerous districts of the Rocky Mountain and Pacific region, it will be observed that the essential principles recognized, and in more or less artificial form recorded, are the merit of discovery with privileges attached; necessity for possession and the reinforcement of this most precarious of titles by work and as an evidence of good faith; preventing the unproductive retention of that which was originally open to the general public; requirements for marking the claim so that all may be advised of what the first claimants assert to be their own, thus advising later comers and preventing needless conflict and claims for fraudulent purposes; a record, so that there may be preserved durable and public evidence of title and boundaries, since stakes themselves might be moved; provision for the

time within which operations should be begun ; the evidence of ownership and retention by right, by occupation, or limited absence, during which the tools were required to be left upon the claim ; the size of the claim, so that there might be an equitable distribution of opportunities among the members of the community ; the acts which should constitute an abandonment ; means for speedy trials of disputes ; appeals from these rude tribunals to the body of the miners assembled en masse ; the assertion of the right of the people to mine without paying compensation to the general government, so frequently discussed in early days as the doctrine of "free mining" ; the right to modify, from time to time, the regulations adopted ; a variety of methods of trial, from that by a judge, arbitrators, jury, to the entire body of the miners.

These miners acted upon the further theory that whenever that which was claimed to be a wrong had been inflicted, and they had not provided a remedy or created a tribunal with jurisdiction to try it, they were invested with a reserved power to remedy this defect by either trying the controversy directly, or by the creation of a court of original or appellate jurisdiction for that purpose. They made good, in the administration of their system of laws, the boast of the common law that there is no wrong without a remedy. If the remedy were wanting, if precedents did not exist, if the wrong had not been anticipated and legislated against, if it violated rules of right and honor, they claimed and exercised the power to provide a tribunal with ample jurisdiction and full support, whose decrees the body of the miners were pledged to put into speedy and absolute execution. In theory and operation, however simple and rude, a more comprehensive and perfect system of law has seldom been announced. It could only have originated, have existed and been enforced under the peculiar circumstances surrounding the miners in these early days. The love of law and order, a respect for right, a belief that a solemn duty rested upon every miner to devote his time, although it meant large pecuniary loss, to the restitution of rights and the punish-

ment of offenses, everywhere prevailed and in singular form, as evidenced by the proceedings of the miners' meetings in many instances and districts of which the proceedings of two districts are instructive examples.

In the Weaverville mining district, Trinity County, California, on July 7, 1853, the miners of the district met en masse, for the purpose of finally settling the claims to the water of West Weaver, which, it is alleged, had been conducted to those "diggings" by two races known as Dr. Ware's and Fiddler's, but then claimed by the miners of West Weaver. The meeting selected a president and secretary. One of the miners arose and, in the language of the record, "Stated in a concise and short address the object of the meeting, giving the history of the above races, the cause of their origin, and concluded with an expose of the law on the subject." After some desultory remarks, it is announced that a certain preamble and resolution were adopted by a seven-eighths vote; among other things it recited:

"WHEREAS, Some malicious persons residing on West Weaver have, without cause or provocation, committed a wanton destruction of property in the burning of Dr. Ware's reservoir on West Weaver, and cut and otherwise injured the race known as Dr. Ware's race, which, in part, supplies water for the diggings on McKenzie's gulch and its tributaries, to the serious injury of not only Dr. Ware, but also the miners working on said gulches, and

"WHEREAS, It becomes us as Americans and good citizens to protect one another in our rights and privileges, therefore, be it

"*Resolved*, That we, the miners of Weaver, assembled en masse, do hereby repudiate and frown upon any and every such spirit of agrarianism as has so lately manifested itself in the burning of the reservoir and cutting of Dr. Ware's race, and will protect all persons in their respective rights and privileges, as guaranteed to them by the constitution of the state as well as that of the United States.

Resolved, That we will assist Dr. Ware in the repair of his race, and do hereby constitute a committee of the whole and pledge ourselves to see the provisions of this meeting complied with."

And on the 9th of August, at Johnson's old house at Sidney Flat, a meeting of miners was held :

"The object of the meeting was to investigate the existing difficulties between Dr. Ware and a mob of miners on West Weaver, who, without any apparent cause and in violation of all laws of the country and of honor, have destroyed his property with that of other individuals, and as we are creditably informed are now holding water by force of arms that is justly the property of Ware and others."

The record proceeds :

"Dr. Ware explained the object of the meeting in a few pertinent remarks. In this dilemma Dr. Ware calls upon his fellow miners to assist him in defending his rights, agreeable to the old miners' law ; they said that this was a serious affair, but that they were willing to defend the old and established miners' laws and the right.

"Mr. Miller then moved that a committee of five be appointed to investigate the nature of the grievances and examine the law on the subject and report to an adjourned meeting at one o'clock. Motion carried unanimously."

At one o'clock they met and the committee reported as follows :

"Having thoroughly investigated the laws and customs of the miners of Weaver, we fully concur in the opinion that Dr. Ware is fully entitled to all the water in West Weaver, except four tomheads, which is allowed for the bed of the stream ; also, that the burning of his reservoir and the destruction of his dam and other property and the taking of his water from his race by force of arms, are malicious acts and should not be submitted to by those who are in favor of law and order.

"On motion, it was resolved that we assist Dr. Ware in turning the water into his race, and that we sustain him to the last extremity in keeping it in the race.

“On motion, meeting then adjourned *for the purpose of carrying this resolution into effect.*”

No one can doubt that right was vindicated, and the laws of right and honor maintained by this adjourned meeting of the miners.

Forfeitures for failure to work were strictly enforced, with generous allowance for illness and poverty. This is an illustration of regulations upon that subject :

“A notice stating the date of posting and the name of the claimant thereof posted in a conspicuous part of the claim shall be considered sufficient to hold such claim for the space of three days from the date of posting thereof; after the expiration of the said time, if no work shall have been done upon the same, it shall be considered as forfeited, and renewal of such notice at said expiration shall in no case be allowed to hold possession.”

“The tools upon a claim shall be considered sufficient to retain possession for the space of three days after cessation of work, provided that such cessation be not caused by sickness; in such case the claim shall not be considered as forfeited until the recovery of said claimant.”

While some districts only sought to regulate matters pertaining directly to mining claims, in others the regulations extended to other matters, and among those adopted by a miners' meeting on July 7, 1861, at the cabin of I. A. Clark, in Jackson District are these :

“No post house nor tent shall be allowed to stand in this district that deals and traffics in spirituous liquors.

“Fraud shall vitiate any contract wherever it makes its appearance.

“Any person convicted of perjury shall receive 25 lashes upon the bare back, and the sheriff shall perform said duty.

“One partner of any company shall not have the power to sell any claim in the absence of the company without he shall have power of attorney or a written agency.”

The exposed condition of property, the necessity for constant attention upon mining, gave remarkable opportunities for theft. But it is asserted that in no community was its perpetration so infrequent, and this is attributed to the honesty of the population; but it may have been somewhat due to the swift and terrible punishments which followed the commission of crimes of this character. In "Canion" Mining District, Clear Creek County, Colorado, as illustrative of the regulations adopted throughout the entire mining region upon this subject, there is this provision:

"If any person or persons be guilty of stealing they shall be taken before the justice of said district and be tried for their guilt, and if said person or persons be found guilty they shall be punished; if the theft exceeds one hundred dollars he or they shall be hanged by the neck until they are dead, and if the theft be less he or they shall receive not less than five lashes or more than forty-five lashes."

Amidst this exemplification of common sense and fairness, however, fallible human nature disclosed its weakness, in legislation, common in the beginning to many of the districts, which provided for the absolute exclusion of lawyers from the practice of their profession. The miners seem to have shared the prejudice and mistaken notions frequent everywhere, and which are said by historians to have been entertained by the early Spanish explorers, when they vigorously objected to lawyers accompanying them to the new world. Balboa is said to have written to the king of Spain, before starting out:

"One thing I supplicate your majesty: that you will give orders, under a great penalty, that no bachelors of law should be allowed to come here; for not only are they bad themselves, but they also make and contrive a thousand iniquities."

Illustrative of the regulations upon this subject are those in the Sugar Loaf District.

"No practicing lawyer or any other person having been admitted as such in any state or territory, shall be permitted

to appear in any cause pending in this district as attorney or agent of any person except he himself is a legal party to said suit and if any lawyer should be a legal party to any suit, the opposite party may also employ counsel in his case if he chooses so to do, but in all other cases lawyers shall not be admitted."

In Union District a more rigorous exclusion and drastic remedy was provided by this resolution :

"That no lawyer shall be permitted to practice law in any court in the district, under a penalty of not more than fifty nor less than twenty lashes, and be forever banished from the district."

These errors of judgment, however, inevitably by experience righted themselves, and led these pioneers in legislation to a recognition of that which had been forced upon their predecessors in legislation everywhere, that the lawyer is essential to a due ascertainment of human rights and a fair administration of justice. Among the men who handled the pick and rocker in these early days were some of the ablest lawyers of America, men who afterwards shed luster upon the bench of the highest state and federal courts, and at bars where they met the ablest trained intellects of the land.

This system of miners' common law continued, uninterfered with by federal legislation, until February, 1866.

In 1851 Stephen J. Field, later chief justice of California and justice of the Supreme Court of the United States, one of the master intellects of the American judiciary, familiar with every phase of mining in the earliest days, as well as of its later development, introduced into the California legislature, as a section of the civil code, this clause :

"In actions respecting mining claims, proof shall be admitted of the customs, usages or regulations established and in force at the bar of diggings embracing such claims, and such customs, usages, or regulations, when not in conflict with the Constitution and laws of this state, shall govern the decision of the action." This was the first statute to take notice of

and to recognize these usages and regulations, and it not only recognized them, but adopted them as a part of the law of California. At first it was contended, and was held for some time by the Supreme Court of California, that the state of California, as a sovereign state, succeeded to the sovereign rights which would have been possessed under the common law by the crown in England, and therefore was the owner of the royal metals in the public lands, of which it was contended the United States was trustee for the state until its admission into the Union, and therefore the regulations of the miners, authorized or adopted by a state statute, were an adequately authorized disposition of these minerals. Later this view was overruled in an opinion of Justice Field, delivering the decision of the Supreme Court of California; and while there seems to be yet some contention and uncertainty upon the subject, the effect of his decision, that the minerals belonged to the United States and not to the state, can be accepted as the settled law upon this subject.

The Supreme Court of California, with reference to the miners' usages and regulations, and the legislation just mentioned, says:

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

A statute of the United States of February 27, 1865, providing for District and Circuit Courts of the United States for Nevada, and now section 910 of the Revised Statutes of the United States, made like provision, in these words:

"No possessory action between persons in any court of the United States for the recovery of any mining title, or for

damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States, but each case shall be adjudged by the law of possession."

In *Sparrow vs. Strong*, Chief Justice Chase, speaking for the Supreme Court of the United States, at the December term, 1865, says, with reference to mining claims originating under the regulations of the miners :

"We know, also, that the territorial legislature has recognized by statute the validity and binding force of the rules, regulations and customs of the mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital and contributing largely to the prosperity and improvement of the whole country."

The final and perfect recognition of the miners' common law came from congressional legislation, which has been pronounced awkward, crude and unsatisfactory upon many subjects, but which specifically avows the tacit policy pursued by the federal government from the prudent inaction of Governor Mason down to the enactment of this federal legislation, which is entitled "An Act granting right of way to ditch and canal companies through the public lands and for other purposes." The title, it will be observed, makes not the slightest reference to mines nor the disposition of mineral lands. But this was in effect the first general law passed by the Federal government under which title to public mineral lands within the precious metal-bearing states and territories could be acquired. Section 1 provides :

"That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration subject to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

This legislation, which followed similar declarations by state and territorial legislatures, marks the beginning of the end of the miners' law as a living force, for, by the supplemental legislation of the states and territories preceding and following up the Act of 1866 and the Act of May 10, 1872, the field was substantially occupied, so that nothing of importance was left to the expressly authorized legislation of the miners' districts, it being provided in these various legislations that they might adopt customs and provide regulations not in conflict with the state, territorial and federal legislation. This example, therefore, of direct legislation by the assembled people voting directly upon the subject is substantially ended. That it accomplished much good, that it resulted in a wise system, that it led to the preservation of what was known as free mining, still, in part, an element of the American mining code, can not be questioned. The principles underlying it were sound; the objects sought eminently praiseworthy; the means adopted effectual. No higher eulogy, it seems, can be pronounced upon any system of legislation than to say that its object was justice, and by the means adopted the object was accomplished.

It must not be assumed that the failure of the Federal government to assert its right to the mineral in its public domain and to legislate with reference thereto was due to a lack of knowledge of the value of the mineral, the necessity for law or the rights of the government. The subject was brought to the attention of the executive department by reports from those representing the government in this territory, and the attention of the legislative department was directed to it by executive communications and by the introduction of bills, and able and extended discussions in the Federal Congress.

It may be said generally of the mining codes of the world, and they have been numerous, extended and varied, the general result is a declaration of regnal rights, as they are technically called, to the mineral contained in the land, independent of and in distinction from the ownership of the land itself. In

other words, that the crown, or the government, was the owner of what we usually know as the royal or precious metals, and many of the other minerals, independent of any ownership of the land, and that they could not become the subject of absolute ownership by individuals. It is announced by a distinguished writer that all continental publicists who have written on the subject lay down the fundamental rule that mines, from their very nature, are not a dependence of the ownership of the soil; that they ought not to become private property in the same sense as the soil is private property; but should be held and worked with the understanding that they are by nature public property, and are to be used and regulated in such way as to conduce most to the general interests of society. He enumerates the various reasons assigned in support of this doctrine.

Many of these reasons are artificial, others political; others due to the peculiar system of tenures of the government in which it was announced, or to the method of acquisition of dominion over the territory in which the mines were found. One reason is said to arise from the use which is made of metals in coining money, manufacturing arms, etc., and that public utility and public necessity require that the production of metals should not be subject to the will of the surface owner, who, at his own option, may cut off the supply. De Foz declares that this system of regulation, right and control, with opportunities for leasing and development upon conditions affixed by the sovereign, precludes private ownership, and has been admitted by almost every people, giving citations from the mining codes and the ancient laws of the Athenians and Romans, of Bavaria, Bohemia, Hungary, Austria, Saxony, Sweden, Norway, Hanover, Spain, France, Belgium, Holland, Russia, Prussia and England in support thereof, and that this regulation and right is fully recognized in all the countries named, except England, where it is limited to gold and silver, other metals being there regarded as belonging to the owner of the surface of the land. Private ownership, it is contended,

would prevent full development, and Delebecque cites England as an example to demonstrate that the failure to develop its mineral wealth was due to the peculiarities of its laws. In England, as Coke, in his *Second Institutes*, page 577, says, the mines which might be called royal were exclusively the property of the crown, and were mines of silver and gold. And so strong was this prerogative title that it was held by English courts, although the king should grant lands in which mines were situated, together with all mines in them, yet royal mines—that is to say, mines containing gold and silver—should not pass by such description and grant. In *Plowden's Reports*, page 336, there is given a unique statement of the basis upon which it is asserted the prerogative of the crown, with reference to royal mines, rests, in this language:

“Onslow alleged three reasons why the king shall have mines and ores of gold or silver within the realm, in whatever land they are found. The first was, in respect of the excellency of the thing, of all things which the soil within this realm produces or yields, gold and silver is the most excellent; and of all persons in the realm the king is, in the eye of the law, most excellent. And the common law, which is founded upon reason, appropriates everything to the persons whom it best suits, as common and trivial things to the common people, things of more worth to persons in a higher and superior class, and things most excellent to those persons who excel all others; and because gold and silver are the most excellent things which the soil contains, the law has appointed them (as in reason it ought) to the person who is most excellent, and that is the king.”

Senators Fremont, Benton and others directed the attention of the United States Congress and the general government to what was by some called the chaotic condition of title to mining lands in California and the west, and discussed the question of appropriate legislation, and it was urged by some that a general policy should be adopted which would secure to the government, either by leasing or by sale, or by some permis-

sion upon the payment of a license therefor, the right of the citizens to explore and mine, and, as some suggested, ultimately to obtain complete title to the mining lands. This suggestion was combatted by those who advocated free mining, upon the ground that Congress should only adopt regulations providing for the exploration, determination of the extent of rights and permitting mining to proceed without requiring the purchase of the lands or the payment of tribute in any form to the general government. Public men at one time believed that the mines of the west containing the precious metals should be resorted to as similar mines had been in ancient times by Rome, Athens and Spain as sources of revenue, and that out of the proceeds thereof the public debt might be discharged.

The recognition of the doctrine of free mining, was ably advocated by Senator Benton, supported by Senator Seward and many Western men.

It was said, in support of the proposition for the adoption by the government of free mining as a system that wonderful results would be received by the country generally; that under its operations "for near a quarter of a century a race of men, constituting a majority by far of all the miners of the West, patient of toil, hopeful of success, deprived of the associations of home and family, had devoted themselves, with untiring energy, to sinking deep shafts, running tunnels thousands of feet in solid granite, traversing deserts, climbing mountains and enduring every conceivable hardship and privation, exploring for mines, all with the idea that no change would be made in this system that would deprive them of their hard-earned treasure; that some of them had found valuable mines, and a sure prospect of wealth and comfort when the appliances of capital and machinery shall be brought to their aid, while others had received no compensation but anticipation, no reward but hope, and that while these people had done little for themselves, they had done valuable service for the government, had enhanced the property of the nation near one hundred per cent. ;

had converted that vast unknown region, extending from British Columbia on the north to Mexico on the south, and from the eastern slope of the Rocky mountains to the western decline of the Sierra Nevadas, into the great gold and silver fields of the United States, surpassing in richness and extent the mines of any other nation on the globe."

The speaker further says :

"I assert, and no one familiar with the subject will question the fact, that the sand plains, alkaline deserts and dreary mountains of rock and sagebrush of the great interior, would have been as worthless to-day as when they were marked by geographers as the great American desert, but for this system of free mining fostered by our neglect, and matured and perfected by our generous inaction."

To what was thus vigorously asserted in 1865, may be added the history of the wonderful mining development of the West down to the present time, which has resulted in adding millions of dollars of coin value and precious metals in the West to the wealth of the nation and the world, to the development of other industries, the extension of great railroad systems, the establishment of a great merchant marine, to the building of cities, the founding of agricultural communities, and the establishment of homes for an adventurous and deserving American population.

The early miners, in their mountain gulches, in their humble cabins, at their primitive assemblages, unfamiliar with the history of mining laws and regulations in the old world, and even with the Spanish regulations which had prevailed in the very territory which they occupied, seized upon the aptest, wisest and most beneficial principles which could have been adopted, and by vigorous, strenuous, independent, but respectful assertion of their rights, secured their recognition at the hands of the general government, to the incalculable enrichment and advantage of the entire nation.

Beginning with 1866, and with an amendment in 1870, which latter contained the gist of federal legislation with

regard to placers and a provision for their sale, we have, as the final form of federal legislation, a substantially complete code of mining law embraced in the act of May 10, 1872, with only slight amendments, and with a few supplements by local legislation, contains the American mining law of to-day. It recognized the essential principles found in the miners' regulations.

This code is not perfect, and the efforts of legislators to prescribe in details has led to confusion and costly litigation. The present code has failed to provide for many difficult questions, some of which would have been avoided had the simple regulations of the miners been adopted, and which have arisen to vex miners and perplex courts, affording for the latter a large field of judicial interpretation, and sometimes for that which has been called judicial legislation. The principles and regulations of the present code I attempt here to summarize, illustrating the supplemental regulations permitted by states and territories by those which have been adopted in the state of Colorado, and which are fairly representative.

In order to secure the fullest development of the public mineral domain, it was determined that it should be thrown open to the citizens of the United States, and provided, in addition to the declaration contained in the act of 1866, just quoted, by the act of May 10, 1872, that

“All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase.”

Further that the discoverer, whose industry, patience, enterprise, audacity and endurance of hardships had discovered the mineral, should have, as against the government, a title permanent, assignable and inheritable, and should be entitled to substantial protection and favor. The law of May 10, 1872, declares that “* * * No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.” In every contest and litigation, before courts and juries and in the interior department, there

has been a generous interpretation of law and facts in behalf of the first comer who has honestly made a discovery upon the public domain, for the purpose of protecting him against the assaults upon his right by later comers, who have sought, by technical means, to defeat and destroy his property; and from the time of his discovery his right is esteemed as perfect, though subject to more difficulty in its establishment in court as after the government has conferred upon him the fee-simple by patent.

To prevent uncertainty as to the extent of the discoverer's rights to the grounds which were taken or occupied, and in order that the unappropriated domain should be open and known to be open to other explorers, it is required that the claim should be marked and defined upon the ground, by proper markings and monuments, so as to be easily found and recognized, and that documents announcing the extent of the claim, the owners thereof, and the basis of title, should be filed with certain officers.

By section 2324 of the United States Revised Statutes, it is provided that

“The location must be distinctly marked on the ground, so that its boundaries can be readily traced.”

In Colorado it is provided, in pursuance of the permission given to the state to legislate upon this subject by the federal government, that “the discoverer of a lode shall, within three months from the date of discovery, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate, which shall contain the name of the lode, the name of the locator, the date of the location, the number of feet in length claimed on each side of the center of the discovery shaft, the general course of the lode as near as may be;” and that before filing such location certificate, the discoverer shall locate his claim by sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show a well-defined crevice; by posting, at the point

of discovery on the surface, a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery ; by marking the surface boundaries of the claim ; and it is provided that such surface boundaries shall be marked by six substantial posts, one at each corner and one at the centre of each side line of said claim, and that where it is dangerous to life and limb, by virtue of the precipitous character of the ground, to set the stakes where they would properly fall, they may be set near, and a reference made to the true position which the corner should occupy.

To prevent the acquisition or taking up of large bodies of mineral lands, without developing them, and thus withdrawing them at once from the control of the government and from the use of the public and depriving the community of the advantages which their development would secure, requirements for work and development are made.

The act of May 10, 1872, requires that "On each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year."

Whilst permitting the extraction of all the ore from a mining claim without any payment whatever to the government, and the retention of the title indefinitely, only subject to the requirement of annual expenditures, the government made provision for the acquisition of complete title by the locator or claimant ; in short, did not require that the lands should be purchased, but made provision that they might be. Section 2326 contains the provisions upon this subject, and provides that "A patent for any land claimed and located for valuable deposits may be obtained." And in order that there might be certainty as to the requirements upon which purchase should be made, and with reference to the procedure which should be adopted, and an opportunity given to all who contested the right of the claimant to the title to oppose the same and assert their own right, and that there might be a speedy determin-

ation thereof, and provision compelling this assertion, we have a definite statutory requirement, authorizing proceedings in the general land office by an applicant to obtain a patent, wherein he is compelled to give notice of this application, to establish his compliance with the law and his right to the patent, and permission and opportunity, as a result of published notice to all contesting his claim, to antagonize it by adverse claim filed in the land office, to be supplemented and followed up by proper litigation in courts having jurisdiction of the subject matter so that, as far as possible, there shall be fully settled and determined all controversies with reference to the title before the issuance of a patent by the United States.

The miners, in their regulations with reference to lode claims, had allotted to the various locators so many feet upon the lode, without reference to its width, with the right to follow it as far as it extended into the earth, with provision for the use of surface ground upon either side for its convenient operation. When the act of May 10, 1872, was adopted, it provided for claims of definite dimensions within fixed limits, and gave the right to follow the veins having their apexes or tops therein upon their descent into the earth within the end lines of the claim extended, these end lines being required to be parallel. This was a modification, and at the same time recognition and preservation of the miners' common law view of this right. This statute has been as prolific of controversy, litigation and expense as we are told was the famous Statute of Frauds—alleged to have cost for every line in it a subsidy.

The law upon this subject is known as the law of the apex. While there have been numerous interpretations by the courts of its provisions and meaning, in an effort to apply it to the occurrences of nature, it yet remains the subject of debate and must be the subject of future construction and adjudication. This cannot be discussed nor the results of interpretation given or even slightly touched upon here. The statute, which is the Iliad of many mining woes, and which has received alternately the blessings and anathemas of litigants, lawyers,

courts and mining engineers, is contained in the following language:

“The locators of all mining locations on any mineral vein, lode or ledge, situated on the public domain, shall have the exclusive right of possession and enjoyment of * * * all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations.”

The miners were confronted with difficulty in determining the extent of mining claims and the length of lodes which might be taken up under one location. In some districts, where the bars were of great wealth, a few square feet only were allotted. In others the limit was much more extensive. With reference to lodes, in some districts a few feet, and in others, many hundreds of feet, were permitted to be located by one person or association. Congress undertook to legislate upon this subject, leaving some latitude for local legislation and miner's regulations. We have the provision thereof contained in section 2320 of the Revised Statutes of the United States, which provides that “Mining claims * * * heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the 10th day of May, 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode. * * * No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May, 1872, render such limitation necessary. The end lines of each claim shall be parallel to each other.”

The result has been that the miners have the right to make their claims as narrow and as short as they choose, but cannot make them longer than fifteen hundred feet nor wider than six hundred feet. In Colorado, by state legislation, and the action in counties in pursuance thereof, no mining claim may exceed fifteen hundred feet in length nor from fifty to three hundred feet in width; whilst in other states and territories, by local statutes, they are permitted to be fifteen hundred feet in length and six hundred feet in width. The form is not defined. It was the evident purpose that they should be rectangular; but with the limitation that the end lines shall be parallel, many irregular forms have been adopted by the miners and sustained by the courts; the irregularity in form being due to the conformation of the country or to the character and extent of the ground open to location, or to the result of conflict with other claims.

After five hundred dollars worth of expenditure, the right to make application for a patent or purchase the land arises. When the patent is issued it constitutes a deed by the Government of the United States to the claim, and conveys the land, with all lodes having their tops or apexes within it subject to the apex rights of other locations, because the law proceeds upon the theory that no valid location can be made without the finding of the apex of a vein within its boundaries, and thereupon the title of the claim becomes absolute. A mining claim is real estate, vendible, conveyable, inheritable, taxable and leviable as any other real estate, and is subject to the usual regulations concerning its conveyance, and this is true not only after patent, but during the progress of its existence from the time of its discovery.

Many controversies arise as to whether or not a discovery has been made; whether or not the necessary work has been done, stakes set; whether the location certificate is in proper form, properly recorded; whether or not the vein pursues the proper course within the boundaries of the claim, or has its apex therein; whether or not the vein is continuous in its

descent into the earth—and upon each and every of these questions innumerable litigations have arisen, which have taxed the wisdom of the courts, the ingenuity of the lawyers, and the learning and skill of experts and miners in their presentations. The principle followed by the courts, however, in their construction of the law, has been to give it a practicable interpretation in view of the fact that the prospector and locator of claims is to be governed by it, and that he can not be attended, in his explorations, by a lawyer to construe the law, a surveyor to determine the boundaries and position of his claim, and assayers and geologists to give him the result of their operations and the character of the formation in which he is working, all of which would be necessary if some of the contentions urged against the validity of locations should be by the courts sustained. A liberal spirit has been adopted generally in these decisions, sustaining good faith and honest effort to comply with the law, and an avoidance of technical defects to meritorious claims, while at the same time requiring a fair, honest and substantial compliance with the terms upon which the general government extends its bounty to the prospector and locator.

Many important questions, far reaching in their character, with reference to lode and placer claims, have been raised and adjudicated, while some are still pending and others await litigation. A knowledge of them is important in obtaining a complete view of mining law; but not to understand the underlying general ideas determining and which have determined the growth of the law as a system. These only and but imperfectly have been sketched and outlined here. The system is important, involving in its history peculiar institutions, and possessing now a rich literature, the work of eminent lawyers and of able judicial exposition, and is worthy of a better exhibition than has been made of it here.