Pertaining to Mining Districts & The Local Customs of Miners

Prepared by the
South West Oregon Mining Association

www.miningrights.org

UNITED STATES

MINERAL LANDS;

LAWS GOVERNING THEIR

OCCUPANCY AND DISPOSAL;

DECISIONS OF

FEDERAL AND STATE COURTS IN CASES ARISING THEREUNDER; AND REGULATIONS AND RULINGS OF THE LAND DEPARTMENT IN CONNECTION THEREWITH;

WITH

FORMS, GLOSSARY AND RULES OF PRACTICE.

BY HENRY N. COPP.

PUBLISHED BY THE EDITOR,
WASHINGTON, D. C.
1881.

INJUNCTION.

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 vs. Winder*, 34 Cal. 270. See *Morrison's Mining Digest* for further references.

JURISDICTION.

Act of Congress — Jurisdiction of State Courts.—The object of the acts of Congress of July 26, 1866, July 9, 1870, and May 10, 1872, in relation to the location 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. *The 420 M. Co. vs. Bullion M. Co.*, 9 Nevada 240.

Jurisdiction.—Where the only questions to be litigated in suits to determine the right 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 vs. Nougues*, 4 Sawyer 178.

LABOR.

(*See Expenditure.*)

LEASE.

Fraudulent Lease of a Mine.—Where a board of directors of a mining corporation makes a nominal lease of the mine owned by the corporation, to a party really acting in the interests of a minority of the stockholders, not in the ordinary course of the business of the corporation, but for the purpose of withdrawing the mine from the control of a board of directors about to be elected at an approaching meeting of the stockholders, and thereby perpetuating the control of the minority, a court of equity will cancel the lease on a bill filed by the corporation for that purpose. *Mahoney M. Co. vs. Bennett*, 5 Sawyer 141.

LIENS.

Foreman of Mine Entitled to Lien. —Where a foreman of a mine is employed to "boss" the men at work in a mine, keep their time and give them orders for their pay, *Held*, that his employment is of that kind that is protected by the lien law. *Capron vs. Strout*, 11 Nevada 304.

Laborers' Lien.—The act of February 6, 1867, allowing liens in favor of laborers for work done on mining claims (Statutes of 1867, 48,) did not give a lien for labor done before its passage. *Hunter vs. Savage Con. S. M. Co.*, 3 & 4 Nevada 647; 4 Nevada 153.

Mechanic's Lien for Work Done by Miner under Various Contracts.— Where miners filed mechanics' liens for work done in the development of a mine, and it appeared that they worked a portion of the time under special contracts, and a portion of the time by the day, but always under the direction of the foreman of the mine: *Held*, that the work was to be considered as one continuous employment, and not as distinct and independent jobs or contracts, and that each miner might file one lien for all his labor within the proper time after stopping work. *Skyrme vs. Occidental Mill and M. Co.*, 8 Nevada 219.

LOCAL LAWS.

Reserved Rights — Miners' Customs.—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, user, and forfeiture of mining claims. *Robertson vs. Smith.* 1 Montana 410.

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 vs. Nougues*, 4 Saw. 178.

Mining on the Public Lands Legalized—Rights of Miners.—Section 9 of the act of July 26, 1866, grants to the proper persons 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.*

Nevada Statutes—Judicial Recognition.—The mining regulations once established and recognized by the courts, and in Nevada by statute, have the force of legislative enactments. *Mallett vs. Uncle Sam M. Co.*, 1 Nev. 194.

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 vs. Hense*, 2 Col. 424.

Local Mining Districts and Rules.—The mining laws of the United States recognize and sanction the custom among the miners of organized mining districts to adopt local laws or rules governing the location, recording and working of claims not in conflict with the State or Federal legislation. *Golden Fleece vs. Cable Consolidated M. Co.*, 12 Nev. 312.

Mining Customs—Effect on Common Law.—The rules and customs of miners in a particular district are laws, and constitute the American common law on mining for precious metals. *King vs. Edwards*, 1 Montana 235.

Mining Customs—Location of Mining Ground.—The rules and customs, which point out the manner of locating mining ground, are conditions precedent, which must be substantially complied with. *Id.*

Mining Rules.—Miners have the power to prescribe the rules governing the acquisition and divestiture of titles to this class of claims, and their extent, subject only to the general laws of the State. *English vs. Johnson*, 17 Cal. 107.

Right of Possession.—In order to secure the right of possession to a mining claim, there must be a compliance not only with the laws of the United States, but also with such local regulations of the mining district as are not in conflict therewith. *Gleeson vs. Martin White M. Co.*, 13 Nevada 442.

The right in a mining claim vests by the taking in accordance with local rules. *McGarrity vs. Byington*, 12 Cal. 426.

Right to a Mining Claim — How Maintained.—To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continued substantially to comply with the mining rules and customs established and in force in the district where the claim is situated. *Oreamuno vs. The Uncle Sam Gold & Silver Mining Co.*, 1 Nevada 215; *Strang vs. Ryan*, 46 Cal. 33; *Doak vs. Brubaker*, 1 Nev. 217.

Vested Rights.—The right to occupy, explore and extract the precious minerals 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 vs. Smith*, 1 Montana 410.

Observed "Mining Customs" Prevail over Disregarded "District Mining Laws."—Section six hundred and twenty-one 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 vs. Ryan*, 42 Cal. 626.

Existence of "District Mining Laws" 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. *Idem.* See *Coleman vs. Clements*, 23 Cal. 245. See *North Noonday M. Co. vs. Orient M. Co.*, 1 Federal Reporter 522.

Possession—Presumption—Mining Customs.—It will be presumed, in the absence of evidence, that the parties in the possession of mining claims hold them according to the local rules and customs of the miners in the district. *Robertson vs. Smith.* 1 Montana 410.

Mining Laws Presumed to be 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 vs. Edwards*, 1 Montana 235.

Mining Rules as Evidence.—In suit for mining claims, the Court permitted defendants to introduce in evidence the mining rules of the district, though 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 the pre-existing rights being sufficiently guarded by instructions of the Court. *Roach vs. Gray*, 16 Cal. 383.

Adoption After Location of Claim.—A local mining regulation or custom, adopted after the location of a claim, can-

not be given in evidence to limit the extent of a claim previously located. *Table Mountain Tunnel Co. vs. Stranahan*, 31 Cal. 387.

Introduction of Testimony.—Testimony as to mining customs may be introduced under our statute, however recent the date or short the duration of their establishment. *Smith vs. North American M. Co.*, 1 Nevada 424.

Controversies Solved by Mining Usages and Customs.—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 to which such right is asserted or denied, whether such customs and usages are written or unwritten. *Morton vs. Solambo C. M. Co.*, 26 Cal. 527.

Change in Written Mining Regulations.—An alteration, made after their adoption, in one of several mining regulations reduced to writing by the officers of the meeting, does not change the legal effect of the other articles. *Table Mountain Tunnel Co. vs. Stranahan*, 31 Cal. 387.

Limitation of Purchase.—The mining rules of the district cannot limit the quantityof ground or the number of claims a partymay acquire by purchase. *Prosser vs. Parks*, 18 Cal. 47.

Rules of a District Not Varied by those of Another.—The rules and customs of the miners of one district cannot be introduced to vary those of another district. *King vs. Edwards*, 1 Montana 235.

Evidence of Local Mining Laws.—In order to introduce evidence of the local mining laws of districts, 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 vs. Wilson*, 1 Utah 292.

Book of Mining Rules as Evidence.—In this case: *Held*, that defendant could not offer in evidence an extract or single clause of a book containing the mining rules; but must offer the whole book—the book being in court, and in possession of defendant, and it being necessary to a fair understanding of any one part that the whole should be inspected. *English vs. Johnson*, 17 Cal. 107.

Proof of Mining Customs.—On the trial of an action to quiet the title to a mining claim, the plaintiffs' title depended upon maintaining their allegation, that by the custom prevailing among miners of the district embracing their claims, the mode of locating claims therein was for the locators to measure off and designate by stakes on the ground their boundaries, to enter upon the occupation of the same, and to cause a record thereof to be made of such location, in the county recorder's office: *Held*, that the contents of a book kept in said recorder's office, consisting of the records of numbers of such locations—among which, and the first in the order of their registration, was the record of plaintiffs' claim—was properly admitted in evidence as tending to prove such allegation. *Pralus vs. Pacific G. & S. Mining Co.*, 35 Cal. 30.

Excess Over Quantity Allowed by Mining Laws.—In the absence of any mining rule, declaring that a failure to record a claim avoids the entry or claim, a party may take actual possession of mineral land, though in taking possession he do not observe the requirements as to registry, and the like acts, prescribed by the local laws. But if he take more land than these rules allow, this would not give him title to the excess against any one subsequently entering, who complies with the laws, and takes up such excess in accordance with them. *English vs. Johnson*, 17 Cal. 107.

Laws Passed on a Different Day from that Advertised.—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 vs. McBrayer.* 18 Cal. 582.

Nevada County, California.—The true interpretation of the mining usage in the county of Nevada is, that work to the value of one hundred dollars, or twenty days of faithful labor performed on a claim, or on 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 vs Lee.* 38 Cal. 362.

Manner of Locating and Conveying Colorado Claims:—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 vs. Hense*, 2 Col. 424.

LOCATION.

Statutes Construed.—Section 3 of the mining act of May 10, 1872, recognizes as valid locations of mining claims made prior to its passage, and while the mining act of 1866 was in force, the surface lines of which included more than one vein or lode, and confirms the locators thereof in the exclusive possession of all the lodes which have their apex within the surface lines of such mining claim. *Mount Diablo M. C. vs. Callison*, 5 Sawyer 439.

Reasonable Time to Sink a Discovery Shaft.—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 could not complain. *Patterson vs. Hitchcock*, 3 Colorado 533.

Locations, How Made—Compliance with Act of Congress.—Under the laws of Congress the location of a mining claim, or a vein, must be made by taking up "a piece of land" to include the vein. *Gleeson vs. Martin White M. Co.*, 13 Nevada 442.

Colorado Mining Claims Located in 1860.—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 miners in the district where such claim is situated. *Sullivan vs. Hense*, 2 Col. 424.

Sufficiency of Notice and of Location.—A notice of location, otherwise good, is not invalid because it does not contain a description of the claim by reference to some natural object or permanent monument; the law only requires that the record of the claim shall contain such description. It is a sufficient compliance with the law if the description of the *locus* of the claim is appended to the notice when it is recorded. *Gleeson vs. Martin White M. Co.*, 13 Nevada 442.

General Recognition Makes a Title Good.—Where a mining claim is made and actually possessed and worked for several years, the claim and location being generally recognized as valid by the miners of the vicinity, the title of the claimant is good, even though the location may not have been originally made in strict accordance with the mining rules in force at the time, especially so as between the co-claimants and their grantees. *Kinney vs. Con. Va. M. Co.*, 4 Sawyer 382.

Mineral Districts—Locations for Diverse Purposes.—One party may locate ground in the mineral districts for fluming purposes, and another party, at the same or a different time, may locate the same ground for mining purposes the two locations, being for different purposes will not conflict. *O'Keife vs. Cunningham*, 9 Cal. 589.

Statement of Witnesses.—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 vs. Taylor*, 23 Cal. 11.

Location Presumed to Include.—A location of a lode claim will be presumed to include the vein upon which the discovery was made, until the contrary is shown. *Patterson vs. Hitchcock*, 3 Colorado 533.

But when the vein has been shown to leave the side lines of the location, the location beyond the point of departure is defeasible, if not void, *Id.*

Excess Void—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 defeat the entire claim. *Atkins vs. Hendree*, 1 Ida. 108.

Patent Broader than the Law.—A lode claim is to be fixed by reference to the plat or survey of the location; and although the lode, in its descending course, may be followed to any depth with its dips, angles and variations, into the premises adjoining, yet in its onward course or strike it may not depart from the line of its location, and the patentee is not entitled to its possession beyond the lateral boundaries, as against one who has subsequently located and patented it. If the patent is broader than the law, it is to that extent nugatory. *Wolfley vs. Lebanon M'g. Co.*, 4 Col. 112.

Quantity of Ground.—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 vs. Parks*, 18 Cal. 47.

Reasonableness of the Extent of a

DIGEST

OF THE

PACIFIC STATES REPORTS

PRIOR TO THE

PACIFIC REPORTER

INCLUDING

CALIFORNIA REPORTS, VOLUMES 1–63; COLORADO REPORTS, VOLUMES 1–6; IDAHO REPORTS, VOLUME 1; KANSAS REPORTS, VOLUMES 1–29; MONTANA REPORTS, VOLUMES 1–3; NEVADA REPORTS, VOLUMES 1–16; NEW MEXICO REPORTS, VOLUMES 1–2; OREGON REPORTS, VOLUMES 1–10; UTAH REPORTS, VOLUMES 1–2; WASHINGTON TERRITORY REPORTS, VOLUME 1; WYOMING REPORTS, VOLUMES 1–2

WITH REFERENCES TO THE

MONOGRAPHIC NOTES IN AMERICAN DECISIONS, AMERICAN REPORTS, AMERICAN STATE REPORTS, AMERICAN ANNOTATED CASES, LAWYERS' REPORTS ANNOTATED, AMERICAN CRIMINAL REPORTS, AMERICAN NEGLIGENCE CASES, AMERICAN NEGLIGENCE REPORTS, NEGLIGENCE AND COMPENSATION CASES ANNOTATED, AND WATER AND MINING CASES ANNOTATED

IN THREE VOLUMES

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VOLUME II

EVIDENCE TO NUNC PRO TUNC

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1913

purpose of mining. And such justification must be affirmatively pleaded in the answer, with all the requisite averments to show a right under the statute or by law to enter.—Lentz v. Victor, 17 Cal. 271, 12 Morr. Min. Rep. 211.

Entering upon premises in the actual possession of another, for the purpose of performing the acts necessary to constitute location and possession, amount only to a trespass, and cannot form the basis for the acquisition of title.—Lebanon M. Co. of N. Y. v. Consolidated R. M. Co., 6 Colo. 371.

§ 10. Persons Entitled to Acquire Lands.

As a general rule, the public mineral lands of the state 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. 100, 5 Morr. Min. Rep. 218.

The United States mining law of July 26, 1866, gives to citizens, and those who have declared their intention to become citizens, the right to enter upon and explore and possess the mineral lands of the United States, and excludes therefrom the territory aliens, and all others. Held, that this act does not authorize the forfeiture of the title of aliens to said land, and that aliens can hold and enjoy the possessory title to said lands within the territory.—Territory v. Lee, 2 Mont. 124.

The territory has no right or title to the unappropriated mineral land within its boundaries. The act of the legislative assembly of January 12, 1872 (Code Stats., c. 82, p. 593), concerning mines held by aliens, which provides "for the forfeiture to the territory of placer mines held by aliens," interferes with the primary disposal of the public domain within the territory, and is, therefore, inconsistent with section 6 of the organic act, and void. Knowles, J., dissented.—Territory v. Lee, 2 Mont. 124.

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 Co. v. Cable Com. Co., 12 Nev. 312.

§ 11. Licensing Foreigners to Work Mines.

The state has the power to require the payment by foreigners of a license fee for the privilege of working the gold mines in the state.—People v. Naglee, 1 Cal. 232, 52 Am. Dec. 312.

The act of the legislature prohibiting foreigners from working the gold mines, except on condition of paying a certain sum each month for the privilege, is not repugnant to either the federal or the state constitution or treaties with foreign powers.—People v. Naglee, 1 Cal. 232, 52 Am. Dec. 312.

Revenue act of 1860, section 64, prohibiting parties not citizens of the United States from mining without a license, does not refer to mines contained in lands the private property of individuals, but only to the mines in the public lands of the state or the United States.—Ah Hee v. Crippen, 19 Cal. 491, 10 Morr. Min. Rep. 367.

That portion of the revenue act of 1861 that provides for collecting license fees from foreigners engaged in mining does not apply to mines contained in lands which are the private property of individuals, but only to mines in the public lands of the state or United States.—Ah Yew v. Choate, 24 Cal. 562, 1 Morr. Min. Rep. 492.

§ 12. —— Questioning Right to Mine or Locate Claims.

The fact that the parties in possession of gold mine are foreigners, and have obtained no license, affords no apology for trespassers. The state alone can enforce the law against foreigners working mines without a license.—Mitchell v. Hagood, 6 Cal. 148, 1 Morr. Min. Rep. 506.

§ 13. Mining Terms.

"Quartz Lode or Vein."—It is a fissure or seam in the country rock filled with quartz matter bearing gold or silver. There must be a discovery of the walls of the country rock.—Foote v. National Min. Co., 2 Mont. 402, 404.

"Placers."—These are superficial deposits, which occupy the beds of ancient rivers or valleys.—Moxon v. Wilkinson, 2 Mont. 421, 424.

A "lode" is a "vein" containing ore. Veins are narrow plates of rock intersecting other rocks, and are the fillings of cracks or fissures.—Moxon v. Wilkinson, 2 Mont. 421.

Under the act of the legislature of May 8, 1873, and the United States statutes in force, a vein or lode bearing "valuable deposits" does not include a placer claim.—Moxon v. Wilkinson, 2 Mont. 421.

§ 14. Local Customs and Miners' Rules.

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.

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 bedrock flume to it from another district, are unreasonable. King v. Edwards, 1 Mont. 235.

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.

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. 235.

Under the mining laws of White Pine district, as amended in July, 1867, it requires only two days' work to hold a "location" for

[For additional notes to above cases, see appendices of annotated edition of Reports.]

a year; and such location means an entire mining claim, irrespective of the number of locations or feet.—Leet v. John Dare S. M. Co., 6 Nev. 218.

§ 15. —— Recognition of, by Mining Laws of United States.

The mining laws of the United States recognize and sanction the custom of the miners among organized mining districts to adopt local laws or rules governing the location, recording and working of claim not in conflict with state or federal legislation.—Golden Fleece Co. v. Cable Con. Co., 12 Nev. 312.

Congress has given the local laws and customs of miners the force and effect of laws, so far as they are not in conflict with any superior law.—McCormick v. Varnes, 2 Utah, 355.

§ 16. —— Effect of Compliance With Mining Laws of United States.

It is not essential that mining districts should be organized and local rules adopted in order that mining claims may be held and the government titles 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. 312.

§ 17. —— Construction and Effect of.

Admissibility of local customs, rules and usages in evidence. See post, § 136.

The mode of acquiring and the extent of a mining claim must be in conformity with the local rules of mines.—Dutch Flat Water Co. v. Mooney, 12 Cal. 534, 6 Morr. Min. Rep. 303.

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, 4 Morr. Min. Rep. 452.

Local district mining rules may limit the claim of an individual to one claim of twenty-five feet by location or prior appropriation.—Prosser v. Parks, 18 Cal. 47, 4 Morr. Min. Rep. 452.

The district mining rules provided as follows: "Sec. 2. A claim shall consist of twenty-five feet front, and extend into the hill without limit . . . . Sec. 3. Each person may hold one claim by pre-emption." Held, that these rules limited the right of an individual to one claim by location or prior appropriation.—Prosser v. Parks, 18 Cal. 47, 4 Morr. Min. Rep. 452.

Mining rules passed on a different day from that advertised for a meeting of the miners are not affected by this fact. The regularity of the action of these local legislatures and primary assemblages will not be inquired into by the supreme court. The fact of their agreement upon their rules is enough. Gore v. McBrayer, 18 Cal. 582, 1 Morr. Min. Rep. 645.

A local mining regulation, adopted after the location of a claim, cannot limit the extent thereof.—Table Mt. Tunnel Co. v. Stranahan, 31 Cal. 387.

General custom cannot be ascertained by taking the average of different local customs. Table Mountain etc. Co. v. Stranahan, 31 Cal. 387.

Mining rules are not to be construed to authorize invasion of actual possession by one who does not comply with them.—Bradley v. Lee, 38 Cal. 362, 4 Morr. Min. Rep. 470.

A local custom or local mining rule does not, like a statute, acquire validity by the mere enactment, but from customary obedience and acquiescence of the miners. It is void whenever it falls into disuse or is generally disregarded.—Harvey v. Ryan, 42 Cal. 626, 4 Morr. Min. Rep. 490.

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.—Strang v. Ryan, 46 Cal. 33, 1 Morr. Min. Rep. 48.

Where the statute law is in conflict with mining regulations, the latter must give way. Williams & Kellinger Original Co. v. Winthrop Min. Co., 60 Cal. 631.

The mining laws of the locality govern the location and manner of developing the mines, and when they directly point out how such mining claims must be located, and how the possession once acquired is to be maintained, that course must be strictly pursued. A failure to do so might work a forfeiture of the ground.—Mallett v. Uncle Sam Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

When the 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 Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

§ 18. Placer and Lode Claims.

It is essential to the validity of a placer mining claim made in 1856 that it be staked off and surrounded by a ditch, as required by the mining rules and regulations of the district.—Myers v. Spooner, 55 Cal. 257, 9 Morr. Min. Rep. 519.

The right of the quartz miner comes from his appropriation; and, whenever his claim is defined, there is no reason in the nature of things why the appropriation may not as well take effect upon quartz in a decomposed state as any other sort, or why the condition to which natural causes may have reduced the rock should give character to the title of the locator.—Brown v. '49 & '56 Quartz Min. Co., 15 Cal. 152, 76 Am. Dec. 468, 9 Morr. Min. Rep. 600.

§ 19. Location—In General.

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

MINERAL LAW DIGEST

EMBRACING

A DIGEST OF DECISIONS OF THE COURTS AND OF THE LAND DEPARTMENT, UNDER THE PUBLIC MINERAL LAND LAWS; A BRIEF MANUAL OF PROCEDURE, WITH FORMS; AND A MANUAL OF MINERAL SURVEYS AND DEPARTMENTAL REGULATIONS.

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CHICAGO:
CALLAGHAN AND COMPANY.
1897.

28. The annual expenditure upon mining claims may be made in running a tunnel. Com'r to John Hunter, 5 C. L. O. 34.

Sutro Tunnel.

29. In applications for patent on the Comstock lode hearings may be had to determine whether they have been benefited or drained by the Sutro tunnel. Brunswick Mine, 3 C. L. O. 114.

30. The only patents for mining claims which should contain the conditions specified in the act of July 25, 1866, are such as may be issued for claims on the Comstock lode. Sutro Tunnel Co., 3 C. L. O. 34.

31. Lands west of the Comstock lode are included in the grant to A. Sutro. Sutro Tunnel Co., 8 C. L. O. 54.

32. Annual expenditures on mines within limits of grant (Sutro Tunnel) are not required. Sutro Tunnel, 8 C. L. O. 54.

33. What is the Comstock lode? Question discussed. Sutro Tunnel, 3 C. L. O. 34.

POSSESSORY TITLE.

MINING DISTRICTS.

I. The Statute.
II. Regulations.
III. Decisions.

I. The Statute.

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. 17 Stat. 92; 18 Stat. 61; 19 Stat. 52; 21 Stat. 61; sec. 2324, U. S. Rev. Stat.

II. Regulations.

12. It is provided by the Revised Statutes that the miners of each district may make rules and regulations not in conflict with the laws of the United States, or of the State or Territory in which such districts are respectively situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. They likewise require that the location shall be so distinctly marked on the ground that its boundaries may be readily traced. This is a very important matter, and locators cannot exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by reference to some natural object or permanent monument, as will identify the claim.

III. Decisions.

1. What are the laws of a mining district is a question of fact for the General Land Office. Parley's Park Silver M. Co. v. Kerr, 130 U. S. 256.

2. Mining district rules are a part of the law of the land. Morton v. Solambo M. Co., 26 Cal. 527; 4 Mor. Min. Rep. 463; Gropper v. King, 1 Pac. Rep. 755.

3. When there are written rules or regulations of a mining district, parol evidence cannot be given of a mining custom. Ralston v. Plowman, 1 Idaho, 595; 5 Mor. Min. Rep. 160.

4. Where written district regulations are of doubtful force, parol evidence of local customs is admissible. Colman v. Clements, 23 Cal. 245; 5 Mor. Min. Rep. 247.

5. The book containing local mining regulations is competent evidence under section 504, Civil Practice Act. Orr v. Haskell, 2 Mont. 225; 4 Mor. Min. Rep. 492.

6. The rules and customs of a mining district may be proven by a written rule if such exists, or by any competent evidence of a custom. Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

7. While the local record of a mining community is the best evidence of the rules and customs governing mining interests, it is not the best or only evidence of priority or extent of actual possession. Campbell v. Rankin, 99 U. S. 261; 12 Mor. Min. Rep. 257.

8. Evidence of the local mining rules must consist of a copy from the proper custodian, who must be shown to be empowered to give certified copies thereof, and to certify that such was a copy of the laws then in force in such district. Roberts v. Wilson, 1 Utah, 292; 4 Mor. Min. Rep. 498.

9. Mining district rules must be offered in evidence as a whole. English v. Johnson, 17 Cal. 107; 12 Mor. Min. Rep. 202.

10. In the absence of a statute, a purported copy of mining district regulations must be shown by proper testimony to have come from the proper custody and be otherwise proven to be what it purports to be, and cannot be rendered admissible by submission of *ex parte* affidavits. Roberts v. Wilson, 1 Utah, 292; 4 Mor. Min. Rep. 498.

11. Proof of a record of a location is inadmissible unless a record is shown to be provided for by local statute or regulations. Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450.

12. District rules to be obligatory upon all must be clear and specific, not optional. Flaherty v. Gwinn, 1 Dak. 509; 12 Mor. Min. Rep. 605.

13. The regularity of the adoption of mining district laws will not be inquired into by the courts if they are acknowledged by the miners. Gore v. McBrayer, 18 Cal. 582; 1 Mor. Min. Rep. 645.

14. After adoption, a mining district regulation is presumed to have continued in force, in the absence of a showing to the contrary. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

15. The existence and tenor of mining district regulations and customs are questions for the jury. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

16. The existence of a mining district rule or custom is a question of fact to be tried by the jury. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

17. The existence and force of mining district regulations are questions of fact for the jury. Harvey v. Ryan, 42 Cal. 626; 4 Mor. Min. Rep. 490.

18. The existence of mining district regulations is a question of fact. Parley's Park S. M. Co. v. Kerr, 130 U. S. 256; Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487.

19. The existence of miners' rules or regulations are matters of fact to be proven in the usual manner. Poujade v. Ryan, 21 Nev. 449; 33 Pac. Rep. 659; Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; King v. Edwards, 1 Mont. 205; 4 Mor. Min. Rep. 480; Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487; Harvey v. Ryan, 42 Cal. 626; 4 Mor. Min. Rep. 490.

20. The existence of mining district regulations or customs must be proven like any other fact, by the best evidence, and parol testimony as to a custom should not be admitted when it is shown that there are duly recorded regulations. Ralston v. Plowman, 1 Idaho, 595; 5 Mor. Min. Rep. 160.

21. The existence of mining district regulations has received legislative sanction in Montana. Orr v. Haskell, 2 Mont. 225; 4 Mor. Min. Rep. 492.

22. To be of effect, a mining district regulation must be in accordance with the laws of the United States and of the State; must have been established and must be in force, as it does not, like a statute, acquire validity

by its mere enactment, but from the customary obedience and acquiescence of the miners, after its enactment. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

23. Mining district regulations, to be considered, must be shown to be in force. Harvey v. Ryan, 42 Cal. 626; 4 Mor. Min. Rep. 490; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

24. A mining district regulation must be in force at the time in order to be of effect. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

25. Whether or not a miner's rule or custom is in force at a given time is a question of fact for the jury. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

26. Whether or not a mining district rule or regulation has been established and is in force is a question of fact for the jury. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

27. It is presumed that the written laws of a mining district are in force, and any custom which conflicts with them must be clearly proved. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

28. Mining district rules may be shown to be in force by custom or usage, without proof of formal adoption, or of a written record. Flaherty v. Gwinn, 1 Dak. 509; 12 Mor. Min. Rep. 605.

29. A custom, reasonable in itself and generally observed, will prevail against a written regulation fallen into disuse. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Harvey v. Ryan, 42 Cal. 626; 4 Mor. Min. Rep. 490.

30. 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. 235; 4 Mor. Min. Rep. 480.

31. The customs of miners constitute the common law of mining, and have been recognized by National and State statutes and by the courts. Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66.

32. The rules and customs of miners, reasonable in themselves and not in conflict with any higher law, are recognized by legislative enactments and judicial decisions as a part of the law of this country. Rosenthal v. Ives, 2 Idaho, 244; 13 Pac. Rep. 904; 15 Mor. Min. Rep. 324.

33. Congress recognized the possessory right of miners under the rules of the mining districts, but in doing this it has not parted with its title to the land. Forbes v. Gracey, 94 U. S. 762; 14 Mor. Min. Rep. 183.

34. The mining customs of any particular mining district have the force and effect of laws, in other words, are laws. They form the American common law on mining rights. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

35. To be recognized, a mining district rule must not only have been enacted or adopted, but must be recognized by the miners, and must be in force. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

36. Congress has given to the local laws and customs of miners the force and effect of laws, so far as they are not in conflict with any superior law. McCornick v. Varnes, 2 Utah, 355; 9 Mor. Min. Rep. 505. See Steel v. St. Louis Sm. Co., 106 U. S. 447.

37. "The Land Department of the government and this court also, have always acted upon the rule that all mineral locations were to be governed by the local rules and customs in force at the time of the location, when such location was made prior to the passage of any mineral law by Congress." Glacier Mtn. S. M. Co. v. Willis, 127 U. S. 471. (Citing Jennison v. Kirk, 98 U. S. 453; Broder v. Natoma Water & M. Co., 101 U. S. 274; Jackson v. Roby, 109 U. S. 440; Chambers v. Harrington, 111 U. S. 350.)

38. Section 9 of the act of 1866 is not retroactive in its effect, and patents theretofore granted are not affected thereby. Said act merely recognized and confirmed rights held under local customs, laws and decisions. Union Mtn. M. Co. v. Ferris, 2 Sawy. 176; 8 Mor. Min. Rep. 90.

39. The Land Department cannot interfere in disputes between miners as to the affairs of a mining district. Its sole duty is to recognize the local laws when not in conflict with statutes, State and National. Com'r to J. N. Barker, Jan. 9, 1892.

40. Compliance with miners' regulations and customs in force is necessary to the validity of a location. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304 (second trial, 17 Colo. 243; 29 Pac. Rep. 173); Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487; Cons. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

41. To prevail in an adverse suit a party, whether plaintiff or defendant, must show, not mere occupancy of the premises in controversy, but a compliance with law, customs and regulations. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304 (second trial, 17 Colo. 243; 29 Pac. Rep. 173); Bryan v. McCaig, 10 Colo. 309; 15 Pac. Rep. 413.

42. The rules and customs which point out the manner of locating mining claims are conditions precedent, which must be substantially complied with. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

43. The mining rules and regulations of a district (1865) govern the location of claims and maintenance thereof, and must be followed. Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188; 1 Mor. Min. Rep. 17.

44. The location must be made in compliance with the United States laws and with miners' rules and regulations. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

45. A forfeiture may take place by failing to comply with local rules and regulations of miners. St. John v. Kidd, 26 Cal. 263; 4 Mor. Min. Rep. 454.

46. The law presumes that locators forfeit their rights by failing to comply with local rules and customs relative to annual work, although no penalty is specified by such rules and customs. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

47. The failure of a party to comply with a mining rule or regulation cannot work a forfeiture of his title thereto, unless the rule so provides. Rush v. French, 1 Ariz. 99; 25 Pac. Rep. 816; Johnson v. McLaughlin, 1 Ariz. 493; 4 Pac. Rep. 130; McGarrity v. Byington, 12 Cal. 426 (1859); 2 Mor. Min. Rep. 311; Bell v. Bed Rock T. & M. Co., 36 Cal. 214; 1 Mor. Min. Rep. 45; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411. *Contra*, King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

48. Forfeiture of a mining claim under mining laws must be specially pleaded, and cannot be shown under the general issue. Morenhaut v. Wilson, 52 Cal. 263; 1 Mor. Min. Rep. 53.

49. Error in the notice of location in a particular not essential under the law or regulations and customs of miners is harmless and does not vitiate a description otherwise good. Metcalf v. Prescott, 10 Mont. 283; 25 Pac. Rep. 1037. (Citing Gamer v. Glenn, 8 Mont. 371; 20 Pac. Rep. 654; Flavin v. Mattingly, 8 Mont. 242; 19 Pac. Rep. 384; Upton v. Larkin, 7 Mont. 449; 17 Pac. Rep. 728; 15 Mor. Min. Rep. 404; S. C., 5 Mont. 600; 6 Pac. Rep. 66; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291.)

50. "A person who makes a valid location of a mineral ledge or lode, and complies with the laws and the local mining rules in respect thereto obtains a vested right to such property, of which he cannot be divested." Blake v. Butte S. M. Co., 2 Utah, 54; 9 Mor. Min. Rep. 503.

51. The right to a mining claim vests by the taking thereof in accordance with local rules. McGarrity v. Byington, 12 Cal. 426; 2 Mor. Min. Rep. 311 (1859); Dutch Flat Water Co. v. Mooney, 12 Cal. 534 (1859).

52. The right to occupy, explore, and extract the precious metals in the mineral lands of the United States becomes vested in the party who located these lands according to local rules and customs of the mining district in which they are situated. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

53. It is presumed, in the absence of evidence, that parties in possession of mining claims hold them according to the rules and customs of the miners in the district. Robertson v. Smith, 1 Mont. 410; 7 Mor. Min. Rep. 196.

54. A person who makes improvements upon public land, knowing that he has no title, and that the land is open to exploration and sale for its minerals, and makes no effort to secure the title to it as such, under the laws of Congress, or a right of possession under the local customs and rules of miners, has no claim to compensation for his improvements as an adverse holder in good faith, when such sale is made to another and

the title is passed to him by a patent of the United States. Sparks v. Pierce, 115 U. S. 408.

55. When plaintiff's ownership and right of possession are put in issue by answer, he must show affirmatively compliance with the act of Congress and local rules and regulations, and that he had thereby made a valid location. Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. Rep. 153; 130 U. S. 291.

56. Actual possession of a portion of a mining claim, according to the custom of miners in a given locality, extends by construction to the limits of the claim held in accordance with such customs. Hicks v. Bell, 3 Hepburn, 220 (1853).

57. A party claiming mining ground not actually possessed, 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 compliance with local mining laws and rules. Roberts v. Wilson, 1 Utah, 292; 4 Mor. Min. Rep. 498.

58. Possession is good only as to that portion of the claim actually occupied and worked, unless the boundaries were plainly and prominently marked, or there was some local regulation giving possession of the whole of the ground claimed. Hess v. Winder, 30 Cal. 349 (1865); 12 Mor. Min. Rep. 217.

59. One attempting to hold by prior possession without reference to local mining customs must give notice to others by actual physical marks or monuments. If this is not done he can only hold to the extent of the land actually occupied and worked, as against others. Hess v. Winder, 30 Cal. 349 (1865); 12 Mor. Min. Rep. 217.

60. Where all the rules, laws, regulations and customs with reference to a mining claim have been complied with, a property right, prior to the issuance of patent, has been acquired that can be transferred or inherited. Suessenbach v. First National Bank, 5 Dak. 477; 41 N. W. Rep. 662.

61. The first locators of mining ground can work the claim with reasonable care and diligence; but a mining custom which would allow the total destruction of a junior location in a gulch below the prior location on ground which was vacant, cannot be maintained under any statute or common mining law. Lincoln v. Rogers, 1 Mont. 217 (1870).

62. "A mining claim is the name given to that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining laws, local and statutory. It must under the law of Congress of 1872 (R. S., sec. 2320), be located upon at least one known vein or lode, but the vein or lode is not the whole claim." Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439; 9 Mor. Min. Rep. 616.

63. Before statutory enactment, the manner of locating mining claims and maintaining such locations was governed by miners' rules and customs, and compliance therewith was necessary to constitute a valid location or to maintain one. Cons. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

64. An adverse complaint must allege a location to have been made in accordance with mining district rules, and proof of compliance with them must be made. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304 (second trial, 17 Colo. 243; 29 Pac. Rep. 173); Sullivan v. Hense, 3 Colo. 424; 9 Mor. Min. Rep. 487; Cons. Republican Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490.

65. In an adverse suit each party must prove his right to a patent by a compliance with the statutes, State and Federal, and miners' rules and regulations in force relative to location, in order to recover a judgment for the ground in controversy. Becker v. Pugh, 9 Colo. 589; 13 Pac. Rep. 906; 15 Mor. Min. Rep. 304 (second trial, 17 Colo. 243; 29 Pac. Rep. 173).

66. A misdescription in the notice of the claimant to a quartz lead, posted up near the premises, in pursuance of the requirements of the mining laws of the district in which the land is situated, and where the lead is under ground and undeveloped, will not vitiate the claim. Johnson v. Parks, 10 Cal. 446 (1858); 4 Mor. Min. Rep. 316.

67. The fact that land is covered by a water right, held by local laws, will not bar entry thereof as a mill site. Charles Lennig, 5 L. D. 190.

68. The failure of an applicant to comply with local regulations will not justify suit by the United States to vacate the patent issued to him. Such failure should be made the subject of an adverse claim or protest during the

pendency of the application. Robert Hawke, 5 L. D. 131.

69. Failure by one-third of the miners of a certain mining district to comply with State and local rules does not render applicable the maxim "*communis error facit jus.*" O'Donnell v. Glenn, 9 Mont. 452; 23 Pac. Rep. 1018.

70. Mining district regulations may restrict placer locations to eighty rods in length. Rosenthal v. Ives, 2 Idaho, 244; 12 Pac. Rep. 904; 15 Mor. Min. Rep. 324; Landale v. Ives, 2 Idaho, 244.

71. The width of mining claims may be limited by local laws or regulations to twenty-five feet on each side of the middle of the vein. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

72. A regulation of a mining district requiring more work to be done to hold the claim than is required by United States law is void. Original M. Co. v. Winthrop M. Co., 60 Cal. 631.

73. Rules and customs of one district cannot be introduced to vary those of another district. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

74. A local mining regulation or custom adopted after location of a claim cannot be given in evidence to limit the extent of a claim previously located. Table Mtn. Tunnel Co. v. Stranahan, 20 Cal. 198; 81 Cal. 387 (1865); 9 Mor. Min. Rep. 457.

75. All mining rules and customs must be reasonable. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

76. Mining customs need not, like customs at common law, be shown to have been of long duration. Smith v. North American M. Co., 1 Nev. 423; 13 Mor. Min. Rep. 599.

77. Written mining district regulations, once adopted, are presumed to continue in force in absence of showing to the contrary. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Riborado v. Quang Pang M. Co., 2 Idaho, 131; 6 Pac. Rep. 125; King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

78. Mining district regulations established and recognized, have all the effect of legislative enactments. Mallett v. Uncle Sam G. & S. M. Co., 1 Nev. 188; 1 Mor. Min. Rep. 17.

79. Local rules and customs of miners recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. Jennison v. Kirk, 98 U. S. 453. (Affirming Titcomb v. Kirk, 51 Cal. 288; 5 Mor. Min. Rep. 10.)

80. In the absence of a local custom allowing it, one miner has no right to run a tail-race or flume over the claim of another, and the owner of such claim may fill up such race or flume by tailings deposited on his own ground. Ralston v. Plowman, 1 Idaho, 595; 5 Mor. Min. Rep. 160.

81. In the absence of local statutes or regulations, a discoverer has a reasonable time within which to perfect his location. Patterson v. Hitchcock, 3 Colo. 533; 5 Mor. Min. Rep. 542.

82. In the absence of local statutes or regulations, a discoverer has no time for marking his claim after discovery, but must proceed with diligence to perfect his location. Patterson v. Tarbell, 26 Oreg. 29; 37 Pac. Rep. 76.

83. In the absence of a local statute or regulation, there is no law which requires the locator of a mining claim to record a notice of location. Haws v. Victoria Copper M. Co., 160 U. S. 303; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411; Harvey v. Ryan, 42 Cal. 626; 4 Mor. Min. Rep. 490; Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182: Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 183; Anthony v. Jillson, 83 Cal. 296; 23 Pac. Rep. 419; Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487; King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480; Golden Fleece G. & S. M. Co. v. Cable Cons. M. Co., 12 Nev. 312; 1 Mor. Min. Rep. 120; 15 Nev. 450; Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; 9 Mor. Min. Rep. 513; Poujade v. Ryan, 21 Nev. 449; 33 Pac. Rep. 659; Allen v. Dunlap, 24 Oreg. 229; 33 Pac. Rep. 675; Carter v. Bacigalupi, 23 Pac. Rep. 361.

84. The United States laws do not require location certificates to be recorded. This is governed only by State or mining district laws. Moxon v. Wilkinson, 2 Mont. 421; 12 Mor. Min. Rep. 602; Gamer v. Glenn, 8 Mont. 371; 20 Pac. Rep. 654; Freezer v. Sweeney, 8 Mont. 508; 21 Pac. Rep. 20; Souter v. Maguire, 78 Cal. 543; 21 Pac. Rep. 183.

85. Record of a location is required, if at all, by local laws or regulations. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

86. Record of a location is not required by the United States law in the absence of State statutes or local regulations. Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383; 9 Mor. Min. Rep. 513.

87. In the absence of a regulation of an organized mining district or a local statute, a notice of a mining location should be filed for record in the office of the county recorder of deeds. Rose Nos. 1 and 2 Lodes, 22 L. D. 83.

88. In the absence of a custom requiring it, the recording of a mining location is not necessary to give it validity; and where such a custom does exist, the fact that the notice is recorded before it is posted is not material. Thompson v. Spray, 72 Cal. 528; 14 Pac. Rep. 182.

89. In the absence of local statutes or rules, a claim is sufficiently marked if a stake be placed at the center of each end with a notice describing the length and width of the claim. North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299; 1 Fed. Rep. 522; 9 Mor. Min. Rep. 529.

90. In the absence of a local statute or regulation, a stake at each end of the lode line, properly marked, is a sufficient marking of the boundaries of a claim, as the boundaries may be traced from a definitely fixed center line. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429. (Refusing to follow Holland v. Mt. Auburn G. Q. M. Co., 53 Cal. 149; 9 Mor. Min. Rep. 497; Gelcich v. Moriarty, 53 Cal. 217; 9 Mor. Min. Rep. 498.)

91. Marking by placing a stake at the discovery point, and one at the center of each end, on the croppings, is sufficient, in the absence of local statutes or regulations to the contrary, without marking the corners of the claim. Gleeson v. Martin White M. Co., 13 Nev. 442; 9 Mor. Min. Rep. 429.

92. No particular mode of marking is required in the absence of local laws or regulations. Jupiter M. Co. v. Bodie Cons. M. Co., 7 Sawy. 96; 11 Fed. Rep. 666; 4 Mor. Min. Rep. 411.

93. In the absence of local statutory requirement, a location notice recorded need not be a copy of the notice posted on the claim, as the United States law does not require any notice to be posted on claim. Gird v. California Oil Co., 60 Fed. Rep. 531.

94. When no mining regulations or customs are in force in a district where a mining claim is located, general customs then in force may be given in evidence upon the question of the reasonableness of its extent. A general uniform custom should be proved, if one exists. Table Mtn. Tunnel Co. v. Stranahan, 20 Cal. 198; 9 Mor. Min. Rep. 457; 31 Cal. 387 (1865).

95. In the absence of local regulations, the quantity of mining ground which may be located is restricted to a reasonable area. This question will be determined by the general usages and customs prevailing upon the subject. Table Mtn. Tunnel Co. v. Stranahan, 20 Cal. 198 (1862); 9 Mor. Min. Rep. 457.

96. In the absence of local statutes or rules, writing is not necessary to the conveyance of a mining claim. Lockhart v. Rollins, 2 Idaho, 503; 21 Pac. Rep. 413.

97. Miners' rules required possession of a mining claim to be predicated on a discovery and maintained by development work. Cons. Rep. Mtn. M. Co. v. Lebanon M. Co., 9 Colo. 343; 12 Pac. Rep. 212; 15 Mor. Min. Rep. 490. (Following Jennison v. Kirk, 98 U. S. 453.)

98. Local regulations requiring certain assessment work to be done on each location, held not to mean that it must be done on every two hundred feet of the entire claim held by several persons, but on the whole claim, irrespective of the number of locations or feet. Leet v. John Dare S. M. Co., 6 Nev. 218; 4 Mor. Min. Rep. 487.

99. 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, but such rules cannot limit the quantity of ground or the number of claims a party may acquire by purchase. Prosser v. Parks, 18 Cal. 47 (1861); 4 Mor. Min. Rep. 452.

100. The mere fact that a suit involves proof and construction of local mining laws, rules and regulations will not justify removal of the case to a Federal court as a case arising under the laws of the United States. Trafton v. Nougues, 4 Sawy. 178.

101. The jurisdiction of the State or the mining district is limited to laws and rules affecting extent and manner of working min-

ing claims. Territory v. Lee, 2 Mont. 124; 6 Mor. Min. Rep. 248.

102. Judicial notice will not be taken of mining district regulations. They must be proven like any other fact. Sullivan v. Hense, 2 Colo. 424; 9 Mor. Min. Rep. 487.

103. State laws or local regulations cannot relieve mine holders from the requirement of the United States laws with regard to annual expenditures for the benefit of claims. Sweet v. Webber, 7 Colo. 443; 4 Pac. Rep. 752; 4 West Coast Rep. 116.

104. The legality of mining district regulations must be decided by the court, and not left to the jury. Ralston v. Plowman, 1 Idaho, 595; 5 Mor. Min. Rep. 160.

105. Where local rules of miners exist, controversies affecting a mining right must be determined by the customs and usages of the bar or diggings where such right is asserted or denied, whether such customs are written or unwritten. Morton v. Solambo M. Co., 26 Cal. 527; 4 Mor. Min. Rep. 463.

106. The question of possession of mining claims under the California laws, rules, and customs, discussed. Atwood v. Fricot, 17 Cal. 37 (1860-61); 2 Mor. Min. Rep. 305; English v. Johnson, 17 Cal. 107 (1860-61); 12 Mor. Min. Rep. 202.

107. Courts must construe local mining rules and customs, and require owners of mining ground to develop and work such ground if consistent with law. King v. Edwards, 1 Mont. 235; 4 Mor. Min. Rep. 480.

108. Mining district laws when introduced in evidence are to be construed by the court, and whether by virtue of such laws a forfeiture has accrued is a question of law and cannot be submitted to the jury. Fairbanks v. Woodhouse, 6 Cal. 33 (1856); 12 Mor. Min. Rep. 86.

109. When the regulations of a mining locality require that every mining claim shall be worked two days in every ten, *held*, that the efforts of the owners to procure machinery for working the claim are by fair intendment to be considered as work done on the claim. Packer v. Heaton, 9 Cal. 568; 4 Mor. Min. Rep. 447 (1858): McGarrity v. Byington, 12 Cal. 426 (1859); 2 Mor. Min. Rep. 311.

110. Where parties' 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 diverted by any mere neighborhood custom or regulation. Waring v. Crow, 11 Cal. 366 (1858); 5 Mor. Min. Rep. 204.

111. If a patent is issued contrary to the regulations of a mining district in force, it is void, at least in so far as it is so in conflict, and may be attacked collaterally. Parley's Park S. M. Co. v. Kerr, 130 U. S. 256.

112. A location made prior to the mining act of 1866 is valid if made according to the then existing local laws and customs. Glacier Mtn. S. M. Co. v. Willis, 127 U. S. 471.

113. A corporation interested in mining may be represented by an officer or agent at a meeting of miners called to frame mining district rules and regulations. McKinley v. Wheeler, 130 U. S. 630.

114. It is not within the province of the General Land Office to instruct mining recorders. Com'r to J. O. Fain, Jan. 18, 1892.

LOCATION.

I. The Statute.

(See sec. 2324, U. S. Rev. Stat., p. 70.)

II. Regulations.

9. From and after the 10th May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet*, but in no event can a location of a vein or lode made subsequent to May 10, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

10. With regard to the extent of surface-ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case *exceed three hundred feet on each side of the middle of the vein at*

THE LAW

OF

MINES AND MINING

IN

THE UNITED STATES.

BY

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ST. PAUL, MINN.
KEEFE-DAVIDSON COMPANY.
1900.

CHAPTER X.

LOCAL MINING RULES AND REGULATIONS.

PRIOR to 1866 no law was enacted by Congress providing for the sale of the public mineral lands or regulating mining thereon. This gave rise to a phenomenon unique in the history of American law. During the interval between 1849 and 1866 there grew up and was established a common law of mining, — a law created and enacted by the miners themselves, which was almost at once recognized as a part of the law of the land and has since received the endorsement of legislative action. This law is the code of mining rules, regulations, or customs in force in each of the different districts. The system had its origin in the early mining camps of California, and the example there set was followed by all the miners on the public domain. The lands in which large deposits of the precious metals were found upon the Pacific slope were the property of the United States, were unsurveyed, and not open by the law to settlement. These the miners penetrated, explored, and developed. Their right to do so, and the title they acquired by engaging in mining upon the public domain, have been considered. But they found there no law to govern them in any of their relations. They accordingly assembled in miners' meetings, and there enacted codes of law for their government. For this purpose the country was divided into districts, each having its own set of district regulations or customs. These rules were generally in writing, and they bore a marked similarity in their provisions. They usually first defined the name and boundaries of the district; secondly, the number and kind of officers to be elected from time to time; and then fixed the extent and number of the claims that might be located, the qualifications of the locator, the manner of designating the claim — generally by posting and recording a notice — the amount of work required to hold the claim; and sometimes established a judicial system for the trial of causes and the enforce-

ment of the regulations. Their differences were those that arose from the extent and character of the mines and the kind of mining carried on in the different districts. But they all recognized *discovery* followed by *appropriation* as the foundation of the possessory title, and *development* as the condition of its retention. The California Practice Act of 1851, sec. 621, provided that proof of "the customs, usages, or regulations established or in force at the bar or diggings embracing such claims" might be given in causes regarding them in justices' courts, and "when not in conflict with the constitution and laws of the State should govern the decision of the action." [1]

But this effect, indeed, was given to them in all the courts, not only in California, but of the other mining States. They were the law by which, prior to 1866, the rights of conflicting claimants were determined; and the kind of property created by them found judicial recognition in the Supreme Court of the United States in *Sparrow* v. *Strong*, 3 Wall. 97.

The act of Congress of July 26, 1866, gave the sanction of law to these miners' rules so far as they were not in conflict with the laws of the United States. Section 1 of that act was as follows: "The mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the law of the United States."

Subsequent legislation specified with greater particularity the manner of location and appropriation and the extent of each mining claim, recognizing, however, the essential features of the rules framed by miners, and among others those which made discovery and appropriation the basis of title, and required work on the claim for its development as a condition of its ownership. The sections of the Revised Statutes now in force recognizing these regulations are sections 2319, 2320, and 2324.

Until 1872 there was no limit to the power of miners' meetings to legislate, except the general principles of the law and the acts of the State and Territorial legislatures. But the act of 1872 has

[1] See Code Civ. Proc. 1885, sec. 748.

superseded all the provisions of mining regulations upon all those subjects upon which it has made distinct provision, and the importance of these rules has been in consequence much diminished. It is, however, still competent for the mining districts to make regulations subject to the restrictions of the act. They may, within the limits prescribed by the act, fix the extent of claims; they may determine whether or not claims shall be recorded, whether and what posting of notice shall be done; they may make additional requirements in the manner of location, of marking boundaries and the like, and as to the amount of work.[1] Beyond this they cannot now go. Their scope is confined to the regulation of the location and working of mining claims. And with reference to these they may only govern the rights of miners as between themselves. They cannot be invoked as against the government or the owner in fee of land, though he holds by patent from the government. Nor have they any effect against the occupants or owners of ground not the subject of mineral appropriation.

Regulations must be reasonable in themselves, and not in conflict with the laws of the United States or with those of the State or Territory in which the district is situated.[2] If they are so, they are of no effect. Generally they are of binding force, but the act of Congress must not be construed in subordination to them. A patentee, for example, cannot by force of them acquire a greater estate than is by the law of the United States given to him. And a regulation of the amount of work necessary to hold a mining claim which is inconsistent with the requirements of Rev. Stats. 2324, or which fixes a less annual expenditure than that section, is entirely void. Rules imposing burdens or obligations in addition to those imposed by the act must be clear and positive, and not rest on inference or presumption.

While the mining districts may enact regulations, they are not bound to do so, and in the absence of proof it will not be presumed that they have done so. If they have not done so, a compliance with the law of Congress and of the State will secure the

[1] Arizona, Rev. Stats. 1887, sec. 2349; Oregon, Hill's Ann. Laws, 1892, sec. 3832; Washington, Gen. Stats., secs. 2210, 2211, 2213; Wyoming, Laws 1888, ch. 40, secs. 1–3; Montana, Code Civ. Proc. 1895, sec. 1321.

[2] Oregon, Hill's Ann. Laws 1892, sec. 3832; Utah, 2 Comp. Laws 1888, sec. 3472, p. 324; Washington, Gen. Stats. 1891, sec. 2213; Wyoming, Laws 1888, ch. 40, secs 1–3.

claim to the locator. To have the force of law, a regulation must be in force at the time of the location. It does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following its enactment. It likewise becomes void by disuse; this disuse, however, must be general: it is not sufficient that the rule has been disregarded or violated by a few persons. Whether it has so fallen into disuse is a question of fact. To satisfy the Land Department of such disuse, an applicant for a patent, it seems, must show that it is without exception. A locator, therefore, who intends to apply for a patent should not treat a regulation as obsolete if it is at all regarded.

Where a regulation has fallen into disuse, a custom reasonable in itself and generally observed, though contrary to the regulation, may be proved. But the written rules are presumed to be in force, and proof of a contrary custom must be clear. A witness may not be asked if he knows of a custom to prevent what the written rule prescribes, — at least, before the rule has been shown to have fallen into disuse. The existence of mining regulations is a fact, and must be proved as a fact whether in court or in the Land Office. Judicial notice will not be taken of them. Upon the person relying on them lies the burden of proving them. This is done by producing the original rules when in writing. They are generally deposited with some public officer, as the county recorder. When it is proved that rules were adopted and recognized, they become admissible in evidence. The fact that the meeting at which they were adopted was held upon a day different from that named in the notice thereof, does not, in the absence of fraud, render them inadmissible. And an alteration in one article of regulations after their adoption does not change the legal effect of the other articles.

When it is sought to prove regulations by copy, it should be shown that the copy comes from the proper depositary, and that he is empowered to certify copies so that they may become evidence. Neither these things nor the fact that such regulations prevailed in the district can be shown by the certificate itself or by other *ex parte* proof.

When the written regulations are deposited with some authorized officer, or recorded in his office, they may not be proved by parol evidence. Other evidence, however, besides proof of the

written record or of the acts of a miners' meeting is admissible as tending to prove the existence of a particular rule. This may be done by establishing a custom or usage in the district. The custom of recording claims in a district, while not proving absolutely the existence of a rule requiring such a record, tends to establish it. So on a subject as to which the written rules, when proven, are silent, a custom prevailing in the district may be proved; but regulations or customs of another district are not admissible to vary such a custom or the written rules.

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

When regulations have been proved, their construction, like that of other writings, is for the court. But where good faith is shown, a substantial compliance with them is sufficient.

There is a distinction between the local rule made by a few miners within a district and a mining regulation enacted by the whole district, or a custom in universal force throughout the district. The former is not binding upon the locator, unless he had actual notice of its existence or assisted in its enactment.

The effect of a failure to comply with local regulations is discussed below in Chapter XI., Div. II.

United States. *Campbell* v. *Rankin*, 99, 261 (1878). "But the local record of a mining community, while it may be and probably is the best evidence of the rules and customs governing the community and to some extent the distribution of mining rights, is not the best evidence or the only evidence of priority or extent of actual possession. It may fix limits to individual acquisitions, the terms and rules for acquiring and transferring mining rights as the laws of the State do in regard to ordinary property; but such rules and customs no more determine who was the first locator or where he located, than any other competent evidence of that fact."

Mt. Diablo M. & M. Co. v. *Callison*, 5 Sawy. 439 (1879), C. C. D. Nev. The mining laws of Columbus District, sec. 8, provided: "Each locator or claimant in any ledge shall be entitled to three hundred feet by location. . . . The locator or locators of any ledge or lode shall also be entitled to hold one hundred feet on each side of said ledge or lode, together with all minerals therein contained." Also, "each claim located shall have a mound or stake placed thereon, on which shall be marked the name of the company, and the number of feet located and claimed," and "all notices of location shall contain the names of locators or claims." A notice claiming fourteen

hundred feet upon a certain lode, "together with all the privileges granted by the laws of the C. Mining District, running seven hundred feet each side of this notice," is sufficient to entitle the locators to hold one hundred feet each side of the lode.

North Noonday Min. Co. v. *Orient Min. Co.*, 6 Sawy. 299; 1 Fed. 522 (1880), C. C. D. Cal. A regulation prescribing a width of claim less than that fixed by Rev. Stats. 2320, to be valid must be in force at the time of the location. The statute of California provides that "proof must be admitted of the customs, usages, or regulations established and in force," and that they must govern the decision of the action. A regulation does not, like a statute, acquire validity by its mere enactment, but from the customary obedience and acquiescence of the miners following its enactment. It is void whenever it falls into disuse or is generally avoided. Whether it has so fallen into disuse is a question of fact to be determined by the jury on the evidence. Violation by a few persons is not sufficient to abrogate a rule still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused. In this case defendant showed a regulation fixing the width at fifty feet on each side, adopted in 1860, and continued by amendments to 1867. There was no action in regard to the rules of the district from that time to 1876 (after the locations in question), when the miners declined to adopt the "United States Law." The plaintiff showed that there were no locations in the district in 1872; one in 1873, with no width specified; none in 1874; eleven in 1875, of which nine were three hundred feet, and two fifty feet on each side; in 1876, twenty-five, of which six were three hundred feet, and the rest fifty feet on each side. It was argued from this that there had been an abandonment of mining in the district for several years, and that there were no rules, and the jury found for the plaintiff.

Jupiter M. Co. v. *Bodie Consol. M. Co.*, 11 Fed. 666; 7 Sawy. 96 (1880), C. C. D. Cal. Same point as in *North Noonday M. Co.* v. *Orient M. Co.* Jury charged in almost identical language.

Woodruff v. *North Bloomfield G. M. Co.*, 18 Fed. 753 (1884), C. C. D. Cal. The right to deposit refuse upon the lands along the banks of a river cannot be set up as a "custom of miners." "None of these (statutory) provisions, either State or National, have any relation at all to the subject matter of this suit. They simply recognize and legalize customs and regulations by which miners' rights, as between themselves, upon the public lands may be secured, regulated, and protected. They relate to 'mining claims' alone,—to the manner of acquiring and protecting rights in them. They refer to the extent of the claim, the manner of taking up and holding it, the evidence of title, etc., as between themselves and as against each other, and in the State legislation, not as against the government or owner of the land. Much less does it attempt to give them rights as against private parties, vested with the fee of other lands not mining, and not even within the mining regions. It has no relation to lands owned in fee by private parties. The principle acted upon was to regard the miners, as against everybody except the owner of the lands in which the mines were found, as the proprietors of limited portions of the mines on the public lands actually in their possession and occu-

pation, and to prescribe rules for the acquisition, regulation, and protection of such limited rights."

Erhardt v. *Boaro*, 113, 527 (1884). Field, J.: "Before 1866, mining claims upon the public lands were held under regulations adopted by the miners themselves in different localities. These regulations were framed with such just regard for the rights of all seekers of the precious metals, and afforded such complete protection, that they soon received the sanction of the local legislatures and tribunals; and, when not in conflict with the laws of the United States, or of the State or Territory in which the mining ground was situated, were appealed to for the protection of miners in their respective claims, and the settlement of their controversies. And although, since 1866, Congress has to some extent legislated on the subject, prescribing the limits of location and appropriation and the extent of mining ground which one may thus acquire, miners are still permitted, in their respective districts, to make rules and regulations not in conflict with the laws of the United States or of the State or Territory in which the districts are situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. Rev. Stats. 2324. In all legislation, whether of Congress or of the State or Territory, and by all mining regulations and rules, discovery and appropriation are recognized as the sources of title to mining claims, and development, by working, as the condition of continued ownership until a patent is obtained." "It does not appear, in this case, that there were any mining regulations in the vicinity of the Hawk Lode, which affect in any respect the questions involved here. Had such regulations existed they should have been proved as facts in the case. We are therefore left entirely to the laws of the United States and the laws of Colorado on the subject."

Glacier M. Co. v. *Willis*, 127, 471 (1887). Locations made prior to the passage of the act of 1866 are governed by the local rules and customs in force at the time of the location. Whether a location was so made cannot be determined on demurrer.

Parley's Park S. M. Co. v. *Kerr*, 130, 256 (1889). The question under Rev. Stats. 2319, as to what customs and rules of miners in a mining district, not inconsistent with the laws of the United States, are in force in the district when an application is made for a patent of mineral land, is one of fact determinable by the Commissioner of the Land Office. A rule of a mining district, adopted May 17, 1870, limiting the width of a mining location to two hundred feet, was so modified on May 4, 1872, that thereafter the surface width was to be governed by the laws of the United States. Consequently the provisions of the act of May 10, 1872, as to width of claims were in force in the district.

McKinley v. *Wheeler*, 130, 630 (1889). A corporation interested in mining may be represented by its officer or agent at any meeting of miners called together to frame rules and regulations in their mining district.

Arizona. *Rush* v. *French*, 1, 99 (1874). Before May 10, 1872, possession and occupancy, so long as they continued, were sufficient to hold a mining claim against one attempting to make

a subsequent location. "If the miners had legislated upon the subject, and in their local assemblies, known as miners' meetings, had adopted a law that mere possession should not hold against a party regularly locating under the laws, then such possession would not prevail as against such subsequent location; but in the absence of such law, and its absence is presumed until the contrary is shown, actual possession is good as long as it lasts."

"Up to May, 1872, there was generally no limit to the power of the local legislatures known as miners' meetings, except the general principles of law. During this time, then, actual possession was good so far as it did not claim more than the law allowed, it not being shown that a failure to comply with the rules by posting a notice, recording, working, etc., was of itself declared to work a forfeiture."

Johnson v. *McLaughlin*, 1, 493 (1884). Defendant located his claim in accordance with the provisions, and complied with all the requirements, of the statutes of the United States and the Territory, but did not comply with a district regulation by which a locator was required to record his claim with the district recorder and procure him to go upon the ground to inspect the same for the purpose of finding prior claims. Subsequently plaintiff located the same ground, complying with the district regulation as well as with all other requisites. *Held*, as there was no provision in the district regulations for forfeiture for failure to comply with this rule, the defendant's title was not defeated but was valid. "The laws of the United States are of course paramount. . . . The laws of either State or Territory must not conflict with those of the United States, and so far as they do they are entirely nugatory to the extent of said conflict."

California. *Fairbanks* v. *Woodhouse*, 6, 433 (1856). "Mining laws, when introduced in evidence, are to be construed by the court, and the question whether by virtue of such laws a forfeiture had accrued is a question of law. It was therefore improper to submit it to the determination of the jury."

Waring v. *Crow*, 11, 366 (1858). The rights of the owner of a mining claim being fixed by the rules of property, which are the general law of the land, cannot be divested by neighborhood custom or regulation. The court below was affirmed, having charged: "Where a party has once acquired a right by possession to a mining claim, no mining law can divest him of that right unless he assisted in the passage of such law, in which case he would be considered a party to the contract. Mining laws may be given in evidence to prove a custom in respect to the size of claims, or to raise a presumption of abandonment where such laws have a universal notoriety throughout such district; or if they have not, then proof must be given that the party sought to be bound had actual notice of them."

McGarrity v. *Byington*, 12, 426 (1859). "The failure to comply with any one of the mining rules and regulations of the camp is not a forfeiture of title. It would be enough to hold the forfeiture as the result of a non-compliance with such of them as make non-compliance a cause of forfeiture."

Roach v. *Gray*, 16, 383 (1860). In a suit for mining claims,

defendants may give in evidence the mining rules of the district, though adopted after the rights of the plaintiff attached. Admitting that the plaintiff's 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 the instructions of the court.

Atwood v. *Fricot*, 17, 37 (1860). See this case under Chap. XIII., Div. I., *post*.

English v. *Johnson*, 17, 107 (1860). Miners have the right to prescribe rules governing the acquisition and divesting of title to claims and their extent, subject only to the general laws of the State. An extract or single clause of a book containing the mining rules of a district is inadmissible; the whole of the laws in the book should be offered.

Prosser v. *Parks*, 18, 47 (1861). The quantity of ground a miner may acquire by location or prior appropriation for mining purposes may be limited by the rules and regulations of the district, but not the quantity or the number of claims he may acquire by purchase.

Gore v. *McBrayer*, 18, 582 (1861). The fact that the notice of a meeting to pass mining rules named a day different from that on which they were passed does not affect their admissibility as evidence. It is enough that the miners agreed upon their local laws, and that these are recognized as the rules of the vicinage unless some fraud be shown or some other like cause for rejecting the laws.

Table Mountain Tunnel Co. v. *Strahahan*, 20, 198 (1862). Upon the question of reasonableness of the extent of a mining location, a general custom, whether existing before the location or not, may be given in evidence; but a local rule stands upon a different footing, and is inadmissible to affect the validity of a claim acquired previous to its establishment. "The former results from the general sense of the mining community as to what is just and reasonable in that respect, and in connection with the particular circumstances of the case, may be safely relied on in arriving at a conclusion. The latter owes its origin to the will and discretion of a few individuals, and operating directly upon the location sought to be limited, would be an improper and unjust criterion of action, as in many cases its effect would be to deprive persons of property to which, prior to its adoption, they had a valid legal right."

Colman v. *Clements*, 23, 245 (1863). In ejectment for mining claims, mining rules and customs in support of an alleged title may be given in evidence without having been averred in the complaint.

Morton v. *Solambo Copper Min. Co.*, 26, 527 (1864). Mining regulations, having received the sanction of the legislature in the act of 1852, 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.

If a mining custom allows a person to locate a vein or lode 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 others, some of whom have no knowledge of the location, these latter become tenants in common

with the locator and the others, and cannot be divested of their interest by the locator's afterwards tearing down the notice and posting another, omitting their names, unless this is done with their knowledge and assent.

Table Mountain Tunnel Co. v. *Stranahan*, 31, 387 (1866). Where there are no local customs or regulations in force in the district where a mining claim is located at the time of its location, general customs then in force are admissible upon the question of the reasonableness of its extent, but not evidence of local usages and customs in different localities varying from each other as to the size of claims located.

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 plaintiff's location to the same amount, before the adoption of the custom, was unreasonable in size.

Section 621 of the Practice Act provides that local customs, etc., not general customs, shall govern the decision of actions. If a company locates a mining claim of a certain width extending through the 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 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.

An alteration made after their adoption in one of several mining regulations, reduced to writing by the officers of the meeting, does not change the legal effect of the other articles.

Pralus v. *Jefferson G. & S. M. Co.*, 34, 558 (1868). In an action to quiet title to a mining claim, the findings were entirely silent as to the method which the mining laws or customs prescribed for locating, working, or defining the boundaries of claims or their extent. "In the absence of light on these subjects it is impossible to say whether or not the plaintiffs located their claim in accordance with those laws or customs, and as the plaintiffs hold the affirmative of the issue it is incumbent on them to prove not only what acts were required to be done under the mining laws or customs to locate and hold a claim, but also to show a compliance on their part with these requirements."

Harvey v. *Ryan*, 42, 626 (1872). In an action for possession of a mining claim, where plaintiff relied upon a location under certain written rules adopted by the miners of the district, which contained no requirements that notices should be posted on the claims at the time of the location, defendant may prove a custom in the district requiring such posting of notices. No distinction is made by the statute (Practice Act, sec. 3, 621) between the effect of a "custom" or "usage," the proof of which must rest in parol, or a "regulation," which may be adopted at a miners' meeting and embodied in a written local law.

The custom or regulation must not only be established, but must be in force. A custom reasonable in itself and generally observed will prevail as against a written mining law which has fallen into disuse. Whether the law is in force at any given time is for the jury.

The custom sought to be proven in this case was not even in conflict with the mining rules. It merely prescribed another and not unreasonable act in the series of acts required for a location.

Original Co. v. *Winthrop Mining Co.*, 60, 631 (1882). It was error to charge the jury that a locator of a mining claim must not only observe the act of Congress which required that ten dollars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein, until a patent shall have been issued therefor, "but also the local regulations of the miners of this district which require that work shall be done every sixty days on the claim." There is a clear conflict between the law and the regulation, and the law must prevail.

Donahue v. *Meister*, 88, 121 (1891). A notice written on one side of a sheet of paper, which was folded with the writing inside and placed on a mound of rocks three feet high and under two flat rocks, so that about three-quarters of an inch of the margin was exposed to view, and which was so placed not for the purpose of concealing it, but in good faith to protect it from the weather, is sufficiently posted to comply substantially with a regulation requiring that "the notice should be posted conspicuously in a conspicuous place upon the claim located." A substantial compliance with mining customs, where good faith is shown, is sufficient.

Colorado. *Sullivan* v. *Hense*, 2, 424 (1874). Before any law was enacted by the territorial assembly, regulating the manner of locating and conveying mining claims on the public domain, these were governed and regulated by laws made by the inhabitants of the district in which the claim was situated, or in the absence of such rules by the local customs and usages of the district. These were subsequently given legal effect by the legislature. Judicial notice cannot be taken of these rules, usages, and customs. They must be proved at the trial like any other fact.

Wolfley v. *Lebanon M. Co. of N. Y.*, 4, 112 (1878). Local laws when not in conflict with the laws of the United States are of binding force and must be observed, but the act of Congress is not to be construed in subordination of these laws. A patentee cannot acquire by virtue of local law or custom a greater interest or estate than that which the paramount law warrants.

Sweet v. *Webber*, 7, 443 (1884). Neither a rule of miners nor a State law can authorize a less annual expenditure on claims than is required by the act of Congress, without being in conflict therewith and therefore void.

Becker v. *Pugh*, 9, 589 (1886). A requirement of miners' regulations that a claim be "staked off," means, it seems, that the boundaries, or at least the course of the veins, be marked with stakes. It is not complied with by erecting one stake containing a notice.

Dakota. *Flaherty* v. *Gwinn*, 1, 509 (1878). Defendant offered in evidence the record books of the district as tending to show that there was during a certain time a custom among miners in the district requiring locations to be recorded. Counsel stating that this was to be followed by other evidence tending to prove the same thing, it was held to be admissible.

"Now there are more ways of proving a rule or regulation of miners than by the act of the miners in their meetings or by a written record. Such rule or regulation may be established and shown to be in force by custom or usage." "In order to deprive a party of the right to property which he is enabled to acquire by a compliance with the provisions of the statutes of the United States, by the imposition of any additional burdens or obligations imposed by rules and regulations of miners, such rules and regulations must be clear and positive in their character and requirements, and must not rest in inference or presumption; they must enforce an obligation to do some certain and specific act, which, if not complied with, will, by the terms of the rule, deprive the locator of some right.

"Where miners, in their experience, deem some additional rule or regulation requisite, providing for some additional act thought necessary for the better protection of the miner and his rights in mining property, there is no doubt in my mind but that it is entirely competent for them to establish such rules and regulations, provided they are reasonable and do not conflict with federal or territorial legislation, and attach penalties for their violation. Now, if it was the custom of miners to record all claims located in the office of the mining recorder of the district, that fact is proper to be given in evidence as one act only, tending to prove a local rule or regulation making the recording obligatory."

Idaho. *Ralston* v. *Plowman*, 1, 595 (1875). It is error to admit parol evidence of local mining customs when it appears that they were recorded in the proper office according to the laws relating thereto. Whether mining regulations are contrary to law is for the court, not the jury.

Rosenthal v. *Ives*, 2, 244 (1887). Rules and customs of miners reasonable in themselves and not in conflict with any higher law may still be adopted and enforced as a part of the law. A custom limiting placer claims to eighty rods in length is reasonable and in entire harmony with the spirit of the law.

Montana. *King* v. *Edwards*, 1, 235 (1870). "The mining customs of any particular mining district have the force and effect of laws, or in other words, are laws." "The title to mineral lands is vested in the United States. Any citizen of the United States, or any person who has declared his intention to become such, may, by complying with the local rules and customs of any district, become vested with the right to possess and mine any specific portion of mining ground. The customs which point out the manner of locating mining ground are conditions precedent. A substantial compliance with them is necessary. The right to possess and mine any mining ground is derived from the United States by virtue of this compliance. The United States is divested of this right as effectually as if these rules and customs were acts of Congress, for they are now the American common law of mining for precious metals. The regulations of miners which require that so much work must be performed upon each claim are conditions subsequent." Their breach works a forfeiture, although the rule itself does not so provide. What customs are in force in a district is a question for the jury, and it would be

error to charge that because there is a dispute as to what is the custom, a forfeiture cannot be found.

The written laws of a district are presumed to be in force, and a custom contrary to them must be clearly proved. It is not competent to ask a witness if he knows of a custom of a district to prevent a thing the opposite of which was prescribed by the written rule. The rules and customs of one district cannot be introduced to vary those of another district.

Mining rules and customs must be reasonable. A custom requiring work to be performed directly in reference to ground in the district is not unreasonable. Where mining ground could not be worked profitably without going outside the district to run a bed rock, flume, or drain race to it, a custom requiring work to be done in the district to represent it might be unreasonable.

Boucher v. *Mulverhill*, 1, 306 (1871). Mining regulations provided "that no claim shall be recognized as legally held unless the prior claimant has personally pre-empted the same, with the exception of three claims allowed the discoverers for their prospecting partners." *Prospecting partners* is not to be construed by the law of strict partnership. It includes those who furnish money and provisions, for which they are to receive interests in the mining grounds that might be discovered. This rule is not against public policy, and should be upheld.

Robertson v. *Smith*, 1, 410 (1871). "The clause 'subject to such regulations as may be prescribed by law' reserves only the right to regulate the manner and conditions under which miners must work their claims, by legal enactments. The clause 'subject to the local customs or rules of miners in the several mining districts' refers evidently to the rules, customs, and regulations of miners in relation to the location, user, and forfeiture of mining claims. By no rule of legal construction that I am aware of can these clauses be made to refer to a reservation of a right to the public to construct a highway over located mining claims."

Orr v. *Haskell*, 2, 225 (1874). A book containing the rules and regulations of the miners of the district in which the mining land in controversy was situated is competent evidence under sec. 504, Civ. Prac. Act, and under sec. 207, same act, the jury may take said book to their room when they retire for deliberation.

Gropper v. *King*, 4, 367 (1882). When the rules and customs of a mining district are not in conflict with the laws of the United States or the Territory, they become a part of the law of the land, and when complied with in the taking up and locating mining ground, a grant from the government follows and title vests in the locator.

Nevada. *Mallett* v. *Uncle Sam G. & S. M. Co.*, 1, 188 (1865). Usually the mining claims in this State have been located with direct reference to the mining laws established in the district where the location is made. Such mining laws when once established are recognized by the courts, and indeed the legislature of the State has given them the force and binding obligation of legislative enactment (Stats. of Nev., p. 21, sec. 77). When those mining laws directly point out how mining claims must be located, and how the

possession once acquired is to be maintained and continued, that course must be strictly pursued. A failure to do so works a forfeiture, —not a strict forfeiture, "but a kind of forfeiture recognized by the courts of this coast from the earliest day, and which is certainly founded upon rational and just principles." When a court presumes title in a 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. In the absence of mining laws, the miner locating a claim holds only by actual occupancy and by such working for the development of the mine as would under all the circumstances be deemed reasonable, and his right of possession will only be continued by occupancy and use.

Oreamuna v. *Uncle Sam G. & S. M. Co.*, 1, 215 (1865). *Mallett* v. *Uncle Sam G. & S. M. Co.* followed. It was not error to instruct the jury as follows: "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 mining rules and customs established and in force in the district where the claim is situated upon which such right is made to depend."

Smith v. *North American M. Co.*, 1, 423 (1865). Mining customs may be proved under the Nevada statute, however recent their date or short the duration of their establishment. The common law rules as to customs do not apply to them.

Leet v. *John Dare S. M. Co.*, 6, 218 (1870). The mining regulations of the White Pine District provided that each claimant should be entitled to hold by location two hundred feet; that all locations should have two days' work done upon them annually for each location; that work done upon a portion of a location should be deemed done for the benefit of the whole of said location. *Held*, where a company located twelve hundred feet, "location" in the regulations meant the aggregate of the ground claimed by the parties, and not the interest of a single shareholder, and two days' work was sufficient to preserve the claim from relocation for a year.

Golden Fleece G. & S. M. Co. v. *Cable Consolidated G. & S. M. Co.*, 12, 312 (1877). "All that the government requires to be done in order to obtain its license to occupy is prescribed by the law, and in the absence of local rules a compliance with the public law will secure the claim. The miners in their respective districts may, if they choose, exact something more; but they are not obliged to do so, and no court, in the absence of proof, will presume that they have done so." "Proof of a record is totally irrelevant without proof of some regulation making a record obligatory or giving it some effect." For neither of these does the law provide, leaving their enactment to the miners of the respective districts.

Gleeson v. *Martin White M. Co.*, 13, 442 (1878). It seems that the act of 1872 was a revocation of local rules requiring notices and record, and if a locator chose to mark his boundaries at once, the validity of his claim was not affected by his failure to record. These provisions of the local rules, if remaining in force, only serve to protect the claim during the time reasonably necessary for tracing its course and marking its boundaries. But if such rules were re-enacted

after the passage of the act of 1872, then compliance with them became essential.

Poujade v. *Ryan*, 21, 449 (1893). The court will not take judicial notice of the existence of a rule requiring claims to be recorded. Such rule, if it exists, must be proved like any other fact in the case.

South Dakota. *Marshall* v. *Harney Peak T. M. M. & M. Co.*, 1, 350 (1890). In the absence of proof of regulations, it will be presumed that none exist.

Utah. *Roberts* v. *Wilson*, 1, 292 (1876). "In order to introduce the written local mining laws of a district, it is necessary that it should appear *aliunde* that the copy comes from the proper repository, and that such party was empowered to give a certified copy so as to become evidence, and that such was a copy of the laws prevailing and in force in the district at the required date. These things have not been, and could not be, shown by the certificate attached to the alleged laws. Nor is there any authority for showing them by affidavit. This could only be done by express statute, and no such statute exists. In attempting to prove these facts the opposite party is entitled to his right of cross-examination; from which he is cut off if *ex parte* affidavits are sufficient."

McCormick v. *Varnes*, 2, 355 (1878). Congress has given to the local laws and customs of miners the force and effect of laws, so far as they are not in conflict with any superior law.

Land Office Decisions.

A location notice which, after naming the locators and their interests to the extent of 1,000 feet, concludes: "We claim 500 feet easterly and 500 feet westerly, situate about 200 feet easterly from the Sacramento," is sufficient under mining rules which require the notice to state "the number of feet claimed in the location and number claimed each side of monument," and that "in making a record of location of any claim the same shall be definitely described with reference to some natural or artificial monument."

Where the district rules provide that "the recorder in person or through his deputies go on the ground before filing a location for record and see that the proper notice and monument are placed thereon, and note on the notice and in a book for that purpose the locality of said location," the fact that notice was filed and recorded is corroborative evidence that the locator had complied with the law in the matter of location. *Red Pine Mine*, Copp, 158 (1875).

"The laws adopted by miners of a district must remain in force until amended, or repealed by the same authority that established them, or until abolished or modified by a law of the United States, or of the State or Territory within which the district is situated." An applicant for a patent, who had not complied with the local regulations, alleged that they were obsolete, and proved that a majority of locators in the district had disregarded them, though some had located in accordance with them. This was held not to establish the allegation, and the application was refused. *Chavanne Quartz Mine*, Copp, 283 (1880).

MINES AND MINING

A COMMENTARY ON THE LAW OF

MINES AND MINING RIGHTS

BOTH

COMMON LAW AND STATUTORY

WITH APPENDICES

CONTAINING

THE FEDERAL STATUTE AND THE STATUTES OF THE WESTERN STATES AND TERRITORIES RELATING TO MINING FOR PRECIOUS METALS ON THE PUBLIC DOMAIN

AND

FORMS FOR USE IN APPLICATION FOR PATENT AND ADVERSE SUITS

BY

WILSON I. SNYDER

OF THE UTAH BAR

IN TWO VOLUMES

VOLUME I

CHICAGO

T. H. FLOOD AND COMPANY

1902

CHAPTER VII.

SUPPLEMENTAL DISTRICT RULES.

§ 118. Distinction between district rules under the statute and those which existed prior thereto.— The district rules authorized by the statute are closely allied in their force and effect to state statutes.[1] They form part of the present law of mining,[2] titles rest upon them, and more may be yet acquired.[3] Moreover, while in some parts of

[1] In re Monk, 16 Utah, 100, 50 Pac. Rep. 810; Sanders v. Noble, 22 Mont. 110, 55 Pac. Rep. 1037; Sissons v. Summers, 24 Nev. 379, 55 Pac. Rep. 829; Jupiter M. Co. v. Bodie M. Co., 11 Fed. Rep. 666; McCornick v. Varnes, 2 Utah, 355.

[2] Johnson v. McLaughlin, 1 Ariz. 493, 4 Pac. Rep. 130; Sullivan v. Hense, 2 Colo. 424; Dutch Flat Water Co. v. Mooney, 12 Cal. 534.

[3] Morton v. Solambo M. Co., 26 Cal. 527; Table Mountain Tunnel Co. v. Stranahan, 31 Cal. 387; Donohue v. Meister, 88 Cal. 121.

some states the district organizations have lapsed and have no longer any potential existence, there are other parts of states where the district organizations are preserved intact, either supplemental to or co-ordinate with state statutes, or as *quasi*-independent systems.

The difference between the rules and customs authorized by congress and those which before existed is in many instances most marked, in that any assumed authority beyond the limitations fixed by congress is, as a general rule, carefully avoided; and while many of the rules themselves remain the same in form, there is this distinction to be borne in mind with reference to them: those enacted since the statute rest upon the authority delegated by congress and are limited in respect to their potency thereby; while those existing prior to the statute, whether they exist from notions or suppositions of necessity as a corollary adjunct to mining everywhere, and are so observed, or whether they exist by reason of having been enacted by that solemn conclave — that American stannary parliament — the miners' meetings, they are recognized by the courts and by the law as of controlling influence in respect to mining claims. And it matters not what name is applied to them, whether it be customs, miners' rules and regulations or the by-laws of the district, they come to us not only in the humble garb of custom, but as an authoritative enunciation of the mining common law of the vicinage;[1] a different custom, it is true, from the immemorial custom so long recognized in England, but a custom none the less.[2]

§ 119. District rules authorized by law of congress — Special limitations — What they may contain.— The district rules, since the passage of the acts of congress of 1866 and 1872, are merely a continuation in many respects of the rules in force prior thereto, where not superseded by the laws of congress and the laws of the state or territory.

[1] King v. Edwards, 1 Mont. 235; Gleeson v. Martin White M. Co., 13 Nev. 442.

[2] See comment in Preface.

Under the law of congress[1] the district has the right to pass local laws, rules and regulations governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the requirements of the above law that the location must be distinctly marked upon the ground so that its boundaries can be readily traced, and all records of mining claims authorized by district rules or state statutes must refer to some natural object or permanent monument. Likewise the annual labor or improvements must not be less than one hundred dollars in value.[2]

§ 120. The binding force and intrinsic value of district rules — Must be authorized, and must be reasonable in themselves — Must be obeyed. — It is manifest from the foregoing that district rules, to be binding, must be within the letter and spirit of the authority granted by the law of congress; must not conflict therewith nor with state statutes. This narrows their scope. Where congress has acted there is no need for district rules. Where it has not, or has not authorized district rules or state statutes, it must be manifest that neither can be enacted or exist, for want of power.[3]

In recognizing and authorizing the continuance of local customs or district rules, congress meant just what the words implied: that the districts, where states or territories had not acted, might make laws, and such laws would be binding. Moreover, congress recognized the force and effect of miners' customs as they existed, and must be presumed to be mind-

[1] R. S. U. S., § 2324.

[2] Id.; Erhardt v. Boaro, 113 U. S. 537; Golden Fleece G. & S. M. Co. v. Cable Con. G. & S. M. Co., 12 Nev. 312; Leet v. John Dare S. M. Co., 6 Nev. 218; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522; Riborado v. Quang Pang. M. Co., 2 Idaho, 131, 6 Pac. Rep. 125.

[3] Hammer v. Garfield M. Co., 130 U. S. 291; Thompson v. Spray, 72 Cal. 528, 14 Pac. Rep. 182; Atwood v. Fricott, 17 Cal. 37; Becker v. Pugh, 9 Colo. 589, 13 Pac. Rep. 906, 17 Colo. 243, 29 Pac. Rep. 173; Lockhart v. Rollins, 2 Idaho, 503, 21 Pac. Rep. 413; Robertson v. Smith, 1 Mont. 410; Mallett v. Uncle Sam M. Co., 1 Nev. 188.

ful of the fact that titles rested upon them; and if reason were necessary, herein is to be found the reason for their existence and the authority for their continuance. Of necessity such customs, rules and regulations must be reasonable, and moreover be within the authority granted; they must be recognized and followed by miners, and have such universal application and receive such general observance as to give the miners the right to believe that all miners in the district do act and will act with reference to their provisions, and obey them.[1] It will thus be seen that while the miners' rules and regulations, prior to the statute, could be much broader and more comprehensive in their scope and effect, being circumscribed only by the general requirement that they do not conflict with natural right nor the general laws of the country, nor its constitution, and likewise that they are reasonable within themselves, those under the federal statute, in addition to this limitation, are restricted in their operation and value still further, in that, as before noted, they must not be contrary to the authority granted by congress. In fine, then, mining customs, rules and regulations, when not in conflict with state or national law, and when reasonable in themselves, must be complied with.[2]

[1] Glacier Mountain Silver M. Co. v. Willis, 127 U. S. 471; Broder v. Natoma W. & M. Co., 101 U. S. 274; Chambers v. Harrington, 111 U. S. 350; s. c. *sub nom.* Harrington v. Chambers, 3 Utah, 94; Eberle v. Carmichael, 8 N. M. 169, 42 Pac. Rep. 95; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 522; Becker v. Pugh, 9 Colo. 589; Sullivan v. Hense, 2 Colo. 422; Con. Rep. M. M. Co. v. Lebanon M. Co., 9 Colo. 343, 12 Pac. Rep. 212; Harvey v. Ryan, 42 Cal. 626; King v. Edwards, 1 Mont. 235; Jupiter M. Co. v. Bodie Con. M. Co., 11 Fed. Rep. 666; Prosser v. Parks, 18 Cal. 47; Noonan v. Caledonian M. Co., 121 U. S. 393.

[2] Woodruff v. North Bloomfield Gravel M. Co., 18 Fed. Rep. 753–802; King v. Edwards, 1 Mont. 235; McCornick v. Varnes, 2 Utah, 355; Gleeson v. Martin White M. Co., 13 Nev. 442; Harvey v. Ryan, *supra;* Rosenthal v. Ives, and Lansdale v. Ives, 2 Idaho, 244, 12 Pac. Rep. 904; Upton v. Larkin, 7 Mont. 449, 17 Pac. Rep. 728; Orr v. Haskell, 2 Mont. 225; Hess v. Winder, 30 Cal. 349; Merritt v. Judd, 14 Cal. 64; English v. Johnson, 17 Cal. 107; St. John v. Kidd, 26 Cal. 263; Titcomb v. Kirk, 51 Cal. 288; Watervale M. Co. v. Leach (Ariz.), 33 Pac. Rep. 418; Erhardt v. Boaro, 113 U. S. 527.

§ 121. Necessity of following local rules — Language of courts — Customs must also be lawful. — It may be laid down as axiomatic, and the supreme court of the United States and the land department of the government have always acted upon the theory, that mining locations, as a general rule, are governed by local rules and customs, wherever the location was made prior to statute; and that where made subsequent to statute it will be presumed, in the absence of a showing to the contrary, that local customs and the statute have been complied with.[1] It is necessary that this should be so in order to preserve a uniformity of decision and opinion. It is likewise necessary that there should be an actual compliance with the laws, not only federal but such local rules as obtain and are recognized in the district.[2] The supreme court of Idaho states the general rule clearly, and while it repeats to some extent what is already stated, we reproduce it as a correct statement of the law: "Rules and customs of miners, reasonable in themselves and not in conflict with any higher law, have long been recognized and sanctioned by legislative enactments and judicial decisions. That such rules may still be adopted and enforced as part of the law of this country is too well settled to admit of argument. We cannot see that the custom in question (a custom limiting all placer claims in the district to eighty rods in length) in any way conflicts with either the acts of congress or the laws of the territory, but, on the contrary, we think the custom a reasonable one and entirely in harmony with the spirit of the laws."[3] It is not enough that certain customs are recognized and considered binding upon

[1] Robertson v. Smith, 1 Mont. 410; Atchison v. Peterson, 20 Wall. 507; Glacier Mountain Silver M. Co. v. Willis, 127 U. S. 471; Jennison v. Kirk, 98 U. S. 452; Jackson v. Roby, 109 U. S. 440; Chambers v. Harrington, 111 U. S. 350; Basey v. Gallagher, 20 Wall. 670.

[2] Gleeson v. Martin White M. Co., 13 Nev. 442–464; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312.

[3] Rosenthal v. Ives, and Lansdale v. Ives, 2 Idaho, 244, 12 Pac. Rep. 904. See also St. Louis S. & R. Co. v. Kemp, 104 U. S. 52; Gropper v. King, 4 Mont. 367, 1 Pac. Rep. 755.

the miners of the district, but they must also be lawful. For example, the commission of a trespass can never be permitted under the sanction of custom; and it matters not that long silence may imply license by the upper quartz miner or mill man to permit his debris to float upon the lower one, it is nevertheless unlawful. So, allowing the debris from a mine to drift down the stream, and fill the natural channel, thereby causing the water and sand to spread over the country, and polluting the waters of said stream, cannot be justified by custom; and, unless authorized by statute, it will be restrained.[1]

§ 122. Writing — Immaterial whether district rules are in writing or parol — Mode of enactment immaterial. Since the vital and material question respecting miners' rules and customs is, as we have seen, whether they are in force and generally understood and obeyed, and whether from that miners will be presumed to have acted with reference to them, it is quite immaterial by what means they were enacted or brought into existence; whence it follows that courts will not inquire into the regularity of the enactment of district rules.[2] It is sufficient, and as far as the court will inquire, that they are generally understood to be in force and so observed. It is also immaterial whether they are in writing or rest in the common knowledge of the miners.[3] Thus, mining district rules may be shown to be in force by custom or usage without proof of formal adoption by written record.[4] To be recognized, however,

[1] Woodruff v. North Bloomfield Gravel M. Co., 18 Fed. Rep. 753; Lincoln v. Rogers, 1 Mont. 217.

[2] Gore v. McBrayer, 18 Cal. 582.

[3] Flaherty v. Gwinn, 1 Dak. Ty. 509; Campbell v. Rankin, 99 U. S. 261; North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522, 6 Sawy. 299; Jupiter Con. M. Co. v. Bodie M. Co., 11 Fed. Rep. 666, 673; Gore v. McBrayer, *supra;* Pralus v. Pacific G. & S. M. Co., 35 Cal. 30; Harvey v. Ryan, 42 Cal. 626; Coleman v. Clements, 23 Cal. 245; King v. Edwards, 1 Mont. 235; Golden Fleece M. Co. v. Cable Con. G. M. Co., 12 Nev. 312; Roberts v. Wilson, 1 Utah, 292.

[4] Flaherty v. Gwinn, *supra.*

a mining district rule must not only have been enacted or adopted or admitted to exist, but it must be so recognized and followed by the miners;[1] but mining customs are not like common-law customs, and need not be shown to have been of long duration;[2] they cannot override state or national laws.[3]

§ 123. Judicial notice — Courts will not take judicial notice of miners' rules — They must be proved. — From the foregoing it is quite apparent that the existence of miners' rules and regulations, like statutes of foreign states, must be proved, and that the courts will not take judicial notice of them.[4] Judge Hallett, when chief justice of Colorado, tersely stated the rule, which has everywhere been followed, to the effect that judicial notice cannot be taken of the rules, usages and customs of mining districts; they must be proved at the trial, like any other fact, by the best evidence that can be obtained respecting them. And he briefly states the reason of the rule in the following language: "To say that the court is advised as to the nature and extent of such regulations is contrary to the fact, and therefore they cannot be the subject of judicial notice."[5] And if no proof is made as to a custom upon a particular point the court will not assume its existence.[6]

[1] Jupiter M. Co. v. Bodie Con. M. Co., 11 Fed. Rep. 666.

[2] Yale, Mines, p. 86; Smith v. North Amer. M. Co., 1 Nev. 357; Oreamuno v. Uncle Sam M. Co., 1 Nev. 215; King v. Edwards, 1 Mont. 235.

[3] Sweet v. Webber, 7 Colo. 443, 4 Pac. Rep. 752; Jupiter M. Co. v. Bodie Con. M. Co., *supra;* McCornick v. Varnes, 2 Utah, 355. And a regulation of a mining district requiring more work to be done than required by United States law has been held to be void. Original M. Co. v. Winthrop, 60 Cal. 631. But see Packer v. Heaton, 9 Cal. 568; McGarrity v. Byington, 12 Cal. 426.

[4] Sullivan v. Hense, 2 Colo. 424; Harvey v. Ryan, 42 Cal. 626; Flaherty v. Gwinn, 1 Dak. Ty. 509; Parley's Park S. M. Co. v. Kerr, 130 U. S. 256; Sussenbach v. First Nat. Bank, 5 Dak. Ty. 477, 41 N. W. Rep. 662; Coleman v. Clements, 23 Cal. 245.

[5] Sullivan v. Hense, *supra.*

[6] Perigo v. Erwin, 85 Fed. Rep. 904.

§ 124. District rules must be plain and specific — Must be within authority and must bind all.— Not to repeat too much, but to reconcile what might seem to be a conflicting statement in the preceding section, it is proper to observe that, to protect a location, the presumption would be indulged that it is properly made, in the absence of a showing to the contrary; but were some authority relied upon different from or beyond that conferred by the federal statute, as existing in local rules or the like, the existence of such authority must be established and will not be presumed. For obvious reasons district rules imposing conditions upon miners in addition to those imposed by the statutes of the United States, or conferring rights in enlargement of those statutes, must be clear and positive in their character, and not rest upon inference or presumption merely.[1] While local rules and regulations, within the limits pointed out, are authorized and may be relied upon to protect the miners' rights, it is essential to their validity that they have a potential existence, either by specific enactment and observance and obedience by the miners, or by common consent, as of natural right.[2] For a still stronger reason, these rules and regulations, to be of value, must not apply merely to a portion of a district,[3] but must be of general application and must be binding and obligatory upon all.[4]

§ 125. Existence of rules must first be proved — Presumed to continue.— Since, as we have seen, judicial knowledge cannot be taken of district rules and regulations, it must follow as a necessary corollary from what has been

[1] Flaherty v. Gwinn, 1 Dak. Ty. 509; Mallett v. Uncle Sam M. Co., 1 Nev. 188; Robertson v. Smith, 1 Mont. 410.

[2] Erhardt v. Boaro, 113 U. S. 527; Jackson v. Roby, 109 U. S. 440; St. Louis S. & R. Co. v. Kemp, 104 U. S. 636; Con. Rep. Mt. M. Co. v. Lebanon M. Co., 9 Colo. 348.

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

[4] Flaherty v. Gwinn, *supra;* Jupiter M. Co. v. Bodie M. Co., 7 Sawy. 96, 11 Fed. Rep. 666; Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383.

said, that before any right can be asserted which has for its support or foundation a district rule, custom or regulation, the rule itself must be established by competent proof, which must show that it is enforced and observed in the district by being universally observed, obeyed and acquiesced in. And it is not sufficient that it be shown that such a rule once existed, but it must be shown to be in force and observed at the time it is relied upon.[1] But agreeable to general principles of the law, when mining rules and customs are once shown to be in force, they are presumed to continue in force, and the burden would be upon the person attacking their validity or existence in such case to show that they had fallen into disuse and ceased to be observed to the extent that miners in the district no longer acted with reference to them.[2] And where it is claimed that a forfeiture has resulted from a failure to comply with local rules, the rule itself must not only be proved, but the forfeiture must likewise be established, and must, moreover, be pleaded.[3]

§ 126. The district rules — Enactment a question of fact — How proved.— From the foregoing it would seem scarcely necessary to add the proposition of law which has become axiomatic, namely, that the existence or non-existence of miners' rules or customs is always a question of fact, but their construction and validity when established is a question of law for the court.[4] The mode of proof, of

[1] Strang v. Ryan, 46 Cal. 33; Oreamuno v. Uncle Sam M. Co., 1 Nev. 215; Sussenbach v. First Nat. Bank, 5 Dak Ty. 477, 41 N. W. Rep. 662; Dutch Flat Water Co. v. Mooney, 12 Cal. 534; Blake v. Butte Silver M. Co., 2 Utah, 54; St. John v. Kidd, 26 Cal. 263; Becker v. Pugh, 9 Colo. 589, 13 Pac. Rep. 906; North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 Fed. Rep. 523; Harvey v. Ryan, 42 Cal. 626; Table Mt. Tunnel Co. v. Stranahan, 20 Cal. 198; Ralston v. Plowman, 1 Idaho, 595; Roach v. Gray, 16 Cal. 383.

[2] Riborado v. Quang Pang M. Co., 2 Idaho, 131, 6 Pac. Rep. 125; North Noonday M. Co. v. Orient M. Co., *supra;* King v. Edwards, 1 Mont. 235.

[3] St. John v. Kidd, *supra;* Morenhaut v. Wilson, 52 Cal. 263.

[4] Parley's Park Silver M. Co. v. Kerr, 130 U. S. 256; Sullivan v.

course, is governed by the ordinary rules of evidence, and it would seem, from the weight of authority and reason, that mining district rules or regulations upon a particular point must be offered in evidence as a whole; must be proven by the best evidence, and must be proved by the books themselves, properly produced, if there are books, or by the production of such other paper evidence as there may be of their existence. If there are no books, and the rules are not in writing, they may of course be proved by any competent evidence, the same as any other fact.[1] The land department accepts proof of mining district rules by a certified copy of the rules or by-laws attested by the seal of the district and the seal of the recorder or other legal custodian. If no proof is made of a custom or by-law upon a given point, the court will assume, for the purposes of the trial, that none exists.[2]

§ 127. **Same — Records parol.**— Suggestions have appeared in the foregoing indicating that miners' rules and customs may in general be proved by any competent evidence agreeable to general rules. Manifestly, therefore, they may be proved by the records themselves;[3] indeed, this has been said to be the best evidence.[4] But while this is true, and while a duly authenticated copy, agreeably to the rule in the land department, and that governing the admissibility of records generally, may in a proper case supply the place of the original, that is not the only way of prov-

Hense, 2 Colo. 424; Poujade v. Ryan, 21 Nev. 449; Harvey v. Ryan, 42 Cal. 626; King v. Edwards, 1 Mont. 235; Jupiter M. Co. v. Bodie M. Co., 11 Fed. Rep. 666; Golden Fleece M. Co. v. Cable M. Co., 12 Nev. 312; Doe v. Waterloo M. Co., 70 Fed. Rep. 455.

[1] English v. Johnson, 17 Cal. 107; Roberts v. Wilson, 1 Utah, 292; Campbell v. Rankin, 99 U. S. 261; Pralus v. Pac. G. & S. M. Co., 35 Cal. 30; Doe v. Waterloo M. Co., 70 Fed. Rep. 455; St. John v. Kidd, 26 Cal. 263.

[2] Marshall v. Harney Peak M. Co., 1 S. D. 350; Perigo v. Erwin, 85 Fed. Rep. 904.

[3] St. John v. Kidd, 26 Cal. 363; English v. Johnson, 17 Cal. 107; Roberts v. Wilson, *supra;* Orr v. Haskell, 2 Mont. 225.

[4] Campbell v. Rankin, 99 U. S. 261.

ing them.[1] The rule is firmly established that they may be proved by any one familiar with them and competent, if not in writing, to testify, the same as any other matter in parol.[2] And parol evidence is admissible to show that written rules have fallen into disuse.[3] Unless the particular right in question is dependent for its force and validity upon the existence of a district rule, it is not necessary to plead it.[4]

§ 128. District rules, what are — Question of fact.— What are and what are not district rules being thus made matter *in pais*, it necessarily follows that their existence or non-existence, when called in question, become matters of fact, to be determined as such by the court or jury, the same as any other fact in the case.[5] But when established their validity becomes a question of law for the court;[6] but this inquiry, as we have seen, only extends to the question whether they are reasonable,[7] or are not contrary to the statute of the United States[8] or of the state or territory.[9]

§ 129. Summary.— In the foregoing sections we have attempted to demonstrate those principles of mining law which have for ages, in many countries, guided the operations of men engaged in mining, defined their rights and furnished the mode of redressing their wrongs. And from

Flaherty v. Gwinn, 12 M. R. 605; Campbell v. Rankin, 99 U. S. 261.

[2] Coleman v. Clements, 23 Cal. 245; Ralston v. Plowman, 1 Idaho, 595; Flaherty v. Gwinn, *supra;* Waring v. Crow, 11 Cal. 366; Harvey v. Ryan, 42 Cal. 626; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666, 7 Sawy. 96; Leet v. John Dare M. Co., 6 Nev. 218; North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522, 6 Sawy. 299; Campbell v. Rankin, *supra.*

[3] King v. Edwards, 1 Mont. 235; Leet v. John Dare M. Co., *supra.*

[4] Coleman v. Clements, *supra.*

[5] Harvey v. Ryan, 42 Cal. 626; Sullivan v. Hense, 2 Colo. 424; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. Rep. 666, 7 Sawy. 96; North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522, 6 Sawy. 299; Campbell v. Rankin, 99 U. S. 261.

[6] Ralston v. Plowman, 1 Idaho, 595.

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

[8] Jupiter M. Co. v. Bodie Cons. M. Co., *supra;* McCornick v. Varnes, 2 Utah, 355.

[9] Barnes v. Sabron, 10 Nev. 217.

it all we glean these deductions: That the western system of mining law enforced throughout the precious metal-bearing mining states and territories of the United States had its birth, for the greater part, primarily in the laws in force in Mexico and other Spanish-American countries prior to the cession of California and the other Pacific coast possessions to the United States; but at the same time, the customs and laws in force in at least four counties in England, and in some countries on the European continent, played an important part in furnishing the elementary principles upon which our law is based, partly by direct application and from being copied directly into the miners' rules and regulations, and partly through the fact that substantially the same principles and rules existed in the Mexican ordinances.

Our mining system, then, at the present time in the United States, is composed of two distinct yet closely allied systems:

1. Those changeless principles of the common law which are the same everywhere, and which furnish in many respects the final test by which rights are to be measured and adjusted, wrongs redressed, statutes interpreted and enforced, and men's rights everywhere protected and adjusted upon the same standard.

2. The federal statute and the decisions made under it, which in turn is composed of three elements, namely: (*a*) the statute itself; (*b*) the supplemental state statutes authorized by it; (*c*) the district rules, not only those authorized by the statute and subordinate to it, but those existing prior thereto, and recognized thereby, and upon which many titles rest, and under which many rights may be asserted and wrongs redressed.

This comprehensive system, then, thus shown to be in existence will be examined in detail in the further pages of this work.