DUMP.

The Right to Dump is but little if at all affected by statutory regulations, and the right to dump, as of necessity or by custom, across lower claims, has never been brought under the adjudication of the Court of last resort in any of the mining States, to the writer's knowledge; but in the case of *Equator Co. v. Marshall Co. U. S. C. Ct. Colorado*, an action brought to restrain the dumping across a claim lying below on the mountain slope, it was *held*, as of course, that it was no case for injunction, unless where work was being prevented, shafts filled, life endangered or other gross and continuing injury, and the remedy, if any, was by action at law for damages.

In a later suit in the same Court between the same parties it was *held* that when continuous dumping had been carried on by owners and lessees, without proof or attempt at proof, as to the injury done by each party, that only nominal damages could be recovered against an owner, and that the owners were not responsible for the injuries done by their lessees; and there being no proof that the defendant, one of the owners, had ever taken an active part in the management of the mine, the jury found for the defendant.—See also *Little Schuylkill Co. v. Richards, 10 M. R. 661; 57 Pa. 142.*

In the case of continuous and indiscriminate dumping over lower claims it may, if not in the meanwhile regulated by statute, be finally recognized as a controlling custom and so fixed as a permanent easement on the lower claims.

In the case of careless or wanton injury to improvements the upper claim is, of course, liable; but the right to dump over unimproved and valueless surface ground is doubtless such an easement as may be prescribed by state statute under the permission of R. S. § 2338, ante p. 186. or allowed by district rule.

A Dump Is Real Estate and passes to the grantee without special mention. But a contract to sell the ore found in it need not necessarily be by deed.—*Smart v. Jones, 15 Com. Bench, N. S. 717.* Dump deposited on the land of another and allowed to remain indefinitely becomes parcel of the land.—*Lacustrine Co. v. Lake Guano Co. 82 N. Y. 476; Erwin's App. 12 Atl. 149; 16 M. R. 91.* A deposit of tailings becomes an accretion to the land.—*Rogers v. Cooney, 14 M. R. 85; 7 Nev. 213.*

Under a mining lease in general terms the lessee has the right to work over the dump, but the wording of the lease may be such as to exclude dumps by construction.—*Boileau v. Heath, L. R. (1898), 2 Ch. 301; Genett v. Delaware Co. 43 N. Y. Sup. 589; 25 N. E. 922.*

The right to dump may be lost by allowing adverse possession of the ground for the statutory period.—*McLaughlin v. Del Re, 16 Pac. 881.* Ejectment lies to recover ground used for tailings.—*Campbell v. Silver Bow Co. 49 Fed. 47.*

The lessee has no property in the dump after his term has expired; nor, during term, to minerals not contemplated in his lease.—*Erwin's App. 16 M. R. 91; 12 Atl. 149; Doster v. Friedensville Co. 21 Atl. 251.*

Construction of contract to work dump.—*Foster v. Lumbermen's Co. 36 N. W. 171.*

Appurtenance.

It has been held that the grant of a tunnel right carries with it as an appurtenance the right to dump on the grantor's land at the mouth of the tunnel.—*Scheel v. Alhambra Co. 79 Fed. 821.*

THE MINING LAWS OF OREGON.

INCLUDES ALL THE LATE MINING LAWS ENACTED BY THE 21ST REGULAR SESSION OF THE LEGISLATIVE ASSEMBLY; ALSO COMPRISING THE GENERAL PROVISIONS OF THE FEDERAL STATUTES, THE DECISIONS OF THE COURTS AND OF THE GENERAL LAND OFFICE TOUCHING MINES, MINING AND WATER RIGHTS; WITH FORMS FOR LOCATING, BONDING, ETC. NAMING OF ROCKS, GAME AND FISH LAWS, AND MUCH USEFUL INFORMATION, ETC.

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1902.

sional act also recognizes and confirms the right of way over the public domain for the construction of ditches and flumes. The Oregon statute porvides for the condemnation of private land for right of way.

ABANDONMENT OF DITCHES AND WATER RIGHTS.—The general rule as to abandonment applies to water rights, and a failure to use the water and allowing the ditch to go to decay are evidence tending to prove abandonment.

On this subject the Oregon statutes provide that if any person, company or corporation shall fail or neglect to use the same for a period of two years at any time it shall be taken and deemed to have been abandoned.

The same act declares ditches and flumes when permanently attached to the soil to be real estate; they can, therefore, only be transferred by deed with the usual formalities as to conveyance of that class of property.

A right to use water does not confer the privilege of filling the water course with debris and tailings and allowing them to flow down on the ground of another.

Ground for Dump.

There is no statute providing any method for locating ground to be used as a dump; but a right to dump over unimproved and valueless surface ground undoubtedly exists as a necessary incident to the right to mine, and such right will be protected by the courts as a mining custom.

It has been held that a dump is real property and passes to a purchaser of the ground without special mention.

Dump deposited on the land of another and allowed to remain there indefinitely becomes parcel of the land, and the right to dump may be lost by allowing adverse possession of the ground for the statutory period.

Ground intended for use as a dump should be located and recorded with all the formalities prescribed for a mining claim.

Tailings.

Tailings are the property of the miner who made them, so long as retained on his own land or under his control and not abandoned. When allowed to flow on the land of another the latter becomes entitled to them.

The general rule is that each miner must take care of his tailings or so discharge them as not to injure the property of others.

Right to Timber.

One locating a mining claim is permitted to cut and use the timber thereon for mining purposes.

Mining Partnership.

Where tenants in common of a mine unite and co-operate in working it they constitute a mining partnership. Such partnerships differ from ordinary partnerships in this, (amongst other things), that a change in the personnel of the partnership does not necessarily dissolve the relation; each member has power to dispose of his interest in the mine to any one, and is free to deal with his associates as with a stranger. New members who purchase such interest with knowledge of an outsanding partnership cannot repudiate the same.

In such partnerships the will of the

THE LAW

OF

MINES AND MINING

IN

THE UNITED STATES.

BY

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OF THE PHILADELPHIA BAR.

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

IV. Tailings and Refuse.

A. *Property therein and their Deposit on the Land.*

At common law the mine owner is bound to dispose of his refuse so as not to injure others; he may not deposit it on the lands of others, but must deposit it on his own land, or on the surface land beneath which his mines lie. Where the minerals are owned by one person and the soil by another, the former has a right to deposit his refuse upon the surface. This right is limited to the refuse of the mines beneath the particular surface estate, but it may, by the terms of the conveyance or contract, be enlarged to include that from adjoining mines. But he must make the deposit in such manner as to occasion the least possible damage to the surface.

The mine owner is subject to the further obligation to make the deposit on his own land in such a manner that the refuse will not by the ordinary action of nature be carried upon the land of others. Where the refuse is liquid, as in the case of oil wells, the disposal of it is governed by the rules stated in the next subdivision[1] in regard to the pollution of streams.

A different rule from that at common law seems to have prevailed in those Western States where placer and hydraulic mining are carried on extensively. It was early held in California that a miner might appropriate a dumping ground of the public domain if he did not interfere with pre-existing rights. This land might subsequently be located as mining ground subject to the prior right of deposit, but not, however, to a subsequent one. The right to the use of such dumping ground may be lost by adverse possession. But even a prior locator must work his claim with reasonable care. In so doing he may, by the discharge of his tailings, do some necessary injury to subsequent locators on lower ground for which he will not be liable, provided he does not thereby destroy the value of the latter claims or prevent the mining of them. But he may not let his tailings unrestrained run down a natural channel, without regard to the damage they may do. A custom to do so will not justify it. In Colorado this subject is regulated by statute,[2] by which it is made the duty of every miner to take care of his own tailings

[1] Page 613, *post*.

[2] M. A. S. 3144.

on his own property, or become responsible for all damages that may arise therefrom.

The measure of damages for depositing refuse on the ground of another is the cost of removal, but no larger amount than the value of the lot can be recovered.

The tailings or refuse of a mine are the property of the mine owner. This property he may, however, abandon, either by casting the refuse away, or by suffering it to go where it will unobstructed. If it flow upon the land of another, he is entitled to it. When once abandoned, any one may appropriate it, provided it is not reclaimed before this appropriation. The original owner may reclaim it, though another with a view to its appropriation has incurred expense. The latter's right is contingent upon continued abandonment, and the owner is not obliged to continue the abandonment. Where tailings have been deposited upon public lands, which have no value except for such tailings, the land may be located as mineral land, a possessory title to it may be gained in the same way as to mineral lands, and the holder of such a title may recover damages against any one removing the tailings.

The obligation of a lessee as to tailings and refuse, and his property therein, are governed by the terms of his contract. As a lessee's right is generally to take mineral of specified kinds, he has, in the absence of provision to that effect, no right to tailings; these are the property of the owner. A covenant in a lease to remove all rubbish at the end of the term applies only to such as result from the operations during the lease.

In several of the States the right of eminent domain has been conferred upon mine owners to take rights of way for the purpose of conducting their tailings away from their mines, and even to take ground for places on which to dump their refuse.[1]

A proceeding under the California statute was held unconstitutional as an attempt to take property for private uses.

California. *Jones* v. *Jackson*, 9, 237 (1858). The pay dirt, and tailings of a miner, which are the products of his labor, are his property. When a place of deposit for tailings is necessary to the working of a mine (as where the deposit is of such a character that the first washings only extract a portion of the gold), there can be no doubt of the miner's right to appropriate such ground as may be neces-

[1] California, Code Civ. Proc. 1238; Georgia, Code 1882, art. 7, secs. 742–753; Idaho, Rev. Stats. 1887, secs. 3130, 3142; Montana, Pol. Code 1895, secs. 3630–41; Code Civ. Proc. 1895, sec. 2211; Utah, Act March 12, 1890, c. 37.

sary for this purpose; provided he does not interfere with pre-existing rights. His intention to appropriate such ground must be clearly manifested by outward acts. Mere posting notices is not sufficient. He must claim the place of deposit as such or as a mining claim.

To suffer the tailings to flow where they list without obstructions to confine them within the proper limit, is conclusive evidence of abandonment, unless there is some peculiarity in the locality constituting an exception to this rule. If no artificial obstruction is required to confine them within the proper limits, then notice is necessary. If a miner allows his tailings to mingle with those of other miners, this does not give a stranger a right to the mixed mass. Where tailings are allowed to flow upon the claim of another, he is entitled to them.

O'Keiffe v. *Cunningham*, 9, 589 (1858). One party may locate ground in a mineral district for fluming purposes, and another may at the same or another time locate the ground for mining purposes. The locations, being for different purposes, will not conflict. A party may locate a claim for mining purposes on land which has been and still is used as a place of deposit for tailings by another. His mining right will be subject to this prior right of deposit, but not to that of a third party, who subsequently attempts to use the land as a place of deposit for his tailings.

Esmond v. *Chew*, 15, 137 (1860). The owner of mining claims situated in the bed of a cañon has not the right to build a flume and deposit tailings upon the claim of another subsequently located below him, on the ground of necessity.

It was error for the court below to charge "that a person first locating a mining claim in the bed of a stream is entitled to the channel below as an outlet, and that when such outlet from the usual mining operations above becomes obstructed he may open the same, and if he can do so by no other means, may construct a flume down the channel as far as necessary, and as far as the same can be constructed without considerable damages to the claims subsequently located."

Logan v. *Driscoll*, 19, 623 (1862). Plaintiffs owned mining claims in the bed of a creek, defendants owned claims upon the hill above, in working which they caused large quantities of rock and earth to rush down the hill by the force of the water which they used, covering up and destroying the plaintiffs' works, and rendering it impossible for them to use their claims.

It was not error to charge that a subsequent locator had no right to so work and use his claim as to deprive a prior locator of the use of his claim, that such a use was unreasonable, and in such a case the rule of first in time, first in right, applied. Plaintiff being the prior locator, was entitled to damages and an injunction.

Dougherty v. *Creary*, 30, 290 (1866). If miners engaged in washing their claims with water abandon the water and tailings which pass from their mining grounds, any other persons have a right to take and appropriate the same to their own use, but their right is contingent on the fact of continued abandonment. It does not become obligatory on the persons abandoning to continue to do so, even though other persons, encouraged by the circumstance of abandonment for a time, have incurred the expense of constructing flumes to use the abandoned water and tailings.

Gregory v. *Harris*, 43, 38 (1872). A party mining upon a ravine which runs into another ravine is not clothed by virtue of his right to use the ravine upon which he is mining as an outlet for his tailings, with the general right to break in at any point he may select upon the tail-race of another constructed in the other ravine, and to discharge his tailings therein.

Consolidated Channel Co. v. *C. P. R. Co.*, 51, 269 (1876). Code Civil Proc., sec. 1238, subd. 5, provides for the exercise of the right of eminent domain in behalf of "tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from the mines." A mining company sought to have land of a railroad condemned under this act for the purpose of building a flume and having a place to dump tailings. A demurrer to the complaint was sustained on the ground that the proceeding was unconstitutional, as taking property for private uses.

McLaughlin v. *Del Re*, 16 Pac. 881 (1886). In an action to recover damages for dumping tailings upon plaintiff's land, and for an injunction to restrain a continuance of such injury, a judgment for the plaintiff is supported by the finding that the plaintiff had for more than ten years been in open, notorious, exclusive, and adverse possession of the land, though it was originally claimed for a dumping ground, under miners' regulations, by the defendant's grantors.

Colorado. *Fuller* v. *Swan River Min. Co.*, 12, 12 (1888). Under M. A. S., 3144, miners must take care of their tailings on their own property. Evidence of a custom to dump their tailings on their own ground, and let them take care of themselves, is insufficient to prevent the issuing of an injunction against the washing of tailings upon plaintiff's claim. Nothing but plaintiff's consent will excuse this act.

Idaho. *Ralston* v. *Plowman*, 1, 595 (1875). Plaintiff built a flume, through which he discharged his tailings on the ground of defendant, who was a prior locator. The latter built a flume entirely on his own ground, and his tailings filled up the plaintiff's flume. *Held*, plaintiff has no right of action, so long as he was not prevented from dumping on his own ground.

Illinois. *McGoon* v. *Ankeny*, 11, 558 (1850). One who having made slag, and considering it worthless, casts it away with the intention of abandoning it, thereby divests himself of the title, and any person may appropriate it, the original owner having no more right to complain than if he had never owned it, unless he reclaimed it without violating the rights of others, and before its appropriation by others.

Coppinger v. *Armstrong*, 5 Ap. 637 (1880). A covenant by the lessee in a lease of land with the right to use rock and burn lime, that all rubbish and spawls should be removed at the expiration of the term, is binding on the assignee of the lease.

Coppinger v. *Armstrong*, 8 Ap. 210 (1881). But this covenant does not apply to rubbish and spawls on the premises at the execution of the lease, but only such as result from the operations under the lease.

Montana. *Lincoln* v. *Rodgers*, 1, 217 (1870). A custom by which those holding mining claims in a gulch may let their tailings run down the natural channel without cribbing the same, without regard to the damage done to those having claims below, cannot be sustained. In an action for damages for washing down tailings on plaintiff's claim, whereby it was rendered valueless, such a custom is no defence. The defendants in working their claims with reasonable care, under prior locations, might do some necessary injury to plaintiffs which would be *damnum absque injuria*. "But a mining custom which would allow the total destruction of a junior locator's mining operations, in a gulch below prior locators, on ground which was vacant, cannot be maintained under any statute or any common mining law with which we are acquainted."

"Where persons locate ground for the purpose of constructing a flume, they can locate any number of feet, not in violation of the mining regulations of the district, and, if there are no regulations, not exceeding a reasonable amount for the deposit of tailings or dump; but the boundaries of the same must be marked in accordance with the regulations of the district, or, if there are none, by fixing the boundaries by such physical marks as will advertise the precise ground claimed for mining and dump, so that those wishing to locate thereafter may know what is vacant."

Nelson v. *O'Neal*, 1, 284 (1871). It is not an abuse of discretion for a court to refuse to enjoin parties from building a dam upon their mining ground to prevent tailings from injuring their property. Miners are entitled to the free use of the channel of a creek so that water will flow from their own ground, but they have no right to fill the channel with tailings that will flow down upon the claims of others.

Nevada. *Harvey* v. *Sides S. M. Co.*, 1, 539 (1865). Where the plaintiff claimed damages for the deposit of a dump pile from a quartz lode upon his building lot, and it was shown that the cost of removing the dump would be greater than the value of the premises, the measure of damages is limited by the value of the lot, although in ordinary cases the measure of damages would be the cost of removal.

Rogers v. *Cooney*, 7, 213 (1872). If land be of value only for tailings which have been washed down a stream and deposited upon it, and it is claimed for no other purpose, though not strictly mineral land, the acquisition of possessory title to it is governed by the same rules as such titles to mining claims.

A person who enters upon such land when vacant for the purpose of digging, hauling away, and milling the tailings, has a survey made and recorded, marks the boundaries with large posts, and continuously works the claim and builds a cabin on it for storing tools, can maintain trespass against an intruder entering his boundaries. His right to the tailings is coextensive with his right to the land, and he may recover for their removal.

New York. *Genet* v. *D. & H. Canal Co.*, 122, 505 (1890). Plaintiff "leased" to defendant "all the coal contained on, in, or under" a certain tract, and further granted rights of way for roads, ditches, and drains, "with the right to erect drains on the

surface for the proper mining of said coal," also the use of the land for digging air shafts, erecting necessary buildings, "together with lands for piling coal or culm, and all other appurtenances they may require for mining, etc., the coal to be mined under this agreement." And it was further agreed and understood that the defendant might "use and occupy the rights and privileges hereby granted and the openings, buildings, fixtures and appurtenances made and constructed by them for the mining, preparing and forwarding coal under this agreement, and for the mining, preparing and forwarding coal from any adjoining or contiguous lands, until all the lands that they desire to take coal from, and that can be mined and taken out through said openings, shafts and slopes, shall be exhausted."

The defendant was held to have the right to pile upon plaintiff's land the culm or refuse taken from the adjoining lands. This also included the right to drain water from the mines on the adjoining land to the shaft on plaintiff's land and thence to pump it out. The defendant had a right to unite its works on all the properties into one mine.

Pennsylvania. *Erwin's Ap.*, 20 W. N. C. 278 (1887). A contract was made for the exclusive right to all the iron ore on a certain tract of land, with the right to wash on said premises such ore as should require washing; a certain royalty per ton to be paid for each ton of clean merchantable iron ore taken. For some time the refuse from the washing of the ore was allowed to accumulate in a dam, being considered of no value. Its utility for the manufacture of paint having been discovered, the lessees proposed to remove it, and the lessor filed a bill to restrain such removal. The testimony of experts and others was that, while containing iron ore and so classified by scientists, this refuse matter was commercially known as ochre. *Held*, that the iron ore intended by the contract was the iron ore at that time mined with a well known use and application, and that the crude ochre in the dam did not pass under the terms of the lease.

Doster v. *Friedensville Zinc Co.*, 140, 147 (1891). A lease was granted "for the purpose of searching for minerals and fossil substances, and conducting mining and quarrying operations to any extent he might deem advisable," the lessee to pay forty cents per ton for all fine zinc ores, sulphurets of zinc, and iron ores, and to have the right to separate clean sulphuret ores from the rock and pay only for the clean ores; and in case any other than zinc ores were removed, they were to be paid for at the same rate. In the process of extracting the ore, the rock was crushed and washed, and the refuse, which contained 7.5 per cent of zinc ore, was treated as waste. Subsequently it was discovered that this material was valuable in the manufacture of paving blocks. It was held to be the property of the lessor, and the lessee having sold it, had to account for its price and was enjoined from further removal of it. The purpose of the lease was to deal only concerning ores.

Commonwealth v. *Steimling*, 156, 400 (1893). Where waste from mines is deposited upon the bank of a stream, and is washed down and deposited in the bed of the stream, having been abandoned by the original owner, it is the property of him who owns the bed of the stream at that point.

Lance v. *Lehigh & Wilkesbarre Coal Co.*, 163, 84 (1894). See this case on page 134, *ante*, as to what "refuse or culm" includes under a covenant that this shall belong to the lessor of a coal mine.

B. *Pollution of Streams.*

When the refuse from mining operations is deposited, conducted, or allowed to find its way into watercourses, another set of principles and rules is brought into action to determine the rights and duties of the mine owner. He is then a riparian owner, with the rights and subject to the obligations of such a proprietor.

The general rule is that the owner of land over which flows an unnavigable stream, may use the water, but must return it to the stream so that it may descend to the land of the owners lower down the stream undiminished in quantity and unimpaired in quality, except so far as is necessary to the ordinary and natural use and enjoyment of his land. The natural use and enjoyment of mineral lands (that is, lands which are more valuable for the minerals they contain than for any other purpose) is mining in the ordinary and usual manner. Such pollution, therefore, of the stream as takes place by reason of mining upon its banks is *damnum absque injuria*, provided there is no deposit therein of matter whose accumulation upon the land is the result of artificial means. Water, although so impregnated with other substances as to render the stream absolutely unfit for domestic, agricultural, or manufacturing purposes, if its accumulation upon the land and in the mines is the result of natural forces, and not of human agencies, may be conducted into the streams which form the natural drainage of the land in which the mine is situated. Such a pollution of a stream might become a public nuisance if it was such as to involve the general health and well-being of the community,[1] but the mere personal inconvenience of a riparian owner must give way to the necessities of a great public industry. This rule does not, however, give to the miner the right to discharge into a stream accumulations of water which has been brought upon his land by artificial means, or such refuse as would not be naturally carried off the land by natural drainage. If sand, mud, and refuse of a similar kind are deposited in the stream by him, and they are carried down upon the property of the lower owners, he is liable to them for such injury as may be caused

[1] See *Comm.* v. *Russell*, 172 Pa. 506, *post*.

thereby. The rule that a man must so use his property as not to injure that of others, prevails in such a case. He must, as was said above, take care of his refuse upon his own ground, and he has no more right to discharge it upon the land of another through the agency of a natural stream than he has to throw it directly thereon. If the mine owner deposits his refuse upon his land so that every ordinary flood carries it into the stream, he is liable for the injury caused thereby. He must guard against such floods, and place the refuse of the mine where it cannot be carried off by them. If he does this, an extraordinary flood will be treated as a *vis major*, and he will escape liability for damages caused by its carrying into the stream or upon the land of others the refuse which he has placed out of reach of ordinary floods and the natural current of the stream.

The mine owner's right is subject to the further modification that the damage which is inflicted upon others must be unavoidable in the proper use of the land. If he can prevent it at an expense that will not so detract from the purpose and benefit of mining as to substantially deprive him of the right to use his own property, he is bound to do so. And if he fail to fulfil his obligation, he is liable for the damages resulting from his failure.

The principal rule is dissented from in Ohio, where, however, the subject is disposed of by statute imposing a penalty on those mine owners who allow the pollution of streams by their refuse.[1]

These principles are of especial importance in those States where hydraulic mining is carried on extensively. Here the mine owner, by flumes and aqueducts, brings upon his land water, by means of which he deposits in the watercourses of the country the very land itself, which being carried off is deposited upon the land of others and in the beds of navigable as well as unnavigable streams. Such acts are absolutely unlawful, and those who suffer damage therefrom have a cause of action against the mine owner. Hydraulic mining is, however, an industry of such importance that equity will not interfere with it to prevent injuries of this sort, unless there is shown to be a substantial injury. Where the operation is of any magnitude, the injuries are generally substantial, and even, as in the case of the Yuba and Feather Rivers and their tributaries, incalculable. They then become nuisances,

[1] Rev. Stats. 1890, sec. 6925, as amended by Act April 22, 1896, 92 O. L. 287. See also Virginia, Act Feb. 29, 1892, p. 759.

both public and private, subject to all the remedies for such at the suit of the State or of individuals. Equity will enjoin their continuance, though the effect be to prevent mining by the hydraulic system. The right to such a deposit of débris cannot be gained by prescription or custom. It does not follow, however, that hydraulic mining is unlawful,[1] and the sale of water to be used in that business will not be enjoined on the ground that it is to be so used and will work injury to others.

In an action for damages for pollution of water, it is no defence that the deterioration was caused by the combined acts of a large number of riparian owners, and that defendant's act alone did not materially affect the water. Nor will the fact that others polluted the water prevent the granting of an injunction, when it is not found as a fact whether defendant contributed materially to the pollution. But it has been held in Pennsylvania and Alabama that the defendant in such a case would not be liable in damages for the combined result of the action of all.

The grantor of land for mining purposes, with the right of discharging tailings through a stream, or by means thereof, upon other of his land, cannot complain of any injury which naturally results to him from the use of this right.

As to navigable waters, the riparian owner is without rights therein below low-water mark; but so also are all others except the State, and they are consequently without remedy against him for obstructing their use of the water. They may, however, hold him liable for depriving them of the advantages of location, if he fill the stream by dumping therein the refuse of his mines.

United States. *Atchison* v. *Peterson*, 20 Wall. 507 (1874), affirming s. c. 1 Mont. 561. Plaintiff, the prior appropriator of water of a stream, owned two ditches by which it supplied water to miners. Defendants owned mining claims fifteen miles farther up the stream, into which were washed the tailings from their operation. Plaintiff alleged that thereby its ditches were obstructed with sand and dirt, making it necessary to erect a guard and employ a man ten minutes every day to clean out the same. The evidence showed there was little sand in the plaintiff's first ditch, and the preponderance of evidence was that this was washed down naturally from the side of the hills, and that the sand in the second ditch was carried by a tributary of the stream flowing into it below the first ditch. Defendants being responsible, and the damage to plaintiff inappreciable in comparison

[1] Its legality is declared in California by Act March 24, 1893, p. 337.

with that which would result to defendants by the indefinite suspension of the work, an injunction was refused.

Woodruff v. *North Bloomfield Gravel Min. Co.*, 18 Fed. 753 (1884), C. C. D. Cal. The Yuba River rises in the Sierra Nevada Mountains, and after flowing in a westerly direction about twelve miles across the plain after leaving the foot hills, joins the Feather. At the junction, within the angles of these two rivers, is situated the city of Marysville. The Feather thence runs about thirty miles and empties into the Sacramento. These three rivers were originally navigable for steamboats and other vessels for more than one hundred and fifty miles from the ocean, the Sacramento being navigable as far as Marysville for the largest sized steamers. The defendants had been for several years, and they were still, engaged in hydraulic mining, to a very great extent, in the Sierra Nevada Mountains, and had discharged and were discharging their mining débris, rocks, pebbles, gravel and sand, to a very large amount, into the head waters of the Yuba, whence it was carried down by the ordinary current and by floods into the lower portions of that stream, and into the Feather and Sacramento. The débris thus discharged had produced the following effects: It had filled up the natural channel of the Yuba above the level of its banks and of the surrounding country, and also of the Feather below the mouth of the Yuba, to the depth of fifteen feet or more. It had buried with sand and gravel and destroyed all the farms of the riparian owners on either side of the Yuba, over a space two miles wide and twelve miles long. It was only restrained from working a similar destruction to a much larger extent of farming country on both sides of these rivers, and from in like manner destroying or injuring the city of Marysville, by means of a system of levees, erected at great public and private expense by the property owners of the country and inhabitants of the city, which levees continually and yearly required to be enlarged and strengthened to keep pace with the increase in the mass of débris thus sent down, at a great annual expense, defrayed by means of special taxation. It had polluted the naturally clear water of these streams so as to render them wholly unfit to be used for any domestic or agricultural purposes by the adjacent proprietors. It had filled to a large extent, and was filling up the beds and narrowing the channels of these rivers and the navigable bays into which they flow, thereby lessening and injuring their navigability and impeding and endangering their navigation. All these effects had been constantly increasing during the past few years, and their still further increase was threatened by the continuance of the defendants' mining operations.

Complainant owned a block of houses in Marysville, and farm and wharf properties on the banks of the Feather River below Marysville.

"Unless the acts of the defendants complained of, in view of all their necessary consequences, are legal, unless they are authorized by some valid law, it does not appear to us to admit of doubt or discussion that the results of those acts heretofore developed, still existing and operating and certain to continue and increase in the future, as disclosed by the evidence and indicated by the preliminary statement of facts, constitute a grievous and far-reaching public nuisance most destructive

in its character, or, in the terse language of one of complainant's counsel, a nuisance 'destructive, continuous, increasing, and threatening to continue, increase and be still more destructive.' Nor can there be any doubt that the complainant has suffered, that he is still suffering, and that by the continuance of those acts he will continue to suffer, special injuries, peculiar to himself, of a character to entitle him to equitable relief. The nuisance is both public and private." "If to unlawfully bury and destroy one hundred and twenty-five acres of a private party's best land; to from time to time cause injury to his remaining lands and buildings, necessitating large expense for repairs, and to impose upon him annually an extraordinarily onerous tax for the purpose of strengthening and enlarging levees for the protection of that portion of his property still left him against the constantly augmenting dangers, as in the case of complainant, does not inflict a special injury peculiar to that party which entitles him to relief, then it would be difficult to say what kind of injury arising from a public nuisance would entitle a private party to relief at his own suit. The acts complained of, if unlawful, or in the language of the Code of California, 'if not done or maintained under the express authority of a statute,' completely fill the definition given by the Code of a public nuisance, and also one for which a private person injured by it may maintain an action." Code, secs. 3479, 3480, 3493. The acts complained of being a nuisance, can under the law of California be legalized only by a statute expressly authorizing them, and no such statute exists. As to the acts of Congress, no intention can be properly inferred from any of them to permit the destruction or injury of the navigable waters of the State, or of towns and cities, or property of riparian or adjacent owners along the watercourses of the State, navigable or otherwise. "As to non-navigable waters, Congress had nothing to do with them, beyond the rights of the United States as a riparian proprietor, which are the same as the rights of other riparian proprietors, except that it might itself limit the rights of purchasers from the government of lands owned by it, sold subsequent to the passage of the act under which such limited sales are made. It had no power whatever to enlarge the rights of the vendees of the United States as against rights already vested in prior purchasers." "They could not grant lands, and in the grant, or by statute or otherwise, impose an easement for the benefit of their grantees upon lands already owned in fee by private parties, unincumbered by easements or conditions of any kind, or authorize any other trespass upon or injury to such other lands. They could only deal with their own as other land proprietors deal with theirs." Instead of enlarging the rights of the government's grantees beyond its own rights, the acts of 1866, 1870, and 1872 have placed limitations, restrictions, and incumbrances on them. Rev. Stats. 2338 does not show an intent to authorize the filling up of the navigable rivers of the State. It has no relation to the regulation of commerce on navigable rivers, but refers only to the public lands of the United States. It adds nothing to the legislative power of the State as to private lands.

The direction contained in the River and Harbor Bill of 1880 to the Secretary of War to make an examination with a view to devising a

system to prevent further injury from the deposit of débris in the navigable waters of California, does not legalize that deposit. Nor is the mere failure to prohibit the commission of a nuisance an authorization of it.

Even if authority were found in any act of Congress, it would be without force, for the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain within the limits of the State, except by express grant; the shores and soils of navigable rivers were originally reserved to the States, and new States have the same rights, sovereignty and jurisdiction over this subject as the original States, and Congress has no power to grant the soil of navigable rivers as public land.

The destruction of the navigability of a river is not a regulation of commerce.

Of the California statutes, subd. 5, sec. 1238, Code Civ. Proc., does not authorize the acts complained of, nor does the act of 1878, sec. 1, subd. 8, which sought to devise a plan to avert the injury caused by the débris from hydraulic mining. Besides, the acts of the defendants constitute a taking and damaging of complainant's land without compensation, and as such contravene the provisions of the Fourteenth Amendment and the constitution of California, and the legislature of the State cannot legalize them. They are also unlawful, because by their permission the police powers of the State would be "so abridged or construed as to permit corporations to conduct their business in such manner as to infringe the rights of individuals or the general well being of the State." Further, the sovereignty of the State over the soil of navigable rivers is inalienable, and it cannot authorize them to be filled up with débris to the destruction of the public easement, the right of navigation. The admission of California into the Union was upon the express condition that "all the navigable waters within the said State shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor." This is a valid act of Congress under its power to regulate commerce which the State may not violate.

The right to commit or continue a public nuisance cannot be acquired by prescription, either as against the public or as against an individual specially injured thereby. Even if it were otherwise, there is not sufficient evidence in this case of an open, notorious adverse claim to an easement to avail the defendants to establish a prescriptive right. The acts in question are not authorized by any valid usage or custom. The "customs of miners" have no application. They cannot control the rights of owners in fee of lands, not only non-mineral, but not in a mining region. A custom authorizing the acts complained of would be void as violating constitutional rights of private property. Besides which it would be an unreasonable custom.

A perpetual injunction was accordingly granted.

Hardt v. *Liberty Hill Con. M. & W. Co.*, 27 Fed. 788 (1886), C. C. D. Cal. Defendant having been enjoined from discharging débris from hydraulic mining into Bear River, constructed a dam across the river in the cañon below its mines for the purpose of impounding the débris and preventing its flowing down the river and injuring com-

plainant. Defendant now moved for a modification of the decree so as to permit it to proceed with its mining operations. It presented affidavits of engineers declaring the dam sufficient to impound the débris permanently and obviate the injury to the complainant; and the latter presented affidavits of engineers of a contrary opinion. The application was denied. In view of the failure of the attempts hitherto made to impound débris of this character, "it may well be doubted whether any restraining dam, however constructed across the channels of the main mountain rivers of a torrential character, should be accepted by the courts as a sufficient protection to the occupants of land in the valleys below liable to be injured. But if any are to be accepted, they should only be those the ample sufficiency of which has been established upon testimony of the most unquestionable and satisfactory character. Nothing should be left to conjecture;" and "it would seem that such dams should be constructed by or under the supervision and in accordance with the ideas of the parties in danger and liable to be injured rather than under the supervision and according to the views of those who commit the trespasses and perform the acts which give rise to the danger, and whose interests are not endangered or in any respect liable to suffer."

It had been said by Sawyer, J., in *Woodruff* v. *North Bloomfield G. M. Co.*, 18 Fed. 805: "We cannot presume to determine the possibility of engineering skill in constructing these restraining dams, with 'money enough' at command, where distinguished engineers differ in opinion upon the problem. It is enough for us to know that the matter rests in mere opinion, and that the opinions of men eminent in their profession are not in accord upon the question. It is obviously impossible that the court should determine in advance what dams may be built that will be sufficient, or prescribe any conditions upon the fulfilment of which defendants should be permitted to continue the acts complained of."

In re North Bloomfield Gravel Min. Co., 27 Fed. 795 (1886), C. C. D. Cal. Running a tunnel of 2,500 feet into respondent's mine, and washing the earth removed therefrom, and washing the earth from caves of the banks occurring from time to time, by a hydraulic monitor, and other washing of earth and débris by water flowing over the high banks of the mine into a tributary of the Yuba River, is a violation of the injunction perpetually restraining defendant "from discharging or dumping into the Yuba River or its tributaries any of the tailings, boulders, cobble stones, gravel, sand, clay, débris, or other refuse matter" from any of their mines; and is a contempt. "It can make no difference whether the refuse matter is thrown into the streams by what is strictly called hydraulic mining or drift mining. This can only be a question of degree in the injury resulting. The acts found by the master are clearly within the terms of the decree and the acts complained of." Even if the decree could be limited to hydraulic mining, the acts complained of were hydraulic mining within the meaning of the term as used in the decree.

Woodruff v. *N. Bloomfield G. M. Co.*, 45 Fed. 129 (1891), C. C. N. D. Cal. The mining company having built an impounding dam, proceeded to mine; they carried their tailings into this dam, where

they settled, and the water flowing over the dam was discharged into the Yuba River. The defendants having been accused of contempt for thus violating the decree of Jan. 23, 1884, it was held that in the absence of evidence showing that the water flowing over the dam contained refuse to an appreciable extent, or that defendants were in some other way running refuse into the stream, they were not guilty.

Alabama. *Tennessee C. I. & R. Co.* v. *Hamilton*, 14 So. Rep. 167 (1893). Defendant was engaged in mining iron ore from its own lands. It set up a washer, and operated it by means of the waters of a stream flowing past the land, and returned the water after so using it into the stream. Plaintiff owned land bordering on the stream below defendant's, and used the water for farming and domestic purposes. She brought this action against defendant for damages caused by the pollution of the water by defendant's use of it. The burden was on the plaintiff to establish the alleged pollution, after which the question was, whether plaintiff's use of the water was reasonable, which was a question of fact.

The defendant's evidence showed that the ore was valueless without washing, that the creek was the only available water supply, that there was no other outlet for the water after it was used, and that it had resorted to the customary and best means of purifying it before permitting it to flow back into the creek.

It was held that the interest of the public and of an important industry required a modification of the individual right of the riparian owner to the normal purity of the water. "But there is a limit to this duty to yield to this claim and right to expect and demand. The watercourse must not be diverted from its channel, or so diminished in volume, or so corrupted and polluted, as practically to destroy or greatly to impair its value to the lower riparian owner."

It is competent for defendant to show that other persons also were polluting the stream above plaintiff's property.

California. *Bear River & Auburn Water Co.* v. *N. Y. Mining Co.*, 8, 327 (1857). The first appropriator of water for mining purposes is entitled to have the water flow without material interruption in its natural channel. He is entitled to the water so undiminished in quantity as to leave sufficient to fill his canal or ditch, as it existed at the time of subsequent appropriations of the stream above him. But deterioration in the quality of the water by reason of its being used for mining purposes, before it reaches the ditch of the prior locator, must be deemed *damnum absque injuria*.

Hill v. *King*, 8, 336 (1857). Plaintiff, a ditch company, constructed a ditch, appropriated the waters of a stream, and sold them for mining purposes. Defendants subsequently located mining claims on the stream and above plaintiff's ditch, and in working their claims occasioned a material and essential injury to the water, so as to impair its value for mining purposes. *Held*, defendants were liable to plaintiff for the damage, although they may have worked their claims in the most reasonable and practicable manner, and did no more damage than was necessary in order to work their claims.

Wixon v. *Bear River Water & Min. Co.*, 24, 367 (1864). If a tract of land in the mineral region, bordering on a stream, is enclosed

and appropriated for garden and orchard purposes, and the waters of the stream are afterwards appropriated for mining purposes at a point above the enclosed land, the water thus appropriated must be so used as not to materially injure the fruit trees and garden. The injury here consisted of flooding the orchard and garden with mud and sediment.

Hill v. *Smith*, 27, 476 (1865). Where a ditch has been excavated from the bed of a stream and the water diverted for mining purposes, a miner subsequently locating along the stream and above the head of the ditch has no right to work his claim so as to mingle mud and sediment with the water, and injure its value to the ditch owner for mining purposes, and to fill up the ditch and reservoirs so as to lessen their capacity and increase the expense of cleaning them. It matters not how cautiously or carefully the miner works, or that he has worked his claim so as to do the least possible injury. If he has injured the lower owner, he is liable.

Hill v. *Smith*, 32, 166 (1867). Where a large number of persons are mining on a small stream, and each deteriorates the water a little, so that the combined acts of all render the water unfit for use by a prior appropriator for mining purposes, each cannot successfully defend an action on the ground that his act alone did not materially affect the water.

Robinson v. *Coal Co.*, 50, 460 (1875). If one who is engaged in coal mining causes water, sand, clay and refuse in a flowing mass to descend upon the land of another so as to destroy its value for cultivation, and such descent is the direct result of the act of the party and not merely of natural laws, the persons whose lands are injured may recover damages and enjoin the future commission of such acts.

Robinson v. *Coal Co.*, 57, 412 (1881). Defendant, in working his coal mine, caused the deposit of coal screenings, ashes and other refuse in a natural stream of water. These were carried down by the water and deposited upon the land of the plaintiff. The defendant was held liable for damages thus caused, although the stream in its natural course inundated plaintiff's land.

People v. *Gold Run D. & M. Co.*, 66, 138 (1884). The defendant owned five hundred acres of mining land on the North Fork of the American River, the surface being one thousand feet above the river. The defendant worked this land by the hydraulic process, and discharged the débris into the river. It had done so for eight years, discharging into the river annually six hundred thousand cubic yards of boulders, cobbles, gravel and sand. This, mingling with the discharge from other hydraulic mines and the products of natural erosion, was deposited in the beds of the American and Sacramento Rivers and on the adjacent lands. The bed of the former had thus been raised from ten to twelve feet, and of the latter from six to twelve, the channels were rendered shallow, the liability to overflow increased, causing the floods to cover a greater area and to be more destructive than they otherwise would have been, and covering the land with mining débris. The navigation of the rivers was likewise impaired by the lessening of their depth, — a part thereof, which had previously been navigable by steamers of deep draught, being unnavigable thereby except at high water.

The defendant was enjoined from further deposit of débris in the river.

"To make use of the banks of a river for dumping places, from which to cast into the river annually six hundred thousand cubic yards of mining débris, consisting of boulders, sand, earth and waste material, to be carried by the velocity of the stream down its course, and into and along a navigable river, is an encroachment upon the soil of the latter and an unauthorized invasion of the rights of the public to its navigation; and when such acts not only impair the navigation of a river, but at the same time affect the rights of an entire community or neighborhood or any considerable number of persons to the free use and enjoyment of their property, they constitute, however long continued, a public nuisance."

An injunction will issue against the defendant although others were engaged in the same wrongful act, and it was not found as a fact whether defendant's working alone materially contributed to the evil.

The right to continue this nuisance could not be acquired by custom or prescription.

Hobbs v. *Amador & Sacramento Canal Co.*, 66, 161 (1884). The owner of a mining claim may not work it so as either directly or indirectly to cover the land of his neighbor with mining débris, sand and gravel. An injunction was accordingly granted to restrain such an owner from discharging or dumping tailings or débris into the streams and trenches above plaintiff's land, which was subsequently modified to permit him to work his mine and use his supply of water to preserve his dam and other structures, so long as he should impound and restrain the coarse débris. It makes no difference, apparently, that the decision renders hydraulic mining by defendant impossible.

County of Yuba v. *Cloke*, 79, 239 (1889). The business of hydraulic mining is not in itself unlawful, or necessarily injurious to others, and the sale of water to be used in such business is lawful, and will not be enjoined on the ground that such business will be in fact so conducted as to work injury to others, unless the defendant is directly connected with the wrongful act complained of, — as by a knowledge that the water sold by him was to be used in a manner to injure others.

Colorado. *People ex rel. Wolpert* v. *Rogers*, 12, 279 (1888). A complaint setting forth that the relators are owners of agricultural lands in certain counties dependent upon irrigation, and seeking to enjoin the operation of certain stamp mills, which polluted the waters of the stream from which the relators obtained their water, though its final determination may seriously affect either the agricultural or mining prosperity of four counties, tenders an issue of a private character and not of a public character, and the Supreme Court will not assume original jurisdiction thereof.

Connecticut. *Bushnell* v. *Proprietors of Ore Bed*, 31, 150 (1862). The plaintiff had formerly conveyed to the defendants, an ore company, the right of washing their ore upon a small stream that ran through his land, and to discharge dirt upon his "meadow lot" lying below upon the stream. A great quantity of dirt accumulated upon the meadow lot, filling the bed of the stream and raising

the lot above the adjoining land, so that the dirt washed upon the lot spread, and was carried upon the plaintiff's pasture lot adjoining. The plaintiff owned this lot at the time the deed was given. *Held*, that the defendants were not liable for any damages to the pasture lot resulting naturally from the discharge of dirt upon the meadow lot.

Georgia. *Palmour* v. *Mitchell*, 69, 750 (1882). One who sold land on a creek for mining purposes, with full knowledge of the use to which it was to be put, and consenting that the "tailings" from the mine should be drained off through the creek, and consequently through a reservoir which he had for operating a mill lower down the creek than the mine, could not complain if such drainage was used and his reservoir was injured thereby.

Satterfield v. *Rowan*, 83, 187 (1889). An upper riparian owner who, by building a dam and washing ores in a stream, renders it unfit for use by the lower owner and diminishes the flow of water, is liable for the damages caused thereby. It was pleaded in this case that the use of the stream made by the defendant was reasonable and sanctioned by the usage of the country, and that the stream was of more use and value to the defendant and all adjacent and subjacent owners for the purpose of washing ores, than to plaintiff and all subsequent riparian owners for the purpose to which he put it as alleged in his declaration, viz. as a farm and dwelling; the first of which seems to have been decided against defendant, no mention being made of the last.

Michigan. *Edwards* v. *Allouez Mining Co.*, 38, 46 (1878). A man bought for speculation certain bottom lands upon which large quantities of sand were being deposited by a stream which carried it down from a stamp mill which operated a copper mine. He tried to sell the lands for an amount from three to five times what they cost him, to the owners of the mill, but they declined to buy. He then prayed for an injunction to restrain the owners of the mill from casting sand on his land and polluting the stream. An injunction was refused, but the case was referred to a jury to assess the damages.

Montana. *Nelson* v. *O'Neal*, 1, 284 (1871). An owner of mining ground is entitled to the free use of the channel of a creek, to allow the water which comes down from above to flow away from his mining ground; but he has no right to fill the channel with tailings and débris, and let them flow down upon another's ground.

McCauley v. *McKeig*, 8, 389 (1889). One who appropriates the water of a stream for the purpose of placer mining, will not be enjoined from diverting the water at the suit of another who subsequently appropriates it for purposes of irrigation. Nor will he be enjoined from running his tailings down the stream and into the plaintiff's ditch, when it was found by the jury that this was a necessary incident of placer mining, and that the plaintiff was not damaged thereby. "We are not to be understood as declaring that the owner of a placer mine may disregard the rights of others owning property adjacent to his; but the public policy of this Territory demands that a trifling, a nominal damage shall not be ground sufficient to destroy one of its leading industries. The laws of the United States, from which power the plaintiff obtains his right, granted to defendant the right to use

the water for placer mining purposes, and we think we have no power to deprive them of that right by enjoining him from doing that which is a necessary incident to the enjoyment thereof, certainly not at the request of one who is a subsequent purchaser from a common grantor."

New York. *McCormick* v. *Horan*, 81, 86 (1880). "The right of an owner of lands through which a watercourse runs to have the same kept open, and to discharge therein the surface water which naturally flows thereto, is not limited to the drainage and discharge of surface water into the stream in the same precise manner as when the land was in a state of nature, and unchanged by cultivation or improvements." Such an owner, who excavated upon his land a quarry, into which was collected water and melting snow, which would otherwise have drained into the stream, had a right to pump it into the stream, although his so doing increased the flow of water to an amount greater than it would have been, the natural capacity of the stream being in this case sufficient to carry off the water without damage to the lower riparian owner.

Ohio. *Columbus & Hocking C. & I. Co.* v. *Tucker*, 48, 41 (1891). If the owner of a coal mine situate on the bank of a stream intentionally deposits therein coal, dirt, slack and refuse, or intentionally deposits the same upon the banks so that it will be washed into the stream by natural agencies, he is liable to lower riparian owners for damage caused thereby by overflowing their land, filling up and polluting the stream. The intention may be inferred from the circumstances.

"Of course the right of the coal company, as a land owner, to the natural and full use of the soil, is measured by the same rule as that applied to the like right of the plaintiff. But the right it insists upon is something different from the natural and ordinary use of the soil. While not an unusual one perhaps with those engaged in the same business in the locality, it is an exceptional rather than a common and ordinary one. It is not incidental to the use of the soil itself, as such; indeed, is destructive of what is the most common use of the soil, viz. for agricultural purposes."

The acts in question cannot be justified on the ground of custom, or that they are necessary to the successful conduct of defendant's business. "If the injury complained of were merely a fanciful wrong, or produced simply personal discomfort, such as any dweller in a town is necessarily subject to by reason of the operations of trade which may be there carried on, and which are actually necessary, not only for the enjoyment of property, but for the benefit of the inhabitants of the town and the public at large, there might be no real ground of complaint; but where the result of the acts of one on his own land is a direct and material injury to the property and property rights of another, a very different question arises, and in such cases the maxim *sic utere tuo ut alienum non laedas* applies." Besides, the acts complained of here are, by statute in Ohio, a nuisance. Act April 15, 1857; Act March 27, 1875; Rev. Stats. 6925.

Pennsylvania. *New Boston C. & M. Co.* v. *Pottsville Water Co.*, 54, 164 (1867). A water company filed a bill for an injunction against a mining company, to restrain them from polluting the

water of a stream from which the former supplied the town of Pottsville. The evidence not being clear that the water, where taken from the stream by the water company, was affected by the drainage from the mines, it was error to grant a preliminary injunction.

Little Schuylkill N. R. & C. Co. v. *Richards*, 57, 142 (1868). A dam was filled with coal dirt washed down from deposits made on the lands of a mining company, as well as on the lands of others unconnected therewith. The court charged that if at the time defendants were throwing coal dirt into the stream the same thing was being done at other collieries, and they knew it, they were liable for the combined result of all the deposits. This was error. The defendants' tort, in the absence of concerted action with the others, was several, and the difficulty of determining what part of the dirt in the dam came from defendants' mine would not make them liable for the negligence of others.

Brown v. *Torrence*, 88, 186 (1878). If a stream of water passing through a tract of land is polluted and rendered unfit for use by reason of the discharge of refuse from the mines beneath the land, the surface owner may recover damages therefor from the mine owner.

Pennsylvania Coal Co. v. *Sanderson*, 113, 126 (1886), overruling s. c. 86, 401, and 94, 302. · One operating a coal mine in the ordinary and usual manner may, upon his own lands, drain or pump the water from his mine to the surface, whence it may drain into a stream which forms the natural drainage of the basin in which the mine is situated, although the quantity of the water of the stream may thereby be increased, and its quality so affected as to render it totally unfit for use for domestic purposes by the lower riparian owners.

The use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners who purchased their land, built their houses, and laid out their grounds before the opening of the coal mine, the acidulated water from which rendered the stream entirely useless for domestic purposes, must, *ex necessitate*, give way to the interests of the community, in order to permit the development of the natural resources of the country and to make possible the prosecution of the lawful business of mining coal.

"It will be observed that the defendants have done nothing to change the character of the water, or to diminish its purity, save what results from the natural use and enjoyment of their own property. They have brought nothing on to the land artificially. The water as it is poured into Meadow Brook, is the water which the mine naturally discharges; its impurity arises from natural, not artificial causes. The mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it.

"It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property."

"The defendants, being the owners of the land, have a right to mine the coal. It may be stated, as a general proposition, that every man has the right to the natural use and enjoyment of his own property, and if whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is

damnum absque injuria, for the rightful use of one's own land may cause damage to another without any legal wrong.

"Mining in the ordinary and usual form is the natural user of coal lands; they are, for the most part, unfit for any other use. 'It is established,' says Cotton, L. J., in *West Cumberland Iron Co.* v. *Kenyon*, L. R. 11 Ch. Div. 773, 'that taking out mineral is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful, proper mining operations.' In the same case, Brett, L. J., says: 'The cases have decided that where that maxim (*sic utere tuo ut alienum non lædas*) is applied to landed property, it is subject to a certain modification; it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.' L. R. 11 Ch. Div. 787.

"The right to mine coal is not a nuisance in itself. It is, as we have said, a right incident to the ownership of coal property, and when exercised in the ordinary manner, and with due care, the owner cannot be held for permitting the natural flow of mine water over his own land, into the watercourse, by means of which the natural drainage of the country is effected.

"There are, it is well known, percolations of mine water into all mines; whether the mine be operated by tunnel, slope or shaft, water will accumulate, and, unless it can be discharged, mining must cease. The discharge of this acidulated water is practically a condition upon which the ordinary use and enjoyment of coal lands depends; the discharge of the water is therefore part and parcel of the process of mining, and as it can only be effected through natural channels, the denial of this right must inevitably produce results of a most serious character to this, the leading industrial interest of the State.

"The defendants were engaged in a perfectly lawful business, in which they had made large expenditures, and in which the interests of the entire community were concerned; they were at liberty to carry on that business in the ordinary way, and were not, while so doing, accountable for consequences which they could not control; as the mining operations went on, the water by the force of gravity ran out of the drifts and found its way over the defendants' own land to the Meadow Brook. It is clear that for the consequences of this flow, which by the mere force of gravity, naturally, and without any fault of the defendants, carried the water into the brook and thence to the plaintiff's pond, there could be no responsibility as damages on the part of the defendants."

"But it does not appear from any evidence in this cause, that the mine was conducted by the defendant, in any but the ordinary and usual mode of mining in this country. The deeper strata can only be reached by shaft, and no shaft can be worked until the water is withdrawn. A drift is in some sense an artificial opening in the land and accumulates and discharges water in a greater volume and extent than would otherwise result from purely natural causes, yet mining by drift has, as we have seen, been held to be a natural user of the land. So, too, we think, according to the present practice of mining, the working of the lower strata by shaft, in the usual and ordinary way, must be considered the natural user of the land for the taking out of the coal,

which can be reached by shaft only; and, as the water cannot be discharged by gravity alone, it must necessarily, as part of the process of mining, be lifted to the surface by artificial means, and thence be discharged through the ordinary natural channels for the drainage of the country."

"We do not say that a case may not arise in which a stream, from such pollution, may not become a nuisance, and that the public interests as involved in the general health and well-being of the community may not require the abatement of that nuisance. This is not such a case; it is shown that the community in and around the city of Scranton, including the complainant, is supplied with abundant pure water from other sources; there is no complaint as to any injurious effects from the water to the general health; the community does not complain on any grounds. The plaintiff's grievance is for a mere personal inconvenience, and we are of opinion that mere private personal inconvenience, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community."

Gallagher v. *Kemmerer*, 144, 509 (1891). In trespass for injury to plaintiff's lands, it was shown that refuse and waste from defendants' coal breaker, on their own lands, were carried down the stream, filled the bed thereof, overflowed, and accumulated upon plaintiff's bottom-land, rendering the same unproductive and worthless. It was made to appear that a portion of the accumulated refuse, fouling the stream and injuring the plaintiff's land, had come from the coal breaker of another company operating independently, on their own lands, on the same stream, and above the coal works of the defendants.

The liability of the defendants sued began with their own act on their own land, and, being independent of the acts of the other operators, it was several when committed, and did not become joint because the general consequences were united. Wherefore the defendants were liable separately for the results of their own act, though difficult of exact ascertainment; and they were not discharged by a prior quit-claim and release executed by the plaintiff to the upper operators, for all injury done by them in their operations.

Williams v. *Fulmer*, 151, 405 (1892). Where the owner of a quarry, by depositing the waste thereof in a navigable river, obstructed the water power of a riparian owner below, and diverted the stream from its natural channel in front of his land, he could recover damages for the latter, but not for the former. The stream being navigable, he was without title to the water, but it was an actionable injury to deprive him of the advantages of his location.

Williams v. *Union Imp. Co. & J. T. Co.*, 1 Dist. Rep. 288 (1892). Defendants, owning coal mines, instead of draining into the stream running through the valley in which they were situated, proposed to conduct their waste water by means of a tunnel five miles long, through the mountain, and discharge it into another basin, which formed the drainage of a valley containing no mines, but devoted to agricultural

purposes. This will be enjoined at the suit of owners along the stream in this valley. The case differs from *Pennsylvania Coal Co.* v. *Sanderson*, and is not rendered analogous by the fact that the water was deposited on ground belonging to defendants.

Elder v. *Lykens Valley Coal Co.*, 157, 490 (1893). Williams, J.: "If the drainage from the mines falls into and pollutes a stream of water and injuriously affects lower riparian owners, this fact alone will not impose liability on the owner of the coal. *Sanderson* v. *Coal Co.*, 113 Pa. 126. He may deposit the culm and refuse from his mines on his own land, where they will be safe from encroachment by ordinary floods. If an extraordinary flood should reach and carry away any portions of the culm so deposited, and leave it on the lands of lower riparian owners, he is not liable for the injury so sustained. But he must deposit the culm and refuse on his own lands. He has no right to throw it into the streams, or leave it where ordinary floods will carry it down upon the lands of others; *Lentz* v. *Carnegie Bros.*, 145 Pa. 612. If he does throw it into the stream, or leave it where ordinary floods will carry it away, then the injury that his neighbor may suffer therefrom is not the natural and necessary consequence of the rightful mining of coal, but of the want of proper care in disposing of the refuse product of the mines. For an injury resulting from the want of care an action will lie."

"If, on the other hand, the evidence satisfied the jury that the defendant had thrown the culm into the stream where every flood, as well as the ordinary current, would act upon it, and carry it gradually down the stream, the fact that an extraordinary flood quickened its descent and gave the final impulse that lodged it on the plaintiff's land is not enough to bring the case within the rule."

Pfeiffer v. *Brown*, 165, 267 (1895). Defendant, boring an oil well, pumped therefrom salt water, which was turned into a storage tank, and thence drawn off and allowed to flow by a natural depression over plaintiff's land. Plaintiff afterwards diverted it into a neighboring brook by means of a ditch ploughed along the line of depression. *Prima facie*, defendant, having increased the aggregate quantity of water discharged, concentrated it at an artificial point of flow and changed its character from fresh to salt, whereby it became more injurious to plaintiff's land, was liable for the injury caused thereby. He claimed to be excepted from the general rule, because the water was discharged in a lawful and proper use of their own land, under the authority of *Pennsylvania Coal Company* v. *Sanderson*.

It was *held*, however, that this exception did not go beyond proper use and unavoidable damage, and the defendant was liable for the injury, if he could have avoided inflicting it by reasonable care and expenditure.

"If the expense of preventing the damage . . . is such as practically to counterbalance the expected profit or benefit, then it is clearly unreasonable, and beyond what he could justly be called upon to assume. If, on the other hand, however large in actual amount, it is small in proportion to the gain to himself, it is reasonable in regard to his neighbor's rights, and he should pay it to prevent damage, or should make compensation for the injury done. Between these two extremes

lies a debatable region where the cases must stand upon their own facts, under the only general rule that can be laid down in advance, that the expense required would so detract from the purpose and benefit of the contemplated act as to be a substantial deprivation of the right to the use of one's own property. If damages could have been prevented short of this, it is *injuria* which will sustain an action."

A proper standard of estimating damage is not given where the court charges that if the injury could have been avoided "at slight expense or at small expense," it was the duty of defendant to make such expenditure.

The simple device resorted to by the plaintiff avoided the injury, and was evidence upon which the jury should have found that defendants should have foreseen the result of their operations and provided against it.

Hindson v. *Markle*, 171, 138 (1895). The rules laid down in *Elder* v. *Lykens Valley Coal Co.*, *ante*, were repeated and followed.

The defendant here pumped water from his mine, used it to wash the coal, and then carried it by troughs to a point on his own land. Some of the culm was dropped and deposited on the land, and some carried by the water in troughs directly into the stream or into a gully that led into the stream.

Green, J.: "The case of *Penna. Coal Co.* v. *Sanderson*, 113 Pa. 126, is not at all in point. That was the mere flowing of natural water which was discharged by natural and irresistible forces, necessarily developed in the act of mining prosecuted in a perfectly lawful manner. While the mine water thus discharged polluted the water of the stream in which it necessarily flowed, it caused no deposit of any foreign substance on the land of the plaintiff and did not deprive her of its use."

Commonwealth v. *Russell*, 172, 506 (1896). The owners of land which they operated for oil, after separating the oil from the salt water with which it was mixed, allowed the latter to run out upon the surface, whence it drained into a stream, from which the borough of Butler was supplied with water. The water was thus rendered unfit for use. This case was held not to be ruled by *Pennsylvania Coal Co.* v. *Sanderson*. The rights of the public stand on higher ground than the personal inconvenience and injury of an individual. The fact that the water from this stream was supplied to the borough by a water company does not alter the public character of the right. This was a bill in equity to enjoin the pollution of the stream. The court below dismissed the bill. The Supreme Court reversed this action, and sent the case back for additional findings as to the condition of the ground, the extent and value of the oil operations, the possibility of working the oil wells without contaminating the stream, whether this contamination could be prevented by any means, whether the plaintiff could obtain a water supply elsewhere, and the expense of so doing, etc.

V. Drainage.

The owner of a mine on a higher level may allow the water therein to flow in natural channels and percolations into an adjoining mine, but he may not, in the absence of an easement or license to do so, discharge it by means of artificial drains into such adjoining mine. He may permit the water to flow where it naturally will in the course of ordinary mining, and is consequently not bound to impound it to prevent its flowing into an adjoining mine. The lower mine is under a natural servitude to an adjoining higher one to receive water flowing down to it naturally by the force of gravitation.[1] The owner of the latter may not, however, allow water to flow into the mine on the lower level, or to fill up his own mine to the destruction of an easement which the owner of a lower level has therein.

The owner of the latter may take out all of his mineral, and the owner of the former, if he wishes to prevent the flooding of his mine, must leave upon his side of the boundary sufficient barriers to protect it. This duty to dam is, however, only for the mine owner's own protection. To an owner of a mine of still lower level he owes no obligation to leave or build such a barrier against higher mines, nor having built is he bound to maintain it, though by building the dam he increases the volume of water, which he may subsequently discharge upon the lower mine.[2] Where, however, the owner of one mine conducts into the adjoining mine water which otherwise would not go there, or causes water to go there at different times or in larger quantities than it otherwise would, he is liable for the damage resulting. He may not, therefore, construct a drain emptying into the neighboring mine. He may not dam up and change the course of a stream so as to discharge its waters into the adjoining mine. He may not break through the barrier left by the adjoining owner to protect his mine. These are all trespasses for which he will be responsible in damages. This responsibility is unaffected by any question of negligence; but he may be likewise held liable for such overflow as is occa-

[1] The mine owner's right of drainage is the same as the right of surface drainage at the civil law. The law as stated has been applied in at least one State where the common law as to surface drainage is followed. Whether this course would be taken in others is of course doubtful. For an exposition of the law of surface drainage, see *Walker* v. *Southern Pac. R. Co.*, 165 U. S. 602.

[2] See, however, Pennsylvania Act May 15, 1893, art. ix. sec. 4; Act June, 1891, art. iii. sec. 10, P. L. 183.

sioned by bad mining or insufficient pumping of water flowing in from the surface. It is a duty which the mine owner owes to his adjoiner to pump not only what is sufficient for ordinary drainage, but to provide against heavy rains and snows, which, by their periodical recurrence, might be anticipated. There is, however, no duty to pump out water that has accumulated naturally from the force of gravity. A mine owner is under no obligation to keep his mine pumped out for the benefit of his neighbor. Consequently he cannot be charged with the cost to his neighbor of pumping water that has naturally drained into the latter's mine.[1]

Whether a mine owner may be held liable for failure to support the surface whereby water from the surface is introduced into his mine and flows into the adjoining one, is the subject of dispute. In Pennsylvania, and formerly in New Jersey, the position was taken that the mine owner's duty to support the surface was absolute, and the mine owner was responsible for injury resulting from the introduction of surface water caused by withdrawing the ribs, pillars, or other supports; and he would be enjoined from such removal. This would be undoubted where the defendant had connected his mine with plaintiff's by his own trespass, but as a general principle it is denied in the most recent case in New Jersey. The right of surface support is not a right of the adjoining but of the superjacent owner. To the adjoining owner, the mine owner only owes the duty of mining carefully and in the ordinary way. If he does this he may remove all the minerals from his mine without regard to the damage to his neighbor by flooding.

Where the owner of the upper mine first reaches the boundary and mines over it, and either himself breaks into the lower mine, or the owner of that mine subsequently breaks into the excavation made by him, he is liable in trespass, but cannot be compelled in equity either to close the opening or to prevent the flow of water into it.

The cause of action is the trespass in mining over the line, not the flowing of the water, and the Statute of Limitations runs from the date of that trespass.

The measure of damages is the actual loss sustained in delay, loss of time, damage to machinery, and the like. If the mine is

[1] As to tapping bituminous coal mines in Pennsylvania, see Act May 15, 1893, art. ix. sec. 3.

irreclaimable, that is, if the cost of removing the mineral would exceed its value when removed, then the measure of damages is the value of the estate. The better opinion is that loss of earnings is not a proper measure of damages.[1]

The drainage of mines is a matter of such general importance, that in many of the States the legislature has enacted statutes governing the mode in which it should be conducted. Provision is made for drainage over or through adjoining lands, and even the right of eminent domain has been given for acquiring the necessary ground for drainage. The constitutionality of this grant may at least be considered doubtful.[2]

Some States, again, have provided elaborate systems of joint drainage by adjoining owners;[3] and Iowa has prescribed a royalty to be paid to those who rid a mine of water,[4] while in Missouri the owner of mines is compelled to drain for the benefit of his licensees, or be deprived of a remedy for the collection of his rent.[5] In North Carolina it is made a misdemeanor to obstruct a drain.[6]

In the public land States, the regulation of drainage has been left by Congress to the local legislatures.[7]

United States. *Prevost* v. *Gorrell*, 5 W. N. C. 149 (1877), C. C. E. D. Pa. Plaintiff and defendant leased adjoining mines from the same landlord. A former tenant of plaintiff's mine had committed a trespass by crossing the division line and thus connecting the mines. In an action of trespass for causing water to flow into plaintiff's mine: *Held*, defendant had the right to take out all the coal within the boundaries of his lease, subject to the requirements of skilful and careful mining. He was responsible for drainage into plaintiff's mine, occasioned by the use of artificial contrivances not resorted to in the course of good and skilful mining; for such overflow as was occasioned by insufficient pumping capacity and bad mining;

[1] See, however, *Prevost* v. *Gorrell*, *post*.

[2] California, Code Civ. Proc. sec. 1238; Georgia, Code 1882, art. 7, secs. 742–53; Idaho, Rev. Stats. 1887, sec. 3142; Illinois, Hurd's Rev. Stats. 1895, ch. 94, sec. 1, p. 1052; 2 Starr & Curtis Ann. Stats. 2738; Iowa, Rev. Code, 1888, tit. x. ch. 2, p. 421, secs. 1228–35; Montana, Pol. Code 1895, secs. 3630–41; Code Civ. Proc. 1895, sec. 2211; Nevada, Gen. Stats. 256–273; North Carolina, Code 1883, secs. 3293–8; Pennsylvania, Acts April 14, 1868, P. L. 293; Feb. 18, 1870, P. L. 197; March 24, 1868, P. L. 438; May 15, 1893, art. ix., P. L. 55; Wisconsin, Ann. Stats. 1889, secs. 1650–5, pp. 989, 990. See also *ante*, p. 591.

[3] Arizona, Rev. Stats. 1887, secs. 2352–7; Colorado, M. A. S., secs. 3172–3180.

[4] Rev. Code 1888, tit. x. ch. 2, p. 421, secs. 1229–35.

[5] Gen. Stats. 1889, sec. 7043.

[6] Code of 1883, sec. 3301.

[7] Rev. Stats. 2338; Colorado, Const., art. xvi. sec. 3.

for surface water which was introduced into his mine by reason of badly constructed ditches on the surface and insufficient pumping. The measure of defendant's duty as to pumping capacity is not that which is sufficient to provide for ordinary and useful drainage, but he must provide also for such heavy and continued rains and melting snow as by their understood periodical recurrence might be anticipated.

The measure of damages was the plaintiff's loss of legitimate earnings, which is the difference between the cost of mining and preparing the coal for market, and the market prices when prepared, upon such quantity as plaintiff shows satisfactorily he was provided with necessary means to mine and prepare, and that he could ship and sell.

California. *People* v. *Parks*, 58, 624 (1881). The act of April 23, 1880, entitled "An act to promote drainage," is unconstitutional, as it contravenes the provision of the constitution requiring every act to embrace but one subject, which should be expressed in its title. This act among other things provided for the appointment of commissioners to investigate the subject of drainage with a view to the control of débris from mining and other operations.

Illinois. *Bannon* v. *Mitchell*, 6 Ap. 17 (1880). Where defendant in mining coal passed over the line of his land and removed a quantity of coal left by the adjoining owner on his land as a barrier, and in consequence of such removal the water from defendant's mine flowed into the mine of the latter, and rendered further mining impracticable, the adjoining owner may recover substantial damages. If the flooding makes it so difficult to get the coal out that the expense of taking it out is greater than its value when taken out, it may be treated as destroyed, and recovery be had accordingly.

Jones v. *Robertson*, 116, 543 (1886). Each of the owners of adjacent mines has the right to take out all of the coal within his own boundaries up to the dividing line; but it is incumbent upon the owner of the lower mine to protect himself from water flowing naturally in his direction, and for this purpose he should leave a wall of coal within his own boundaries of sufficient width and strength to protect him from the encroachments of the water from the upper mine, which, if unobstructed, would necessarily flow into his own.

Where a mining district consists of numerous adjoining mines, and those of the upper part of the dip, or on the higher level, have been exhausted and abandoned, and have filled with water, which presses upon and passes into those below, the owner of a mine not yet exhausted may build a dam to hold back the accumulating water while he continues his operation. When the dam breaks and floods his own and a lower mine, he is not liable for injury to the lower mine, although this mine might have been saved if, instead of building the dam and accumulating the water behind it, the owner of the upper mine had abandoned his mine and allowed water to flow in without restriction.

Iowa. *Ahern* v. *Dubuque Mining Co.*, 48, 140 (1878). Section 1229 of the Code, providing that any person who shall by drains or adit levels rid lead-bearing mineral lands of water, making them productive or available for mining purposes, shall be entitled to receive one-tenth of all the lead mineral taken therefrom, is constitutional. This statute is identical in principle with those regulating party walls

and partition fences, and provides only that one should compensate another for outlays lawfully made by which he himself has been benefited. There is no taking of private property, but the recovery of compensation for benefits rendered. The building of an adit is a matter of public interest, and of great good, and for that reason is lawful.

Maine. *Ulmer* v. *Farnsworth*, 80, 500 (1888). Compensation for pumping from a quarry water which ran into it from an adjoining quarry, where it accumulated, cannot be recovered in an action of assumpsit against the owner of the other quarry, when there is no evidence of a promise to pay for such services.

Michigan. *National Copper Co.* v. *Minnesota Mining Co.*, 57, 83 (1885). One of two adjoining mine owners broke over the dividing line, but not into the neighboring mine. Subsequently the owner of the latter mine in its operations reached this opening, and over fifteen years afterwards, upon the abandonment of its mine by the trespassing owner, the accumulated water flowed into the lower mine. *Held*, that an action of trespass was barred by the Statute of Limitations.

The breaking over the line was a trespass, but the failure to fill up the hole so made was not a continuing trespass. The leaving of a hole in the wall of another is not a trespass. The mere flowing of the water from one mine into the other did not constitute an act of trespass. Neither party was under obligation to keep his mine pumped out for the benefit of its neighbor. Either was at liberty to discontinue its operations and abandon its mine whenever its interest should seem to require it.

New Jersey. *Thomas Iron Co.* v. *Allentown Mining Co.*, 28 Eq. 77 (1877). Where the owner of mines has mined over the boundary, and taken ore from the land of an adjoining owner, he will be enjoined from mining his land to exhaustion so as to let down the surface, if his so doing will cause the waters of a swamp on the surface to be conducted through the openings made by him into his neighbor's ore beds.

Lord v. *Carbon Iron Mfg. Co.*, 38 Eq. 452 (1884). A lower mine is under a natural servitude to an adjoining higher one to receive water flowing down to it naturally.

It is the natural right of each of the owners of two adjacent mines to work his own mine in the manner most convenient and beneficial to himself, though the natural consequence be that some injury will accrue to his neighbor. For damages resulting from natural causes, or from lawful acts done in a proper manner, the law gives no redress; but when one of two adjoining mine owners conducts water into his neighbor's mine, which would not otherwise go there, or causes water to go there at different times and in larger quantities than it would naturally go there, he is answerable in damages.

Equity will restrain one of two adjacent mine owners from removing the supports which prevent the surface from caving in, when such removal will result in the destruction of his neighbor's mine.

Lord v. *Carbon Iron Mfg. Co.*, 42 Eq. 157 (1886). If an upper mine owner break through a barrier which was left by a lower adjacent

owner to protect his mine from water, the upper owner is liable for the trespass, but he cannot be compelled in equity either to close the opening or prevent the flow of water into it.

First and third paragraphs of abstract of last case (*Lord* v. *Iron Co.*, 38 N. J. Eq. 452) adopted. The owner of a mine has a right to take away the whole of the minerals. Equity will not enjoin his doing so, so as to allow the surface to subside. Whether, by reason of such subsidence, water having flowed into and damaged the adjoiner's mine, he would have an action for damages, not decided.

New York. *Genet* v. *D. & H. Canal Co.*, 122, 505 (1890). See this case on p. 611, *ante*.

Ohio. *Williams* v. *Pomeroy Coal Co.*, 37, 583 (1882). Defendants were lessees of coal under a certain lot of land, and in excavating it, mined over the boundary of the adjoining lot. This was in 1861. The plaintiff subsequently purchased the adjoining lot, and in 1868, after the determination of the defendant's lease, tapped the water that had accumulated in his mine. In an action for damages, the statute was held to run from the date of the original trespass, and the action was barred. The cause of action was the original trespass and not the creating and maintaining a nuisance.[1]

Pennsylvania. *McKnight* v. *Ratcliff*, 44, 156 (1863). A mine owner is liable for damages to an adjoining owner, whose mine was flooded by reason of the former's damming up and changing the course of a stream.

It is no defence to an action for such damages that the plaintiffs had chosen to connect their works with those of the defendants, operating through their gangway, had extended their slope below the water level of the defendants' shaft, and had not erected any barrier between their respective workings, or to protect themselves against influx of water, which the custom of miners and the rules of good mining required. As the injury was wilful, counter negligence was not a defence.

The measure of damages was the actual injury sustained in delay, loss of time, damage to machinery, and the like; and if the mine was irreclaimable, then the value of the estate and property. Mere speculative profits, supposed to be lost, could not be recovered, and it was error to charge that if the mine was rendered entirely useless, profits that might have been made out of the coal would be a fair basis for estimating damages.

Douty v. *Bird*, 60, 48 (1869). In trespass for breaking a dam, and so flooding plaintiff's mine, whereby work was prevented, evidence of the amount of coal each miner would mine, and of the expense of keeping mules while the mine could not be worked, is admissible on the question of damages.

Locust Mountain Coal Co. v. *Gorrell*, 9 Phila. 247 (1872). The owner of an upper mine, must use reasonable diligence to prevent the flow of water from his mine into a lower mine. The maxim *sic utere tuo ut alienum non lædas* applies. When the miner in the upper mine, in carrying forward his gangway, strikes into a breast which has been wrongfully worked by a trespasser up the dip of his coal vein, he is not justified in emptying the water flowing down the drain or gutter of

[1] The effect of this case has been obviated in Ohio by Rev. Stats. 1890, sec. 4982.

his gangway into the opening thus struck, if by reasonable means he can carry the water across the drain into the gutter or drain leading into his own sumpt. But when water, following the law of gravitation after the removal of the coal in a careful and proper manner, finds its way by percolation or through fissures unforeseen and unknown, into the lower mine, its owner cannot complain of it as an injury done by the owner of the upper mine.

Phila. & Reading Coal Co. v. *Taylor*, 5 Leg. Gaz. 392 (1873), Com. Pleas. In the working of upper and lower levels of the same vein, the maxim *sic utere tuo ut alienum non lædas* obtains. Adjacent owners on the same level owe no special duty to one another; but subjacent owners have a servient, and superjacent owners a dominant, interest. The owner of the higher level may mine all his coal down to his line, and he is not responsible for water that flows by the force of gravitation into the lower level. The owner of the latter is bound to leave on his side of the line a sufficient pillar of coal to prevent the water in the upper level from breaking through.

When, however, the owner of the upper level created a servitude upon his land in favor of the subjacent owner, such owner, after he has worked all his coal out and is about to abandon his workings, must give reasonable notice to the owner of the dominant tenement, which in this case is the lower level, and on his failure to do so, equity will restrain him from permitting the water to fill up, if by so doing it will destroy the easement, the owner of the dominant tenement to be at the expense of pumping the water until the injury can be remedied. The legal relation of the owners of upper and lower levels under ground are much the same as those of the owners of surface and minerals.

Horner v. *Watson*, 79, 242 (1875). The owner of a mine is not liable for damages occasioned by the collection and flow of subterranean water upon lower mines, arising from mining coal in any ordinary way. But it is otherwise where by his mining, whether done in an ordinary way or not, he introduces foreign water from the surface or higher land, by reason of the roof falling in. The owner of the minerals owes the duty of support to the surface, from which duty no custom will excuse him.

MINING, MINERAL AND GEOLOGICAL LAW

A TREATISE ON THE LAW OF THE UNITED STATES

Involving Geology, Mineralogy and Allied Sciences as applied in Mining, Real Estate, Public Land, United States Customs and other Litigation

Also the Acquisition and Maintenance of Mining Rights in the Public Domain and Obtaining Patents for Mineral Land under the United States Mining Laws

BY

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Property in Broken Minerals, Tailings, etc.

After a mineral has been broken or severed from the vein or deposit, it is no longer real estate, but personal property and subject to the rules of law respecting personal property.[17] This is true, even if the mineral is not removed from the mine, but lies at the breasts, having been broken down from the working face.

If tailings from a stamp mill or other ore-dressing establishment or mine are abandoned by the owner and allowed to flow down the stream or are deposited on land belonging to other persons, they become the property of the owner of the land on which they may be deposited.[18] If they accumulate on vacant or unappropriated land they may be appropriated by the first comer under the provisions of the Placer Act. Perhaps this last statement should be qualified, because the courts, in reality, have not gone farther than to say in relation to such a case:

"Although not a mining claim within the strict meaning of the expression as generally used in this country, still it is so closely analogous to it that the propriety of subjecting the acquisition and maintenance of the possession of it to the rules governing the acquisition of the right of possession to a strictly mining claim at once suggests itself.

"The only value attached to the land results from the precious metals that may be obtained from it. What is the difference how these metals may have been deposited there, so far as a case of this kind is concerned? It is distributed through a certain stratum of earth, which must be dug up and put through a certain milling process, as in the case of any ordinary metalliferous earth. If the land be valuable only for the metal which it may contain, and it is claimed by neither party for any other purpose, the acquisition of title to it should manifestly be governed by the rules ordinarily controlling the acquisition of title or the right of possession to mining claims. We do not pretend to hold the land here in question to be mineral land, but only that it is so clearly analogous thereto that the laws controlling the possession of one should also govern the other." [19]

Although in the above case the court does not go farther than to hold that such land with the deposit of tailings thereon could be held by right of possession *analogous* to the statutory provisions of the mining law, there does not seem to be any good reason

[17] *Crouch* vs. *Smith*, 1 Md. Ch., 401; *Riley* vs. *Boston Water Power Co.*, 11 Cush. (Mass.), 11; *Lykens Valley, etc., Co.* vs. *Dock*, 62 Pa. St., 232.

[18] *Jones* vs. *Jackson*, 9 Calif., 237; *Rogers* vs. *Cooney*, 7 Nevada, 212

[19] *Rogers* vs. *Cooney*, 7 Nev., 212 (vols. v, vi, and vii, combined, 873).

this was a placer mine or not; but it is stated that the owner being present at the workings on one occasion said to the manager that he "expected complainant had or would give him up the land to plant corn on," so that it was probably a placer, and surface possession decided the matter.

A related question is whether the statute of limitation for bringing actions of trespass to real property applies where the trespass is committed under ground in the course of mining operations. On the surface, the fact of the trespass is open to observation, and the statute runs from the date of the commission of the act. But under ground the trespass is concealed; and the general rule is, that the statute of limitation does not begin to run until the discovery of the trespass or until the time when the same might have been discovered by reasonable diligence.[22]

In Montana, Ohio, and Utah there are statutory provisions on the subject which, of course, control in these States.

Property in Meteorites

The ownership of meteorites, the bodies of mineral, usually metallic iron, which fall from the sky upon the surface of the earth, is one of special interest because it involves a direct legal construction of the theory of the constitution of the universe as expounded in the planetesemal hypothesis, the nebular hypothesis, etc. The first case of this kind of which there is a record in the United States is that of *Goddard* vs. *Winchell*, 86 Iowa, 71, 52 N. W., 1124, in which the dispute was to whether the owner of the land was also the owner of a meteorite which fell on his land, or whether it belonged to a third party who had seen it fall and dug it up and sold it to Winchell. This third party dug it up from a depth of three feet below the surface, where it had imbedded itself by the force of the fall. Goddard, the owner of the land, replevied it from Winchell, and the case went up to the Supreme Court of the State, which says in its decision of the case:

"The subject of the dispute is an aerolite, of about 66 pounds' weight, that 'fell from the heavens' on the land of the plaintiff, and was found three feet below the surface. It came to its position in the earth through natural

[22] *Lewey* vs. *H. C. Fricke Coke Co.*, 166 Penn. State, 536, 31 Atl., 261, 45 Am. St. Rep., 684; *Gottshall* vs. *Langdon*, 16 Pa. Super. Ct. Rep., 158; *Boyd* vs. *Blankman*, 20 Calif., 19, 87 Am. Dec., 146.