

AN ANOMALY IN MINING LAW

By Chief Justice Theodore Brantly, Supreme Court of Montana.

Title to mineral land containing quartz deposits is acquired by discovery of a ledge or vein therein and location of it in compliance with the federal statute and local laws and customs not inconsistent therewith. The location followed by a fulfilment by the locator of all the conditions subsequent entitles him to demand a patent. It has always been the policy of the Congress, with reference to lands other than those containing quartz deposits, to vest in the patentee the entire interest, making no reservation of any kind either in favor of the government or for any other purpose. This policy has been consistently pursued, except that the legislation providing for the disposition of agricultural lands overlying coal measures, authorizes patent to issue to the agricultural claimant for the surface only.¹

Speaking generally, a patent is a common law grant. The title conveyed by a patent to a quartz claim, however, is in some cases greater, and in others less, than that conveyed by a common law grant, dependent upon subsurface conditions. If the vein on its descent into the earth departs from a perpendicular course it must finally pass into adjoining ground. The condition of parallelism in the end lines of the claim being present, the right to pursue the vein extralaterally is included in the grant.² Thus a servitude in favor of a mining claim is imposed upon an adjoining claim into which the vein departs extralaterally, it also being subject to a like servitude in favor of an adjoining owner who has extralateral rights. Where there are cross-veins, priority of title governs, but the holder of the junior title has a right of way through the space of intersection for the purpose of working his vein.³ This provision imposes a servitude upon the senior claim, but does not otherwise affect the exclusive right of the senior claimant.⁴ Within these, and perhaps other similar limitations, the owners of

¹ 32 St. at Large, 388; 36 Id., 583.

² U. S. Rev. Stat., Sec. 3220.

³ U. S. Rev. Stat., Sec. 2336.

⁴ *Calhoun Gold Min. Co. v. Ajax Min. Co.*, 182 U. S., 505.

mining claims hold them subject to the incidents of ownership and possession at common law.⁵

With these matters every lawyer who has given attention to the provisions of the statute regulating the disposition of mineral lands and the decisions of the courts thereunder, is familiar. They are mentioned in order to make clear the point which it is the purpose of this discussion to illustrate. Section 2322, U. S. Rev. Stat., provides: "The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, 1872, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." The right acquired by the location has always been held to be property of the highest character, and may be protected from trespass by any suitable remedy. The legal title is held by the government in trust for the locator or his vendee. Its power of disposition is exhausted.⁶

In the *Del Monte Case*,⁷ the Supreme Court held that the lines of a junior location may be "laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location." Since it is the special prerogative of that tribunal to construe the Acts of Congress, the scope and meaning assigned to them by it must be the guide to state courts when they come to apply them.⁸ In its decision the court recognized the doctrine that in construing

⁵ *Parrott Silver & C. Co. v. Heinze*, 25 Mont., 504; *Doc v. Waterloo Min. Co.*, 54 Fed., 985; *St. Louis Min. Co. v. Montana Min. Co.*, 194 U. S., 235.

⁶ *Noyes v. Mantle*, 127 U. S., 351; *Clipper Min. Co. v. Eli Min. Co.*, 194 U. S., 226.

⁷ *Del Monte M. & M. Co. v. Last Chance M. & M. Co.*, 171 U. S., 55.

⁸ *Galhoun Gold Min. Co. v. Ajax Min. Co.*, 182 U. S., 497.

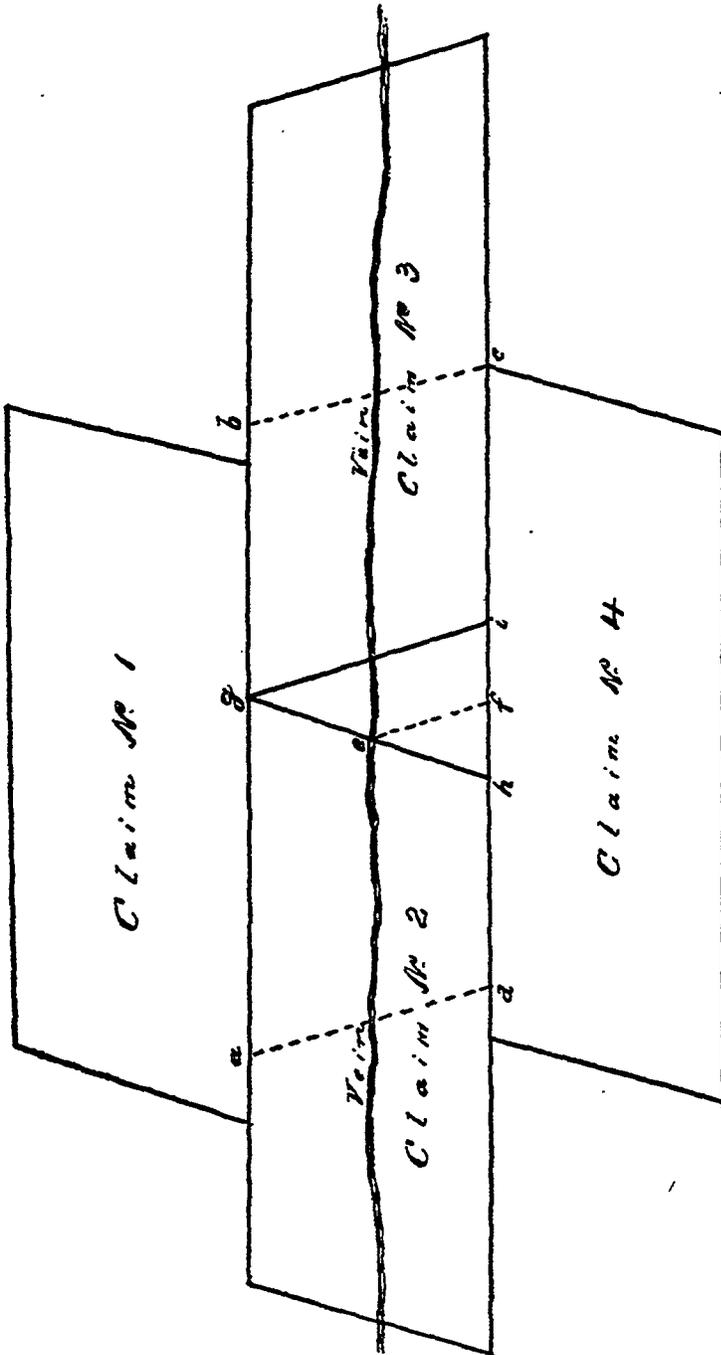
the statute, the question is not what according to equitable principles the locator ought to have under his location, but whether he has complied with the statute under any reasonable and fair construction of it. In other words, there is no right unless it is in terms granted by the statute.⁹ It also reaffirmed the doctrine that one locator cannot initiate a right by encroaching upon the surface of a valid and subsisting location belonging to another, because the encroachment is a trespass. It then proceeded to hold that the overlapping location is not void, but that by virtue of the parallelism of its end lines, secured by means of the apparent appropriation of land already appropriated by others, the owner is entitled to extralateral subsurface rights which he would not have acquired if he had not laid his boundaries as he did; that is, "within, upon or across the surface of a senior location." This conclusion was induced by knowledge of the conditions actually existent in mining districts, such as the rough and uneven nature of the country, the confusion and haste often incident to the making of locations when deposits are discovered in new districts, the irregularity in the course of the vein or veins, the likelihood of mistakes in laying boundary lines, and the like, all of which must have been foreseen and expected by the Congress when it formulated the legislation, as in the opinion of the court is evidenced by the fact that it made provision for the adjustment of conflicting claims.¹⁰ The court seems also to have been influenced somewhat by the consideration that the legal title to a mining claim does not pass from the government until the issuance of patent, and until that time arrives Congress retains a certain measure of control, though this notion is not in accord with its prior decisions. It is not the purpose to question the soundness of the conclusion reached by the court. In view of the definite requirement that parallel end lines are a necessary prerequisite to extralateral subsurface rights and the conditions known to be prevalent in the mining districts, the rule as announced was adopted because it seemed more nearly in conformity with the spirit of the mining statute. The only other conclusion possible was, that all overlapping locations are void, and hence the further conclusion that the federal government cannot, without additional legislation, dispose of the valuable extralateral rights which ap-

⁹ *Belk v. Meagher*, 115 U. S., 45; *Iron Silver Min. Co. v. Elgin Min. Co.*, 118 U. S., 196; *King v. Amy Min. Co.*, 152 U. S., 272.

¹⁰ U. S. Rev. Stat., Secs. 2325, 2326.

pertain to so much of the apex of a vein as is found within the boundaries of an irregularly shaped piece of mineral land. Yet the rule as stated does not dispose of the difficulty even where the overlapping claims are not patented. It does not go to the extent of declaring that the junior location may overlap the senior location despite objection on the part of the owner—in other words, that the right to overlap is one conferred by law and may be enforced by judicial process or otherwise. It is often the case that the senior locator does object and sustains his objection by force of arms. He knows that upon application for patent the junior locator will in all likelihood test the validity of his location by an adverse suit, with its attendant expense and vexatious delay, or that he will himself be compelled to resort to one, to prevent the junior locator from taking from him the area embraced in the overlap. So that, as the law now stands, the power of the officers of the Interior Department to dispose of the values found in the extralateral portions of the vein is dependent upon the consent or want of objection on the part of the owner or owners whose claims surround the irregularly shaped area. The subjoined diagram, though it does not represent a concrete case, serves for the purpose of illustration (see next page):

Suppose the vein departs in the direction of Claim 4. Suppose that A owns Claims 1, 2, 3 and 4, not patented, and that B desires to locate the enclosed triangle *g, h, i*, so as to secure the extralateral rights appertaining to the portion of the apex of the vein included within it. He cannot do so without setting his monuments and laying his lines upon A's claims. He wishes to place his monuments at the points *a, b, c, d*. If A objects and enforces his objection, he must either bound his claim so as to include only the triangular area and forego claim to the extralateral portion of the vein, or he must lay his end lines parallel with the end lines of either Claim 2 or 3 (for illustration, *e, f*, and *g, i*), thus excluding a triangle equivalent to the area *c, f, h*, together with the mineral contained in it. In the first case the extralateral rights excluded will belong to A by reason of his ownership of the surface of Claim 4, or the title to them will remain in the federal government. In the second case, the mineral included within the perpendicular planes bounding the surface of the triangle *e, f, h*, will remain unappropriated and not subject to appropriation, because no portion of the apex is left, and under the provisions of the statute as they now are, some portion of the



apex is necessary to authorize a location. And, though this were not so, the extralateral portion beyond the line *hf* cannot be appropriated, with the result that it remains unappropriated or belongs to A by reason of his right to the surface of Claim 4, and consequently his *prima facie* right to everything beneath. Suppose Claims 1, 2, 3 and 4 are patented. They are not subject to any control by Congress. B cannot then go upon any of A's claims for any purpose except by A's consent. He cannot, therefore, appropriate the extralateral portions of the vein except by A's acquiescence. If this is so, then the federal government owns property which it cannot dispose of without the consent of a private citizen—a proposition the soundness of which once admitted, destroys the conception of sovereignty altogether. And yet it was actually assumed to be sound, by the Secretary of the Interior in his decision in the case of Hidee Gold Mining Company,¹¹ for the point decided is stated in the headnote as follows: "The location lines of a lode mining claim are used only to describe, define and limit property rights in the claim, and may be laid within, upon or across the surface of patented lode mining claims for the purpose of claiming the free and unappropriated ground within such lines and the veins apexing in such ground, and of defining and securing extralateral underground rights upon all such veins, where such lines: (a) are established openly and peaceably, (b) do not embrace any larger area of surface, claimed and unclaimed, than the law permits." If we assume this to be a correct statement of the law, the converse of it is also correct, viz.: that if the lines and monuments of the overlapping location cannot be established openly and peaceably, they cannot be established at all.

The point sought to be illustrated is not suggested by speculation upon mere possibilities. It is well known that it is often the case that the owner of located claims resents intrusion upon his areas by others for any purpose, whether they are patented or unpatented. The records of our criminal courts show many cases where the setting of monuments and laying of boundary lines for the sole and avowed purpose of securing subsurface values which would otherwise be unappropriated, have led to violence and sometimes to homicide. A single citizen armed with a Winchester rifle can thus set at naught the decision in the Del Monte case and every other one following it. So the local courts, con-

¹¹ 30 L. D., 420.

fronted with declaration so emphatically made by the Supreme Court in many cases, that the statute must be the sole guide in determining the rights of mineral claimants, are often at a loss in the effort to determine cases for which the statute seems to make no provision because their occurrence was not anticipated when the statute was enacted. It is not surprising, therefore, that there should be conflicting views. For illustration: In one case a federal court held that the extralateral portion of a vein, the apex of which was found within the area of a triangular-shaped location, belonged neither to the locator of that claim nor to the owner of the adjoining claim, because it had never been granted to either and hence could be disposed of only by legislation amendatory to the present statute.¹² Considering the same question, a state court held that inasmuch as that portion of the vein had not been appropriated by the owner of the triangle and was beneath the surface of the adjoining owner, the latter was entitled to it by virtue of his common law right to everything beneath the surface.¹³ The Supreme Court of the United States seems to approve the conclusion announced by the state court.¹⁴ The failure of Congress to make specific provision for the disposition of these irregularly-shaped areas gives rise to these anomalies, and has tempted the courts to supplement the statute by judicial legislation, although the authority to do so is consistently disavowed. Would it not have been better if the court of last resort had adhered strictly to the rule, so often theretofore declared, that the statute is the only guide, and have left it to the Congress to supply its deficiency by additional legislation? Any solution of the difficulty so far reached by any court cannot be regarded as a guide in any other case not identical in its facts with the one in hand. Does it not seem an anomaly for a court to say at one time that a locator has the exclusive right to the surface of his location, and may protect his possession by any appropriate means, and at another that his rights are exclusive *sub modo* only? It may be that the apparently inconsistent announcements made by the Supreme Court can be reconciled upon some sound principle, but the condition of the law at present seems altogether anomalous.

Theodore Brantly.

¹² *Montana Co., Lim., v. Clark*, 42 Fed., 626.

¹³ *State ex rel. Anaconda C. Min. Co. v. District Court*, 25 Mont., 504; *Parrott S. & C. Co. v. Heinze*, 25 Mont., 139.

¹⁴ *St. Louis Min. Co. v. Montana Min. Co.*, 194 U. S., 235.