The Extralateral Right: Shall It Be Abolished?

III. The Federal Mining Act of 1872.

It was generally recognized that the law of 1866 was a long step in the right direction, inasmuch as it gave explicit federal sanction to mining on the public domain and thus set at rest any question as to what attitude the government would take toward the miners who were for eighteen years prior to its passage technical trespassers.[1] Everyone recognized that the Act of 1866 had been hastily prepared and passed to meet an emergency and thus forestall legislation hostile to the mining interests. Senator Stewart himself in urging the bill of 1871 in the Senate referred to the bill "as an amendment to the law of 1866 that was passed through in rather a crude state."[2] In the next Congress Senator Stewart was again the leader in framing the bill which during that session became the Act of 1872 and was its most active champion. A draft of a proposed act had previously been sent through the mining districts for criticism and the discussion had covered a period of two or three years.

The bill which had passed the Senate in 1871 was reintroduced in the next session of Congress and passed the House.[3] This bill

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[1] A similar situation has but recently arisen on the public domain in connection with the immensely valuable oil lands of California and Wyoming. Oil miners had gone on the public lands, though in this case at the invitation of the government, and expended fortunes in some instances in developing oil. The placer mining law was plainly unsuited to these novel conditions, where discovery of the oil lying at great depth required large capital and considerable time. Many claimants failed to comply with all of the technical requirements of this law and while certain remedial legislation was passed by Congress to improve the situation, the federal government has more recently treated these operators as trespassers and now seeks not only to eject them from these lands but also to recover the value of the oil theretofore extracted. This reversal of the liberal policy adopted by Congress in 1866 is due to the growth of the idea that the best interests of the public demands the reservation and control by the federal government of all natural resources which are vital to the future welfare of the nation and that this new policy is especially applicable to lands containing petroleum which is in demand for use in the navy. 3 California Law Review, 272-291.

[2] Congressional Globe, Feb. 6, 1871, p. 978.

[3] Dr. Raymond in commenting on this bill said: "In its main features it is an eminently wise and salutary measure. Senator Stewart has displayed both courage and judgment in its preparation, and has given new proof of intelligent, earnest devotion to the true interests of the mining industry. Raymond, Mineral Resources (1872), p. 502.

left the length of lode claims the same as under the Act of 1866 but provided for a maximum width of three hundred feet on each side of the middle of the vein at the surface and prescribed that the end lines should be parallel and at right angles with the general course of the vein.[4]

After the bill had passed the House, the Senate Committee on Mines and Mining evidently did its real work. The various features of the law that required changing were extensively debated. There appeared before this Committee representatives of the mining interests of the West.

Senator Alcorn of Mississippi had charge of the bill as chairman of the Committee and while disclaiming any special knowledge of the subject, yet, as a matter of accomodation, stood sponsor for the measure when it came before the Senate, saying:

> "This bill has been considered by the Committee with great care, each section of the bill has been discussed, and the result is that the report embodies the intelligence brought to the Committee by various persons who appeared before it in the interests of the mining districts. . . . . As to its practical working, I will only say that it is in conformity with what seems to be the settled policy of the Government with regard to mining."[5]

Senator Stewart, who was the real advocate of the bill in its revised form—the form which was substituted for the House bill, already passed by that body,—outlined the general situation leading up to its framing as finally presented for passage. His years of experience with actual conditions

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[4] Congressional Globe (Jan. 23, 1872), p. 533. Mr. Sargent representing California, who had charge of this bill in the House, urged its passage saying: " . . . . The bill does not make any important changes in the mining laws as they have heretofore existed. It does not change in the slightest degree the policy of the Government in the disposition of the mining lands. . . . . Now, although the legislation of 1866 was extremely imperfect in the machinery, which since that time we have been trying to improve so that it might be easier for miners to avail themselves of the benefits intended to be conferred upon them by law, yet it showed to observers that the system was correct. . . . . This bill simply oils the machinery a little; it does not change the principles of the law; it does not change the tenures; . . . . Congressional Globe, Feb. 6, 1871, p. 978.

In urging the passage of the Placer Act of 1870, Sargent had used the following language in describing the origin of these mining laws: "The original title or possession depended upon mining laws—a code originally written, modified afterward by custom—a code as well settled and understood by our courts and by the miners themselves as is the Common Law of England by the Courts of the United States—a code eminent for its wisdom, perfected by long experience, and admirably adapted to the conditions and necessities of the people among whom it originated."

[5] Congressional Globe, April 16, 1872, p. 2460.

in the mining districts of the West and his active interest in mining legislation, ever since he took the leading part in securing the adoption of the Act of 1866, add immeasurably to the weight of his views, which were as follows:

> " . . . . In the first instance the miners legislated for themselves. Congress finally in 1866 passed a bill embodying many of the principles of this bill, and from that time to this the Land Office has been operating under it, and for the last three years we have been attempting to codify it and bring it into a shape that will be satisfactory and more certain and correct abuses. Last year a bill was introduced here and passed which was quite similar to this. A bill has passed the House which is similar to the one that passed here last winter. Since its passage by the House the Delegates from the Territories and those familiar with mining rules have had a great many meetings over this bill in connection with the Committee on Mines and Mining, and the result is a codification, which is the best they can do. I believe it will meet with universal favor. It is a very important bill to be passed to prevent litigation and give certainty to mining enterprises. It provides for a very large district of country where there are important interests dependent upon it which are now in a very uncertain condition involving litigation. This is the best we can get with all the experience we can bring to bear. It is no one man's work, but it is the work of a great many men interested in this business. . . . ."[6]

When the bill as amended in the Senate came up in the House for re-passage, Representative Sargent of California made the following comment:

> ". . . . the variations from the bill as passed by the House are very trifling. . . . .[7] In the Senate the Committee on Mines and Mining and the Delegates and members of the House from the mining Territories and States, aided that Committee in perfecting the bill and improving its machinery. The bill is now entirely satisfactory to every Delegate and every member of the mining States and Territories, as well as to the Committee on Mines and Mining of this House."[8]

The bill as amended passed without any great opposition. In fact the main debate and criticism came from Western members of Congress who were not entirely satisfied with some of the changes made in the original bill by the Senate amendments. The

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[6] Id. p. 2457.

[7] As a matter of fact they were not as trifling as Mr. Sargent would have led his colleagues to believe.

[8] Id. p. 2897.

right of free mining was not seriously challenged and the subject of the extralateral right which was again confirmed by the new act was not mentioned in the debates in Congress, an indication that no objections of consequence had as yet been made against the continued exercise of this right.[9]

The Act of 1872,[10] again confirmed the right of free mining on the public domain that had already been recognized in the Act of 1866. While the Act of 1872 was intended to limit the operation of the miners' rules and regulations and make the mining law throughout the West more uniform by prescribing in greater detail the specific acts of location, yet the first section of the act expressly provided that mineral lands might be acquired

> "under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

In this connection the following was said during the Senate debate on the bill:

> Mr. Trumbull (of Illinois).
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> " . . . . as I understand, it adopts as law the regulations which the miners may make, which may be as various as the mines."
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> Mr. Stewart.
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> "Allow me to say that the old law (Act of 1866) adopts them. One of the difficulties is that they have legislated too extensively since the adoption of that law. This curtails their power of legislation, cuts it down to to a very small extent, takes away most of it, takes anything that can be prejudicial, and prescribes the rule so that their legislation cannot interfere with it. That is the main object of the bill."

Section 2, provided that quartz or lode claims theretofore located should be

> "governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location.

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[9] When the Placer Act of 1870 was before the House, Julien of Ohio, who had bitterly opposed the passage of the Act of 1866, could not resist the opportunity to vent again his hostility, and speaking of the extralateral grant of the latter Act said: "I admit that there may be a hardship in allowing a man to discover and hold a lode or vein of mineral which can be traced to the land of another from which he is debarred. There is hardship in that; but there is far greater hardship in the law as it now stands, recognizing the right everywhere to pursue a vein or lode on the land of another, inasmuch as it breeds interminable litigation and never can be resorted to as a method of settling titles to these lands." Congressional Globe, March 17, 1870, p. 2029.

[10] U. S. Stats. at Large, p. 91 et seq.

A mining claim located after the passage of this Act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode. . . . ."

As already noted, when the bill to amend the Act of 1866 passed the Senate in the previous session of Congress, and when the bill, which, as afterwards amended, became the Act of 1872, was reintroduced in the next session and first passed the House, it left the length of the lode claims unchanged, that is, two hundred feet along the vein for each locator and a maximum length of three thousand feet in one claim for an association of persons. The reasons for making this change were stated by Senator Stewart in the course of the debate on the bill to be as follows:

" . . . . In the Act of 1866 it is true that the locator was confined to two hundred feet, and two hundred feet additional for the discoverer of the lode, making four hundred feet. It allowed him to unite in companies until they got three thousand feet. In practical operation it is thought by the Delegates generally, and that is the experience, that three thousand feet is longer than can be worked at one place conveniently, but fifteen hundred feet makes a very reasonable claim. The practice under the other law was for them to put in fictitious names and buy them out, and you could not prevent them doing it. This matter was discussed considerably; we had several meetings on this point and the committee thought it was best to let them do directly what was reasonable, and not have them do anything indirectly.[11] It is a matter to which I am not especially wedded, but it was the result of three or four meetings of all the parties interested as to which plan should be adopted, and this was the one which was selected."

Mr. Cole, (one of the Senators from California).

"I have heard the Senator's explanation, and it is not satisfactory to me at all, because I know by the rules of miners claiming the mines upon these ledges for a long time,

[11] It is worth noting that this same act amended the Placer Act of 1870 by reducing the amount of ground that an individual could locate from 160 acres to 20 acres and by providing that an association of eight persons was necessary to locate 160 acres in one claim. Revised Stats., § 2330. This change gave rise to the same use of fictitious names or "dummies" in the case of placers, that Senator Stewart points out had occurred in the case of lodes, in order that an individual might acquire indirectly what the law prohibited him from acquiring directly. It is strange that this defect in the lode law should have been remedied by the same statute that injected it into the placer law. It was due to the fact that Mr. Cole of California, who evidently did not believe in large claims and who had objected to the increase of length of lode claims from 200 feet to 1500 feet, insisted on reducing the placer area an individual might locate from 160 to 20 acres. See Congressional Globe.

two hundred feet was the limit to which they restricted each other, and to allow persons now to obtain title, each individual to fifteen hundred feet upon the lode, is certainly a very great leap forward. It is in my judgment too much of an extension."[12]

Mr. Casserly:—"Does the Senator (Stewart) consider that there is no danger of abuse in allowing so great a quantity?"

Mr. Stewart—"None in the world."[13]

Another clause of Section 2 provided that "no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface," and no mining regulation was permitted to reduce the width to less than twenty-five feet on each side of the vein. This provision was an attempt to bring uniformity out of the chaotic condition previously existing under the Act of 1866, which had only prescribed a uniform linear measurement along the vein and had left the determination of the surface area accompanying the vein to be determined by local laws. The Act of 1866 had granted a certain length of lode, but the shape and size of the surface area of the claim were incidental, while the Act of 1872 granted a surface area of prescribed dimensions containing the lode.[14] The intention of the miners under their earlier regulations prior to 1866, judging from the phraseology of the rules and their lack of regard for lateral surface measurements, was undoubtedly to secure to the locator a certain length of lode irrespective of the surface containing it.[15] The courts later held, however, that a patent granted under the Act of 1866 conveyed rights only to the length of lode actually included in the surface boundaries of the claim as patented, and the fact that greater number of linear feet along the lode was claimed under the rules and regulations of miners did not give the claimant any right to any portion of the length of the lode outside of his surface lines.[16] The Act of 1872 cleared up this objectionable situation by emphasizing the surface and prescribing a definite and conventional surface area which was theoretically, at least, to include the middle of the vein at the sur-

[12] Congressional Globe, April 16, 1872, p. 2458.

[13] Id. p. 2462.

[14] Lindley on Mines, § 71; Gleeson v. Martin White M. Co. (1878), 13 Nev. 442.

[15] ". . . . the claim was of so much of the lode in whatever direction it might be found to run, with a strip of the adjacent surface, taken for convenience in working the lode and as a mere incident or appurtenance thereto." Beatty, Report of Public Land Commission (1880), p. 397.

[16] This situation and its development is comprehensively treated in Lindley on Mines, §§ 58-60.

face. As was stated by Dr. Raymond in his comment on the Act of 1872:

> "The section giving absolute title to a certain surface and and all veins 'topping' within vertical lines drawn from the boundaries of that surface-claim, is necessary to prevent special litigation."[17]

This surface provision of the Act of 1872 was but the adoption of a stereotyped form of surface measurement for lode claims that had been in existence for centuries in the Germanic and Derbyshire lode mining laws. Under these latter laws a specified surface width on each side of the vein at the surface was the prescribed mode of laying out lode claims.[18] Whether these foreign laws served as a model in this respect is doubtful. There is nothing in the Congressional debates on the bill which gives us information on this point and the hearings of the Committee on Mines and Mining where the source of the provision might have been noted are not available. It has already been mentioned that many of the mining district regulations prescribed the maximum width of lode claims which should be measured "on each side of the center of the lead," and that in some of them as well as in the territorial legislation of Arizona a maximum total width of six hundred feet or two hundred yards for each claim had been prescribed.[19] It is probable that this provision of the Act of 1872 was patterned after these local laws.

A very interesting feature of Section 2 of the Act of 1872 was the concluding provision of that section providing that "The end lines of each claim shall be parallel to each other." The Act of 1866 was silent on the subject of end lines of lode locations and as a consequnce end lines of locations made under the Act were seldom parallel and often broken and of varying length. As Justice Field stated in the Eureka case,[20] end lines or rather end line planes at right angles to the general course of the vein were implied under the Act of 1866.[21] A careful search of local rules and state

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[17] Raymond, Mineral Resources (1873), p. 453.
[18] 4 California Law Review, pp. 365-6, 375.
[19] Id. pp. 448-450.
[20] (1877), 4 Sawy. 302; Fed. Cas. 4548.
[21] The Germanic and Derbyshire laws were equally silent on this subject of the manner of making end line measurements and yet each of these laws was interpreted to impliedly confer extralateral rights between end line planes at right angles to the general course of the vein. Even under the Spanish mining ordinances of 1783, the surface claim was a rectangle with end lines, theoretically, at least, at right angles to the course of the vein. See 4 California Law Review, pp. 366-7, 375-6, 383.

and territorial legislation fails to disclose any which provided that the end lines of locations should be either at right angles to the general course of the vein or that they should be parallel, except the territorial laws of Arizona which called for lode locations with a surface two hundred yards square and the right to follow the vein on its dip. Attention has been called to the fact that the bill introduced in Congress in 1871 and the similar bill as originally introduced in the next session, which eventually, as amended, became the Act of 1872, provided that the end lines should be parallel "and at right angles with the general course of the vein," thus adopting what had theretofore been commonly accepted as the legal longitudinal limitation of the segment of vein located. Why the right angle end line provision was eliminated from the bill as finally adopted and only the requirement of parallelism retained does not appear in the debates and was probably determined upon at the unreported hearings in Committee. Evidently the idea was to permit the locator to lay out his parallel end lines in any direction and thus enable him to follow down on a valuable ore shoot in the vein which might trend or rake away from the true dip or perpendicular. If this was the intention, it was "putting the cart before the horse," for it is rarely that the locator at the time of location has any idea where ore shoots exist in the piece of vein he locates and much more rarely that he knows their trend. End lines might after location be readjusted as to direction and in this manner the locator might be enabled to include within his extralateral sweep a valuable ore shoot subsequently discovered and to follow it down. In practice, however, by the time the facts are discovered, contiguous locations on the apex of the vein will usually prevent such readjustment. It would seem to have been preferable to have retained the right angle end line requirement, for under such a rule end lines of locations placed along the apex of a vein would be more nearly uniform in direction, and conflicting extralateral rights in depth much less frequent. Of course, a decided change in the direction or course of the vein at the surface would have produced underground conflicts if the requirement of end lines at right angles to the local course of the vein were strictly followed. But the language of the earlier mining bill called for right angle measurement to be made from "the *general* course of the vein." If this wording had been retained in the Act as finally passed it would certainly have materially lessened the litigation directly traceable to the extralateral right provision. By laying

out a base line on the surface representing the general course of the vein, as was done on the Comstock lode and also for a time in Australia, then projecting the end lines of the various claims taken up along the vein at right angles to this base line, and thus measuring the extent of each locator's right to follow the vein extralaterally down on its dip, there would have been afforded the most scientific and harmonious measure of this right possible to devise.[22]

Section 3 of the Act of 1872 is as follows:[23]

> "That 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 at the passage of this act, so long as they comply with the laws of the United States and the state, territorial, and local regulations, not in conflict with said 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 said surface locations; provided, that their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges. And provided further, that nothing in this section shall authorize the locator or possessor of a vein or lode which extends, in its downward course, beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another."

This section is identical with Section 3 of the bill which passed the Senate in 1871. It merely confirms in more elaborate and explicit language the right which had been created by the early miners, subsequently written into their local regulations and state and territorial legislation, and later recognized in the Act of 1866. The only point of material difference was the extension of this right under the Act of 1872 to "all veins" which were found to

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[22] See "The Law of Apex" (1914) by Kenney, a volume devoted to an expostion of this interesting principle. Also see 4 California Law Review, p. 385.

[23] See U. S. Revised Stats., § 2322.

apex within the surface of each location. The Act of 1866 had confined the extralateral right to the one main vein. This had given rise to so much uncertainty and litigation that it was deemed best to extend the right to all veins occurring in the surface area located, thus removing the temptation to trespass on another's claim in the attempt to discover or locate a secondary vein which might exist therein.[24]

The use of the words "top" or "apex" with reference to the veins found in the surface location, appears to have been the first use of these terms in this relation.[25] The miners' regulations the state and territorial legislation and the Act of 1866, all provided for the location of a specific "length along the vein." It was taken for granted that this meant that the location should include the outcrop or "top or apex" of the vein or that portion of its upper or terminal edge lying nearest the surface.[26] With the appearance of these terms in the Act of 1872 came into existence the expression the "Law of the Apex," which has since been extensively used to describe the extralateral right feature of the Act. The use of these terms, however, did not change the character of the extralateral right one iota; they were merely descriptive of a portion of the vein which it had always been assumed must form the basis of the location.

This discussion is concerned only with those portions of the Act which have a direct bearing on the extralateral right. Section 4 granted a unique tunnel right which included the right to such veins or lodes as might be discovered in the tunnel.[27] Aside from a provision contained in Section 11 applicable to veins found to exist in placer claims and Section 14 which provided that priority of title should govern where veins intersected or crossed each other and also where they united in depth, the Act was devoted to other subjects than the extralateral right.

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[24] "The law of 1866 was fatally deficient . . . . in failing to prohibit prospecting within the surface-lines of an already located claim" but the amendment of 1872 may be considered ample to remedy this defect. Raymond, Mineral Resources (1874), p. 513. See also Raymond, Mineral Resources (1870), pp. 433-436.

[25] Stevens v. Williams (1879), Fed. Cas. No. 13,414. For a complete discussion of these terms, see Lindley on Mines, §§ 305-313.

[26] The Derbyshire and Germanic laws only called for a certain length of vein and there was no attempt to define the portion of the vein to be located. It was assumed that this would be the top or upper edge of the vein.

[27] This provision was included for the protection of certain Colorado miners. Senator Stewart in Congressional Globe (1872), pp. 978-9.

Looking at the Act of 1872 broadly we see that the fundamental principles created by the miners under their own laws and customs, later embodied in state and territorial legislation and eventually crystallized in the Act of 1866, were not materially altered by the Act of 1872.[28] The basic right of free mining was retained unchanged and the extralateral right was again confirmed, though in more elaborate language. With the exception of the parallel end line provision which supplanted the implied right angle end line measurement under the previous law and the grant of *all* veins found apexing in the surface location, the extralateral right remained the same in substance. As already noted, the surface area obtainable under the new act was described with great detail. The adoption of the basic features of the miners' laws, and the elaborate provision contained in the Act governing acquisition of the surface claim rendered the local rules and regulations of the mining districts practically obsolete. Though the Act recoguized such local laws and customs as did not conflict with the federal Act their value was largely a thing of the past. They had served their important purpose and they gradually died a natural death.

The Act of 1872 was generally considered a great improvement over the imperfect and incomplete Act of 1866.[29]

It was later codified and became a part of the federal Revised Statutes,[30] and is, with a few minor additions and modifications, the mining law in force today governing the acquisition of mineral lands on the public domain. The extralateral right feature of the Act has remained unchanged. It is not the purpose of this article to present the detailed interpretation of this extra-

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[28] "It (the Act of 1872) recognized the essential principles found in the miners' regulations." Charles J. Hughes, Jr., Address on "The Evolution of Mining Law." XXIV, Reports of American Bar Association (1901), p. 344.

[29] Judge Beatty said in the Gleeson v. Martin White M. Co. case, supra, n. 14, referring to the Act of 1872: "Nobody can pretend that it is perfect; but to our minds it is a great improvement on the system which it displaced."

Dr. Raymond in commenting on the Act, wrote: "It embodies much that I have advocated in former reports, and I think it will be approved by the large body of practical miners in the United States, who whatever criticisms they may make upon particular provisions, must agree in commending the tone which mining legislation has assumed, and the character of the protection offered to their property." After making some minor criticisms of features of the law, he added: "Nevertheless it is certain that the present law is a great advance on anything we have had." Raymond, Mineral Resources (1873), p. 454.

[30] §§ 2319-2337.

lateral grant, gradually built up by court decisions. This may be found in the leading works dealing with the subject of mining law.[31]

Before taking up the concluding phase of this discussion, which will be a consideration of the proposed abolition of the extralateral right, it may be worth while to sum up briefly the evidence bearing on the origin of the extralateral right in the United States.

If the miners' rules and regulations were patterned after mining laws of other countries we have no direct evidence bearing on the question. There were men, however, who would have been likely to have possessed some information on this subject if it had existed. Senator Wm. M. Stewart who, as we have seen, not only took the leading part in framing the Act of 1866, but also did more than anyone else in drafting the Act of 1872, had spent years in the mining districts and associated with other Senators and Congressmen from the West who aided in moulding this legislation and, as the debates reported in the Congressional Globe of that period show, were, many of them, originally miners themselves. Senator Stewart also met with delegations of miners from the Western States and Territories and discussed extensively all of the features of the mining law.

Stephen J. Field had grown up with the mining districts. He represented the miners in the California State legislature in 1851, and secured the enactment of the section of the Practice Act making the customs, usages and regulations of the "bar or diggings" govern in actions respecting mining claims. He had previously been an alcalde and later went from the supreme bench of the State to the Supreme Court of the United States. As Judge Lindley has said in his eloquent tribute to Justice Field, he had "the practical knowledge acquired by personal contact with the mining communities" and "was a part of the history of which he wrote."[32]

Justice Wm. H. Beatty was for years a district judge in the mining regions of Nevada and became the Chief Justice of the Supreme Court of that state and later, up to the date of his recent death, was Chief Justice of the Supreme Court of Cali-

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[31] Lindley on Mines, §§ 581-615; Costigan, Mining Law, pp. 417-452; Barringer & Adams Law of Mines, pp. 437-470; Morrison, Mining Rights, (14th ed.), pp. 192-219; 1 California Law Review, pp. 336-358.

[32] Lindley on Mines, § 44.

fornia. He was greatly interested in the miners' rules and regulations and thoroughly conversant with their history.

These three men were pre-eminently qualified to discuss the evolution of the mining law of the West; each of them was deeply interested in its origin and development and they were constantly in direct contact with the pioneer miners and discussed problems arising out of the mining industry. One or the other of these men would surely have learned of the source of these local laws if this source were directly traceable to mining laws of other countries. On the contrary, we nowhere find in their remarkably lucid and complete presentations of the history and development of these laws any reference whatsoever to any foreign mining law as furnishing the basis for these early customs and regulations.

Senator Stewart in his famous speech in the United States Senate advocating the passage of the Act of 1866, described the exciting emigration to California following upon the discovery of gold, saying:

> "Upon the discovery of gold in California, in 1848, a large emigration of young men immediately rushed to the modern Ophir. These people, numbering in a few months hundreds of thousands, on arriving at their future home found no laws governing the possession and occupation of mines but the common law of right, which Americans alone are educated to administer. They were forced by the very necessity of the case to make laws for themselves. The reason and justice of the laws they formed challenge the admiration of all who investigate them. Each mining district, in an area extending over not less than fifty thousand square miles, formed its own rules and adopted its own customs. The similarity of these rules and customs throughout the entire mining region was so great as to attain all the beneficial results of well-digested, general laws. These regulations were thoroughly democratic in their character, guarding against every form of monopoly, and requiring continued work and occupation in good faith to constitute a valid possession."[33]

Nowhere in his entire eloquent appeal for recognition of the principles established by the miners themselves, with its many detailed references to the democratic origin of these rules, does Senator Stewart mention their having been patterned after mining laws of other countries.

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[33] 70 U. S. 777, Appendix.

In his classic description of the gold rush to California, Justice Field, speaking of the pioneers, says:

> "Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated," etc. . . . . They were so framed as to secure to all comers,, within practicable limits absolute equality of right and privilege in working mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the lawmakers, as respects mining, upon the public lands in the State."[34]

Justice Field above all others should have known whether these laws were of foreign origin and yet he makes no reference to any such source.

Justice Beatty while Chief Justice of the Supreme Court of Nevada was requested by the Public Land Commission to give his views on the mining laws.[35] From his comprehensive and illuminating reply the following is quoted:[36]

> "When placer mining began in California there was no law regulating the size of claims or the manner of holding and working them, and local regulations by the miners themselves became a necessity. They were adopted, not because the subject was too complicated or difficult for general regulation, but because they were needed at once as the sole refuge from anarchy. The first and most important matter to be regulated was the size of claims, and the earliest miners' rules contained little else than a limitation of the maximum amount of mining ground that one miner might hold."

He outlined the addition of other requirements to the placer rules and then added:

> "After these regulations had been some time in force came the discovery of veins or lodes of gold-bearing rock in place, and to them the law of the placer was adapted with the least possible change."

It is quite clear that Justice Beatty did not have in mind any thought but that the lode mining regulations were founded on the placer rules that had just been established and that it was a natural step from the one to the other.[37] If he had entertained

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[34] Jennison v. Kirk (1878), 98 U. S. 453, 457-8.

[35] Report of the Public Lands Commission (1880), pp. 395-402.

[36] Id. p. 396.

[37] J. Ross Browne entertained the same view, for in his report of 1867 on Mineral Resources, p. 231, he states that the early quartz regulations were framed "under the influence of persons familiar only with small claims customary in the placers."

any idea that the local lode laws were patterned after any system of mining law imported by miners from foreign countries, he would certainly have mentioned a fact of such unusual interest.

The mere failure of these three distinguished men, who were admittedly pre-eminent in their knowledge of the subject with which they were so intimately associated, to mention the fact that our lode mining law had a foreign origin, does not, of course, prove conclusively that it did not have some such basis. However, all fair minded persons must admit that such foreign influence if it actually existed must have been kept a profound secret, otherwise one or the other of these men would certainly have learned of it and called attention to it.

The main support for the idea that our lode law and its extra-lateral right was derived from foreign sources is to be found in Yale on "Legal Titles to Mining Claims, etc." Speaking of the origin of these rules and regulations he says:[38]

> "The real mining code, as far as it can be traced by legal ear marks, has sprung from the customs and usages of the miners themselves, with rare applications of common law principles by the Courts to vary them. Most of the rules and customs constituting the code, are easily recognized by those familiar with the Mexican ordinances, the Continental Mining Codes, especially the Spanish, and with the regulations of the Stannary Convocations among the Tin Bounders of Devon and Cornwall, in England, and the High Peak Regulations for the lead mines in the county of Derby. These regulations are founded in nature, and are based upon equitable principles, comprehensive and simple, have a common origin, are matured by practice, and provide for both surface and subterranean work, in alluvian, or rock *in situ.* In the earlier days of placer digging, in California, the large influx of miners from the western coast of Mexico, and from South America, necessarily dictated the system of work to Americans, who were almost entirely inexperienced in this branch of industry, with few exceptions from the gold mines of North Carolina and Georgia, and from the lead mines of Illinois and Wisconsin. The old Californians had little or no experience in mining. The Cornish miners soon spread themselves through the State, and added largely by their experience, practical sense, and industrious habits, in bringing the code into something like system. The Spanish-American system which had grown up under the practical

[38] (1867), pp. 58-9.

working of the mining ordinances for New Spain, was the foundation of the rules and customs adopted.

"Senator Stewart has ascribed undeserved merit to the early miners in pronouncing them the authors of the local rules and customs. . . . . But they were not the spontaneous creation of the miners of 1849-50. Historical accuracy ascribes a different origin to them. They reflect the matured wisdom of the practical miner of past ages, and have their foundation, as has been stated, in certain natural laws, easily applied to different situations, and were propagated in the California mines by those who had a practical and traditional knowledge of them in their varied form, in the countries of their origin, and were *adopted*, and no doubt gradually improved and judiciously modified by the Americans. This self-evident fact can be admitted without detracting from our national pride."

Yale also gives General Halleck's opinion of their origin.[39]

"General Halleck ascribes to them a more limited origin, otherwise agreeing in the statement made. In his introduction to the translation of De Fooz, he says: 'But the miners of California have generally adopted, as being best suited to their peculiar wants, the main principles of the mining laws of Spain and Mexico, by which the right of property in mines is made to depend upon *discovery* and *development;* that is, *discovery* is made the source of title, and *development*, or *working*, the condition of the continuance of that title. These two principles constitute the basis of all of our local laws and regulations respecting mining rights.' (De Fooz, §§5, 7.)"

He concludes with a statement which more nearly embodies what is probably the real truth of the matter as far as the origin of these laws is concerned.

"An examination of the mining codes of different nations, tracing them back to remote antiquity, and through modern legislation, tested by the philosophical principles of comparative law, would, probably, result in the conclusion that they have a common origin, maintaining certain general equitable principles upon which all are agreed, and differing only in the details which a diversified ownership, the peculiarities of race, and condition of locality necessitate."

It seems quite certain that both Mr. Yale and General Halleck are mistaken in attributing the origin of these rules and regulations to Spanish influence. As already pointed out, the Spanish-Mexican mining laws were inoperative and unknown in

[39] Id. p. 71.

this new region at the time the early miners' laws were framed.[40] The requirements of discovery and development were universal requirements and were not characteristic of Spanish law alone.

Direct Germanic influence is also doubtful and the complex Germanic form of extralateral right is so different from the simple form of this right which developed in this country that the Germanic extralateral right could only remotely have suggested the idea here.[41]

Many writers attribute the source of our mining laws to Cornish influence. This idea does not seem well founded, for no extralateral right was exercised in the tin mines of Cornwall or Devonshire and the ancient right of tin bounding or right of staking out a mining claim on waste land had almost ceased to be exercised.[42] Most of the lode mining in Cornwall and Devon was carried on under leases from the Duke of Cornwall.[43] The fact that the Duke of Cornwall had the right to these mines and in leasing them, naturally, gave the lessee the right to follow the veins down indefinitely in depth and thus severed them from the surface, may have had something to do with the idea expressed in the early regulations here, that the vein was the principal thing and the surface a mere incident.

It cannot be denied, however, that the Cornish influence was pronounced. The early and widespread use in the miners' regulations of the term "lead" or "lode" and the appearance in these local rules of such terms as dips, spurs, angles, slides, fitters (flitters), leaders, dial (survey), offshoots is quite positive evi-

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[40] 4 California Law Review, pp. 437-8; Hon. Charles T. Hughes, Jr., in his interesting article on "The evolution of Mining Law" (Vol. XXIV, Report of American Bar Association, p. 343) in summing up his views, has this to say on the Spanish influence: "The early miners, in their mountain gulches, in their humble cabins, at their primitive assemblages, unfamiliar with the history of mining laws and regulations in the old world, and even with the Spanish regulations which had prevailed in the very territory which they occupied, seized upon the aptest, wisest and most beneficial principles which could have been adopted, and by vigorous, strenuous, independent, but respectful assertion of their rights, secured their recoguition at the hands of the general government, to the incalculable enrichment and advantage of the entire nation."

[41] Aguillon in his "Legislation des Mines, Étrangère" (1891), Part II, p. 292, in commenting on the American extralateral right, says: "It is, one realizes, the system of defining the claim by the ancient law, notably the German system of Langenfelder or Gestrektefelder."

[42] "Through the scarcity of wastrel land it (in bounding) has, however, become more or less obsolete." (Vol. II, Part I, p. 32) Transactions of the Mining Association of Cornwall.

[43] Bainbridge on Mines & Minerals (5th ed.), pp. 121, 133-134; Mac Swinney, The Law of Mines etc. (3rd ed.), pp. 176-177.

dence that Cornishmen supplied a large part of the mining vocabulary.

The resemblance of the extralateral right which was created by the miners here to the similar simple form of that right existing in Derbyshire, England, has led many to claim a direct relationship. This is doubtful, and unless some direct proof of Derbyshire influence can be adduced, the weight of evidence seems rather opposed to this view. If the Derbyshire influence had been pronounced, we would expect the Derbyshire term "rake," meaning vein, to have supplanted the Cornish "lode," and yet the word "rake" does not appear in any of the regulations.

If we examine the regulations themselves, the simplicity of the language employed, and the variations of expression used in the different districts to describe the same right, lead to the conviction that instead of being knowingly patterned after other mining codes, these local laws were merely the direct outgrowth of the necessities of the hour. It became necessary to apportion the placer ground among the increasing number of miners flocking into the mining districts and small square or rectangular areas of surface were naturally adopted as the size of claim to which each miner was entitled. But when veins became important it was equally natural for the miner to apportion the vein in short lengths and disregard the surface as something unimportant, for the vein was the thing of value. To follow the vein down on its dip to the extent that the miner owned of length was also a natural and normal sequence, for the miner was the discoverer of the top of the vein and why should he give up to another the vein on its dip when that other had nothing to do with finding it? Probably some such line of thought in the minds of these pioneers resulted in the adoption of their early rules regulating lode claims, including the extralateral right. That they did not have in mind any definite laws as a pattern granting the extralateral right to the locator, is further borne out by the fact that the extralateral right first appeared in the Saunders' Ledge regulations on June 6, 1851, in Nevada County, where the words "dips and angles" were employed to describe the right and one hundred feet in length on the ledge constituted a claim while, on June 7, 1851, only the day following, the miners of Drytown Mining District, Amador County, adopted regulations establishing the length of claims to be two hundred and forty feet in length of the vein "without regard to

width" which was only another way of expressing the same idea that there was no limitation on the right to follow the vein in depth. Other regulations granting the same right to follow a certain length of vein indefinitely in depth were expressed in language which varied in each case. This diversity of expression to convey the same general idea of a right to follow down on the vein indefinitely and also the varying length of vein awarded to the locator in different districts, argue strongly against any idea of a definite prototype which influenced the drafting of these regulations.

The resemblance of many features of these regulations to the provisions of other systems of mining law is merely confirmation of the fact that if intelligent persons are confronted with a state of affairs creating a situation which demands regulation by a set of rules, they will frequently arrive at results similar in their broader aspects. Dictates of common sense will usually direct the adoption of rules based on equitable considerations. It seems quite certain that the pioneer miners of California proceeded along similar lines and met the situation which confronted them by adopting laws governing their mining operations, similar in many respects to other laws which had been evolved elsewhere under like circumstances. The similarity was a coincidence rather than the result of a deliberate recognition of pre-existing laws.[44]

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[44] Walmesley in "The Mining Laws of the World" (1894), p. 163 says: . . . . . "The California system was probably not due to Mexican influence. The principle of possessory tenure, dependent upon continued work, is probably German in origin, and passed from Germany to other countries. Together with all the other peculiarities of the California system, it was adopted under the pressure of the peculiar circumstances of the case, a great rnsh of population to the gold-fields, more people than room for them, no courts, no surveyors, and an overwhelming necessity for simple right of property, based on priority and possession, and determinable by mere tape-line measurement, without surveying. These causes adequately explain the whole result." The basis of most of Walmesley's statements is the testimony given by Dr. Rossiter W. Raymond before the Royal Commission on Mining Royalties. (Third Report: England).

The presence here of foreigners in large numbers from all parts of the world lends weight to the idea that in a broad way, at least, certain fundamental principles may have been suggested by them to the original framers of these local codes, who may have thus been confirmed in their codification of similar ideas.